

The value of a decision as authority depends upon how it has been interpreted and how the principles therein announced have been limited or modified and applied, and to what extent it has been followed. — D. E. Hydrick, Justice of Supreme Court, South Carolina.

A more serious difficulty, and one likely to increase in future with the ceaseless growth of recorded cases, is that exact and comprehensive citation cannot be ensured. If the Judge is to be bound by precedents he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search. He must depend largely on the assistance of counsel, and since the industry and acumen of the Bar are also fallible, it is not uncommon to meet with cases which might have been decided otherwise, ~~or are even overruled later,~~ because pertinent decisions have not been taken into consideration. (Professor Allen in "*Law in the Making*.")

Watch the latest Rulings. They are nearest to you and nearest to the Courts.

In one sense no reported case can ever be obsolete while the laws and judicial usages of English-speaking countries are what they are: that is, no man can say beforehand that any given case, however antiquated or trifling it may appear in itself to be, may not at some time have its use for the modern practitioner or text-writer. Every decision in the books is part of the history of the law, and no part of that history can be absolutely insignificant.—(Sir Frederick Pollock, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford.)

Accurate knowledge of the present state of the law upon any subject involves necessarily the history of the development of the law upon that subject, which can only be attained by following down the decision touching upon it. — (Francis M. Scott, Justice, Supreme Court, New York.)

The law is the last interpretation of the law given by the last Judge.

The enunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition" No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required.—(The Hon'ble Sir Cecil Walsh, Kt., K.C., Ex-Offg., Chief Justice, Allahabad High Court.)

The last Judicial Interpretation of the law is the Law on which your case hangs.

To correctly appraise a Judicial decision, it is important to know later applications of its rules to varying states of facts by way of extension or qualification. — (S. Shepard, Chief Justice, Court of Appeal, Washington (U. S. A.).)

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UNREPEALED CENTRAL ACTS
(CIVIL AND CRIMINAL)

TO THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

A. I. R. PUBLICATION

THE A. I. R. MANUAL

UNREPEALED CENTRAL ACTS

(CIVIL AND CRIMINAL)

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VOLUME I

A TO CIVIL PRO. CODE, ORDER XX.

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PREFACE

Roughly speaking, modern law may be said to fall into two broad categories—case-law or judge-made law and statute-law or law enacted by the Legislature. The whole tendency in modern times is towards codification, i. e., the reduction of the whole *corpus juris*, so far as practicable, to the form of enacted law. We are told that in recent years there has been a decline in the estimate of the superior value of legislation. But this has not resulted in the reduction of the bulk of enacted law. At any rate, in India there are no signs of any decline in the popularity of legislation as a form of the development of the law. On the other hand, the trend seems to be definitely in the contrary direction. New enactments covering new branches of law are continuously being brought into existence. Even in regard to personal laws like the Hindu and Muhammadan laws the Legislatures have shown considerable activity and introduced several changes by the process of statute-making. The culminating and perhaps the most significant development in this direction is the movement for the codification of Hindu law which has already commenced to take shape.

The aim of the present publication is to make available to the Bench and the Bar in a set of convenient volumes practically the entire statute law passed by the Central Legislature which is of general application to the whole of India. The Acts are given in the alphabetical order of their titles. This has the advantage of enabling an Act to be referred to without having to remember the year and number of the Act — which is the difficulty one feels when referring to the volumes of the Government publication, "Unrepealed Central Acts" in which the arrangement is according to the year and number of the Act. We also have not made any division into civil and criminal Acts as is sometimes done, as we felt that such a division is on the whole an inconvenience rather than an advantage to the profession. In numerous instances, sections of a penal nature are found in enactments which are mainly of a civil nature, e. g., the Stamp Act, Income-Tax Act, Cantonments Act, etc. In such cases it will be highly inconvenient to omit, in the portion that may be allotted to the civil section, the sections of a penal nature and print them in the criminal section. If such a course is adopted, it will detract from the utility of both the portions of the publication. Again, there are Acts like the Evidence Act which will have to appear in both sections. It was, therefore, considered, on the whole, to be the better course to just give all the Acts in their alphabetical order without labelling them as civil or criminal Acts.

Care has been taken to incorporate all the amendments in the various Acts up to date. Even provincial amendments have been given as completely as possible. In the case of the Civil Procedure Code, local amendments by the various High Courts are given. Letters Patent of the different High Courts are also given and also the rules of the Federal Court and the Judicial Committee of the Privy Council.

Besides the above, we have also given the more important of the Acts of the British Parliament applicable to India, such as the Government of India Act, 1935.

We need hardly say that all the Acts have been carefully edited and annotated. Not only have all the amendments been incorporated but also notes have been added giving particulars as to the date and other matters relating to the amendments. Full and copious extracts from Select Committee Reports, Statements of Objects and Reasons and Notes on Clauses have been given in appropriate places under each Act. Besides the above, each Act is preceded by a statement as to how the Act has been affected by subsequent legislation. Further, cognate Acts and provisions have been indicated under the respective enactments.

In addition to the above features, the case-law bearing on the different enactments has been given in the foot-notes under each section. We have taken care to see that the notes are full and it is hoped that the bulk of the relevant Indian case-law would be found summarised in the foot-notes. The notes have been divided into convenient headings of which a synopsis is given for each section. The matter under each heading is presented in a manner which is well adapted for easy and quick reference. It may also be mentioned that what may be treated as a special feature of A. I. R. publications, viz., the giving of the particular page of the report where the point occurs is also present in this publication.

There will be a consolidated subject index at the end of the last volume. This will practically be something more than a general subject index for the whole of the statute law which is of general application to India and the advantages of such an index to the profession are too obvious to require mention. It is also intended to give in the last volume the rules relating to interpretation of statutes. —

It will be seen from the above that no pains have been spared to make the publication as complete and accurate as possible. But, we are aware of the possibility of errors and omissions in a work of this vast nature. We shall feel grateful to our readers if they bring to our notice any such error or omission which they may detect and we shall gladly remedy the defects in the next edition, if, by God's grace, one is called for.

In the preparation of this work we have received the willing and able co-operation of a large body of lawyers working in the legal section of the All India Reporter Office. We take this opportunity of expressing our sincere thanks to all of them. We wish to mention in particular the services of the following gentlemen, Messrs. V. S. Balkundi, B.A., LL.B., and V. B. Bakhale, M.A., LL.B., Assistant Editors, 'The All India Reporter'; and Messrs. D. R. Rajandekar, B.A., LL.B., W. N. Gadgil, B.Sc., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.Sc., LL.B., V. R. Buche, B.A., LL.B., G. N. Badhe, B.A., LL.B., M. Kuppuswami, B.A., B.L., P. R. Deshpande, M.A. (Eng.), M.A. (Sans.), LL.B., and J. G. Patankar.

We also desire to thank Mr. D. G. Ranade who was in charge of the administrative side of the organisation, and Mr. D. W. Chitale, B.A., LL.B., Superintendent of the All India Reporter Press, for the fine printing and get up of the volume.

24th October, 1946.

(Deepavali Day)

V. V. C.

S. A. R.

ABBREVIATIONS

- | | |
|--|---|
| <p>A. O. ... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.</p> <p>A. O. (P) ... The Government of India (Adaptation of Acts of Parliament) Order, 1937.</p> <p>A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.</p> <p>All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.</p> <p>Agra. ... Agra High Court Reports.</p> <p>All. L. Jour. ... Allahabad Law Journal.</p> <p>All. W. N. ... Allahabad Weekly Notes.</p> <p>All. W. R. ... Allahabad Weekly Reporter.</p> <p>App. Cas. ... Law Reports, Appeal Cases (England).</p> <p>Beng. L. R. ... Bengal Law Reports.</p> <p>B. R. ... Bihar Reports.</p> <p>Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.</p> <p>Bom. H. C. R. ... Bombay High Court Reports.</p> <p>Bom. L. R. ... Bombay Law Reporter.</p> <p>Bom. P. J. ... Bombay Printed Judgments.</p> <p>Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.</p> <p>Cal. L. Jour. ... Calcutta Law Journal.</p> <p>Cal. L. Rep. ... Calcutta Law Reports.</p> <p>Cal. W. N. ... Calcutta Weekly Notes.</p> <p>C. P. L. R. ... Central Provinces Law Reports.</p> <p>Cri. L. Jour. ... Criminal Law Journal.</p> <p>E. R. ... English Reports (England).</p> <p>Ind. App. ... Law Reports, Indian Appeals.</p> <p>Ind. Cas. ... Indian Cases.</p> <p>Ind. Rul. ... Indian Rulings.</p> | <p>Kar. (I. L. R.) ... Indian Law Reports, Karachi Series.</p> <p>K. B. ... Law Reports, King's Bench (England).</p> <p>Knapp ... Knapp's Reports.</p> <p>Lah. or I. L. R. Lah. ... Indian Law Reports, Lahore Series.</p> <p>L. J. ... Law Journal (England).</p> <p>L. R. ... Law Reports (England).</p> <p>L. R. A. ... Law Reporter, Allahabad.</p> <p>Low. Bur. Rul. ... Lower Burma Rulings.</p> <p>Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.</p> <p>Luck. Cas. ... Lucknow Cases.</p> <p>Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.</p> <p>Mad. H. C. R. ... Madras High Court Reports.</p> <p>Mad. Jur. ... Madras Jurist.</p> <p>Mad. L. Jour. ... Madras Law Journal.</p> <p>Mad. L. Tim. ... Madras Law Times.</p> <p>Mad. L. W. ... Madras Law Weekly.</p> <p>Mad. W. N. ... Madras Weekly Notes.</p> <p>Moo. Ind. App. ... Moore's Indian Appeals.</p> <p>Nag. (I. L. R.) ... Indian Law Reports, Nagpur Series.</p> <p>Nag. L. Jour. ... Nagpur Law Journal.</p> <p>Nag. L. R. ... Nagpur Law Reports.</p> <p>N.-W. P. H. C. R. ... North-West Provinces High Court Reports.</p> <p>Oudh Cas. ... Oudh Cases.</p> <p>Oudh L. Jour. ... Oudh Law Journal.</p> <p>Oudh L. R. ... Oudh Law Reports.</p> <p>Oudh S. C. ... Oudh Select Cases.</p> <p>Oudh W. N. ... Oudh Weekly Notes.</p> <p>Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.</p> |
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Pat. H. C. C. ... Patna High Court Cases.	Rang. L. R. ... Rangoon Law Reports.
Pat. L. Jour. ... Patna Law Journal.	R. R. ... Revised Reports (England).
Pat. L. Tim. ... Patna Law Times.	Sind L. R. ... Sind Law Reporter.
Pat. L. R. ... Patna Law Reporter.	Suth. W. R. ... Sutherland's Weekly Reporter.
Pat. L. W. ... Patna Law Weekly.	Times L. R. ... Times Law Reports (England).
Pat. W. N. ... Patna Weekly Notes.	U. P. L. R. ... United Provinces Law Reports.
Pun. L. R. ... Punjab Law Reporter.	Upp. Bur. Rul. ... Upper Burma Rulings.
Pun. Re. ... Punjab Records.	Weir. ... Weir's Criminal Rulings.
Pun. W. R. ... Punjab Weekly Reporter.	W. R. (Eng.) ... Weekly Reporter (England).
Q. B. ... Law Reports, Queen's Bench (England).	
Rang. ... Indian Law Reports, Rangoon Series.	

Other Abbreviations.

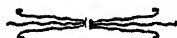
Art. ... Article.	O. ... Order.
B. R. ... Board of Revenue.	P. ... Page.
Civ. ... Civil.	P. C. ... Privy Council.
C. A. ... Court of Appeal.	Pre. ... Preamble.
Cl. ... Clause.	Rev. ... Revenue.
Cr. ... Criminal.	R. ... Rule.
D. B. ... Division Bench.	R. S. C. ... Rules of Supreme Court.
F. B. ... Full Bench.	S. ... Section.
F. C. ... Federal Court.	S. B. ... Special Bench.
F. N. ... Foot-Note.	S. C. R. ... Select Committee Report.
G. I. ... Government of India Act, 1915.	S. O. R. ... Statement of Objects and Reasons.
Jour. ... Journal.	U.P.B.R. ... United Provinces Board of Revenue.
L. P. ... Letters Patent.	
N. ... Note.	

Note :— The mark * indicates that citation of a different case begins.

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(I. L. R.) Calcutta

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1895	1896	1897	1898	1899
29	30	31	32	33
1902	1903	1904	1905	1906
36	37	38	39	40
1909	1910	1911	1912	1913
43	44	45	46	47
1916	1917	1918	1919	1920
50	51	52	53	54
1923	1924	1925	1926	1927
57	58	59	60	61
1930	1931	1932	1933	1934
			1935	1936

From 1937 citation by year.

Calcutta Law Journal

1-2	3-4	5-6	7-8	9-10	11-12	13-14
1905	1906	1907	1908	1909	1910	1911
15-16	17-18	19-20	21-22	23-24	25-26	
1912	1913	1914	1915	1916	1917	
27-28	29-30	31-32	33-34	35-36	37-38	
1918	1919	1920	1921	1922	1923	
39-40	41-42	43-44	45-46	47-48	49-50	
1924	1925	1926	1927	1928	1929	
51-52	53-54	55-56	57-58	59-60	61-62	
1930	1931	1932	1933	1934	1935	
63-64	65-66	67-68	69-70	71-72	73-74	
1936	1937	1938	1939	1940	1941	
75-76	77	78	79-80	81-82		
1942	1943	1944	1945	1946		

Calcutta Law Reports

1-2	3-4	5-6	7-8	9-11	12-13
1878	1879	1880	1881	1882	1883

Calcutta Weekly Notes

1	2	3	4	5	6	7
1897	1898	1899	1900	1901	1902	1903
8	9	10	11	12	13	14
1904	1905	1906	1907	1908	1909	1910
15	16	17	18	19	20	21
1911	1912	1913	1914	1915	1916	1917
22	23	24	25	26	27	28
1918	1919	1920	1921	1922	1923	1924
29	30	31	32	33	34	35
1925	1926	1927	1928	1929	1930	1931
36	37	38	39	40	41	42
1932	1933	1934	1935	1936	1937	1938
43	44	45	46	47	48	49
1939	1940	1941	1942	1943	1944	1945
					1946	

Central Provinces Law Reports

1	2	3	4	5	6	7
1888	1889	1890	1891	1892	1893	1894
8	9	10	11	12	13	14
1895	1896	1897	1898	1899	1900	1901
15	16	17				
1902	1903	1904				

Criminal Law Journal

1	2	3-4	5-6	7-8	9-10	11
1904	1905	1906	1907	1908	1909	1910
12	13	14	15	16	17	18
1911	1912	1913	1914	1915	1916	1917
19	20	21	22	23	24	25
1918	1919	1920	1921	1922	1923	1924
26	27	28	29	30	31	32
1925	1926	1927	1928	1929	1930	1931
33	34	35	36	37	38	39
1932	1933	1934	1935	1936	1937	1938
40	41	42	43	44	45	46
1939	1940	1941	1942	1943	1944	1945
					1946	

Hyde's Reports

1-2
1897

(L. R.) Indian Appeals

1	2	3	4
1873-1874	1874-1875	1875-1876	1876-1877
5	6	7	8
1877-1878	1878-1879	1879-1880	1880-1881
9	10	11	12
1881-1882	1882-1883	1883-1884	1884-1885
13	14	15	16
1885-1886	1886-1887	1887-1888	1888-1889
17	18	19	20
1890	1891	1892	1893
24	25	26	27
1897	1898	1899	1900
31	32	33	34
1904	1905	1906	1907
			1908
			1909
			1910

(L. R.) Indian Appeals (*contd.*)

38	39	40	41	42	43	44
1911	1912	1913	1914	1915	1916	1917
45	46	47	48	49	50	51
1918	1919	1920	1921	1922	1923	1924
52	53	54	55	56	57	58
1925	1926	1927	1928	1929	1930	1931
59	60	61	62	63	64	65
1932	1933	1934	1935	1936	1937	1938
66	67	68	69	70	71	72
1939	1940	1941	1942	1943	1944	1945
1946						

Indian Cases

1-4	5-8	9-12	13-17	18-21	22-25
1909	1910	1911	1912	1913	1914
26-31	32-36	37-42	43-48	49-53	54-58
1915	1916	1917	1918	1919	1920
59-64	65-70	71-77	78-84	85-91	92-98
1921	1922	1923	1924	1925	1926
99-106	107-112	113-120	121-128	129-134	
1927	1928	1929	1930	1931	
135-140	141-146	147-152	153-158	159-165	
1932	1933	1934	1935	1936	
166-172	173-178	179-184	185-190	191-196	
1937	1938	1939	1940	1941	
197-203	204-209	210-215	216-221		
1942	1943	1944	1945		

Indian Jurist

1	2	3	4	5	6	7
1877	1878	1879	1880	1881	1882	1883
8	9	10	11	12	13	14
1884	1885	1886	1887	1888	1889	1890
15	16	17				
1891	1892	1893				

Indian Rulings

IR 1929	IR 1930	IR 1931	IR 1932	6
1929	1930	1931	1932	1933-1934
7	8	9	10	
1934-1935	1935-1936	1936-1937	1937-1938	
11	12	13	14	
1938-1939	1939-1940	1940-1941	1941-1942	
15	16	17	18	
1942-1943	1943-1944	1944-1945	1945-1946	

(I. L. R.) Karachi

ILR 1939 Kar	Citation by year.
1939	

Knapp's Reports, Privy Council

1	2	3
1829-31	1831-34	1834-36

(I. L. R.) Lahore

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936	From 1937 citation by year.			

Lahore Law Journal

1	2	3	4	5	6	7
1919	1920	1921	1922	1923	1924	1925
8						
1926						

Law Reporter, Allahabad

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17				
1934	1935	1936				

Lower Burma Rulings

1	2	3	4
1900-1902	1903-1904	1905-1906	1907-1908
5	6	7	8
1909-1910	1911-1912	1913-1914	1915-1916
9	10	11	
1917-1918	1919-1920	1921-1922	

(I. L. R.) Lucknow

1	2	3	4	5	6	7
1926	1927	1928	1929	1930	1931	1932
8	9	10	11	12	13	14
1933	1934	1935	1936	1937	1938	1939
15	16	17	18	19	20	21
1940	1941	1942	1943	1944	1945	1946

(I. L. R.) Madras

1	2	3	4-5	6
1876-1878	1878-1880	1881	1882	1883
7	8	9	10	11
1884	1885	1886	1887	1888
13	14	15	16	17
1890	1891	1892	1893	1894
20	21	22	23	24
1897	1898	1899	1900	1901
27	28	29	30	31
1904	1905	1906	1907	1908
34	35	36	37	38
1911	1912	1913	1914	1915
41	42	43	44	45
1918	1919	1920	1921	1922
48	49	50	51	52
1925	1926	1927	1928	1929
55	56	57	58	59
1932	1933	1934	1935	1936
From 1937 citation by year.				

Madras High Court Reports

1	2	3	4
1862-1863	1864-1865	1866-1868	1869-1869
5	6	7	8
1869-1870	1870-1871	1871-1874	1874-1875

Madras Law Journal

1	2	3	4	5	6	7
1891	1892	1893	1894	1895	1896	1897
8	9	10	11	12	13	14
1898	1899	1900	1901	1902	1903	1904

Madras Law Journal (contd.)

15	16	17	18	19	20	21
1905	1906	1907	1908	1909	1910	1911
22-23	24-25	26-27	28-29	30-31	32-33	
1912	1913	1914	1915	1916	1917	
34-35	36-37	38-39	40-41	42-43	44-45	
1918	1919	1920	1921	1922	1923	
46-47	48-49	50-51	52-53	54-55	56-57	
1924	1925	1926	1927	1928	1929	
58-59	60-61	62-63	64-65	66-67	68-69	
1930	1931	1932	1933	1934	1935	
70-71	From 1937 citation by year.					
1936						

Madras Law Times

1	2	3-4	5-6	7-8	9-10	11-12
1906	1907	1908	1909	1910	1911	1912
13-14	15-16	17-18	19-20	21-22	23-24	
1913	1914	1915	1916	1917	1918	
25-26	27-28	29	30-31	32-33	34-35	
1919	1920	1921	1922	1923	1924	

Madras Law Weekly

1	2	3-4	5-6	7-8	9-10	11-12
1914	1915	1916	1917	1918	1919	1920
13-14	15-16	17-18	19-20	21-22	23-24	
1921	1922	1923	1924	1925	1926	
25-26	27-28	29-30	31-32	33-34	35-36	
1927	1928	1929	1930	1931	1932	
37-38	39-40	41-42	43-44	45-46	47-48	
1933	1934	1935	1936	1937	1938	
49-50	51-52	53-54	55	56	57	
1939	1940	1941	1942	1943	1944	
58	59					
1945	1946					

Madras Weekly Notes

1910	1910
	Citation by year.

Moore's Indian Appeals

1	2	3	4
1836-1837	1837-1841	1841-1846	1846-1851
5	6	7	8
1851-1854	1854-1857	1857-1859	1859-1861
9	10	11	12
1861-1863	1863-1866	1866-1867	1867-1869
13	14		
1869-1870	1870-1872		

(I. L. R.) Nagpur

ILR 1936 Nag	1936
	Citation by year.

Nagpur Law Journal

1	2	3	4	5	6	7
1918	1919	1920	1921	1922	1923	1924
8	9	10	11	12	13	14
1925	1926	1927	1928	1929	1930	1931
15	16	17	18	19	20	
1932	1933	1934	1935	1936	1937	From 1938
citation by year.						

Nagpur Law Reports

1	2	3	4	5	6	7
1905	1906	1907	1908	1909	1910	1911
8	9	10	11	12	13	14
1912	1913	1914	1915	1916	1917	1918
15	16	17	18	19	20	21
1919	1920	1921	1922	1923	1924	1925
22	23	24	25	26	27	28
1926	1927	1928	1929	1930	1931	1932
29	30	31				
1933	1934	1935				

North-West Provinces High Court Reports

1	2	3	4	5	6	7
1869	1870	1871	1872	1873	1874	1875

Oudh Cases

1	2	3	4	5	6	7
1898	1899	1900	1901	1902	1903	1904
8	9	10	11	12	13	14
1905	1906	1907	1908	1909	1910	1911
15	16	17	18	19	20	21
1912	1913	1914	1915	1916	1917	1918
22	23	24	25	26	27	28
1919	1920	1921	1922	1923	1924	1925
29						
1926						

Oudh Law Journal

1	2	3	4	5	6	7
1914	1915	1916	1917	1918	1919	1920
8	9	10	11	12	13	
1921	1922	1923	1924	1925	1926	

Oudh Law Reports

1934 OLR	1934
	Citation by year.

Oudh Weekly Notes

1	2	3	4	5	6	7
1924	1925	1926	1927	1928	1929	1930
8	9	10	11	From 1935 citation by year.		
1931	1932	1933	1934			

(I. L. R.) Patna

1	2	3	4	5	6	7
1922	1923	1924	1925	1926	1927	1928
8	9	10	11	12	13	14
1929	1930	1931	1932	1933	1934	1935
15	16	17	18	19	20	21
1936	1937	1938	1939	1940	1941	1942
22	23	24	25			
1943	1944	1945	1946			

Patna High Court Cases

1917 PHCC	1917
	Citation by year.

Patna Law Journal

1	2	3	4	5	6
1916	1917	1918	1919	1920	1921

Patna Law Reports

1	2	3
1923	1924	1925

Patna Law Times

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940
22	23	24	25	26	27	
1941	1942	1943	1944	1945	1946	

Patna Law Weekly

1	2-3	4-5
1916	1917	1918

Patna Weekly Notes

1936 PWN	Citation by year.
1936	

Punjab Law Reporter

1900 PLR	Citation by year upto 1923 and then
1900	
27	28
29	30
31	32
33	34
35-36	37
38	39
40	41
1933	1934
1935	1936
1937	1938
1939	1940
42	43
44	45
46	47
48	49
1940	1941
1942	1943
1944	1945
1946	

Punjab Records

1872 PR	Citation by year.
1872	

Punjab Weekly Reporter

1905 Pun W R	Citation by year
1905	

(I. L. R.) Rangoon

1	2	3	4	5	6	7
1923	1924	1925	1926	1927	1928	1929
8	9	10	11	12	13	14
1930	1931	1932	1933	1934	1935	1936

Rangoon Law Reports

1937 RLR	Citation by year.
1937	

Sind Law Reporter

1	2	3	4	5	6	7
1907	1908	1909	1910	1911	1912	1913
8	9	10	11	12	13	14
1914	1915	1916	1917	1918	1919	1920
15	16	17	18	19	20	21
1921	1922	1923	1924	1925	1926	1927
22	23	24	25	26	27	28
1928	1929	1930	1931	1932	1933	1934
29	30	31	32			
1935	1936	1937	1938			

Sutherland's Weekly Reporter

1	2-4	5-6	7-8	9-10	11-12	13-14
1864	1865	1866	1867	1868	1869	1870
15-16	17-18	19-20	21-22	23-24	25	26
1871	1872	1873	1874	1875	1876	1877

United Provinces Law Reports

1	2	3
1919	1920	1921

Upper Burma Rulings

1 Cri	2 Civ	From 1904	Citation
1892-1903	1892-1903		2
by year upto 1913 and then			1914-1916
3	4		
1917-1920	1921-1922		

A. I. R. MANUAL

Unrepealed Central Acts

(CIVIL & CRIMINAL)

Volume I

THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937.

AT THE COURT AT BUCKINGHAM PALACE, THE 18TH DAY OF MARCH, 1937.

PRESENT :

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by section two hundred and ninety-three of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act") His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the Order any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act :

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order :

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows :—

1. This Order may be cited as the Government of India (Adaptation of Indian Laws) Order, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty-seven.

2. (1) In this Order the expression "Indian law" means a law as defined in section two hundred and ninety-three of the Act.

(2) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3. The Indian laws mentioned in the Schedules to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect.

4. (1) Whenever an expression mentioned in the first column of the table hereinafter printed occurs (otherwise than in a title or preamble or in a citation or description of an enact-

ment) in a Central or Provincial Act or Regulation, whether an Act or Regulation mentioned in the Schedules to this Order or not, then, unless that expression is by this Order expressly directed to be otherwise adapted or modified, or to stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in column two of the said table.

Table of General Adaptations.

1.	2
Governor-General of India in Council : Governor-General of India : Governor-General in Council : Governor-General : Government of India.	Central Government.
Governor in Council : Governor (except in the expression "Governor's Province") : Lieutenant Governor in Council: Lieutenant Governor : Chief Commissioner (except in the expression "Chief Commissioner's Province"): Local Government : Local Administration.	
Gazette of India ; local official Gazette : local gazette ; any other expression denoting a gazette in which official notices of a Government are published, not being the gazette of a district or other sub-division of a Province.	Official Gazette.

Any reference to the Governor (or Lieutenant Governor) of a named Province in Council shall be treated for the purposes of this paragraph as if it were a reference to the Governor (or Lieutenant Governor) in Council of that Province.

(2) A direction in the Schedules to this Order that a specified Indian law or section or portion of an Indian Law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph.

5. (1) Where this Order requires that in any specified Indian law, or in any section or other portion of an Indian law, certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall, except where it is otherwise expressly provided, be made wherever the words referred to occur in that law, or, as the case may be, in that section or portion.

(2) Where this Order requires that in any Indian law a plural noun shall be substituted for a singular noun or *vice versa*, or a masculine noun for a neuter noun or *vice versa*, there shall be made also in any verb or pronoun in the sentence in question such consequential amendment as the rules of grammar may require.

6. (1) The following provisions shall have effect where any Indian law which under this Order is to be adapted or modified has before the commencement of this Order been amended, either generally or in relation to any particular area, by the insertion or omission of words, or the substitution of words for other words—

- (a) effect shall first be given in the amending law to any adaptation or modification required by paragraphs three and five of this Order to be made therein;
- (b) the original law shall then be amended, either generally or, as the case may be, in its application to the particular area, so as to give effect to the directions contained in the amending law or, where any adaptation or modification has fallen to be made under sub-paragraph (a), in that law as so adapted or modified; and
- (c) all adaptations or modifications required by this Order to be made in the original law shall then be made in that law as so amended, except so far as in the case of any particular area they may be inapplicable.

(2) In this paragraph references to the amendment of a law by the insertion or omission of words or the substitution of words do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner.

7. Subject to the foregoing provisions of this Order, any reference by whatever form of words in any Indian law in force immediately before the commencement of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities, or discharge any functions, in any part of British India shall, where a corresponding new authority has been constituted by or under any Part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it were a reference to that new authority.

8. In any Indian law in force immediately before the commencement of this Order any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this Order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation :

Provided that in the application of any enactment to Madras, Bombay, Bihar or the Central Provinces, references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom on the constitution of the Provinces of Orissa and Sind.

9. The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which any powers are exercisable, shall not render invalid any notification, order, commitment, attachment bye-law, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order; and any such notification, order, commitment, attachment, bye-law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions then applicable to such a case.

10. Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part III of the Government of India Act, 1935, vested in, or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some Legislature or authority empowered to regulate the matter in question.

11. Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

12. For the avoidance of doubt it is hereby declared that—

(a) nothing in this Order transferring or assigning any functions to the Central Government shall be construed as excluding those functions from the operation of section one hundred and twenty-three or section one hundred and twenty-four of the Government of India Act, 1935;

(b) the transfer by this Order to a Provincial Government of any jurisdiction theretofore exercisable by the Local Government of the Province shall not be construed as excluding that jurisdiction from the operation of sub-section (2) of section two hundred and ninety-six of the said Act;

(c) nothing in this Order shall affect the provisions of any Order in Council for the time being in force made under section one hundred and fifty-eight, section one hundred and fifty-nine or section one hundred and sixty of the said Act (which empower Orders to be made regulating the relations of India and Burma as to their monetary systems, relief from double taxation, customs, and ancillary and related matters), or under any corresponding provisions in the Government of Burma Act, 1935; and

(d) no repeal effected by this Order shall affect the operation of sub-paragraph (2) of paragraph fifteen of the Government of India (Commencement and Transitory Provisions) Order, 1936.

[The Schedule is omitted as the amendments made thereby have been incorporated in the appropriate places in the Acts in this Manual.]

THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) SUPPLEMENTARY ORDER, 1937.

AT THE COURT AT BUCKINGHAM PALACE, THE 29TH DAY OF JULY, 1937.

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by section two hundred and ninety-three of the Government of India Act, 1935, (hereafter in the recitals to this Order referred to as "the Act") His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the Order any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act:

AND WHEREAS in exercise of the said powers in Order in Council called the Government of India (Adaptation of Indian Laws) Order, 1937 (hereafter in this Order referred to as "the Principal Order") has been made:

AND WHEREAS by sub-section (2) of section three hundred and nine of the Act His Majesty in Council is empowered to vary any Order in Council previously made under the Act:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.

2. The Schedules to the Principal Order shall be modified as directed in the Schedule to this Order, and shall have effect, and be deemed always to have had effect, as so modified.

[As the Schedules to the Principal Order have been modified as directed in the Schedule to this Order, the Schedule to this Order is omitted.]

^a THE ACTING JUDGES ACT, 1867.

(ACT XVI OF 1867)

[1st March 1867.]

An Act to authorize the making of acting appointments to certain Judicial Offices.

WHEREAS the Governor-General of India in Council or the Local Government, as the case may be, is empowered by divers enactments to appoint the Judges of certain Courts in British India: And whereas it has been doubted whether he or it is empowered to appoint persons to act temporarily as such Judges, and it is expedient to remove such doubts; It is hereby enacted as follows:—

a. Short title given by the Indian Short Titles Act, 1897 (XIV of 1897).

This Act has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874) to be in force in the following Scheduled Districts, namely:

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the Districts of Singbhum—See Gazette of India, 1881, Pt. I, p. 504.

Power to appoint acting Judges.

1. In every case in which the ^a[Central Government] or the ^b[Provincial Government], as the case may be, has power under any Act or Regulation to appoint a Judge of any Court in British India, such power shall be taken to include the power to appoint any person capable of being appointed a permanent Judge of such Court, to act as Judge of the same Court for such time as the ^a[Central Government] or the ^b[Provincial Government], as the case may be, shall direct. Every person so appointed to act temporarily

as a Judge of any such Court shall have the powers, and perform the duties which he would have had and been liable to perform in case he had been duly appointed a permanent Judge of the same Court.

a. *Substituted by A. O. for the words "Governor-General of India in Council."*

b. *Substituted by A. O. for the words "Local Government."*

Certain enactments to be construed as if they contained a clause like section 1 of this Act.

2. Every such Act and Regulation shall be construed as if it contained a special clause to the purport or effect of the first section of this Act.

THE ADMINISTRATOR-GENERAL'S ACT, 1913.

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STATEMENT OF OBJECTS AND REASONS.

"The bulk of the existing law relating to the office and duties of the Administrator-General is to be found in Act II of 1874. When this Act became law, it was desired to provide for a class of Administrators-General who were to be remunerated by commission, to furnish security to Government, to be liable for claims brought against them and to be located in the Presidency-towns. The Act has been amended on several occasions and finally in Act V of 1902 legislation was undertaken by which the Administrator-General may be a salaried officer of Government, for whose liabilities Government is responsible, and the fees for whose services are credited to Government, while by the same Act some measure of provincial decentralisation was provided for.

2. The draft Bill carries this process a stage further, and does away with the class of Administrators-General who were remunerated by commission, and makes all Administrators-General Officers of Government remunerated by fixed salaries, whose liabilities are undertaken by Government, and whose fees are credited to Government.

3. The qualification necessary for appointment to the post of Administrator-General under the present law is unnecessarily narrow. The Bill gives Government a wider field of selection for this appointment.

4. Further power is taken by the Bill to permit a more complete system of provincial decentralisation of the office of Administrator-General. It has been considered necessary, on financial grounds, to provide for a modification of the normal qualifications for appointment to the post of Administrator-General when this power is exercised.

5. The Bill also permits greater elasticity in fixing the fees to be levied under the Act. Experience has shown that many estates, which might otherwise have come into the Administrator-General's hands to their benefit, have been debarred from doing so on the ground of expense. While, however, it has been provided that Government may prescribe the fees to be levied under the Act, this power is limited by the provision that only such fees may be prescribed as will produce an annual amount sufficient to discharge the salaries and other expenses incidental to the working of the Act

including such sum as Government may determine to ensure their revenue against loss.

6. Following the modern practice certain other matters now expressly provided for in the law, but which are in the nature of subsidiary rules of procedure, have been left to be dealt with under the extended rule-making power provided by the Bill.

7. Certain minor amendments in the substance of the law due to judicial decisions or further experience in the

working of the Act have become desirable, and opportunity has been taken to embody them in the Bill.

8. The law relating to the office and duties of the Administrator-General is now contained in five different enactments, and as it is desirable that this branch of the law should be contained in a single enactment consolidation has been undertaken *pari passu* with the amendments specified above." — Gazette of India, 1912, Part V, page 188.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts—X of 1914; XXI of 1922; XXXII of 1926; X of 1927; XXXII of 1940.

—In Bengal amended by Bengal Act XI of 1940.

—Adapted by A. O.

—Repealed in part by Acts — V of 1917; XII of 1927.

COGNATE ACTS AND PROVISIONS.

- | | |
|---|---|
| 1. CHARITABLE ENDOWMENTS ACT, VI OF 1890, SS. 5, 6, 8 AND 10. | 7. PRESIDENCY-TOWNS INSOLVENCY ACT III OF 1909, PART III. |
| 2. COLONIAL PROBATES ACT, 1892 (55 & 56 Vict. C. 6). | 8. SUCCESSION ACT, XXXIX OF 1925, PART IX. |
| 3. DOMICILE ACT, 1861 (24 & 25 Vict., C. 121), S. 4. | 9. TRUSTEES ACT, XXVII OF 1866, (Powers of High Court) SS. 3, 7, 20, 24 TO 29, 34, 43, 48, 51 TO 53. |
| 4. INDIAN SECURITIES ACT, 1860 (23 & 24 Vict., C. 5), S. 1. | 10. TRUSTEES AND MORTGAGEES' POWERS ACT, XXVIII OF 1866, (Powers of Executors And Administrators), SS. 25 TO 28, 38, 40 TO 43 AND 45. |
| 5. LEGAL REPRESENTATIVES' SUITS ACT, XII OF 1855, (In Torts). | |
| 6. MORTGAGED ESTATES ADMINISTRATION ACT XXIII OF 1855. | |

ACT No. III of 1913.^a

[27th February 1913.]

An Act to consolidate and amend the law relating to the office and duties of Administrator-General

WHEREAS it is expedient to consolidate and amend the law relating to the office and duties of Administrator General; It is hereby enacted as follows:—

- a. For Report of Select Committee, see Gazette of India, 1913, Pt. V, p. 3; and for Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 697 and *ibid.*, 1913, Pt. VI, pp. 14, 28 and 64.

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called the Administrator-General's Act, 1913.

(2) It extends to the whole of British India, including the Sonthal Parganas and British Baluchistan, and applies also to all ^a[British subjects in Indian States].

(3) It shall come into force on such date^b as the ^c[Central Government] may, by notification in the ^d[Official Gazette], direct.

- a. Substituted by A. O. for "British and Indian subjects of His Majesty in territories of Native States in India."

b. 1st April 1914, see Gen. R. and O., Vol. IV, p. 406.

c. Substituted by A. O. for "Governor-General in Council."

d. Substituted by A. O. for "Gazette of India."

Interpretation clause.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "assets" means all the property, moveable and immoveable, of a deceased person, which is chargeable with, and applicable to, the payment of his debts and legacies, or available for distribution among his heirs and next-of-kin:

(2) "exempted person" means an Indian Christian, a Hindu, Muhammadan, Parsi or Buddhist, or a person exempted under section 332 of the Indian Succession Act, 1865^a, from the operation of that Act:

1. Section 2 (1). — [1] The word 'assets' includes both moveable and immovable property. (Vol 13) 1926 Mad. 1026 (1027); (1898) 25 Cal. 65 (73).

[2] Per Sale J.—The term 'assets' is usually defined

as meaning and including property of a deceased person chargeable with and applicable to the payment of his debts and legacies. The revenue payable in respect of the estate of a deceased person can hardly be described as a debt of such person. (1904) 31 Cal 572 (583).

^b[(3) "Government" or "the Government" means, in relation to any Province, the Provincial Government, and in relation to British subjects in Indian States, the Central Government]:

(4) "Indian Christian" means a Native of India who is or in good faith claims to be of unmixed Asiatic descent, and who professes any form of the Christian religion:

(5) "letters of administration" includes any letters of administration, whether general or with a copy of the will annexed, or limited in time or otherwise:

(6) "next-of-kin" includes a widower or widow of a deceased person, or any other person who by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased:

^c[* * * * *]

(8) "prescribed" means prescribed by rules under this Act:

^c[* * * * *]

^d[(12) "High Court" means —

(a) in relation to Bengal, Assam and the Andaman and Nicobar Islands, the High Court at Calcutta;

(b) in relation to Madras and Coorg, the High Court at Madras;

(c) in relation to Bombay and British Baluchistan, the High Court at Bombay;

(d) in relation to the United Provinces and Ajmer-Merwara, the High Court at Allahabad;

(e) in relation to the Punjab and Delhi, the High Court at Lahore;

(f) in relation to the Provinces of Bihar and Orissa, the High Court at Patna;

(g) in relation to the Central Provinces and Berar, the High Court at Nagpur;

(h) in relation to Sind, the Judicial Commissioner's Court;

(i) in relation to the North-West Frontier Province, the Judicial Commissioner's Court; and

(j) in relation to British subjects in any Indian State, that one of the aforesaid Courts which the Central Government may from time to time notify in this behalf:

(13) "Division" means the Province or State or group of States for which an Administrator-General has been appointed under this Act].

a. See now the Indian Succession Act, 1925 (39 [XXXIX] of 1925), S. 3.

b. Substituted by A. O. for the original clause.

c. Clauses (7), (9), (10) and (11), defining Official Gazette, the Presidencies of Bengal, Bombay and Madras Presidency and Revenues of the Government, respectively, were repealed by A. O. Cl. (11) had been inserted by the Official Trustees and Administrator General's Acts Amendment Act, (21 [XXI] of 1922), S. 5.

d. Clauses (12) and (13) were inserted by A. O.

PART II.

THE OFFICE OF ADMINISTRATOR-GENERAL.

Appointment of Administrators-General.

3. ^a[(1) The Provincial Government for each Province, and the Central Government for British subjects in any Indian State or group of Indian States, shall appoint an Administrator-General:

Provided that nothing herein contained shall be deemed to bar the appointment of the same person as Administrator-General for two or more Divisions.]

(2) No person shall be appointed to the office of Administrator General ^b[* * * * *] who is not —

(a) a Barrister; or

(b) an Advocate, Attorney or Vakil enrolled by a High Court; or

(c) a person holding the office of Deputy Administrator-General at the commencement of this Act; ^c[or

(d) in the case of a Province other than Bengal, Madras or Bombay, a person already in the service of the Crown.]

^d[* * * * *]

a. Substituted by A. O. for original sub-section (1).

b. The words "of any of the said Presidencies" were repealed by A. O.

c. Inserted by A. O.

d. Sub-section (3) was repealed by A. O.

4. The Government may appoint a Deputy or Deputies to assist the Administrator-General; and any Deputy so appointed shall, subject to the control of the Government and the general or special orders of the Administrator-General, be competent to discharge any of the duties and to exercise any of the powers of the Administrator-General, and when discharging such duties or exercising such powers shall have the same privileges and be subject to the same liabilities as the Administrator-General.

Appointment and powers of Deputy Administrators-General.
Administrator-General to be a corporation sole, to have perpetual succession and official seal, and to sue and be sued in his corporate name.

a. Substituted by A. O. for "Presidency."

5. The Administrator-General shall be a corporation sole by the name of the Administrator-General of the ^a[Division] for which he is appointed and, as such Administrator-General, shall have perpetual succession and an official seal, and may sue and be sued in his corporate name.

PART III.

RIGHTS, POWERS, DUTIES AND LIABILITIES OF THE ADMINISTRATOR-GENERAL.

(a) Grants of Letters of Administration and Probate.

As regards Administrator-General, High Court to be deemed a Court of competent jurisdiction for the purpose of granting probate or letters of administration.

6. So far as regards the Administrator-General of any ^a[Division], the High Court ^b[* * *] shall be deemed to be a Court of competent jurisdiction for the purpose of granting probate or letters of administration under any law for the time being in force wheresoever within the ^a[Division] the estate to be administered is situate.

a. Substituted by A. O. for "Presidency."

b. The words "at the Presidency-town," were repealed by A. O.

Administrator-General entitled to letters of administration, unless granted to next-of-kin.

7. Any letters of administration, which are granted after the commencement of this Act by the High Court ^a[* * *] shall be granted to the Administrator-General of the ^b[Division] unless they are granted to the next-of-kin of the deceased.

a. The words "at any Presidency-town" were repealed by A. O.

b. Substituted by A. O. for "Presidency."

Administrator-General entitled to letters of administration in preference to creditor, non-universal legatee or friend.

8. The Administrator-General of the ^a[Division] shall be deemed by all the Courts in the ^a[Division] to have a right to letters of administration other than letters *pendente lite* in preference to that of —

(a) a creditor; or

(b) a legatee other than an universal legatee; or

(c) a friend of the deceased.

a. Substituted by A. O. for "Presidency."

When Administrator-General is to administer estates of persons other than exempted persons.

9. If any person, not being an exempted person, has died leaving within any ^a[Division] assets exceeding the value of ^b[two thousand] rupees,

and if no person to whom any Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in such ^a[Division] for probate of his will, or for letters of administration of his estate,

the Administrator-General of the ^a[Division] in which such assets are shall, subject to any rules made by the Government, within a reasonable time after he has had notice of the death of

1. Section 7 — [1] Where universal legatee fails to take out letters of administration, the Administrator-General may step in. (Vol 30) 1943 All. 356 (357).

[2] Under S. 7, letters can be issued to the Administrator-General of the division even in respect of estate of exempted person. (Vol 30) 1943 All 356 (356, 357).

[3] Letters of administration to the estate of illegitimate persons may be granted to the Administrator-General. (1873) 11 Beng. L. R. (App) 6 (7, 8).

[4] Letters of administration to the attorney of the executor of a deceased in respect of assets situate in the Punjab cannot be granted by the Calcutta High Court. But it has power to grant letters of administration in respect of such assets to the Administrator-General. (1868) 1 Beng L R (OS) 3 (6,7).

[5] On the question of grants of administration to the Administrator-General and the provisions of law by which such grants are regulated, see. (1879) 4 Cal 770 (774 to 778).

such person, and of his having left such assets, take such proceedings as may be necessary to obtain from the High Court [* * *] letters of administration of the estate of such person.

a. *Substituted* by A. O. for "Presidency."

b. *Substituted* by the Administrator-General's (Amendment) Act, 1926, 32[XXXII] of 1926) S.2, for "one thousand."

c. The words "at the Presidency-town" were *repealed* by A. O.

10. Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at a Presidency town, the Court, on being satisfied that danger is to be apprehended of misappropriation, deterioration or waste of such assets unless letters of administration of the estate of such person are granted, may upon the application of the Administrator-General or of any person interested in such assets or in the due administration thereof, make an order, upon such terms as to indemnifying the Administrator-General against costs and other expenses as the Court thinks fit, directing the Administrator-General to apply for letters of administration of the estate of such person :

Provided that, in the case of an application being made under this section for letters of administration of the estate of an exempted person, the Court may refuse to grant letters of administration, if it is satisfied that such grant is unnecessary for the protection of the assets; and in such case the Court shall make such order as to the costs of the application as it thinks fit.

Provincial Amendment.

BENGAL.—For the words commencing "whenever any person" and ending "at a Presidency-town" *substitute* the following : — "Whenever any person, not being an exempted person, has died leaving assets within Bengal, or being an exempted person, has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court or within any area notified by the Provincial Government in this behalf in the Official Gazette." — BENGAL ACT XI OF 1940.

Power to direct Administrator-General to collect and hold assets until right of succession or administration is determined.

11. (1) Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of any of the said High Courts,

and such Court is satisfied that there is no person immediately available, who is legally entitled to the succession to such assets, or that danger is to be apprehended of misappropriation, deterioration or waste of such assets, before it can be determined who may be legally entitled to the succession thereto, or whether the Administrator-General is entitled to letters of administration of the estate of such deceased person,

the Court may, upon the application of the Administrator-General or of any person interested in such assets, or in the due administration thereof, forthwith direct the Administrator-General

1. Section 10.—[1] The bare possibility that the recovery of assets may become barred by limitation is not such danger of misappropriation as would warrant the granting of an order to the Administrator-General. (1863) 1 Mad H C R 234 (239). (Case under S. 12 of Act 8 [VIII] of 1855.)

[2] "Interested in such assets" means "having a direct interest or share in them". (1863) 1 Mad H C R 234 (235). (Debtor to the estate cannot apply.)

[3] As to the effect of grant of letters to Administrator-General, see S. 24.

1. Section 11.—[1] "We have inserted in clause 11 (i. e. S. 11) a provision to indicate by whom applications under this clause may be made. We have further amended the clause so as to empower the Administrator-General to apply for letters of administration of any estate which may be committed to his charge temporarily, and to retain fees and reimburse himself for expenses lawfully incurred by him on account of such estate. Consequential amendments of clauses 12 and 13 (i. e. Ss. 12 and 13) have also been inserted." — *Select Committee Report*.

[2] "Succession" does not mean intestate succession only. (Vol 7) 1920 Cal 376 (377).

[3] Administrator-General appointed executor of a will, can obtain an order to take possession of the assets before applying for probate. (Vol 7) 1920 Cal 376 (377).

[4] The words "collection of assets" do not necessarily mean realisation by sale or by actual receipt or

possession; they imply the doing of some act in connection with the assets, whereby the Administrator-General incurs trouble of expense or responsibility. (1898) 25 Cal 65 (73); (1863) 1 Mad H C R 171 (176).

[5] A debtor to the estate of a deceased person cannot apply for an order under this section. (1863) 1 Mad H C R 234 (235).

[6] No payment to the prejudice of an estate before the grant of letters of administration can be made good by subsequent administration. Hence, pending the grant of letters a payment to the prejudice of the estate cannot be made by the Administrator-General; but he can make payment for the benefit of, or for the preservation of the assets. (1907) 11 Cal W N 193 (194).

[7] As soon as an order has been made by the High Court authorizing the Administrator-General to collect the assets of the deceased and ordering him, if necessary, to take out letters of administration to his estate, the right of the Administrator-General to the possession of the assets becomes paramount and excludes that of any other person. (1899) 23 Bom 428 (437). (Attachment of deceased's estate subsequent to order to take out letters of administration is void.)

[8] On the question of the re-imbursement of costs incurred by the Administrator-General in a suit to recover property and whether such costs include expenses of taking care of such property, see (1886) 10 Bom 350 (356, 357).

[9] As to the effect of the grant of letters to Administrator-General, see S. 24.

to collect and take possession of such assets, and to hold, deposit, realize, sell or invest the same according to the directions of the Court, and in default of any such directions according to the provisions of this Act so far as the same are applicable to such assets.

(2) Any order of the Court made under the provisions of this section shall entitle the Administrator-General,

- (a) to maintain any suit or proceeding for the recovery of such assets, and
- (b) if he thinks fit, to apply for letters of administration of the estate of such deceased person, and
- (c) to retain out of the assets of the estate any fees chargeable under rules made under this Act, and to reimburse himself for all payments made by him in respect of such assets which a private administrator might lawfully have made.

Provincial Amendment.

BENGAL In sub-section (1) —

(a) for the words commencing "Whenever any person" and ending "the said High Courts" substitute the following —

"Whenever any person, not being an exempted person has died leaving assets in Bengal, or being an exempted person, has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court or within any area notified by the Provincial Government in this behalf in the Official Gazette"; and

(b) for the words "such Court" substitute the words "the Court." — BENGAL ACT XI OF 1940.

Grant of probate or letters of administration to person appearing in the course of proceedings taken by Administrator-General under sections 9, 10 and 11.

12. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10, or section 11, any person appears and establishes his claim—

- (a) to probate of the will of the deceased; or
- (b) to letters of administration as next-of-kin of the deceased, and gives such security as may be required of him by law,

the Court shall grant probate of the will or letters of administration accordingly, and shall award to the Administrator-General the costs of any proceedings taken by him, under those sections to be paid out of the estate as part of the testamentary or intestate expenses thereof.

13. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10, or section 11, no person appears and establishes his claim to probate of a will, or to a grant of letters of administration as next-of-kin of the deceased, within such period as to the Court seems reasonable,

or if a person who has established his claim to a grant of letters of administration as next-of-kin of the deceased fails to give such security as may be required of him by law, the Court may grant letters of administration to the Administrator-General:

Administrator-General not precluded from applying for letters within one month after death.

14. Nothing in this Act shall be deemed to preclude the Administrator-General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased.

(b) *Estates of Persons subject to the Army Act^a [or the Air Force Act].*

Act not to affect Regimental Debts Act, 1893.

15. Nothing in this Act shall be deemed to affect the provisions of the Regimental Debts Act, 1893.^b

a. Inserted by the Repealing and Amending Act, 1927 (X of 1927), S. 2 and Sch. I.

b. 56 & 57 Vict., c. 5.

Letters of administration not necessary in respect of small estates administered by Administrator-General in accordance with the Regimental Debts Act, 1893.

16. It shall not be necessary for the Administrator-General to take out letters of administration of the estate of any deceased person which is being administered by him in accordance with the provisions of the Regimental Debts Act, 1893,^a if the value of such estate does not on the date when such administration is committed to him exceed rupees

1. Section 15. — [1] See the Regimental Debts Act, 1893 (56 & 57 Vict., c. 5), sections 14, 16 and 25 to 30.

1. Section 16. — [1] "We have amended clause 16 (i. e. S. 16) so as to provide that for the purposes of this clause the value of an estate of a person subject to the Army Act is to be estimated at the date upon which the

administration is committed to the Administrator-General." — *Select Committee Report.*

[2] Section 16 of the Regimental Debts Act, 1893, runs as follows:—"Where any surplus or residue, as the case may be, does not exceed one hundred pounds, no duty shall be payable in the United Kingdom or India in

one thousand, but he shall have the same power in regard to such estate as he would have had if letters of administration had been granted to him.

a. 56 & 57 Vict., c. 5.

Provincial Amendment

BENGAL—For the words “rupees one thousand” substitute the words “two thousand rupees.”

— BENGAL ACT XI OF 1940.

17. If the Administrator-General applies in accordance with the provisions of the Regimental Debts Act, 1893^a for letters of administration of the estate of any person subject to the Army Act ^b[or the Air Force Act], the Court may grant to him letters of administration limited to the purpose of dealing with such estate in accordance with the provisions of the Regimental Debts Act, 1893.^a

Power to grant Administrator-General letters limited to purpose of dealing with assets in accordance with the Regimental Debts Act, 1893.

a. 56 & 57 Vict., c. 5.

b. Inserted by the Repealing and Amending Act, 1927 [X of 1927] S. 2 and Sch. I.

(c) Revocation of Grants.

18. If an executor or next-of-kin of the deceased, who has not been personally served with a citation or who has not had notice thereof in time to appear pursuant thereto establishes to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the Administrator-General, any letters of administration granted in accordance with the provisions of this Act to the Administrator-General may be revoked, and probate or letters of administration may be granted to such executor or next-of-kin as the case may be:

Recall of Administrator-General's administration, and grant of probate, etc., to executor or next-of-kin.

Provided that no letters of administration granted to the Administrator-General shall be revoked for the cause aforesaid, except in cases in which a will of the deceased is proved in the ^a[Division], unless the application for that purpose is made within six months after the grant to the Administrator-General and the Court is satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application is made.

a. Substituted by A. O. for “Presidency.”

19. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, the Court may order the costs of obtaining such letters of administration, and the whole or any part of any fees which would otherwise have been payable under this Act, together with the costs of the Administrator-General in any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator-General out of the estate:

Cost of obtaining administration, etc., may, on revocation, be ordered to be paid to Administrator-General out of assets.

Provided that nothing in this section shall affect the provisions of clause (c) of subsection (2) of section 11.

20. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, the same shall, so far as regards the Administrator-General and all persons acting under his authority in pursuance thereof, be deemed to have been only voidable, except as to any act done by any such Administrator-General or other person as aforesaid, after notice of a will or of any other fact which would render such letters void:

After revocation, letters granted to Administrator-General to be deemed as to him to have been voidable only.

Provided that no notice of a will or of any other fact which would render any such letters void shall affect the Administrator-General or any person acting under his authority in pursuance of such letters unless, within the period of one month from the time of giving such notice, proceedings are commenced to prove the will, or to cause the letters to be revoked, and such proceedings are prosecuted without unreasonable delay.

21. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, upon the grant of probate of a will, or upon the grant of letters of administration with a copy of the will annexed, all payments made or acts done by or under the

Payments made by Administrator-General prior to revocation.

respect thereof, and it shall not be necessary that representation to any deceased person be taken out for the purpose of obtaining payment thereof or of any part thereof under this Act from a paymaster or a Secretary of State, except in any prescribed case, or in any case, where the Secretary of State requires it.”

(Regimental Act, 1893, S. 29 — “The expression ‘representation’ includes probate and letters of administration, with or without will annexed, and in Scotland confirmation, and in India or colony the corresponding documents in use according to the law of India or the colony.”)

authority of the Administrator-General in pursuance of such letters of administration, prior to the revocation, which would have been valid under any letters of administration lawfully granted to him with a copy of such will annexed, shall be deemed valid notwithstanding such revocation.

(d) *General.*

Administrator - General's petition for grant of letters of administration.

22. Whenever any Administrator-General applies for letters of administration in accordance with the provisions of this Act, it shall be sufficient if the petition required to be presented for the grant of such

letters states,

- (i) the time and place of the death of the deceased to the best of the knowledge and belief of the petitioner,
- (ii) the names and addresses of the surviving next-of-kin of the deceased if known,
- (iii) the particulars and value of the assets likely to come into the hands of the petitioner,
- (iv) particulars of the liabilities of the estate if known.

Name in which probate or letters to be granted.

^a[23. All probates or letters of administration granted to any Administrator-General shall be granted to him by that name.]

a. *Substituted by A. O. for the original section.*

24. Probate or letters of administration granted by the High Court ^a[* * *] to the Administrator-General of any ^b[Division] shall have effect over all the assets of the deceased throughout such ^b[Division], and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding such assets and shall afford full indemnity to all debtors paying their debts and all persons delivering up such assets to such Administrator-General :

Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout one or more of the other ^b[Divisions].

Whenever a grant is made by a High Court to the Administrator-General with such effect as last aforesaid, the Court shall send to the other High Courts a certificate that such grant has been made, and such certificate shall be filed by the Courts receiving the same.

^c[A grant made by the High Court at Rangoon before the ^dseparation of Burma from India shall have the same effect for the purposes of this section as it would have had if the separation had not taken place.]

a. The words "at any Presidency-town" were repealed by A. O.

b. *Substituted by A. O. for "Presidency."*

c. *Inserted by A. O.*

d. Burma was separated from India on 1-4-1937.

1. Section 22. — [1] "In clause 22 (i. e. S. 22) we have added a sub-clause which requires the Administrator-General when filing an application for letters of administration of an estate to specify particulars of any known liabilities of such estate." — *Select Committee Report.*

[2] Administrator-General in case of insolvent's estate can claim no higher title than the deceased himself and he has not the rights of either the trustee or Official Assignee in insolvency. (Vol 1) 1914 Mad 281 (282).

1. Section 24. — [1] Where an Administrator-General takes out letters of administration to the estate of a Hindu dying intestate the whole estate vests in him completely. (Vol 2) 1915 Mad 110 (111) : 38 Mad 1134.

[2] After receiving the letters of administration the Administrator-General should exercise his ordinary powers as Administrator-General and as the property is vested in him, he has full powers to dispose of it in such manner as may appear to him proper. (Vol 2) 1915 Mad 110 (111) : 38 Mad 1134.

[3] An administration cannot be treated as closed until every act necessary for its completion has been done. Thus, where in order to realise his commission the Administrator-General sold an item of immovable property which had been previously sold by the son of the deceased on attaining majority, it was held that the sale by the son was a nullity. (Vol 2) 1915 Mad 110 (112) : 38 Mad 1134.

[4] On the question of the title of the Administrator-General to whom letters of administration have been granted and whether his title relates back to the death of the deceased or accrues only as from the date of the grant of such letters, *see* (1871) 8 Bom H C R (OS) 140 (148, 150).

[5] Conflict between Administrator-General and Court of Wards — Administrator-General taking possession without prior order of Court — Held, on facts that action of the Administrator-General in taking possession of the estate of the testator was not legal. (1906) 10 Cal W N 241 (243).

[6] Where the Administrator-General has obtained letters of administration in respect of the estate of a deceased insolvent, O. 20, R. 13, Civil P. C., does not apply. (Vol 1) 1914 Mad 281 (282) : 38 Mad 500.

[7] There is no machinery in the law of insolvency under which an insolvent's estate in respect of which letters of administration have been granted to the Administrator-General can be administered under the insolvency law. (Vol 1) 1914 Mad 281 (282) : 38 Mad 500.

[8] Sanction of the Government under S. 197, Criminal P. C., is not necessary for the institution of a prosecution against the Administrator-General. (1903) 30 Cal 927 (933).

[9] As to the Court in which a suit against the Administrator-General can be brought, *see* (1904) 28 Bom 529 (532, 533).

25. (1) Any private executor or administrator may with the previous consent of the Administrator-General of the ^a[Division] in which any of the assets of the estate, in respect of which such executor or administrator has obtained probate or letters of administration, are situate, by an instrument in writing under his hand notified in the Official Gazette, transfer the assets of the estate vested in him by virtue of such probate or letters to the Administrator-General by that name or any other sufficient description.

(2) As from the date of such transfer the transferor shall be exempt from all liability as such executor or administrator, as the case may be, except in respect of acts done before the date of such transfer, and the Administrator-General shall have the rights which he would have had, and be subject to the liabilities to which he would have been subject, if the probate or letters of administration, as the case may be, had been granted to him by that name at the date of such transfer.

a. Substituted by A. O. for "Presidency."

26. (1) When the Administrator-General has given the prescribed notice to creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets or any part thereof in discharge of such lawful claims as he has notice of.

(2) He shall not be liable for the assets so distributed to any person of whose claim he had not notice at the time of such distribution.

(3) No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator-General shall affect him unless proceedings to enforce such claim are commenced within one month after notice of the rejection or disallowance of such claim has been given in the prescribed manner and unless such proceedings are prosecuted without unreasonable delay.

(4) Nothing in this section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

(5) In computing the period of limitation for any suit, appeal or application under the provisions of any law for the time being in force, the period between the date of submission of the claim of a creditor to the Administrator-General and the date of the final decision of the Administrator-General on such claim shall be excluded.

27. (1) When the Administrator-General has, so far as may be, discharged all the liabilities of an estate administered by him, he shall notify the fact in the Official Gazette, and he may, by an instrument in writing, with the consent of the Official Trustee and subject to any rules made by the Government, appoint the Official Trustee to be the trustee of any assets then remaining in his hands.

(2) Upon such appointment such assets shall vest in the Official Trustee as if he had been appointed trustee in accordance with the provisions of the Official Trustees Act, 1913, and shall be held by him upon the same trusts as the same were held immediately before such appointment.

1. Section 25.—[1] Executors of Hindu testator can validly transfer by deed the whole estate vested in them to the Administrator-General. (1895) 22 I. A. 107 (117).

1. Section 26. — [1] "Under clause 26 (i. e. S. 26) as originally drafted no notice of a claim disallowed by the Administrator-General affected him unless proceedings to enforce it were commenced within one month of the date on which such claim was disallowed. We have provided that the period should run from the date when notice of the rejection or disallowance of his claim has been given to the claimant." — *Select Committee Report*.

[2] Sub-section (5) of S. 26 now provides for the exclusion of period between the date of submission of the claim of a creditor to the Administrator-General and the date of the final decision of the Administrator-General on such claim. In a case arising under the Act

of 1874 it was held that even though there was no provision in the Limitation Act that time should cease to run upon a claim being filed or a certificate being issued by the Administrator-General, yet claims which were covered by a certificate issued by the Administrator-General were not to be considered as barred. (Vol 1) 1914 Cal 298 (299).

[3] As to the nature of the suit brought by one of the creditors against the Administrator-General challenging an improper distribution of assets among the creditors, see (Vol 1) 1914 Mad 281 (281, 282) : 38 Mad 500.

1. Section 27. — [1] "We have amended clause 27 (i. e. S. 27) so as to bring it more in accordance with the existing law. We have further provided that any appointment of the Official Trustee under this clause shall be made by an instrument in writing." — *Select Committee Report*.

28. (1) The High Court ^a [* * *] may, on application made to it, give to the Administrator General of the ^b[Division] any general or special directions as to any estate in his charge or in regard to the administration of any such estate.

Power for High Court to give directions regarding administration of estate.

(2) Applications under sub-section (1) may be made by the Administrator-General or any person interested in the assets or in the due administration thereof.

a. The words "at the Presidency-town" were repealed by A. O.

b. Substituted by A. O. for "Presidency."

29. (1) No Administrator-General shall be required by any Court to enter into any administration-bond, or to give other security to the Court, on the grant of any letters of administration to him by that name.

No security nor oath to be required from Administrator-General.

(2) No Administrator-General or Deputy Administrator-General shall be required to verify, otherwise than by his signature, any petition presented by him under the provisions of this Act, and, if the facts stated in any such petition are not within the Administrator-General's own personal knowledge, the petition may be subscribed and verified by any person competent to make the verification.

Manner in which petitions to be verified by Administrator-General and his Deputy.

(3) The entry of the Administrator-General by that name in the books of a company shall not constitute notice of a trust, and a company shall not be entitled to object to enter the name of the Administrator-General on its register by reason only that the Administrator-General is a corporation and in dealing with assets the fact that the person dealt with is the Administrator-General shall not of itself constitute notice of a trust.

Entry of Administrator-General not to constitute notice of a trust.

30. The Administrator-General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question of fact, examine upon oath (which he is hereby authorised to administer) any person who is willing to be so examined by him regarding such question.

Power to examine on oath.

(e) Grant of Certificates.

31. Whenever any person has died leaving assets within any ^a[Division], and the Administrator-General of such ^a[Division] is satisfied that such assets, excluding any sum of money deposited in a Government Savings Bank, or in any Provident Fund to which the provisions of the Provident Funds Act, 1897^b, apply, did not at the date of death exceed in the whole ^c[two thousand] rupees in value, he may, after the lapse of one month from the death if he thinks fit, or before the lapse of the said month if he is requested so to do by writing under the hand of the executor or the widow or other person entitled to administer the estate of the deceased, grant to any person, claiming otherwise than as a creditor to be interested in such assets, or in the due administration thereof, a certificate, under his hand entitling the claimant to receive the assets therein mentioned left by the deceased within the ^a[Division] to a value not exceeding in the whole ^c[two thousand] rupees :

In what case Administrator-General may grant certificate.

1. Section 28. — [1] The High Court should not advise on disputed points of law and fact under S. 28 but only on questions of management of the estate. (Vol 15) 1928 Lah 514 (514).

[2] As to direction by High Court on the recovery of costs out of the estate, see (Vol 1) 1914 Cal 298 (299).

1. Section 29. — [1] "We have added a sub-clause to clause 29 (i. e. S. 29) so as to provide that the entry of the Administrator-General in the books of a company shall not constitute notice of a trust. This clause has been taken from clause 13 of the Official Trustees Bill." — *Select Committee Report.*

[2] Administrator-General is exempted from verifying otherwise than by his signature. (1899) 26 Cal 404 (406).

[3] Signature of Administrator-General is sufficient to verify his petition for letters of administration.² (1898) 20 Cal 879 (880).

1. Section 31 — [1] "We have amended clause 31 (i. e. S. 31) so as to make it clear that certificates can be issued whenever the value of the assets within the Presidency does not exceed Rs. 1000. We have also provided that deposits in Government Savings Banks or in Provident Funds to which the provisions of the Provident Funds Act, 1897, apply should not be taken into account in computing the value of the assets. Lastly, we have made an amendment in the clause which has the effect of limiting the power of the Administrator-General under this clause to cases in which the value of the assets does not exceed Rs. 1000 at the date of the death of the deceased. This amendment reproduces the present law." — *Select Committee Report.*

[2] The provision contained in S. 31 implies that the certificate when granted will, as a matter of law, entitle the claimant to receive the property. (1910) 34 Bom 506 (509). (Incorporation in Hindu Wills Act, 1870, of S. 187 of Succession Act, 1865, did not affect rights, duties and privileges of Administrator-General of Bombay, Madras and Bengal).

Provided that no certificate shall be granted under this section —

- (i) where probate of the deceased's will or letters of administration of his estate has or have been granted, or
- (ii) in respect of any sum of money deposited in a Government Savings Bank or in any Provident Fund to which the provisions of the Provident Funds Act, 1897^b, apply.

- a. *Substituted* by A. O. for "Presidency."
- b. See now the Provident Funds Act, 1925 (19 [XIX] of 1925).
- c. *Substituted* by the Administrator-General's (Amendment) Act, 1926 (32 [XXXII] of 1926), S. 2, for "one thousand".

32. If, in cases falling within section 31, no person claiming to be interested otherwise than as a creditor in such assets or in the due administration thereof obtains, within three months of the death of the deceased a certificate from the Administrator-General under the same section, or probate of a will or letters of administration of the estate of the deceased, and such deceased was not an exempted person, or was an exempted person who has left assets within the ordinary original civil jurisdiction of the High Court, or within any area notified by the Government in this behalf in the Official Gazette, the Administrator-General may administer the estate without letters of administration, in the same manner as if such letters had been granted to him ;

and if he neglects or refuses to administer such estate, he shall, upon the application of a creditor, grant a certificate to him in the same manner as if he were interested in such assets otherwise than as a creditor,

and such certificate shall have the same effect as a certificate granted under the provisions of section 31, and shall be subject to all the provisions of this Act which are applicable to such certificate :

Provided that the Administrator-General may, before granting such certificate, if he thinks fit, require the creditor to give reasonable security for the due administration of the estate of the deceased.

Provincial Amendment.

BENGAL—After the words "in the Official Gazette, the Administrator-General may" insert the following :

"after the lapse of the said three months, or if he is required so to do in writing under the hand of the executor or the widow or other person entitled to administer the estate of the deceased, before the lapse of the said three months."—BENGAL ACT XI of 1940.

33. The Administrator-General shall not be bound to grant any certificate under section 31 or section 32, unless he is satisfied of the title of the claimant and of the value of the assets left by the deceased within the ^a[Division], either by the oath of the claimant, or by such other evidence as he requires.

- a. *Substituted* by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Sch. II for "Presidency".

34. The holder of a certificate granted in accordance with the provisions of section 31 or section 32, shall have in respect of the assets specified in such certificate the same powers and duties, and be subject to the same liabilities as he would have had or been subject to if letters of administration had been granted to him :

Provided that nothing in this section shall be deemed to require any person holding such certificate,

- (a) to file accounts or inventories of the assets of the deceased before any Court or other authority, or
- (b) save as provided in section 32 to give any bond for the due administration of the estate.

35. The Administrator-General may revoke a certificate granted under the provisions of section 31 or section 32 on any of the following grounds, namely :—

- (i) that the certificate was obtained by fraud or misrepresentation made to him,

1. Section 32. — [1] "Clause 32 (i. e. S. 32) of the Bill as introduced precluded the Administrator-General from administering petty estates of exempted persons under the provisions of that clause. It has been pointed out that this limitation has caused considerable in-

convenience in presidency-towns, and the Administrator-General by the clause as amended is authorised to administer petty estates of exempted persons within the presidency-towns and any other areas notified by Government in this behalf." — *Select Committee Report*.

(ii) that the certificate was obtained by means of an untrue allegation of a fact essential in law to justify the grant though such allegation was made in ignorance or inadvertently.

36. (1) When a certificate is revoked in accordance with the provisions of section 35, the holder thereof shall, on the requisition of the Administrator-General, deliver it up to such Administrator-General, but shall not be entitled to the refund of any fee paid thereon.

(2) If such person wilfully and without reasonable cause omits to deliver up the certificate, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

S. 36A.

PROVINCIAL AMENDMENT.

Bengal. — After S. 36 the following section shall be inserted :—

“36A. When a certificate is revoked in accordance with the provisions of Section 35, all payments made *Payment to holder bona fide* under such certificate to the holder thereof before such revocation, shall not-*of certificate before* withstanding such revocation, be a legal discharge to the person making the same; and *it is revoked.* the holder of such certificate may retain, and reimburse himself in respect of, any payments made by him which the person to whom a certificate or probate or letters of administration may afterwards be granted, might lawfully have made.”

— BENGAL ACT XI OF 1940.

Administrator-General not bound to take out administration on account of assets for which he has granted certificate.

37. The Administrator-General shall not be bound to take out letters of administration of the estate of any deceased person on account of the assets in respect of which he grants any certificate, under section 31 or section 32, but he may do so if he revokes such certificate under section 35 or ascertains that the value of the estate exceeded ^a[two thousand] rupees.

[a] Substituted by the Administrator-General's (Amendment) Act, 1926 (32 [XXXII] of 1926), S. 2 for “one thousand.”

38. Where a person not having his domicile in British India has died leaving assets in any ^a[Division] and in the country in which he had his domicile at the time of his death, and proceedings for the administration of his estate with respect to assets in any such ^a[Division] have been taken under section 31 or section 32, and there has been a grant of administration in the country of domicile with respect to the assets in that country,

the holder of the certificate granted under section 31 or section 32, or the Administrator-General, as the case may be, after having given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, and after having discharged, at the expiration of the time therein named, such lawful claims as he has notice of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

[a] Substituted by A. O. for “Presidency.”

(f) Liability.

39. (1) The revenues of the Government ^a[* * *] shall be liable to make good all sums *Liability of Government.* required to discharge any liability which the Administrator-General, if he were a private administrator, would be personally liable to discharge, except when the liability is one to which neither the Administrator-General nor any of his officers has in any way contributed, or which neither he nor any of his officers could, by the exercise of reasonable diligence have averted, and in either of those cases the Administrator-General shall not, nor shall the revenues ^b[of the Government], ^c[* * * *] be subject to any liability.

(2) Nothing in sub-section (1) shall be deemed to render ^b[the Government] ^c[* * * *] or the Administrator-General liable for anything done before the commencement of this Act, by or under the authority of the Administrator-General.

[a] The words “of India” were repealed by the Official Trustees and Administrator-General's Acts Amendment Act, 1922 (21 [XXI] of 1922), S. 6. [b] The words “of the Government or” were inserted by the Official Trustees and Administrator-General's Acts Amendment Act, 1922 (21 [XXI] of 1922), S. 6. [c] The words “or the Government of India”, were repealed by A. O.

40. (1) If any suit be brought by a creditor against any Administrator-General, such *Creditors' suits against Administrator-General.* creditor shall be liable to pay the costs of the suit unless he proves that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of his claim, and had given such evidence in support thereof as, in the circumstances of the case, the Administrator-General was reasonably entitled to require.

(2) If any such suit is decreed in favour of the creditor, he shall, nevertheless, unless he is a secured creditor, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.

PROVINCIAL AMENDMENT.

Bengal. — In sub-section (2) after the word "payment" insert the words "of the amount decreed or ordered by the Court to be paid." — **BENGAL ACT XI OF 1940.**

Notice of suit not required in certain cases.

41. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Administrator-General in which no relief is claimed against him personally.

PART IV.

FEEs.

42. (1) There shall be charged in respect of the duties of the Administrator-General such *Fees.* fees, whether by way of percentage or otherwise, as may be prescribed by the Government :

Provided that, in the case of any estate, the administration of which has been committed to the Administrator-General before the commencement of this Act, the fees prescribed under this section shall not exceed the fees leviable in respect of such estate under the Administrator-General's Act, 1874^a, as subsequently amended :

Provided further that, in respect of the duties of the Administrator-General under the Regimental Debts Act, 1893^b, the fees prescribed in this section shall be determined in accordance with the provisions of that Act.

(2) The fees under this section may be at different rates for different estates or classes

1. Section 40 — [1] "We have amended clause 40 (i. e. S. 40) so as to indicate clearly that this clause is not intended to interfere with the rights of secured creditors." — *Select Committee Report.*

[2] The words "shall be liable to pay the costs" are intended not to impose upon a creditor to whom the condition of exemption is inapplicable an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case require it. (1898) 25 Cal 54 (63).

[3] The rateable payment referred to in the section is rateable payment *out of the assets*; it is nowhere provided that it shall be made out of the net income of the estate or any other specific part of the assets. (1898) 25 Cal 54 (61).

[4] Creditor bringing suit against debtor's widow and obtaining attachment before judgment — Property sold and sale proceeds deposited in Court — Later on Administrator-General joined as defendant in place of widow — Creditor obtaining decree in his favour but before his application for execution of decree sale-proceeds handed over to Administrator-General — Held that S. 33 of Act of 24 [XXIV] of 1867 (corresponding to S. 40 of the present Act) took away creditor's right to payment otherwise than rateably with the other creditors. (1871) 6 Mad H C B 346 (348).

[5] A creditor has a right to demand immediate payment of his claim in full when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full. (1898) 25 Cal 54 (62).

[See also (1884) 10 Cal 929 (930).]

1. Section 42. — [1] Commission is fixed on value of assets as they are ultimately distributed. The amount which the Administrator-General is to receive is a percentage on the assets distributed, provided, they have before distribution been collected by him; if there is a rise or fall in the value of the estate since collection, his commission increases or decreases proportionately. (Vol 9) 1922 Mad 491 (493).

[2] *Section 42 (1), first proviso* — For the right of the Administrator-General to charge commission in cases governed by the Administrator-General's Act, 1874, see (1904) 81 Cal 572 (581, 582); (1898) 25 Cal 65 (73); (1876) 1 Mad 148 (152); (Vol 13) 1926 Mad 1026 (1028). (Decision under Act of 1874 — Mere taking letters of administration is not sufficient to get commission.)

[3] *Administration commenced before Act of 1913* — For purposes of commission value of assets is to be taken at the date of their distribution. (Vol 9) 1922 Mad 491 (495).

[4] *Duties under the Regimental Debts Act, 1893* — *Fees for* — Section 14 (5) of the Regimental Debts Act, 1893, is as follows : — "An official administrator shall not take a percentage on the property exceeding three per cent. on the gross amount coming to or remaining in his hands after payment of preferential charges."

As to the payment of preferential charges, see S. 2 of the same Act.

(*Regimental Debts Act, 1893, S. 20* — "The expression 'official administrator' means in India the Administrator-General of any presidency or province.")

[5] Costs of Administrator-General to come out of the estate. — See Notes on S. 28.

of estates or for different duties, and shall, so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as Government may determine to be required to insure the revenues of the Government ^c [* * *] against loss under this Act).

[a] *Repealed* by the Administrator-General's Act, 1913 (3 [III] of 1913). [b] 56 & 57 Vict., c. 5. [c] The words "of India" were *repealed* by the Official Trustees and Administrator-General's Acts Amendment Act, 1922 (21 [XXI] of 1922), S. 7.

43. (1) Any expenses which might be retained or paid out of any estate in the charge *Disposal of fees.* of the Administrator-General, if he were a private administrator of such estate, shall be so retained or paid and the fees prescribed under section 42 shall be retained or paid in like manner as and in addition to such expenses.

(2) The Administrator-General shall transfer and pay to such authority, in such manner and at such time as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government ^a [* * * *].

[a] The words "of India" were *repealed* by the Official Trustees and Administrator-General's Acts Amendment Act, 1922 (21 [XXI] of 1922), S. 7.

PART V.

AUDIT OF THE ADMINISTRATOR-GENERAL'S ACCOUNTS.

Audit of Administrator-General's accounts. **44.** The accounts of every Administrator-General shall be audited at least once annually, and at any other time if the Government so direct, by the prescribed person and in the prescribed manner.

Auditors to examine accounts and report to Government. **45.** The auditors shall examine the accounts and forward to the Government a statement thereof in the prescribed form, together with a report thereon and a certificate signed by them showing :—

- (a) whether they contain a full and true account of everything which ought to be inserted therein,
- (b) whether the books which by any rules made under this Act are directed to be kept by the Administrator-General, have been duly and regularly kept, and
- (c) whether the assets and securities have been duly kept and invested and deposited in the manner prescribed by this Act, or by any rules made thereunder,

or (as the case may be) that such accounts are deficient, or that the Administrator-General has failed to comply with this Act or the rules made thereunder, in such respects as may be specified in such certificate.

PROVINCIAL AMENDMENT.

Bengal. — For clause (a) *substitute* the following clauses

"(a) whether the accounts have been audited in the prescribed manner,

(aa) whether, so far as can be ascertained by such audit, the accounts contain a full and true account of every thing which ought to be inserted therein." — BENGAL ACT XI OF 1940.

Power of auditors to summon and examine witnesses, and to call for documents. **46.** (1) Every auditor shall have the powers of a Civil Court under the Code of Civil Procedure, 1908 :—

- (a) to summon any person whose presence he thinks necessary to attend him from time to time; and
- (b) to examine any person on oath to be by him administered; and
- (c) to issue a commission for the examination on interrogatories or otherwise of any person; and
- (d) to summon any person to produce any document or thing the production of which appears to be necessary for the purpose of such audit or examination.

(2) Any person who when summoned refuses, or without reasonable cause, neglects to attend or to produce any document or thing or attends and refuses to be sworn, or to be examined, shall be deemed to have committed an offence within the meaning of, and punishable under, section 188 of the Indian Penal Code, 1860, and the auditor shall report every case of such refusal or neglect to Government.

47. The costs of and incidental to such audit and examination shall be determined in accordance with rules made by the Government, and shall be defrayed in the prescribed manner.

PART VI

MISCELLANEOUS.

General powers of administration. **48.** The Administrator-General may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure —

- (a) on such acts as may be necessary for the proper care and management of any property belonging to any estate in his charge; and
- (b) with the sanction of the High Court ^a[* * *] on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property.

[a] The words "at the Presidency-town" were *repealed* by A. O.

Power of person beneficially interested to inspect Administrator-General's accounts etc., and take copies.

49. Any person interested in the administration of any estate, which is in the charge of the Administrator-General shall, subject to such conditions and restrictions as may be prescribed, be entitled at all reasonable times to inspect the accounts relating to such estate and the reports and certificates of the auditor, and on payment of the prescribed fee, to copies thereof and extracts therefrom.

50. (1) The Government shall make rules^a for carrying into effect the objects of this Act and for regulating the proceedings of the Administrator-General.

Power to make rules. (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for:—

- (a) the accounts to be kept by the Administrator-General and the audit and inspection thereof,
 - (b) the safe custody, deposit and investment of assets and securities which come into the hands of the Administrator-General,
 - (c) the remittance of sums of money in the hands of the Administrator-General in cases in which such remittances are required,
 - (d) subject to the provisions of this Act, the fees to be paid under this Act, and the collection and accounting for any such fees,
 - (e) the statements, schedules and other documents to be submitted to the Government or to any other authority by the Administrator-General and the publication of such statements, schedules or other documents,
 - (f) the realization of the cost of preparing any such statements, schedules or other such documents,
- b [* * * *]
- (g) the manner in which and the person by whom the costs of, and incidental to, any audit under the provisions of this Act are to be determined and defrayed,
 - (h) the manner in which summonses issued under the provisions of section 46 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination, and
 - (i) any matter in this Act directed to be prescribed.

(3) All rules made under this Act shall be published in the Official Gazette, and, on such publication, shall have effect as if enacted in this Act.

[a] For such rules for Bengal, see Gen. R. and O., Vol. IV, p. 406; for Madras, see Madras R. and O., 1923, Vol. I, Pt. II, p. 281; for Bombay, see Bombay R. and O., 1924, Vol. II, p. 773; for the provinces of Assam, U. P. and Punjab, see the local Gazettes of 1914 or the latest editions of the Rules and Orders of those provinces. [b] Clause (ff) inserted by the Repealing and Amending Act, 1914 (10 [X] of 1914), was repealed by the Destruction of Records Act, 1917 (5 [V] of 1917), S. 6 and Schedule.

1. Section 47. — [1] "We have amended clause 47 (i. e. S. 47) and provided that the cost of audit of the accounts of the Administrator-General and the manner in which such cost is to be recovered shall be determined by rules." — *Select Committee Report.*

51. Whoever, during any examination authorised by this Act, makes upon oath a statement *False evidence.* which is false and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

52. All assets in the charge of the Administrator-General which have been in his custody *Assets unclaimed for* for a period of twelve years or upwards whether before or after *twelve years to be transferred* the commencement of this Act without any application for payment *to Government.* thereof having been made and granted by him shall be transferred, in the prescribed manner, to the account and credit of the Government ^a[* * *] :

Provided that this section shall not authorise the transfer of any such assets as aforesaid, if any suit or proceeding is pending in respect thereof in any Court.

[a] The words "of India" were repealed by the Official Trustees and Administrator-General's Acts Amendment Act, 1922 (21 [XXI] of 1922), S. 7.

53. (1) If any claim is hereafter made to any part of the assets transferred to the account *Mode of proceeding by* and credit of the Government ^a[* * *] under the provisions of this *claimant to recover principal money so transferred.* Act, or any Act hereby repealed, and if such claim is established to the satisfaction of the prescribed authority, the Government ^a[* * *] shall pay to the claimant the amount of the principal so transferred to its account and credit or so much thereof as appears to be due to the claimant.

(2) If the claim is not established to the satisfaction of the prescribed authority, the claimant may, without prejudice to his right to take any other proceedings for the recovery of such assets, apply by petition to the High Court ^b[* * *] against the ^c[Government], and such Court, after taking such evidence as it thinks fit, shall make such order in regard to the payment of the whole or any part of the said principal sum as it thinks fit, and such order shall be binding on all parties to the proceeding :

^d[Provided that nothing in this section affects any option afforded to a claimant by section 179 of the Government of India Act, 1935.]

(3) The Court may further direct by whom the whole or any part of the cost of each party shall be paid.

[a] The words "of India" were repealed by the Official Trustees and Administrator-General's Acts Amendment Act, 1922 (21 [XXI] of 1922), Section 7. [b] The words "at the Presidency-town" were repealed by A.O.

[c] Substituted by A. O. for "Secretary of State for India in Council." [d] Inserted by A. O.

54. (1) Whenever any person, other than an exempted person, dies leaving assets within *District Judge in certain cases to take charge of property of deceased persons, and to report to Administrator-General.* the limits of the jurisdiction of a District Judge, the District Judge shall report the circumstance without delay to the Administrator-General of the ^a[Division] stating the following particulars so far as they may be known to him —

(a) the amount and nature of the assets,

(b) whether or not the deceased left a will and, if so, in whose custody it is,

(c) the names and addresses of the surviving next-of-kin of the deceased, and, on the lapse of one month from the date of the death,

(d) whether or not any one has applied for probate of the will of the deceased or letters of administration of his estate.

(2) The District Judge shall retain the assets under his charge, or appoint an officer under the provisions of section 239^b of the Indian Succession Act, 1865, to take and keep possession of the same until the Administrator-General has obtained letters of administration, or until some other person has obtained probate or such letters or a certificate from the Administrator-General under the provisions of this Act, when the assets shall be delivered over to the holder of such probate, letters of administration or certificate :

1. Section 53. — [1] "In clause 53 (i. e. S. 53) we have made an amendment to indicate that the clause while providing a summary procedure in the case of claims to assets transferred to Government is not intended to deprive any person claiming such assets of any other remedy he may have." — *Select Committee Report.*

1. Section 54. — [1] "In clause 54 (i. e. S. 54) we have made two amendments: the first imposes on a

District Judge the duty of including the names and addresses of the surviving next-of-kin of the deceased in the report which he is required under the law to submit. The second amendment authorises the District Judge when he has taken charge of assets under this clause to expend such sums as may be necessary for the proper care and management of such assets. It is clear that in many cases such expenditure must be necessary." — *Select Committee Report.*

Provided that the District Judge may, if he thinks fit, sell any assets which are subject to speedy and natural decay, or which for any other sufficient cause he thinks should be sold, and he shall thereupon credit the proceeds of such sale to the estate.

(3) The District Judge may cause to be paid out of any assets of which he or such officer has charge, or out of the proceeds of such assets or of any part thereof, such sums as may appear to him to be necessary for all or any of the following purposes, namely:—

- (a) the payment of the expenses of the funeral of the deceased and of obtaining probate of his will or letters of administration of his estate or a certificate under this Act,
- (b) the payment of wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant,
- (c) the relief of the immediate necessities of the family of the deceased, and
- (d) such acts as may be necessary for the proper care and management of the assets left by the deceased,

and nothing in section 279, section 280 or section 281 of the Indian Succession Act, 1865,^c or in any other law for the time being in force with respect to rights of priority of creditors of deceased persons shall be held to affect the validity of any payment so caused to be made.

[a] *Substituted* by A. O. for "Presidency." [b] *See* now S. 269 of the Indian Succession Act, 1925 (39 [XXXIX] of 1925.) [c] *See* now the Indian Succession Act, 1925 (39 [XXXIX] of 1925.)

Succession Act and Companies Act not to affect Administrator-General, and saving of provisions of Presidency Police Acts as to petty estates.

55. (1) Nothing contained in the Indian Succession Act, 1865,^a or the Indian Companies Act, 1882,^b shall be taken to supersede or affect the rights, duties and privileges of any Administrator-General.

(2) Nothing contained in the Indian Succession Act, 1865,^a or in this Act shall be deemed to affect, or to have affected, any law for the time being in force relating to the moveable property under two hundred rupees in value of persons dying intestate within any of the Presidency-towns [* * *] which shall be or has been taken charge of by the police for the purpose of safe custody.

[a] *See* now the Indian Succession Act, 1925 (39 [XXXIX] of 1925). [b] *See* now the Indian Companies Act, 1913 (7 [VII] of 1913). [c] The words "or in the town of Rangoon" were *repealed* by A. O.

Order of Court to be equivalent to decree.

56. Any order made under this Act by any Court shall have the same effect as a decree.

57. Notwithstanding anything in this Act, or in any other law for the time being in force, the ^a[Central Government] may, by general or special order, direct that, where a subject of a foreign State dies in British India, and it appears that there is no one in British India other than the Administrator-General, entitled to apply to a Court of competent jurisdiction for letters of administration of the estate of the deceased, letters of administration shall, on the application to such Court of any Consular Officer of such foreign State, be granted to such Consular Officer on such terms and conditions as the Court may, subject to any rules made in this behalf by the ^a[Central Government] by notification in the ^b[Official Gazette], think fit to impose.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."

58. (Division of Presidency into Provinces.) *Repealed* by A. O.

Saving of provisions of Indian Registration Act, 1908.

59. Nothing in this Act shall be deemed to affect the provisions of the Indian Registration Act, 1908.

^a[**59A.** The amendments^b of this Act which come into force on the commencement of Part III of the Government of India Act, 1935, shall not affect the jurisdiction of any Court with respect to any proceedings then pending before it and shall not be construed as transferring the administration of any property or estate then in the hands of any Administrator-General to any other Administrator-General.]

[a] *Inserted* by A. O. [b] That is, the amendments by A. O. which came into force on 1st April 1937, simultaneously with Part III of the Government of India Act, 1935.

60. [Repeals.] *Repealed by the Repealing Act, 1927 (12 [XII] of 1927), S. 2 and Schedule.*

THE SCHEDULE. — [Enactments repealed.] *Repealed by the Repealing Act 1927 (12 [XII] of 1927), S. 2 and Schedule.*

THE ADMIRALTY JURISDICTION (INDIA) ACT, 1860.

(23 & 24 Vict., C. 88.)

An Act to extend certain Provisions for Admiralty Jurisdiction in the Colonies to Her Majesty's Territories in India.

(13th August, 1860.)

[Preamble reciting 12 & 13 Vict. c. 96, S. 5; and enacting words were repealed by 55 & 56 Vict., c. 19.]

1. "[* * *] For the purposes of the said Act^b the word "colony" therein shall include and apply to every part and place heretofore under the Government of the East India Company, or which may be under the Government of Her Majesty in India, and all the provisions of the said Act shall be construed and take effect accordingly.

[a] Certain words were repealed by 38 & 39 Vict., c. 66. [b] That is Admiralty Offences (Colonial) Act, 1849 (12 & 13 Vict., c. 96).

2. Provided always that where any person within any place in India is charged with the commission of any offence in respect of which jurisdiction is given by the said Act, or where any person charged with the commission of any such offence is brought for trial under the said Act to any place in India, if at any time before his trial he make it appear to the Court exercising criminal jurisdiction in the place where he is so charged or brought for trial, that in case the offence charged had been committed in such place he could have been tried only in the Supreme Court of one of the three Presidencies in India, and claim to be tried by such a Supreme Court accordingly, the said Court exercising criminal jurisdiction as aforesaid shall certify the fact and claim to the Governor of such place or chief local authority thereof; and such Governor or chief local authority thereupon shall order and cause the person charged to be sent in custody to such one of the Presidencies as such Governor shall think fit for trial before the Supreme Court of such Presidency: and the said Supreme Court and all public officers and other persons in the Presidency shall have the same jurisdiction and authorities and proceed in the same manner in relation to the person charged with such offence as if the same had been committed or originally charged to have been committed within the limits of the ordinary jurisdiction of such Supreme Court.

THE ADMIRALTY OFFENCES (COLONIAL) ACT, 1849.

(12 & 13 Vict., C. 96)

An Act to provide for the Prosecution and Trial in Her Majesty's Colonies of Offences committed within the Jurisdiction of the Admiralty.

(1st August 1849.)

[Preamble—Repealed by 54 & 55 Vict., c. 67.]

1. "[* * *] If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea or in any such haven, river, creek, or place shall be brought for trial to any colony,

then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same

Admiralty Offences (Colonial) Act, 1849.

Section 1 — Note 1.

[1] By virtue of this Act read with 23 & 24 Vict., C. 88 the ordinary criminal Courts in India have jurisdiction over an offence committed on the high seas out within three miles from the coast of British India as being committed within the territorial limits of British India. (1871) 8 Bom H C R 63 (67, 68) (Cr)* (1908) 25 Bom 636 (638)* (Vol 14) 1927 Mad 688 (688)* (1911) 10 Ind Cas 705 (709, 712) (F B) (Low Bur).

[See also (Vol 23) 1936 Sind 3 (4, 5).]

[2] The word 'sea' in section 1 means only that part of the sea over which the Admiral has jurisdiction.

Therefore a British Indian Court has no jurisdiction to try a subject of a Native Indian State for an offence committed on board a ship belonging to a subject of a Native State outside territorial waters on the high seas some eighteen miles off the coast. (Vol 5) 1918 Bom 249 (250) : 42 Bom 234.

[3] Where a person entrusted with rice at a port in British India for conveyance to another port in British India took the rice to Goa, a port in foreign territory and sold it there, it was held that no offence was committed on the high seas so as to give jurisdiction to the British Indian Court under this Act read with 23 & 24 Vict., c. 88. (1882) 5 Mad 23 (25).

jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence, wherewith he may be charged as aforesaid as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of criminal justice of such colony.

[a] Introductory words were repealed by 54 & 55 Vict., c. 67.

2. *[Repealed by 54 & 55 Vict., c. 67.]*

3. ^a[* * *] Where any person shall die in any colony of any stroke, poisoning, or hurt, such *Provision, etc., Where* person having been feloniously stricken, poisoned, or hurt upon the death in the colony, or at sea or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or at any place out of such colony, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of tried, determined, and punished, in such colony, in the same manner and in all respects as if such offence had been wholly committed in that colony;

and if any person in any colony shall be charged with any such offence as aforesaid in respect of the death of any person who, having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt, upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the sea.

[a] Introductory words were repealed by 54 & 55 Vict., c. 67.

4. *[Omitted as being inapplicable to India.]*

5. ^a[* * *] For the purposes of this Act the word "colony" shall mean any island, plantation, colony, dominion, fort, or factory of Her Majesty, except any island within the United Kingdom and the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the lands adjacent thereto respectively^b [* * *].^c

[a] Introductory words were repealed by 54 & 55 Vict., c. 67. [b] And includes British India; see 23 & 24 Vict., c. 88, S. 1, Page 22a, *supra*. [c] Words repealed by 44 & 45 Vict., c. 59.

6. *[Repealed by 41 & 42 Vict., c. 79.]*

THE ADMIRALTY OFFENCES (COLONIAL) ACT, 1860.

(23 & 24 Vict., C. 122)

An Act to enable the Legislatures of Her Majesty's Possessions abroad to make Enactments similar to the enactment of the Act Ninth George the Fourth, Chapter thirty-one, Section Eight.

[28th August, 1860.]

[Preamble reciting 9 Geo. IV, c. 31, S. 8; and enacting words:

Repealed by 55 & 56 Vict., c. 19.]

1. It shall be lawful for the Legislature of any of Her Majesty's possessions abroad to enact *Legislatures of possessions abroad may legislate for trial, etc., of offences committed in such possessions where persons injured die out of the limits thereof.* by any law or ordinance, to be by them made in the usual manner, that where any person, being feloniously stricken, poisoned, or otherwise hurt at any place within the limits for such possession, shall die of such stroke, poisoning, or hurt upon the sea or at any place out of the limits of such possession, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with inquired of tried, determined, and punished in the possession within the limits of which such stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed within the limits of such possession;

or such Legislature may enact, by any such law or ordinance to be made as aforesaid, to the like effect.

THE AGRICULTURAL PRODUCE CESS ACT, 1940.

ACT NO. XXVII of 1940.^a

[15th April 1940.]

An Act to make better financial provision for the Imperial Council of Agricultural Research.

WHEREAS it is expedient to make better financial provision for the carrying out by the Imperial Council of Agricultural Research of the objects for which it is established as set forth in the Memorandum of Association of that body, and for this purpose to impose on certain articles a cess by way of customs duty on export, the proceeds of which shall be paid to the said Council;

It is hereby enacted as follows:—

[a] For the Statement of Objects and Reasons, see Gazette of India, 1940, Pt. V, p. 114. This Act has been applied to British Baluchistan, see Notification No. 168-N, dated 17th October 1940, Gazette of India, 1940, Pt. I, p. 11.

Short title and extent. 1. (1) This Act may be called the Agricultural Produce Cess Act, 1940
(2) It extends to the whole of British India.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context :—

(a) "Collector" means a Customs-collector as defined in clause (c) of section 3 of the Sea Customs Act, 1878, or a Collector of Land Customs as defined in clause (c) of section 2 of the Land Customs Act, 1924, as the case may be, and

(b) "Council" means the Imperial Council of Agricultural Research.

Imposition of cess. 3. (1) A customs duty at the rate of one-half of one per cent. *ad valorem* shall be levied on all articles included in the Schedule which are exported from British India :

Provided that the said duty shall not be levied on articles proved to the satisfaction of the Collector not to have been produced in India.

(2) The Central Government may by notification in the Official Gazette, fix for the purposes of levying the said duty tariff values of any articles included in the Schedule, and may alter any tariff values for the time being in force.

4. The Central Government may, after previous consultation with the Council, by notification in the Official Gazette, direct that any article specified in the Schedule shall cease to be subject to the duty imposed by section 3, and thereupon, so long as the notification remains in force, that article shall be deemed not to be included in the Schedule.

Refund of, and exemption from, cess. 5. The Central Board of Revenue may make rules providing, on such conditions as may be specified in the rules, for :—

(a) the refund of duty levied where articles are exported by land and subsequently imported into India, and

(b) the export by land, without payment of the duty, of articles which are subsequently to be imported into India.

Payment of cess to Council and expenditure of cess by Council. 6. (1) The proceeds of the duty levied under this Act reduced by the cost of collection as determined by the Central Government shall be paid to the Council.

(2) The amount so due shall be paid by the Central Government to the Council at intervals of not more than six months.

(3) The expenditure of the money so paid to the Council shall be subject to such limitations as may be imposed by rules made in this behalf by the Central Government.

7. (1) The Council shall constitute a Standing Finance Committee, of which one member shall be chosen from among the representatives of the Central Legislature on the governing body of the Council, and one member shall be an officer appointed by the Central Government.

1. SECTION 4

[1] Under the Bill as introduced the Central Government was given the power to extend the duty to

articles not included in the Schedule. In the Act this power has been removed on the recommendation of the Select Committee.

(2) Subject to the provisions of sub-section (1), the constitution, functions and procedure of the Standing Finance Committee shall be regulated in such manner as the Council may with the previous approval of the Central Government determine.

Reserve fund.

8. The Council shall in accordance with the rules made in this behalf by the Central Government create and maintain a reserve fund.

Power of Central Government to make rules.

9. (1) The Central Government may, after consultation with the Council, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Central Government may make rules regulating the expenditure of the money paid to the Council under section 6 and providing for the creation, maintenance and management of the reserve fund referred to in section 8.

(3) All rules made under this Act shall be laid before both Chambers of the Central Legislature as soon as may be after they are made.

THE SCHEDULE.

(See section 3.)

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| 1. Bones. | 12. Oilcakes. |
| 2. Bristles. | 13. Pulses. |
| 3. Butter. | 14. Seeds. |
| 4. Cereals, other than Rice and Wheat. | 15. Skins, raw. |
| 5. Drugs. | 16. Spices. |
| 6. Fibre for brushes. | 17. Tobacco, unmanufactured. |
| 7. Fish. | 18. Vegetables. |
| 8. Fruits. | 19. Wheat. |
| 9. Ghee. | 20. Wheat Flour. |
| 10. Hides, raw. | 21. Wood, raw. |
| 11. Manures. | |

THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT, 1937

[As Amended by Acts XIII of 1942 and XX of 1943.]

ACT NO. I of 1937.^a

[24th February 1937.]

An Act to provide for the grading and marking of agricultural^b [and other] produce.

WHEREAS it is expedient to provide for the grading and marking of agricultural^b [and other] produce; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, Extraordinary, dated 13th February 1937, p. 71. [b] Inserted by S. 2 of Act No. 13 [XIII] of 1942. [This Act is deemed to have come into force on 24-2-37.]

Short title and extent.

1. (1) This Act may be called the Agricultural Produce (Grading and Marking) Act, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

Explanations.

2. In this Act, unless the contrary appears from the subject or context:—

- (a) "agricultural produce" includes all produce of agriculture or horticulture and all articles of food or drink wholly or partly manufactured from any such produce, and fleeces and the skins of animals;
- (b) "counterfeit" has the meaning assigned to that word by section 28 of the Indian Penal Code;
- (c) "covering" includes any vessel, box, crate, wrapper, tray or other container;
- (d) "grade designation" means a designation prescribed as indicative of the quality of any scheduled article;

- (e) "grade designation mark" means a mark prescribed as representing a particular grade designation;
- (f) "quality," in relation to any article, includes the state and condition of the article;
- (g) "prescribed" means prescribed by rules made under this Act,
- (h) "scheduled article" means an article included in the Schedule; and
- (i) an article is said to be marked with a grade designation mark, if the article itself is marked with a grade designation mark or any covering containing or label attached to such article is so marked.

Prescription of grade designations. 3. The ^a[Central Government] may, after previous publication by notification in the ^b[Official Gazette] make rules^c —

- (a) fixing grade designations to indicate the quality of any scheduled article,
- (b) defining the quality indicated by every grade designation,
- (c) specifying grade designation marks to represent particular grade designations,
- (d) authorising a person or a body of persons, subject to any prescribed conditions, to mark with a grade designation mark any article in respect of which such mark has been prescribed or any covering containing or label attached to any such article,
- (e) specifying the conditions referred to in clause (d) including in respect of any article conditions as to the manner of marking, the manner in which the article shall be packed, the type of covering to be used, and the quantity by weight, number or otherwise to be included in each covering,
- (f) providing for the payment of any expenses incurred in connection with the manufacture or use of any implement necessary for the reproduction of a grade designation mark or with the manufacture or use of any covering or label marked with a grade designation mark ^d[or with measures for the control of the quality of articles marked with grade designation marks including testing of samples and inspection of such articles or with any publicity work carried out to promote the sale of any class of such articles,] and
- (g) providing for the confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions with a grade designation mark.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."

[c] For such rules, see Gazette of India, 1937, Part I, pages 547 to 564. [d] *Inserted* by S. 2 of Act XX of 1943. [13-8-1943].

Penalty for unauthorised marking with grade designation mark.

4. Whoever marks any scheduled article with a grade designation mark, not being authorised to do so by rule made under section 3, shall be punishable with fine which may extend to five hundred rupees.

5. Whoever counterfeits any grade designation mark or has in his possession any die, plate

Penalty for counterfeiting grade designation mark.

mark shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

6. The ^a[Central Government], after such consultation as ^b[it] thinks fit of the interests

Extension of application of Act.

likely to be affected, may by notification in the ^c[Official Gazette] declare that the provisions of this Act shall apply to an article of agricultural produce not included in the Schedule ^d[or to an article other than an article of agricultural produce] and on the publication of such notification such article shall be deemed to be included in the Schedule.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "he." [c] *Substituted* by A. O. for "Gazette of India." [d] *Inserted* by S. 3 of Act 13 [XIII] of 1942. [24-2-1937].

THE SCHEDULE.

(See section 2.)

- | | |
|-------------------|---------------------|
| 1. Fruit. | 5. Tobacco. |
| 2. Vegetables. | 6. Coffee. |
| 3. Eggs. | 7. Hides and Skins. |
| 4. Dairy produce. | |

1. Section 6. — Having regard to an increasing desire on the part of the trade interests as well as the Provincial Governments the scope of the Act is

enlarged so as to render it capable of embracing all commodities to which the application of the Act may be considered desirable.

AGRICULTURISTS' LOANS ACT, 1884.

STATEMENT OF OBJECTS AND REASONS.

"The object of this Bill is to repeal the Northern India Takkavi Act and re-enact it with certain amendments which appear to be desirable.

First. — The existing law makes no provision for recovery as an arrear of land revenue of interest on loans made under it and of the costs (if any) incurred by the Government in making the loans. Section 3 of Act X of 1879 only provides for the recovery in this way of the principal sum advanced. Section 5 of the Bill supplies this omission by providing that interest and costs (if any) may be recovered as arrear of land-revenue in the same manner as the principal.

Secondly — Act X of 1879 extends to certain limited areas, namely, the North-Western Province and Oudh, the Punjab, the Central Provinces, Assam and Ajmer. At present there is no law in force in Bengal and Coorg under which advances of the nature of those with which the Act deals can be made. There are provisions relating to such advances in the laws in force in Bombay, Madras and British Burma; but the Local Government of Bombay and Madras are authorised to

accept the extension of Northern India Act to their provinces; and the Chief Commissioner of British Burma says that if that Act is not extended in his province, it will be necessary to amend the law at present in force there in order to provide for the recovery of interest on advances. Provision has, therefore, been made in section 2 of the Bill empowering any Local Government, if it thinks fit, to extend the Act to the whole or any part of the territories under its administration.

Thirdly. — A new section 6 has at the request of the Punjab Government been inserted in the Bill similar to section 9 of the Land Improvement Loans Act, 1883, recognising the principle of making loans on the joint responsibilities of village-communities.

Lastly. — As the term "Takkavi" is, it is understood, applied in some parts of India to advances of the nature of those to which the Land Improvement Loans Act relates, it is proposed to alter the present title and to style the new Act 'The Agriculturists' Loans Act'." — Gazette of India, 1884, Part V, page 2.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

- Amended by Acts 8 [VIII] of 1906 and 4 [IV] of 1914.
- „ (in C. P. and Berar) by C. P. and Berar Act 6 [VI] of 1946.
- „ (in Coorg) by Coorg Act 3 [III] of 1936.
- „ (in Madras) by Mad. Act 16 [XVI] of 1935.

- „ (in Orissa) by Orissa Act 6 [VI] of 1937.
- „ (in U. P.) by U. P. Act 12 [XII] of 1934.
- Adapted by A. O.
- Repealed in part by Act 1 [I] of 1938.
- „ (in U. P.) by U. P. Act 12 [XII] of 1922.

COGNATE ACTS AND PROVISIONS.

1. LAND IMPROVEMENT LOANS ACT, 19 [XIX] OF 1883, Ss. 4 TO 11.
2. REGISTRATION ACT, 16 [XVI] OF 1903, S. 89 (3).

ACT NO. XII OF 1884.^a

[24th July 1884.]

An Act to amend and provide for the extension of the Northern India Takkavi Act, 1879.^b

WHEREAS it is expedient to amend the Northern India Takkavi Act, 1879, and provide *Preamble.* for its extension to any part of British India; It is hereby enacted as follows:—

[a] For Proceedings in Council, see Gazette of India, 1884, Supplement pp. 41, 165 and 1130. [b] *Repealed by* S. 3 of this Act.

Short title. 1. (1) This Act may be called the Agriculturists' Loans Act, 1884; and

Commencement. (2) It shall come into force on the first day of August, 1884.

Local extent. 2. (1) This section and section 3 extend to the whole of British India.

(2) The rest of this Act extends in the first instance only to the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governors of the North-Western Provinces^a and the Punjab, and the Chief Commissioners of Oudh,^a the Central Provinces, Assam and Ajmer.

(3) But ^b[any Provincial Government] may, from time to time, by notification in the Official Gazette, extend the rest of this Act to the whole or any part of the territories under its administration.^c

[a] Now the Governor of U. P. [b] *Substituted* by A. O. for "any other Local Government." [c] This Act has by notification been extended to the lower Province of Bengal, see Calcutta Gazette, 1895, Pt. I, p. 555;

the Madras Presidency, *see* Fort St. George Gazette, 1886, Pt. I, p. 138; the Sonthal Parganas, *see* Calcutta Gazette, 1885, Pt. I, p. 905; the Province of Coorg, *see* Coorg District Gazette, 1887, Pt. I, p. 670. Section 2 has been declared to be in force under S. 3 of the British Baluchistan Laws Regulation, 1913 (2 [II] of 1913), in British Baluchistan; *see* Bal. Code.

3. [Repeal of Act X of 1879, and sections 4 and 5 of Act XV of 1880.] *Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Schedule.*

a 4. (1) The ^b[Provincial Government] ^c[or, in a province for which there is a Board of Revenue or Financial Commissioner, such Board or Financial Commissioner, subject to the control of the ^b[Provincial Government]] may, from time to time, ^d[* * *] make rules^e as to loans to be made to owners and occupiers of arable land, for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Loans Act, 1883, but connected with agricultural objects.

(2) All such rules shall be published in the ^f[Official Gazette].

[a] Section 4 has been amended in its application to C. P. and Berar, Coorg, U. P., Madras and Orissa by C. P. and Berar Act VI of 1946, Coorg Act III of 1936, U. P. Acts XII of 1922 and XII of 1934, Madras Act XVI of 1935 and Orissa Act VI of 1937, respectively. [b] *Substituted* by A. O. for "Local Government." [c] *Inserted* by the Decentralization Act, 1914 (IV of 1914), S. 2 and Schedule, Pt. I. [d] The words "subject to the control of the G.- G. in C." were repealed by the Decentralization Act, 1914 (IV of 1914), S. 2 and Schedule, Pt. I. [e] For rules under this power, *see* different local Rules and Orders. [f] *Substituted* by A. O. for "local official Gazette."

PROVINCIAL AMENDMENTS.

Madras

— In sub-section (1) after the words "the relief of distress" *insert* the words "or indebtedness."—MADRAS ACT 16 [XVI] OF 1935, S. 2. [29-10-1935.]

United Provinces

—In sub-section (1) —

(a) *omit* the words "or, in a Province . . . the control of the Provincial Government."—U. P. ACT 12 [XII] OF 1922, S. 2.

(b) after the words "the relief of distress" *insert* the words "the payment of existing debt."

(c) at the end of sub-s. (1) after the words "agricultural objects" *add* the words "including the purchase of rights in agricultural land." — U. P. ACT 12 [XII] OF 1934, Ss. 3 and 4. [19-1-1935.]

5. Every loan made in accordance with such rules, all interest (if any) chargeable thereon *Recovery of loans.* and costs (if any) incurred in making or recovering the same, shall, when they become due, be recoverable from the person to whom the loan was made, or from any person who has become surety for the repayment thereof, as if they were arrears of land-revenue or costs incurred in recovering the same due by the person to whom the loan was made or by his surety.

1. Section 4. — [1] A comparison of S. 4, Land Improvement Loans Act, 1883, with S. 4 of this Act shows that if a loan can be granted under the Land Improvement Loans Act, it cannot be granted under this Act. (Vol 26) 1939 Mad 711 (713) : ILR (1939) Mad 1017.

[2] A loan granted for weeding the land and making a stone pavement in part of it comes under the Land Improvement Loans Act, 1883, and not under this Act. (Vol 26) 1939 Bom 183 (186).

1. Section 5. — [1] A claim arising out of recovery of money due under the Act (1884) is cognizable by the Revenue and not the Civil Court. (Vol 8) 1921 All 80 (80).

[2] A sale to recover amount due under the Act affects only the right, title and interest of the judgment-debtor and not the mortgage-interest created in favour of the Government by the judgment-debtor. (1902) 29 Cal 537 (541, 542.)

[3] Ex-proprietary tenants mortgaging trees to Govern-

ment for takavi advances—Relinquishment by tenants of their rights to zamindar — Right of Government cannot be defeated. If loan is not paid and trees are sold to third person, purchaser's right cannot be defeated by such relinquishment. (1899) 26 All 540 (541, 542).

[4] Sale of house in default of loan does not avoid prior incumbrance. (1900) 22 All 321 (322).

[5] Property of person attached as heir of deceased debtor—Person paying amount under protest and getting property released has right of suit only to recover amount actually paid but has no right to claim damages against Government. (Vol 14) 1927 All 672 (676) (SB).

[6] Warrant issued under S. 5, can be signed by Tahsildar or issued under his order, where he has the authority of the Collector to do so. (Vol 14) 1927 Ondh 296 (297) : 28 Cr L J 673.

[7] The amount due to Government and recoverable under S. 5 as applied to Berar is recoverable not as a land revenue but as an arrear of land revenue and hence is governed by S. 141 (d), Berar Land Revenue Code. (Vol 29) 1942 Nag 50 (51).

PROVINCIAL AMENDMENTS.

C. P. & BERAR—For section 5 the following sections shall be *substituted*, namely —

"5. (1) Subject to such rules as may be made under section 4, a loan granted under this Act with any interest due thereon, shall, in default of payment, be recovered by the Deputy Commissioner in all or any of the following modes, namely :—

- (a) from the borrower—as if it were an arrear of land revenue due by him ;
- (b) from his surety, if any — as if it were an arrear of land revenue due by him ;
- (c) out of any land hypothecated by the borrower as security for the loan — as if it were an arrear of land revenue due in respect of that land ;
- (d) out of property comprised in collateral security, if any — according to the procedure for the realization of land revenue by the sale of immoveable property other than the land on which that revenue is due.

(2) It shall be in the discretion of the Deputy Commissioner acting under this section to determine the order in which he will resort to the various modes of recovery permitted by it.

5A. Where land is hypothecated by a borrower as security for a loan under this Act, such loan together with interest due thereon and costs of recovery shall except in respect of land revenue and rent have priority over all encumbrances and charges, created on the borrower's interest in such land before the date of the order granting the loan." —C. P. & BERAR ACT 6 [VI] OF 1946, S. 2.

6. When a loan is made under this Act to the members of a village community or to any other persons on such terms that all of them are jointly and severally bound to the Government for the payment of the whole amount payable in respect thereof, and a statement showing the portion of that amount which as among themselves each is bound to contribute is entered upon the order granting the loan and is signed, marked, or sealed by each of them or his agent duly authorized in this behalf and by the officer making the order, that statement shall be conclusive evidence of the portion of that amount which as among themselves each of those persons is bound to contribute.

THE INDIAN AIRCRAFT ACT, 1934.

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STATEMENT OF OBJECTS AND REASONS.

"Aerial navigation in British India is at present governed by the Indian Aircraft Act, 1911, and the rules made thereunder. In 1919 an International Convention for the regulation of Aerial Navigation was signed by the plenipotentiaries of 27 countries, with the object of establishing regulations of universal application and of encouraging peaceful intercourse with nations by means of aerial communications. To this Convention India was a signatory.

The Convention deals with all questions relating to international aerial navigation, and also provides for the institution of a permanent International Commis-

sion for Air Navigation with very wide powers as regards the formulation of rules for the marking of aircraft, the grant of certificates, rules of the air and so forth. This Commission meets from time to time to amend the annexes of the Convention, which contain the detailed rules to be observed by the aircraft of all signatory States and by all aircraft when within the borders of those States.

For some years past the inadequacy of the Indian Aircraft Act, 1911, has been increasingly felt, and the stage has now been reached where it is no longer possible to control air traffic efficiently, or to implement

India's international obligations without fresh legislation. The present Bill, therefore, is designed to enlarge the rule-making powers of the Governor-General in Council in order to meet modern developments to

enable Government to give full effect to the provisions of the International Convention and its annexes, and to provide for certain other matters on which legislation has become necessary."—Gazette of India, 1934, Pt. V, p. 82

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts VII of 1936; XXII of 1938; XXXVII of 1939; V of 1944.

—Amended temporarily by Act XXXV of 1939.
—Adapted by A. O.
—Repealed in part by Act I of 1938.

ACT NO. XXII of 1934^a

[19th August 1934.]

An Act to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft.

WHEREAS it is expedient to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft; It is hereby enacted as follows :—

[a] For Report of Select Committee, see Gazette of India, 1934, Pt. V, p. 195.

Short title and extent. 1. (1) This Act may be called the Indian Aircraft Act, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas ^a[and applies also —

- (a) to British subjects and servants of the Crown in any part of India,
- (b) to British subjects who are domiciled in any part of India wherever they may be,
- (c) to, and to persons on, aircraft registered in British India wherever they may be.]

[a] Inserted by the Indian Aircraft (Amendment) Act, 1939 (37 [XXXVII] of 1939), S. 2. [29-9-1939.]

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "aircraft" means any machine which can derive support in the atmosphere from reactions of the air, and includes balloons whether fixed or free, airships, kites, gliders and flying machines;

(2) "aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers, and other structures thereon or appertaining thereto;

(3) "import" means bringing into British India; and

(4) "export" means taking out of British India.

3. The ^a[Central Government] may, by notification in the ^b[Official Gazette], exempt from ^c[all or any of the provisions of this Act] any aircraft or class of aircraft and any person or class of persons, or may direct that such provisions shall apply to such aircraft or persons subject to such modifications as may be specified in the notification.

[a] Substituted by A. O. for "Governor-General in Council." [b] Substituted by A. O. for "Gazette of India." [c] The words "all or any of the provisions of this Act" were substituted for the words "the provisions of this Act, and of the rules made thereunder, or from any of such provisions" by the Indian Aircraft (Amendment) Act, 1939 (37 [XXXVII] of 1939), S. 3. [29-9-1939].

4. The ^a[Central Government] may, by notification in the ^b[Official Gazette], make such rules as appear to ^c[it] to be necessary for carrying out the Convention relating to the regulation of Aerial Navigation signed at Paris, October 13, 1919, with Additional Protocol, signed at Paris, May 1, 1920, and any amendment which may be made thereto under the provisions of Article 34 thereof.

[a] Substituted by A. O. for "Governor-General in Council." [b] Substituted by A. O. for "Gazette of India." [c] Substituted by A. O. for "him".

5. (1) The ^a[Central Government] may, by notification in the ^b[Official Gazette], make ^crules^c regulating the manufacture, possession, use, operation, sale, import or export of any aircraft or class of aircraft.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for:—

- (a) the authorities by which any of the power conferred by or under this Act are to be exercised,

- ^d[(aa) the regulation of air transport services, and the prohibition of the use of aircraft in such services except under the authority of and in accordance with a licence authorising the establishment of the service,
- (ab) the information to be furnished by an applicant for, or the holder of, a licence authorising the establishment of an air transport service to such authorities as may be specified in the rules,]
- (b) the licensing, inspection and regulation of aerodromes, the conditions under which aerodromes may be maintained and the fees which may be charged thereat, and the prohibition or regulation of the use of unlicensed aerodromes,
- (c) the inspection and control of the manufacture, repair and maintenance of aircraft and of places where aircraft are being manufactured, repaired or kept,
- (d) the registration and marking of aircraft,
- (e) the conditions under which aircraft may be flown, or may carry passengers, mails or goods; or may be used for industrial purposes and the certificates, licences or documents to be carried by aircraft,
- (f) the inspection of aircraft for the purpose of enforcing the provisions of this Act and the rules thereunder, and the facilities to be provided for such inspection,
- (g) the licensing of persons employed in the operation, manufacture, repair or maintenance of aircraft,
- (h) the air-routes by which and the conditions under which aircraft may enter or leave British India, or may fly over British India, and the places at which aircraft shall land,
- (i) the prohibition of flight by aircraft over any specified area, either absolutely or at specified times or subject to specified conditions and exceptions,
- (j) the supply, supervision and control of air-routes beacons, aerodrome lights, and lights at or in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes,
- ^e[(jj) the installation and maintenance of lights on private property in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes, by the owners or occupiers of such property, the payment by the Central Government for such installation and maintenance, and the supervision and the control of such installation and maintenance, including the right of access to the property for such purposes,]
- (k) the signals to be used for purposes of communication by or to aircraft and the apparatus to be employed in signalling,
- (l) the prohibition and regulation of the carriage in aircraft of any specified article or substance,
- (m) the measures to be taken and the equipment to be carried for the purpose of ensuring the safety of life,
- (n) the issue and maintenance of log-books,
- (o) the manner and conditions of the issue or renewal of any licence or certificate under the Act or the rules, the examinations and tests to be undergone in connection therewith, the form, custody, production, endorsement, cancellation, suspension or surrender of such licence or certificate, or of any log-book,
- (p) the fees to be charged in connection with any inspection, examination, test, certificate or licence, made, issued or renewed under this Act,
- (q) the recognition for the purposes of this Act of licences and certificates issued elsewhere than in British India relating to aircraft or to the qualifications of persons employed in the operation, manufacture, repair or maintenance of aircraft and,
- (r) any matter subsidiary or incidental to the matters referred to in this sub-section ^f[including the taking of steps necessary to secure compliance with or to prevent contravention of, the rules regulating such matters, or where any such rule has been contravened, to rectify, or to enable proceedings to be taken in respect of such contravention.]

^g[(3) Every rule made under this section shall be laid as soon as may be after it is made before *Rules to be laid before each of the Chambers of the Central Legislature, while it is in session, both Chambers.* for a total period of one month which may be comprised in one session or in two or more Sessions, and if before the expiry of that period, or where the period for

which the rule is so laid, before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.]

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India". [c] *See* the Indian Aircraft Rules, 1937, published in the Gazette of India, 1937, Part I, pages 633 to 719. [d] Clauses (aa) and (ab) were *inserted* by the Indian Aircraft (Amendment) Act, 1944 (5 [V] of 1944), S. 2 [7-3-1944]. [e] Clause (jj) was *inserted* by the Indian Aircraft (Amendment) Act, 1939 (37 [XXXVII] of 1939), S. 4 [29-9-1939]. [f] These words were *added* by the Defence of India Act, 1939 (35 [XXXV] of 1939), S. 6. This amendment shall have effect only during the continuance of the said Act. [g] Sub-section (3) was *added* by the Indian Aircraft (Amendment) Act, 1944 (5 [V] of 1944), S. 3 [7-3-1944].

Power of Central Government to make orders in emergency.

^a[Official Gazette] —

6. (1) If the ^a[Central Government] is of opinion that in the interests of the public safety or tranquillity the issue of all or any of the following orders is expedient, ^b[it] may, by notification in the

- (a) cancel or suspend, either absolutely or subject to such conditions as ^b[it] may think fit to specify in the order, all or any licences or certificates issued under this Act,
- (b) prohibit, either absolutely or subject to such conditions as ^b[it] may think fit to specify in the order, or regulate in such manner as may be contained in the order, the flight of all or any aircraft or class of aircraft over the whole or any portion of British India,
- (c) prohibit, either absolutely or conditionally, or regulate the erection, maintenance or use of any aerodrome, aircraft factory, flying-school or club, or place where aircraft are manufactured, repaired or kept, or any class or description thereof, and
- (d) direct that any aircraft or class of aircraft or any aerodrome, aircraft factory, flying school or club, or place where aircraft are manufactured, repaired or kept, together with any machinery, plant, material or things used for the operation, manufacture, repair or maintenance of aircraft shall be delivered, either forthwith or within a specified time, to such authority and in such manner as ^b[it] may specify in the order, to be at the disposal of His Majesty for the public service.

(2) Any person who suffers direct injury or loss by reason of any order made under clause (c) or clause (d) of sub-section (1) shall be paid such compensation as may be determined by such authority as the ^a[Central Government] may appoint in this behalf.

(3) The ^a[Central Government] may authorise such steps to be taken to secure compliance with any order made under sub-section (1) as appear to ^b[it] to be necessary.

(4) Whoever knowingly disobeys, or fails to comply with, or does any act in contravention of, an order made under sub-section (1) shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both, and the Court by which he is convicted may direct that the aircraft or thing (if any) in respect of which the offence has been committed, or any part of such thing, shall be forfeited to His Majesty.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "he." [c] *Substituted* by A. O. for "Gazette of India."

Power of Central Government to make rules for investigation of accidents.

7. (1) The ^a[Central Government] may, by notification in the ^b[Official Gazette], make rules^c providing for the investigation of any accident arising out of or in the course of ^d[the navigation —

- (a) in or over British India of any aircraft, or
- (b) anywhere of aircraft registered in British India.]
- (2) Without prejudice to the generality of the foregoing power, such rules may —
- (a) require notice to be given of any accident in such manner and by such person as may be prescribed,
- (b) apply for the purposes of such investigation, either with or without modification, the provisions of any law for the time being in force relating to the investigation of accidents,
- (c) prohibit pending investigation access to or interference with aircraft to which an accident has occurred, and authorise any person so far as may be necessary for the purposes of an investigation to have access to, examine, remove, take measures for the preservation of or; otherwise deal with any such aircraft, and

(d) authorise or require the cancellation, suspension, endorsement or surrender of any licence or certificate granted or recognised under this Act when it appears on an investigation that the licence ought to be so dealt with, and provide for the production of any such licence for such purpose.

[a] *Substituted* by A. O. for "Governor General in Council." [b] *Substituted* by A. O. for "Gazette of India."
[c] *See* Pt. X of the Indian Aircraft Rules, 1937, published in the Gazette of India, 1937, Pt. I, pp. 661
[d] to 665. *Substituted* for "air-navigation in or over British India", by the Indian Aircraft (Amendment) Act, 1939(37 [XXXVII] of 1939) S. 5 [29-9-1939.]

8. (1) Any authority authorised in this behalf by the ^a[Central Government] may detain *Power to detain aircraft.* any aircraft, if in the opinion of such authority —

(a) having regard to the nature of an intended flight, the flight of such aircraft would involve danger to persons in the aircraft or to any other persons or property, or

(b) such detention is necessary to secure compliance with any of the provisions of this Act or the rules applicable to such aircraft; or such detention is necessary to prevent a contravention of any rule made under, ^b[clauses (d), (e), (h), (i), (k) or (l) of sub-section (2) of section 5 or the commission of an offence punishable under section 11.]

(2) The ^a[Central Government] may, by notification in the ^c[Official Gazette], make rules^d regulating all matters incidental or subsidiary to the exercise of this power.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* for the original words by the Defence of India Act, 1939 (35 [XXXV] of 1939), S. 6. This amendment shall have effect only during the continuance of the said Act. [c] *Substituted* by A. O. for "Gazette of India." [d] *See*, for instance, Rule 18 of Indian Aircraft Rules, 1937, (Gazette of India, 1937 Pt I. p. 640.)

^a[8A. The ^b[Central Government] may, by notification in the ^c[Official Gazette], make *Power of Central Government to make rules for protecting the public health.* rules for the prevention of danger arising to the public health by the introduction or spread of any infectious or contagious disease from aircraft arriving at or being at any aerodrome and for the prevention of the conveyance of infection or contagion by means of any aircraft leaving an aerodrome and in particular and without prejudice to the generality of this provision may make, with respect to aircraft and aerodromes or any specified aerodrome, rules providing for any of the matters for which rules under sub-clauses (i) to (viii) of clause (p) of sub-section (1) of section (6) of the Indian Ports Act, 1908, may be made with respect to vessels and ports.]

[a] *Inserted* by the Indian Aircraft (Amendment) Act, 1936 (7 [VII] of 1936), S. 2. [b] *Substituted* by A. O. for "Governor-General in Council." [c] *Substituted* by A. O. for "Gazette of India."

^a[8B (1) If the Central Government is satisfied that India or any part thereof is visited *Emergency powers for protecting the public health.* by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the law for the time being in force are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the agency of aircraft, the Central Government may take such measures as it deems necessary to prevent such danger.

(2) In any such case the Central Government may, without prejudice to the powers conferred by section 8A, by notification in the Official Gazette, make such temporary rules with respect to aircraft and persons travelling or things carried therein and aerodromes as it deems necessary in the circumstances.

(3) Notwithstanding anything contained in section 14, the power to make rules under sub-section (2) shall not be subject to the condition of the rules being made after previous publication, but such rules shall not remain in force for more than three months from the date of notification :

Provided that the Central Government may by special order continue them in force for a further period or periods of not more than three months in all."]

[a] Section 8B was *inserted* by the Indian Aircraft (Amendment) Act, 1938 (22 [XXII] of 1938), S. 2, [24-9-1938.]

1. Section 8B.—[1] The Governor-General in Council had till the passing of the Government of India Act, 1935 power to prescribe temporary emergency regulations under S. 2 of the Epidemic Diseases Act (3 [III] of 1897). After 1st April 1935, this power was removed and located in the Provincial Government, for the Province. This Act gives the Central Government the power of emergent regulation to protect India against the introduction of dangerous disease. Under this Act, the power to make rules or regulations is not subject to the condition of previous publication for three months which is required under S. 14 of the Indian Aircraft Act, but the rules so framed shall not remain in force for more than three months from the date of notification.

9. (1) The provisions of Part VII of the Indian Merchant Shipping Act, 1923, relating to Wreck and Salvage. to Wreck and Salvage shall apply to aircraft on or over the sea or tidal waters as they apply to ships, and the owner of an aircraft shall be entitled to a reasonable reward for salvage services rendered by the aircraft in like manner as the owner of a ship.

(2) The ^a[Central Government] may, by notification in the ^b[Official Gazette], make such modifications of the said provisions in their application to aircraft as appear necessary or expedient.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India".

10. In making any rule under section 5, section 7, ^a[section 8, section 8A or section 8B] the ^b[Central Government] may direct that a breach of it shall be punishable with imprisonment for any term not exceeding three months, or with fine of any amount not exceeding one thousand rupees, or with both.

Penalty for act in contravention of rule made under this Act.

[a] The words and figures "Section 8 or Section 8A" were *substituted* for the original words and figure "or Section 8" by the Indian Aircraft (Amendment) Act, 1936 (7 [VII] of 1936), S. 3. And the words and figures "Section 8A or Section 8B" were *substituted* for "or Section 8A" by the Indian Aircraft (Amendment) Act, 1938 (22 [XXII] of 1938) S. 3. [24-9-1938.] [b] *Substituted* by A. O. for "Governor-General in Council".

11. Whoever wilfully flies any aircraft in such a manner as to cause danger to any person or to any property on land or water or in the air ^a[or in such a manner as to interfere with any of His Majesty's forces, ships or aircraft] shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Penalty for flying so as to cause danger.

[a] *Inserted* by the Defence of India Act, 1939 (35 [XXXV] of 1939), S. 6. This amendment shall have effect only during the continuance of the said Act.

12. Whoever abets the commission of any offence under this Act or the rules, or attempts to commit such offence, and in such attempt does any act towards the commission of the offence, shall be liable to the punishment provided for the offence.

Penalty for abetment of offences and attempted offences.

13. Where any person is convicted of an offence punishable under any rule made under ^a[clauses (c), (d), (e), (h), (i), (j), (k) or (l) of sub-section (2) of section 5 or punishable under section 11], the Court by which he is convicted may direct that the aircraft or article or substance, as the case may be, in respect of which the offence has been committed, shall be forfeited to His Majesty.

Power of Court to order forfeiture.

[a] *Substituted* by the Defence of India Act, 1939 (35 [XXXV] of 1939), S. 6. This amendment shall have effect only during the continuance of the said Act.

14. [Rules to be made after publication.] *Omitted by the Defence of India Act, 1939 (35 [XXXV] of 1939), S. 6.*

Note: — The amendment made by the Defence of India Act, 1939, shall have effect only during the continuance of that Act.

15. The provisions of section 42 of the Indian Patents and Designs Act, 1911, shall apply to the use of an invention on any aircraft not registered in British India in like manner as they apply to the use of an invention in a foreign vessel.

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16. The ^a[Central Government] may, by notification in the ^b[Official Gazette], declare that any or all of the provisions of the Sea Customs Act, 1878, shall with such modifications and adaptations as may be specified in the notification, apply to the import and export of goods by air.

Power to apply customs procedure.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."

17. No suit shall be brought in any Civil Court in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather and all the circumstances of the case is reasonable, or by reason only of the ordinary incidents of such flight.

Bar of certain suits.

18. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Act.

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19. (1) Nothing in this Act or in any order or rule made there under shall apply to or in respect of any aircraft belonging to or exclusively employed in His Majesty's naval, military or air forces, or to any person in such forces employed in connection with such aircraft.

Saving of application of Act.

(2) Nothing in this Act or in any order or rule made thereunder shall apply to or in respect of any lighthouse to which the Indian Lighthouse Act, 1927, applies or prejudice or affect any right or power exercisable by any authority under that Act.

20. [Repeals.] *Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Schedule.*

THE INDIAN AIR FORCE ACT, 1932.

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STATEMENT OF OBJECTS AND REASONS.

"The first batch of Indian Air Force Officers from Cranwell will be arriving in India early in the summer of 1932 and after a period of one year's attachment to a unit of the Royal Air Force will be posted to the new Indian Air Unit. Meanwhile the other Indian Ranks are being recruited and will have received their initial training by the time that the officers have completed their period of attachment. On that point, i.e., the summer of 1933, the Indian Air Force will come into complete existence.

2. It is necessary to provide by an Act of the Indian Legislature for the discipline of the Officers and men of the new force since the British Air Force Act does not apply, as it stands, to the Indian personnel nor is restricted in its operation to British India.

3. Legislation can be undertaken in one of two ways :—

(a) by a Bill to apply the British Air Force Act with suitable modifications.

(b) by a self-contained Bill bearing the same general relation to the British Air Force Act as the Indian Army Act bears to the British Army Act.

4. As regards alternative (a) S. 177 of the British Air Force Act gives power to the Legislature in India, or to any of the dominions or colonies to extend or apply all or any of the provisions of the British Act to the officers, non-commissioned officers and men of locally raised Air Force subject to such adaptations, modifications and exceptions as may be specified.

The course thus indicated has been carefully considered by the Government of India, who do not, however, propose to adopt it, partly on account of the unsuitability of the British Act to an Indian Force and still more on account of very complicated nature of the adaptations, modifications and exceptions that would be necessary. The British Air Force Act which is an adaptation of the British Army Act has a very long history behind it and has been so heavily amended from time to time that its arrangement has unavoidably become confused and some of its provisions not easy to trace. These draw-backs, unavoidable in England, can be avoided in India and it is undesirable to burden an Indian personnel with difficulties which trouble even the British Officer. Therefore, large portions of the Act have no application to India as, for instance, para. 3, several of the sections in para. 4 under the heading "Summary and other legal proceedings" and several of the sections in para. 5. But in spite of this the Bill required to adopt the Air Force Act shall be very lengthy and comparatively few of the sections would accept amendment; some would be slightly amended and others extensively amended.

The second schedule to the Air Force (Constitution) Act, 1917, which modified the Army Act into the Air Force Act is long and complicated though some of its provisions are merely formal. The schedule necessary to adapt the Air Force to Indian conditions would be just as long and full of points both of vagueness and intricate drafting. The recommended Act which would be the result of a Bill on these lines, would necessarily differ very widely from the Air Force Act, and the desired object, namely, to retain the similarity between the Indian and the British Acts would not in point of fact be achieved.

5. The Government of India accordingly recommend the adoption of course (b) above, and are accordingly moving to introduce a self-contained Air Force Bill which in its general form, follows the Indian Army Act of 1911,—the Indian Army Act as executed in its present shape for 20 years covering a period of highly intensive use. It has been amended several times, suddenly, but not heavily and it is still the same measure, in arrangements and in substance. It is drafted in fairly simple English easily comprehended by the Indian officers, and it has been reprinted in translations known to the rank and file. The personnel of the Indian Air Force will very generally be trained from the classes which now furnish records to the Indian Army, among whom some knowledge of the Indian Act is current. The Indian Act was drafted with regard to the Indian Criminal Law and section 6 (22) deliberately imposes the terminology of the I. P. C. There can be no doubt that an Act on the lines of the Indian Army Act will be much better understood by the Indian personnel than the Act on the English lines; and it is probable that even the attached British personnel will find less difficulty in following the simple Act on the Indian lines than a heavily amended and complicated Air Force Act.

6. The accompanying Bill, therefore, is a self-contained measure which the honourable members will be able to study without continual reference to other Acts. The material got is drawn both from the Indian Army Act and from the British Air Force Act. The frame work, mode of drafting and substance of the Indian Army Act, have been adopted as far as possible; but where that Act departs widely from the standards of the Air Force Act, the provisions of the latter have been adopted. The provisions in which there is a widest departure from the Indian Army Act are contained in Chapters 3 and 4 on Air Force business and punishments. These chapters have been drafted so as to secure that members of the Indian Air Force will be punishable for any offence with no greater severity than members of the Royal Air Force."

— Gazette of India, 1932, Part V, page 38.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

- Amended by Acts XXXV of 1934 ; XIV of 1943 ;
XXI of 1943 ; VI of 1945 and VIII of 1945. —Adapted by A. O.
—Amended by Ordinances LVIII of 1942; XLII of 1942. —Repealed in part by Act I of 1938.

COGNATE ACTS AND PROVISIONS

- | | |
|---|---|
| 1. ARMY ACT, 8 [VIII] of 1911. | 6. GOVERNMENT OF INDIA. ACT, 1935,
Ss. 99 (2) (e), 110 AND ALSO SEE Ss. 232 TO
239. |
| 2. CIVIL PROCEDURE CODE, 1908, S. 60. | 7. MUNICIPAL TAXATION ACT, 11 [XI] of 1881. |
| 3. CRIMINAL LAW AMENDMENT ACT, 20 [XX]
of 1938. | 8. PENAL CODE. 1860, CH. VII (Ss. 131 to 140.) |
| 4. CRIMINAL PROCEDURE CODE, 1898, Ss. 526A,
549. | 9. SOLDIERS (LITIGATION) ACT, 4 [IV] of 1925. |
| 5. EUROPEAN DESERTERS ACT, 11 [XI] of 1856. | 10. SUCCESSION ACT, 1925, Ss. 65, 66. |

ACT NO. XIV OF 1932^a

[8th April, 1932.]

An Act to provide for the administration and discipline of the Indian Air Force.

WHEREAS it is intended to establish an Indian Air Force ;

AND WHEREAS it is expedient to provide for the administration and discipline of that Force and for purposes connected therewith ;

It is hereby enacted as follows :—

[a] For Report of Select Committee, see Gazette of India, 1932, Pt. V, p. 103.

CHAPTER I.

PRELIMINARY.

*Short title and commence-
ment.*

1. (1) This Act may be called the Indian Air Force Act, 1932.

(2) It shall come into force on such date^a as the ^b[Central Government] may, by notification in the ^c[Official Gazette], appoint.

[a] 8th October 1932 ; see Gazette of India, 1932 Pt. I, p. 1149. [b] *Substituted* by A. O. for "Governor-General in Council." [c] *Substituted* by A. O. for "Gazette of India."

*Persons subject to this
Act.*

2. (1) The following persons shall be subject to this Act, namely —

(a) officers and warrant officers of the Indian Air force,

(b) persons enrolled under this Act,

(c) persons not otherwise subject to military ^a[, naval] or air force law, who, on active service, in camp, on the march, or at any frontier post specified by the ^b[Central Government] by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the Indian Air Force.

(2) Every person who has become subject to this Act under sub-section (1), clause (a) or (b), shall remain so subject until duly discharged or dismissed.

[a] *Inserted* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule. [b] *Substituted* by A. O. for "Governor-General in Council."

3. (1). The ^a[Central Government] may, by notification, direct that any persons or class of persons subject to this Act under section 2, sub-section (1), clause (c), shall be so subject as officers, warrant officers or non-commissioned officers, and may authorise any officer to give a like direction with respect to any such person and to cancel such direction.

(2) All persons subject to this Act other than officers, warrant officers and non-commissioned officers shall, if they are not persons in respect of whom a notification or direction under sub-section (1) is in force, be deemed to be of a rank inferior to that of a non-commissioned officer.

[a] *Substituted* by A. O. for "Governor-General in Council."

4. Every person subject to this Act under section 2, sub-section (1), clause (c), shall, for the purposes of this Act, be deemed to be under the commanding officer of the corps, unit or detachment (if any) to which he is attached,

*Commanding officer of
certain persons.*

and if he is not attached to any corps, unit or detachment, under the command of any officer who may for the time being be named as his commanding officer by the officer commanding the force with which such person may for the time being be serving, or of any other prescribed officer, or, if no such officer is named or prescribed, under the command of the said officer commanding the force :

Provided that an officer commanding a force shall not place a person under the command of an officer of official rank inferior to that of such person if there is present at the place where such person is any officer of higher rank under whose command he can be placed.

5. (1) Whenever persons subject to this Act are serving whether within or without India *Officers to exercise powers in certain cases.* under an officer not subject to this Act, the ^a[Central Government] may prescribe the officer by whom the powers which, under this Act, may be exercised by officers commanding units, shall, as regards such persons, be exercised.

(2) The ^a[Central Government] may confer such powers either absolutely or subject to such restrictions, reservations, exceptions and conditions as ^b[it] may think fit.

[a] *Substituted by A. O. for "Governor-General in Council."* [b] *Substituted by A. O. for "he."*

Definitions.

6. In this Act, unless there is something repugnant in the subject or context,—

(1) "officer of the Indian Air Force" means a person commissioned, gazetted or in pay as an officer of the Indian Air Force ;

(2) "warrant officer" means a person appointed, gazetted or in pay as a warrant officer in the Indian Air Force ;

(3) "non-commissioned officer" means a person attested under this Act holding a non-commissioned rank in the Indian Air Force, and includes an acting non-commissioned officer ;

(4) "officer" means an officer of any of His Majesty's naval, military or air forces, but does not include a warrant officer or non-commissioned officer ;

(5) "airman" means any person subject to this Act other than an officer ;

(6) "commanding officer," used in relation to a person subject to this Act, means the officer for the time being in command of the unit or detachment to which such person belongs or is attached ;

(7) "superior officer," when used in relation to a person subject to this Act, includes a warrant officer and a non-commissioned officer ; and, as regards persons placed under his orders, an officer, a warrant officer or non-commissioned officer of any of His Majesty's naval, military or air forces ;

(8) "corps" means any body of the Indian Air Force which is prescribed as a corps for the purposes of all or any of the provisions of this Act ;

(9) "unit" means any body of the Indian Air Force which is prescribed as a unit for the purposes of all or any of the provisions of this Act ;

(10) "enemy" includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of a person subject to naval, military or air force law to act ;

(11) "active service," as applied to a person subject to this Act, means the time during which such person is attached to, or forms part of, a force which is engaged in operations against an enemy, or is engaged in warlike operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country, and includes, in respect of a person subject to this Act attached to or forming part of a force which is about to be or has recently been on such active service, such time as the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be active service in respect of such force ;

[a] *Substituted by A. O. for "Governor-General in Council."* [b] *Substituted by A. O. for "Gazette of India."*

(12) "air force custody" means the arrest or confinement of a person according to the usages of His Majesty's military and air forces, and includes military custody ;

(13) "air force reward" includes any gratuity or annuity for long service or good conduct, any good conduct pay, good service pay or pension, and any other air force pecuniary reward ;

1. SECTION 6 (11).

[1] For the provision as to certain persons to be deemed to be on active service for the purposes of

the Air Force Act, see the Active Service Ordinance, 1941, (No. 10 [X] of 1941) Ss. 2 and 3

[6-12-1941.]

(14) "Court-martial" means a court-martial held under this Act;

(15) "criminal court" means a court of ordinary criminal justice in British India, or established elsewhere by the authority of the ^a[Central Government or the Crown Representative];
[a] Substituted by A. O. for "Governor-General in Council."

(16) "offence" means any act or omission made punishable by any law for the time being in force;

(17) "air force offence" means any act or omission made punishable by this Act;

(18) "civil offence" means an offence which, if committed in British India, would be triable by a criminal court;

^a[* * * * * *];

(20) "notification" means a notification published in the ^b[Official Gazette];

[a] Clause 19 was repealed by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule. [b] Substituted by A. O. for "Gazette of India."

(21) "prescribed" means prescribed by rules made under this Act; and

(22) all words and expressions used herein and defined in the Indian Penal Code, 1860, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code.

CHAPTER II.

ENROLMENT, ATTESTATION, DISMISSAL, DISCHARGE AND REDUCTION.

7. Upon the appearance before the prescribed enrolling officer of any person desirous of being enrolled, the enrolling officer shall read and explain to him, or cause to be read and explained to him in his presence, the conditions of the service for which he is to be enrolled; and shall put to him the questions set forth in the prescribed form of enrolment, and shall, after having cautioned him that if he makes a false answer to any such question he will be liable to punishment under this Act, record or cause to be recorded his answer to each such question.

8. If, after complying with the provisions of section 7, the enrolling officer is satisfied that the person desirous of being enrolled fully understands the questions put to him and consents to the conditions of service, and if he perceives no impediment, he shall sign and shall cause the person to sign the enrolment paper, and the person shall be then deemed to be enrolled.

9. The enrolling officer shall not cause any person to sign the enrolment paper unless he is satisfied that such a person is a subject of His Majesty or of a Prince or Chief in India, and:—

(a) is of unmixed Indian descent, or

(b) if he is of mixed Indian and non-Indian descent, is domiciled in India, or

(c) if he is of unmixed non-Indian Asiatic descent, is domiciled in India and his father and grandfather were domiciled in India.

^a[10. Every person who has for the space of three months been in the receipt of air force pay and been borne on the rolls of any unit shall be deemed to have been duly enrolled and shall not be entitled to claim his discharge on the ground of any irregularity or illegality in his enrolment or on any other ground whatsoever; ^b[and if any person, in receipt of air force pay and borne on the rolls as aforesaid, claims his discharge before the expiry of three months from his enrolment no such irregularity or illegality or other ground shall, until he is discharged] in pursuance of his claim, affect his position as a person enrolled under this Act or invalidate any proceedings, act or thing taken or done prior to his discharge.]

[a] Section 10 was substituted for the original by the Army and Air Force (Enrolment) Ordinance, 1942 (58 [LVIII] of 1942), S. 3. [26-10-1942]. [b] These words were substituted by the Repealing and Amending Act, 1945 (6 [VI] of 1945), S. 3 and Sch. II. [16-4-1945].

Persons to be attested. 11. The following persons shall be attested, namely —

(a) all persons enrolled as combatants,

(b) all other enrolled persons prescribed by the ^a[Central Government].

[a] Substituted by A. O. for "Governor-General in Council."

12. (1) When a person who is to be attested is reported fit for duty or has completed the prescribed period of probation, an oath or affirmation shall be adminis-

Mode of attestation.

tered to him in the prescribed form by his commanding officer in front of his unit or such portion thereof as may be present, or by any other prescribed person.

(2) The form of oath or affirmation prescribed under this section shall contain a promise that the person to be attested will be faithful to His Majesty, his heirs and successors, and that he will serve in the Indian Air Force and go wherever he is ordered by air, land or sea, and that he will obey all commands of any officer set over him, even to the peril of his life.

(3) The fact of an enrolled person having taken the oath or affirmation directed by this section to be taken shall be entered on his enrolment paper, and authenticated by his signature and by the signature of the officer administering the oath or affirmation.

Dismissal by Central Government.

13. The ^a[Central Government] may at any time dismiss from the service any person subject to this Act.

[a] *Substituted by A. O. for "Governor-General in Council."*

Dismissal by the Air Officer Commanding or prescribed officer.

14. The Air Officer Commanding His Majesty's Air Forces in India, or any prescribed officer, may at any time dismiss from the service any person subject to this Act other than an officer.

15. The prescribed authority may, in conformity with any rules prescribed in this behalf, discharge from the service any person subject to this Act.

Certificate to person dismissed or discharged.

16. Any enrolled person who is dismissed or discharged from the service shall be furnished by his commanding officer with a certificate setting forth —

- (a) the authority dismissing or discharging him,
- (b) the cause of his dismissal or discharge, and
- (c) the full period of his service in the Indian Air Force.

17. (1) Any enrolled person who is entitled under the conditions of his enrolment to be discharged, or whose discharge is ordered by competent authority, and who, when he is so entitled or ordered to be discharged, is serving out of India, and requests to be sent to India, shall, before being discharged, be sent to India with all convenient speed.

(2) Any person subject to this Act who is dismissed from the service and who, when he is so dismissed, is serving out of India, shall be sent to India with all convenient speed :

Provided that, where any such person is sentenced to dismissal combined with any other punishment, such other punishment, or, in the case of a sentence of imprisonment, a portion of such other punishment, may be inflicted before he is sent to India.

18. (1) The Air Officer Commanding His Majesty's Air Forces in India, or any prescribed officer, may at any time reduce any warrant officer or any non-commissioned officer to a lower grade or to a lower rank or to the ranks, or any airman other than a warrant officer or non-commissioned officer to a lower class in the ranks.

(2) The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a non-commissioned officer or, if he has no permanent grade above the ranks, to the ranks.

CHAPTER III.

PUNISHMENTS AND PENAL DEDUCTIONS.

19. Punishments may be inflicted in respect of offences committed by persons subject to this Act, and convicted by court-martial, according to the scale following, that is to say —

- (a) death ;
- (b) imprisonment, which shall be of two degrees, namely —
 - (i) long imprisonment, which shall be rigorous and for a term not less than three years and not exceeding fourteen years, and
 - (ii) short imprisonment, which may be rigorous or simple, for a term not exceeding two years,
- (c) in the case of airmen, detention for a term not exceeding two years ;
- (d) dismissal from the service ;

- (e) in the case of officers and warrant officers, suspension from rank, pay and allowances for a period not exceeding two months ;
- (f) reduction, in the case of a warrant officer, or a non-commissioned officer, to a lower grade, or to a lower rank or to the ranks ;
- (g) in the case of officers, warrant officers, and non-commissioned officers, forfeiture of seniority of rank ;
- (h) in the case of officers, warrant officers, and non-commissioned officers, reprimand or severe reprimand ;
- (i) forfeitures and stoppages as follows, namely —
 - (i) forfeiture of service for the purpose of promotion, increased pay, pension or any other prescribed purpose ;
 - (ii) forfeiture of any military ^a [, naval] or airforce decoration or military ^a [, naval] or air force reward ;
 - (iii) forfeiture, in the case of a person sentenced to dismissal from the service, of all arrears of pay and allowances due to him at the time of such dismissal ;
 - (iv) stoppages of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good ;
 - (v) on active service, forfeiture of pay and allowances for a period not exceeding three months.

[a] *Inserted by the Amending Act, 1934, (35 [XXXV] of 1934) S. 2 and Schedule.*

20. Where in respect of any offence under this Act there is specified particular punishment, there may be awarded in respect of that offence instead of such particular punishment (but subject to the other provisions of this Act as to punishments and regard being had to the nature and degree of the offence) any one punishment lower in the above scale than the particular punishment.

21. (1) Where any person, subject to this Act and under the rank of warrant officer, on active service is guilty of any offence, it shall be lawful for a court-martial to award for that offence any such punishment as may be prescribed as a field punishment. Field punishment shall be of the character of personal restraint or of hard labour but shall not be of a nature to cause injury to life or limb.

(2) Field punishment shall, for the purpose of commutation, be deemed to stand in the scale of punishments next below dismissal.

22. A sentence of a court-martial may award, in addition to or without any other punishment, any one or more of the punishments specified in clauses (d), (f), (h) and (i) of section 19.

23. A warrant officer or non-commissioned officer sentenced by court-martial to imprisonment, detention, field punishment or dismissal from the service, shall be deemed to be reduced to the ranks.

24. When any enrolled person on active service has been sentenced by court-martial to dismissal or to imprisonment, whether combined with dismissal or not, the prescribed officer may direct that such person may be retained to serve in the ranks, and where such person has been sentenced to imprisonment, such service shall be reckoned as part of his term of imprisonment.

25. (1) The ^a [Central Government] may prescribe the minor punishments to which persons subject to this Act shall be liable without the intervention of a court-martial, and the officer or officers by whom, and the extent to which, such minor punishments may be awarded.

(2) Detention and, in the case of persons subject to this Act on active service, any prescribed field punishment may be specified as minor punishments:

Provided that —

- (a) the term of such detention or field punishment shall not exceed twenty-eight days, and
- (b) detention or field punishment shall not be awarded to any person of or above the rank of non-commissioned officer, or who, when he committed the offence in respect of which it is awarded, was of or above such rank.

(3) The provisions of sections 77, 78 and 79 shall apply to the proceedings of officers empowered to award minor punishments under this section as if such officers were courts-martial.

[a] Substituted by A. O. for "Governor-General in Council."

Deductions from pay and allowances. 26. (1) The following penal deductions may be made from the pay and allowances of an officer of the Indian Air Force, that is to say —

(a) all pay and allowances due to an officer who absents himself without leave or overstays the period for which leave of absence has been granted to him, unless a satisfactory explanation has been given to his commanding officer and has been approved by the ^a[Central Government];

(b) any sum required to make good such compensation for any expenses, loss, damage or destruction occasioned by the commission of any offence as may be determined by the court-martial by whom he is convicted of such offence ^b[or by an officer exercising authority under section 25];

(c) any sum required to make good the pay of any officer or airman which he has unlawfully retained or unlawfully refused to pay;

(d) any sum required to make good any loss, damage or destruction of public or service property which, after due investigation, appears to the ^a[Central Government] to have been occasioned by any wrongful act or negligence on the part of the officer.

(2) The following penal deductions may be made from the pay and allowances of an airman, that is to say —

(a) all pay and allowances for every day of absence either on desertion or without leave, or as a prisoner of war, and for every day of imprisonment or detention awarded by a criminal Court, a court-martial or an officer exercising authority under section 25, or of field punishment, awarded by a court-martial or such officer;

(b) all pay and allowances for every day whilst he is in custody on a charge for an offence of which he is afterwards convicted by a criminal Court or court-martial, or on a charge of absence without leave for which he is afterwards awarded imprisonment detention or field punishment by an officer, exercising authority under section 25;

(c) all pay and allowances for every day on which he is in hospital on account of sickness certified by the medical officer attending on him to have been caused by an offence under this Act committed by him;

(d) for every day on which he is in hospital on account of sickness certified by the medical officer attending on him to have been caused by his own misconduct or imprudence such sum as may be prescribed;

(e) all pay and allowances ordered by a court-martial to be suspended or forfeited;

(f) any sum ordered by a court-martial to be stopped;

(g) any sum required to make good such compensation for any expenses caused by him, or for any loss of or damage or destruction done by him to any arms, ammunition, equipment, clothing, instruments, service necessities, or military decoration, or to any buildings or property, as may be awarded by his commanding officer;

(h) any sum required to pay a fine awarded by a criminal Court, a court-martial exercising jurisdiction under section 58 or an officer exercising authority under section 25:

Provided that the total deductions from the pay and allowances of a person subject to this Act made under clauses (e) to (g), both inclusive, shall not (except in the case of a person sentenced to dismissal) exceed in any one month one-half of his pay and allowances for that month.

Explanation. — For the purposes of clauses (a) and (b) —

(i) no person shall be treated as absent, imprisoned, or detained, unless the absence, imprisonment, or detention has lasted six hours or upwards, except where the absence prevented the absentee from fulfilling any air force duty which was thereby thrown on some other person;

(ii) a period of absence, imprisonment, or detention which commences before and ends after midnight may be reckoned as a day;

(iii) the number of days shall be reckoned as from the time when the absence, imprisonment, or detention commences; and

(iv) no period of less than twenty-four hours shall be reckoned as more than one day.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Added* by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 6. [13-8-1943].

Deductions from public money other than pay. **27.** Any sum authorised by this Act to be deducted from the pay and allowances of any person may, without prejudice to any other mode of recovering the same, be deducted from any public money due to him other than a pension.

Remission of deductions. **28.** Any deduction from pay and allowances authorised by this Act may be remitted in such manner and to such extent and by such authority as may from time to time be prescribed.

29. In the case of all persons subject to this Act being prisoners of war whose pay and allowances have been forfeited under section 26, but in respect of whom a remission has been made under section 28, it shall be lawful, notwithstanding any provision in any enactment or any rule of law to the contrary, for proper provision to be made by the prescribed authorities out of such pay and allowances for any dependants of such persons, and any such remission shall in that case be deemed to apply only to the balance thereafter remaining of such pay and allowances.

30. The pay of an officer or airman of the Indian Air Force shall be paid without any deduction other than the deductions authorised by this Act or by any other enactment for the time being in force or prescribed by the ^a[Central Government.]

[a] *Substituted* by A. O. for "Governor-General in Council."

CHAPTER IV.

AIR FORCE OFFENCES.

Service offences punishable with death.

31. Any person subject to this Act who —

- (a) shamefully abandons or delivers up any garrison, fortress, post, or guard committed to his charge, or which it is his duty to defend, or
- (b) shamefully casts away his arms, ammunition or tools in the presence of the enemy, or
- (c) treacherously holds correspondence with or gives intelligence to the enemy, or treacherously or through cowardice sends a flag of truce to the enemy, or
- (d) assists the enemy with arms, ammunition, or supplies, or knowingly harbours or protects an enemy not being a prisoner, or
- (e) having been made a prisoner of war, voluntarily serves with or voluntarily aids the enemy, or
- (f) voluntarily does when on active service any act calculated to imperil the success of His Majesty's Forces or any part thereof, or
- (g) treacherously or shamefully causes the capture or destruction by the enemy of any of His Majesty's aircraft, or
- (h) treacherously gives any false air signal or alters or interferes with any air signal, or
- (i) when ordered by his superior officer or otherwise under orders to carry out any warlike operation in the air, treacherously or shamefully fails to use his utmost exertions to carry such orders into effect,

shall be punishable with death.

Service offences punishable with long imprisonment.

32. Any person subject to this Act who, on active service —

- (a) without orders from his superior officer leaves the ranks in order to secure prisoners or horses, or on pretence of taking wounded men to the rear, or
- (b) without orders from his superior officer wilfully destroys or damages any property, or
- (c) is taken prisoner by want of due precaution or through disobedience of orders or wilful neglect of duty, or, having been taken prisoner, fails to rejoin His Majesty's service when able to do so, or
- (d) without due authority either holds correspondence with, or gives intelligence, or sends a flag of truce to the enemy, or
- (e) by word of mouth, or in writing, or by signals, or otherwise spreads reports calculated to create unnecessary alarm or despondency, or

- (f) in action, or previously to going into action, uses words calculated to create alarm or despondency, or
- (g) negligently causes the capture or destruction by the enemy of any of His Majesty's aircraft, or
- (h) when ordered by his superior officer or otherwise under orders to carry out any warlike operation in the air, negligently or through other default fails to use his utmost exertions to carry such orders into effect, or

(i) misbehaves before the enemy in such manner as to show cowardice,
shall be punishable with long imprisonment.

33. (1) Any person subject to this Act who treacherously makes known the watchword to any person not entitled to receive it, or treacherously gives a watchword different from what he received, shall, if he commits the offence on active service, be punishable with death, and, if he commits the offence not on active service, with short imprisonment.

(2) Any person subject to this Act who —

- (a) without due authority alters or interferes with any air signal, or
- (b) forces a safeguard, or
- (c) forces or strikes a sentinel, or
- (d) breaks into any house or other place in search of plunder, or
- (e) being an airman acting as sentinel, sleeps or is intoxicated, or
- (f) without orders from his superior officer leaves his guard, piquet, patrol or post, or
- (g) by discharging fire arms, making signals, using words, or by any means whatever, intentionally occasions false alarms, or

(h) being an airman acting as sentinel, leaves his post before he is regularly relieved, shall, if he commits the offence on active service, be punishable with long imprisonment and, if he commits the offence not on active service, with short imprisonment.

Service offences punishable with short imprisonment.

34. Any person subject to this Act who —

(a) by discharging fire arms, making signals, using words, or by any means whatever, negligently occasions false alarms, or

(b) makes known the watchword to any person not entitled to receive it, or, without good and sufficient cause, gives a watchword different from what he received, or

(c) impedes the provost-marshal or any assistant provost-marshal or any officer or non-commissioned officer or other person legally exercising authority under or on behalf of the provost-marshal, or, when called on, refuses to assist in the execution of his duty the provost-marshal, the assistant provost-marshal, or any such officer, non-commissioned officer or other person, or

(d) uses criminal force to or commits an assault on any person bringing provisions or supplies to the forces, or commits any offence against the property or person of any inhabitant of or resident in the country in which he is serving, or

(e) irregularly detains or appropriates to his own unit or detachment any provisions or supplies proceeding to the forces, contrary to orders issued in that respect, shall be punishable with short imprisonment.

Mutiny.

35. Any person subject to this Act who —

(a) begins, incites, causes or conspires with any other persons to cause any mutiny in any of His Majesty's naval, military or air forces, or

(b) joins in, or, being present, does not use his utmost endeavours to suppress, any such mutiny, or

(c) knowing or having reason to believe in the existence of any such mutiny, or of any intention to commit such mutiny, or of any such conspiracy, does not without delay give information thereof to his commanding or other superior officer, shall be punishable with death.

Insubordination punishable with long imprisonment.

36. Any person subject to this Act who —

(a) uses criminal force to or assaults his superior officer, being in the execution of his office, or

(b) disobeys in such manner as to show a wilful defiance of authority any lawful command given personally by his superior officer in the execution of his office, shall be punishable with long imprisonment.

Insubordination punishable more severely if committed on active service.

37. Any person subject to this Act who —

- (a) uses criminal force to or assaults his superior officer, or
- (b) uses threatening or insubordinate language to his superior officer, or
- (c) disobeys any lawful command given by his superior officer,

shall, if he commits the offence on active service, be punishable with long imprisonment, and, if he commits the offence not on active service, with short imprisonment.

Insubordination punishable with short imprisonment.

38. Any person subject to this Act who —

- (a) being concerned in any quarrel, affray or disorder, refuses to obey any officer (though of inferior rank) who orders him into arrest, or uses criminal force to or assaults any such officer, or
- (b) uses criminal force to or assaults any person, whether subject to this Act or not, in whose custody he is placed, whether he is or is not his superior officer, or
- (c) resists an escort whose duty it is to apprehend him or to have him in charge, or
- (d) being an airman, breaks out of barracks, camp or quarters, or
- (e) neglects to obey any general, local or other orders (not being orders in the nature of a rule or regulation published for the general information and guidance of the Indian Air Force), shall be punishable with short imprisonment.

39. Any person subject to this Act who deserts or attempts to desert the service shall, if he commits the offence when on active service or under orders for active service, be punishable with long imprisonment, and, if he commits the offence under any other circumstances, with short imprisonment.

40. Any person subject to this Act who, when belonging to the Indian Air Force, without having obtained a regular discharge therefrom, or otherwise fulfilled the conditions enabling him to enlist, enrol or enter, enrolls himself, or enlists in or enters any other of His Majesty's air forces, or any of His Majesty's military or naval forces, or re-enrolls himself in the Indian Air Force, shall be deemed to be guilty of fraudulent enlistment, and shall be punishable with short imprisonment.

41. Any person subject to this Act, who being cognisant of any desertion or intended desertion of a person subject to this Act, does not forthwith give notice to his commanding officer, or take any steps in his power to cause the deserter or intending deserter to be apprehended, shall be punishable with short imprisonment.

Absence from duty without leave.

42. Any person subject to this Act who —

- (a) absents himself without leave, or
 - (b) fails to appear at the time fixed at a parade or place appointed for exercise or duty, or goes from thence without leave before he is relieved, or without necessity quits his duty or duties, or
 - (c) being an airman, when in camp or garrison or elsewhere, is found beyond any limits fixed or in any place prohibited by any general, local or other order, without a pass or written leave from his superior officer, or
 - (d) being an airman, without leave from his superior officer, or without due cause, absents himself from any school when duly ordered to attend there,
- shall be punishable with short imprisonment.

43. Any officer or warrant officer subject to this Act who behaves in a manner unbecoming his position and character shall, notwithstanding anything contained in section 20, be dismissed from the service.

Scandalous conduct punishable with long imprisonment.

44. Any person subject to this Act who —

- (a) steals any property of ^a[the Crown] or dishonestly misappropriates or converts to his own use any property of ^a[the Crown] entrusted to him, or

(b) dishonestly receives or retains any property in respect of which an offence under clause (a) has been committed, knowing or having reason to believe it to have been stolen or dishonestly misappropriated or converted, or

(c) wilfully destroys or damages any property of ^a[the Crown] entrusted to him, or

(d) steals any property of any air force mess, band or institution, or of any person subject to this Act or serving with or attached to the Indian Air Force, or dishonestly misappropriates or converts to his own use any such property entrusted to him, or

(e) dishonestly receives or retains any property in respect of which an offence under clause (d) has been committed, knowing or having reason to believe it to have been stolen or dishonestly misappropriated or converted,
shall be punishable with long imprisonment.

[a] Substituted by A. O. for "Government."

Scandalous conduct punishable with short imprisonment.

45. Any person subject to this Act who —

(a) does any act, not otherwise specified in this Act, with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person, or

(b) malingers or feigns or produces disease or infirmity himself, or intentionally delays his cure or aggravates his disease or infirmity, or

(c) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person, or

(d) commits any offence of a cruel, indecent or unnatural kind, or attempts to commit any such offence and does any act towards its commission,
shall be punishable with short imprisonment.

46. Any person subject to this Act who is found in a state of intoxication, whether on duty or not on duty, shall be punishable, if an officer, with dismissal from the service, and, if an airman, with short imprisonment :

Intoxication.
Provided that where the offence of being intoxicated is committed by an airman not on active service or on duty, the sentence imposed shall not exceed detention for a period of six months.

Permitting escape of prisoner.

47. Any person subject to this Act who —

(a) when in command of a guard, piquet, patrol or post, releases without proper authority, whether voluntarily or otherwise, any person committed to his charge, or

(b) voluntarily or negligently allows to escape any person who is committed to his charge, or whom it is his duty to keep or guard,
shall be punishable, if he has acted voluntarily, with long imprisonment, and, if he has not acted voluntarily, with short imprisonment.

Irregular keeping in custody.

48. Any person subject to this Act who —

(a) unnecessarily detains a person in arrest or confinement without bringing him to trial or fails to bring his case before the proper authority for investigation, or

(b) having committed a person to the custody of any officer, non-commissioned officer, provost-marshal, or assistant provost-marshal, fails without reasonable cause to deliver at the time of such committal, or as soon as practicable, and in any case within twenty-four hours thereafter, to the officer, non-commissioned officer, provost-marshal, or assistant provost-marshal, into whose custody the person is committed, an account in writing signed by himself of the offences with which the person so committed is charged, or

(c) being in command of the guard, does not as soon as he is relieved from his guard or duty, or if he is not sooner relieved, within twenty-four hours after a person is committed to his charge, give in writing to the officer to whom he may be ordered to report that person's name and offence so far as known to him, and the name and rank of the officer or other person by whom he was charged, accompanied, if he has received the account as above in this section mentioned, by that account,
shall be punishable with short imprisonment.

49. Any person subject to this Act, who, being in lawful custody, escapes or attempt
Escape from custody. to escape, shall be punishable with short imprisonment.

Offences relating to property.

50. Any person subject to this Act who —

- (a) commits extortion, or without proper authority exacts from any person carriage, portage or provisions, or
 - (b) in time of peace, commits house-breaking for the purpose of plundering or plunders, destroys or damages any field, garden or other property, or
 - (c) voluntarily or negligently kills, injures, makes away with, ill-treats or loses any animal used in the public service, or
 - (d) makes away with, or is concerned in making away with, any arms, ammunition, equipments, instruments, tools, clothing or service necessities issued to him or required to be maintained by him, or
 - (e) loses by neglect anything mentioned in clause (d), or
 - (f) wilfully damages anything mentioned in clause (d) or any property belonging to ^a[the Crown], or to any air force mess, band or institution, or to any person subject to air force law, or serving with, or attached to the Indian Air Force, or
 - (g) sells, pawns, destroys or defaces any medal or decoration granted to him,
- shall be punishable with short imprisonment.

[a] Substituted by A. O. for "Government."

False accusations and offences relating to documents.

51. Any person subject to this Act who —

- (a) makes a false accusation against any person subject to this Act, knowing such accusation to be false, or
 - (b) in making any complaint under section 120, knowingly makes any false statement affecting the character of any person subject to this Act, or knowingly and wilfully suppresses any material fact, or
 - (c) obtains or attempts to obtain for himself or for any other person any pension, allowance or other advantage or privilege by a statement which is false, and which he either knows or believes to be false or does not believe to be true, or by making or using a false entry in any document or by making any document containing a false statement, or by omitting to make a true entry or document containing a true statement, or
 - (d) knowingly furnishes a false return or report of the number or state of any men under command or charge, or of any money, arms, ammunition, clothing, equipments, stores or other property in his charge, whether belonging to such men or to ^a[the Crown] or to any person in or attached to the Indian Air Force, or who, wilfully or negligently, omits or refuses to make or send any return or report of the matters aforesaid,
- shall be punishable with short imprisonment.

[a] Substituted by A. O. for "Government."

52. Any person having become subject to this Act who is discovered to have made a wilfully

False answers on enrolment.

false answer to any question set forth in the prescribed form of enrolment which has been put to him by the enrolling officer shall be punishable with short imprisonment.

Offences relating to courts-martial.

53. Any person subject to this Act who —

- (a) when duly summoned to attend as a witness before a court-martial, intentionally omits to attend or refuses to be sworn or affirmed or to answer any question, or to produce or deliver up any document or other thing which he may have been duly warned and called upon to produce or deliver up, or
 - (b) intentionally offers any insult or causes any interruption or disturbance to, or uses any menacing or disrespectful word, sign or gesture, or is insubordinate or violent in the presence of, a court-martial while sitting, or
 - (c) having been duly sworn or affirmed before any court-martial or other court or officer authorised by this Act to administer an oath or affirmation, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true,
- shall be punishable with short imprisonment.

Offences relating to air-craft.

54. Any person subject to this Act who —

- (a) voluntarily or negligently damages, destroys or loses any of His Majesty's aircraft or aircraft material, or
- (b) is guilty of any act or omission likely to cause such damage, destruction or loss, or
- (c) is guilty of any act or omission (whether voluntary or otherwise) which causes damage to or destruction of any public property by fire, or
- (d) without lawful authority disposes of any of His Majesty's aircraft or aircraft material, or
- (e) is guilty of any act or omission in flying or in the use of any aircraft, or in relation to any aircraft or aircraft material which causes or is likely to cause loss of life or bodily injury to any person, or
- (f) during a state of war voluntarily and without proper occasion or negligently causes the sequestration, by or under the authority of a neutral State, or the destruction in a neutral State of any of His Majesty's aircraft,

shall be punishable, if he has acted voluntarily, with long imprisonment, and if he has not acted voluntarily, with short imprisonment.

Miscellaneous air force offences.

55. Any person subject to this Act who—

- (a) strikes or otherwise ill-treats any person subject to this Act being his subordinate in rank or position, or
- (b) being in command at any post or on the march and receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person, or has disturbed any fair or market, or committed any riot or trespass, fails to have due reparation made to the injured person or to report the case to the proper authority, or
- (c) by defiling any place of worship, or otherwise, intentionally insults the religion or wounds the religious feelings of any person, or
- (d) attempts to commit suicide and does any act towards the commission of such offence, or
- (e) being below the rank of warrant officer, when off duty, appears, without proper authority, in or about camp or cantonments, or in or about, or when going to or returning from, any town or bazar, carrying a sword, bludgeon or other offensive weapon, or
- (f) directly or indirectly accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gratification as a motive or reward for procuring the enrolment of any person, or leave of absence, promotion or any other advantage or indulgence for any person in the service, or
- (g) is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and air force discipline,

shall be punishable with short imprisonment.

56. Any person subject to this Act who attempts to commit an air force offence or

Attempts. to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence may, where no express provision is made by this Act for the punishment of such attempt, be punished with the punishment provided in this Act for such offence.

57. Any person subject to this Act who abets the commission of any air force offence, or

Abetment. of any offence punishable under the Army Act,^a [the Naval Discipline Act^c or that Act as modified by the Indian Navy (Discipline) Act, 1934,^b the Air Force Act^d or the Indian Army Act, 1911, such offence being of the same nature as any air force offence, shall be punishable with the punishment provided in this Act for such air force offence.

[a] (1881) 44 & 45 Vict., c. 58. [b] *Inserted by the Amending Act, 1934* (35 [XXXV] of 1934), S. 2.

[c] (1866) 29 & 30 Vict., c. 109. [d] (1917) 7 Geo. V., c. 51.

58. (1) Any person subject to this Act who at any place in or beyond British India com-

Civil offences. mits any civil offence shall be deemed to be guilty of an air force offence, and, if charged therewith under this section, shall be liable to be tried by court-martial and to be punished as follows, that is to say:—

(a) if the offence is one which would be punishable under the law of British India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law of British India, and

(b) in other cases, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law of British India, or such punishment as might be awarded to him in pursuance of this Act in respect of an act prejudicial to good order and air force discipline:

Provided that a person subject to this Act who, at any place in British India or at any place in which ^a[the Central Government or the Crown Representative] exercises powers and jurisdiction by virtue of ^b[the Government of India Act, 1935,^c or of any Order in Council made under the Foreign Jurisdiction Act, 1890],^d and while not on active service, commits an offence of murder or culpable homicide against a person not subject to this Act or an offence of rape, shall not be deemed to be guilty of an air force offence and shall not be tried by court-martial.

(2) The powers of a court-martial to charge and to punish any person under this section shall not be affected by reason of the civil offence with which such person is charged being also an air force offence.

[a] Substituted by A. O. for "the Governor-General in Council." [b] Substituted by A. O. for "the Indian (Foreign Jurisdiction) Order in Council, 1902." [c] (1935) 26 Geo. V, c. 2. [d] (1890) 53 & 54 Vict., c. 37.

CHAPTER V.

ARREST AND PROCEEDINGS BEFORE TRIAL.

59. (1) Any person subject to this Act who is charged with an offence may be taken into *Custody of offenders.* air force custody.

(2) Any such person may be ordered into air force custody by any superior officer.

(3) The charge against every person taken into air force custody shall, without unnecessary delay, be investigated by the proper authority, and as soon as may be, either proceedings shall be taken for punishing the offence, or such person shall be discharged from custody.

60. Whenever any person subject to this Act, who is accused of any offence under this Act, *Arrest by civil authorities.* is within the jurisdiction of any Magistrate or police-officer, such Magistrate or officer shall aid in the apprehension and delivery to air force custody of such person upon receipt of a written application to that effect signed by his commanding officer.

61. (1) Whenever any person subject to his Act deserts, this commanding officer shall give *Capture of deserters.* written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a Magistrate, and shall deliver the deserter, when apprehended, to air force custody.

(2) Any police-officer may arrest without warrant any person, reasonably believed to be subject to this Act and to be travelling without authority, and shall bring him without delay before the nearest Magistrate, to be dealt with according to law.

62. (1) When any person subject to this Act has been absent without due authority from *Inquiry on absence without leave.* his duty for a period of twenty-one days, a Court of inquiry shall, as soon as practicable, be assembled and, upon oath or affirmation administered in the prescribed manner, shall inquire respecting the absence of the person, and the deficiency, if any, of property of ^a[the Crown] entrusted to his care, or of his arms, ammunition, equipments, instruments, clothing or necessities; and, if satisfied of the fact of such absence without due authority or other sufficient cause, the Court shall declare such absence and the period thereof, and the said deficiency, if any; and the commanding officer of the unit to which the person belongs shall enter in the court-martial book of the unit a record of the declaration.

(2) If the person declared absent does not afterwards surrender, or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

[a] Substituted by A. O. for "the Government."

63. For the prompt and instant repression of irregularities and offences committed in the field *Provost-marshal.* or on the march, provost-marshal may be appointed by the Air Officer Commanding His Majesty's Air Forces in India; and the powers and duties of such provost-marshal shall be regulated according to the established custom of war and the rules of the service.

64. The duties of a provost-marshal so appointed are to take charge of persons in air force *Duties and powers.* custody, to preserve good order and discipline and to prevent breaches thereof by persons subject to this Act.

He may at any time arrest and detain for trial any person subject to this Act who commits an offence and may also carry into effect any punishments to be inflicted in pursuance of the sentence of a court-martial.

CHAPTER VI.

["The personnel of the Indian Air Force is to be Indian but the officers passing the court-martial may be either Indian or European, as they may be drawn from any of His Majesty's Naval, Land or Air Force. We discussed at some length the proposal that an Indian accused should be given right to call to be tried by Indians; but came to the conclusion that such a provision is not applicable, at least for some years to come. It will take some time before any officer of the Indian Air Force will be qualified to sit on the court-martial. Even if they are qualified, they will not be numerous and it might involve any commensurate delay in giving an accused a right to demand that only officers from other forces who are Indians should sit on the court-martial. We think it is sufficient at present to record recommendation that as far as possible officers sitting on a court-martial trying an Indian accused should be Indians." — *Select Committee Report.*]

CONSTITUTION, JURISDICTION AND POWERS OF COURTS-MARTIAL.

65. For the purposes of this Act there shall be three kinds of courts-martial, that is *Kinds of courts-martial.* to say,—

- (1) general courts-martial;
- (2) district courts-martial; and
- (3) field general courts-martial.

Power to convene general courts-martial.

66. A general court-martial may be convened by the ^a[Central Government], or by any officer empowered in this behalf by warrant of the ^a[Central Government].

[a] *Substituted by A. O. for "Governor-General in Council."*

Power to convene district courts-martial.

67. A district court-martial may be convened by any authority having power to convene a general court-martial, or by any officer empowered in this behalf by warrant of any such authority.

Limitation of powers of convening authorities.

Convening of field general courts-martial.

68. A warrant issued under section 66 or section 67 may contain such restrictions, reservations or conditions as the authority issuing it may think fit.

69. The following authorities shall have power to convene a field general court-martial, that is to say —

- (a) an authority empowered in this behalf by an order of the ^a[Central Government];
- (b) on active service, the commanding officer of the forces in the field, or any officer empowered by him in this behalf;
- (c) the commanding officer of any detached portion of the Indian Air Force on active service, when, in his opinion, it is not practicable, with due regard to discipline or the exigencies of the service, that an offence should be tried by a general court-martial, and circumstances prevent a reference to higher authority.

[a] *Substituted by A. O. for "Governor-General in Council."*

70. A general court-martial shall consist of not less than five officers each of whom must *Composition of general courts-martial.* have held a commission during not less than three whole years and of whom not less than four must be of a rank not below that of a flight lieutenant.

Composition of district courts-martial.

71. A district court-martial shall consist of not less than three officers.

Composition of field general courts-martial.

72. A field general court-martial shall consist of not less than three officers.

Dissolution of courts-martial.

73. (1) If a court-martial after the commencement of a trial is reduced below the smallest number of officers of which it is by this Act required to consist, it shall be dissolved.

(2) If, on account of the illness of the accused before the finding, it is impossible to continue the trial, a court-martial shall be dissolved.

(3) Where a court-martial is dissolved under this section, the accused may be tried again.

Jurisdiction and powers of courts-martial generally.

74. Save as otherwise provided by or under this Act, courts-martial shall have —

(a) jurisdiction to try and to punish all air force offences, and all civil offences committed by persons subject to this Act;

(b) exclusive jurisdiction to try all air force offences which are not also civil offences; and

(c) exclusive power to award the punishments specified in this Act.

Jurisdiction and powers of general and field general courts-martial.

75. A general or field general court-martial shall have power to try any person subject to this Act for any offence made punishable therein, and to pass any sentence authorised by this Act.

Jurisdiction and powers of district courts-martial. **76.** A district court-martial shall have power to try any person subject to this Act other than an officer for any offence made punishable therein, and to pass any sentence authorised by this Act other than a sentence of death or imprisonment for a term exceeding two years.

Prohibition of second trial. **77.** When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been summarily dealt with for an offence under section 25, he shall not be liable to be tried again for the same offence by a court-martial.

Limitation of trial. **78.** No trial by court-martial of any person subject to this Act for any offence (other than ^a[an offence committed after the 7th day of December 1941 while the person in question was a prisoner of war or was present in enemy territory or] an offence of mutiny, desertion or fraudulent enlistment) shall be commenced after the ^b[expiration of a period of three years (in the computation of which period any time spent by the person in question after the aforesaid date as a prisoner of war or in enemy territory or in evading arrest shall be excluded)] from the date of such offence, and no such trial for an offence of desertion (other than desertion on active service) or of fraudulent enlistment shall be commenced if the person in question has, subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of His Majesty's regular forces.

Explanation.—For the purposes of this section “mutiny” means any of the offences specified in section 35 ^c[and “enemy territory” means any area at the time of the presence therein of the person in question under the sovereignty of or administered by or in occupation of a State at that time at war with His Majesty.]

[a] *Inserted by the Indian Army and Indian Air Force (Amendment) Ordinance, 1945 (42 [XLII] of 1945), S. 3 [the amendment shall be deemed always to have been made with effect from 7-12-1941].* [b] *Substituted for the words “expiration of three years”, ibid (do).* [c] *Added, ibid (do).*

79. Any person subject to this Act who commits any offence against it may be tried and punished for such offence in any place whatever.

Order in case of concurrent jurisdiction of criminal court and court-martial. **80.** When a criminal court and a court-martial have each jurisdiction in respect of a civil offence, it shall be in the discretion of the prescribed air force authority to decide before which court the proceedings shall be instituted, and, if that authority decides that they shall be instituted before a court-martial, to direct that the accused person shall be detained in air force custody.

Power of criminal court to require delivery of offender. **81. (1)** When a criminal court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any civil offence, it may, by written notice require the prescribed air force authority at the option of such authority either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the ^a[Central Government].

(2) In every such case the said authority shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the ^a[Central Government], whose order upon such reference shall be final.

[a] *Substituted by A. O. for “Governor-General in Council.”*

Trial by court-martial no bar to subsequent trial by criminal court. **82. (1)** Notwithstanding anything contained in section 26 of the General Clauses Act, 1897, or in section 408 of the Code of Criminal Procedure, 1898, a person convicted or acquitted by a court-martial may be afterwards tried by a criminal court for the same offence or on the same facts.

(2) If a person sentenced by a court-martial in pursuance of this Act to punishment for an offence is afterwards tried by a criminal court for the same offence or on the same facts, that court shall, in awarding punishment, have regard to the air force punishment he may already have undergone.

CHAPTER VII.

PROCEDURE OF COURTS-MARTIAL.

President. **83.** At every court-martial the senior member shall sit as president.

84. Every general court-martial shall, and every district court-martial may, be attended by a judge advocate, who shall be either an officer belonging to the department of the Judge Advocate General in India, or, if no such officer is available, a fit person appointed by the convening officer.

85. (1) At all trials by courts-martial, as soon as the court is assembled, the names of the president and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.

(2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer, decide on the objection.

(3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner by another officer, subject to the same right of the accused to object.

(4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial.

86. (1) Every decision of a court-martial shall be passed by an absolute majority of votes; and where there is an equality of votes, as to either finding or sentence, the decision shall be in favour of the accused:

Provided that no sentence of death shall be passed without the concurrence of two-thirds at the least of the members of the court.

(2) In matters other than a challenge or the finding or sentence, the president shall have a casting vote.

87. An oath or affirmation in the prescribed form shall be administered to every member of every court-martial and to the judge advocate at the beginning of the trial.

88. Every person giving evidence at a court-martial shall be examined on oath or affirmation, and shall be duly sworn or affirmed in the prescribed form.

89. (1) The convening officer, the president of the court, the judge advocate, or the commanding officer of the accused person, may, by summons under his hand, require the attendance before the court, at a time and place to be mentioned in the summons, of any person either to give evidence or to produce any document or other thing.

(2) In the case of a witness amenable to air force^a, [naval] or military authority, the summons shall be sent to the officer commanding the corps, ^a[ship,] unit, department or detachment to which he belongs, and such officer shall serve it upon him accordingly.

(3) In the case of any other witness, the summons shall be sent to the Magistrate within whose jurisdiction he may be or reside, and such Magistrate shall give effect to the summons as if the witness were required in the court of such Magistrate.

(4) When a witness is required to produce any particular document or other thing in his possession or power, the summons shall describe it with reasonable precision.

(5) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to any document in the custody of the postal or telegraph authorities.

(6) If any document in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any court-

martial, such Magistrate or Court may require the postal or telegraph authorities, as the case may be, to deliver such document to such person as such Magistrate or Court may direct.

(7) If any such document is, in the opinion of any other Magistrate or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal or telegraph authorities, as the case may be, to cause search to be made for and to detain such document pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

[a] Inserted by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule.

90. (1) Whenever, in the course of a trial by court-martial, it appears to the court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, in the circumstances of the case, would be unreasonable, such court may address the Judge Advocate General in order that a commission to take the evidence of such witness may be issued.

(2) The Judge Advocate General may then, if he thinks necessary, issue a commission to any Presidency Magistrate, District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

(3) When the witness resides in ^a[any Indian State or tribal area] in which there is an official representing ^b[the Central Government or the Crown Representative], the commission may be issued to such official.

(4) The Magistrate or official to whom the commission is issued, or if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant-cases under the Code of Criminal Procedure, 1898.

(5) Where the commission is issued to such official as is mentioned in sub-section (3), he may delegate his powers and duties under the commission to any official subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

(6) When the witness resides out of India, the commission may be issued to any British consular officer, British Magistrate or other British official competent to administer an oath or affirmation in the place where such witness resides.

(7) The prosecutor and the accused person in any case in which a commission is issued may respectively forward any interrogatories in writing which the court may think relevant to the issue, and the Magistrate or official to whom the commission is issued shall examine the witness upon such interrogatories.

(8) The prosecutor and the accused person may appear before such Magistrate or official by pleader or, except in the case of an accused person in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

(9) After any commission issued under this section has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Judge Advocate General.

(10) On receipt of a commission and deposition returned under sub-section (9), the Judge Advocate General shall forward the same to the court at whose instance the commission was issued or, if such court has been dissolved, to any other court convened for the trial of the accused person; and the commission, the return thereto and the deposition shall be open to the inspection of the prosecutor and the accused person, and may, subject to all just exceptions, be read in evidence in the case by either the prosecutor or the accused, and shall form part of the proceedings of the court.

(11) In every case in which a commission is issued under this section the trial may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

Explanation. — In this section, the expression "Judge Advocate General" means the Judge Advocate-General in India and includes a Deputy Judge Advocate-General.

[a] Substituted by A. O. for "the territories of any prince or chief in India." [b] Substituted by A. O. for "the British Indian Government."

Conviction of one offence permissible on charge of another.

91. (1) A person charged before a court-martial with desertion may be found guilty of attempting to desert or of being absent without leave.

(2) A person charged before a court-martial with attempting to desert may be found guilty ^a[* * *] of being absent without leave.

(3) A person charged before a court-martial with using criminal force may be found guilty of assault.

(4) A person charged before a court-martial with using threatening language may be found guilty of using insubordinate language.

(5) A person charged before a court-martial with any of the offences specified in clause (a), clause (b), clause (d), or clause (e) of section 44 may be found guilty of any other of these offences with which he might have been charged.

(6) A person charged before a court-martial with an offence punishable under section 58 may be found guilty of any other offence of which he might have been found guilty if the provisions of the Code of Criminal Procedure, 1898, were applicable.

(7) A person charged before a court-martial with any other offence under this Act may, on failure of proof of an offence having been committed in circumstances involving a more severe punishment, be found guilty of the same offence as having been committed in circumstances involving a less severe punishment.

(8) A person charged before a court-martial with any offence under this Act may be found guilty of having attempted to commit or of abetment of that offence although the attempt or abetment is not separately charged.

[a] The words "of desertion or" were omitted by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 7.

General rule as to evidence.

92. The Indian Evidence Act, 1872, shall, subject to the provisions of this Act, apply to all proceedings before a court-martial.

93. A court-martial may take judicial notice of any matter within the general, naval, *Judicial notice.* military or air force knowledge of the members.

94. In any proceeding under this Act, any application, certificate, warrant, reply or *Presumption as to signatures.* other document purporting to be signed by an officer in ^a[the service of the Crown] shall, on production, be presumed to have been duly signed by the person and in the character by whom and in which it purports to have been signed, until the contrary is shown.

[a] Substituted by A. O. for the civil, military or air force service of the Government."

95. Any enrolment paper purporting to be signed by an enrolling officer shall, in proceedings under this Act, be evidence of the person enrolled having *Enrolment paper as evidence.* given the answers to questions which he is therein represented as having given. The enrolment of such person may be proved by the production of a copy of his enrolment paper purporting to be certified to be a true copy by the officer having the custody of the enrolment paper.

96. (1) A letter, return or other document respecting the service of any person in, or the *Presumption as to certain documents.* dismissal or discharge of any person from, any portion of His Majesty's Forces, or respecting the circumstance of any person not having served in, or belonged to, any portion of his Majesty's Forces, if purporting to be signed by or on behalf of the ^a[Central Government] or the Commander-in-Chief in India or by any prescribed officer, shall be evidence of the facts stated in such letter, return or other document.

(2) An Army List, ^b[Navy List,] Air Force List or Gazette purporting to be published by authority shall be evidence of the status and rank of the officers or warrant officers therein mentioned, and of any appointment held by such officers or warrant officers and of the corps, ^b[ship,] unit, battalion, arm, branch or department of the service to which such officers or warrant officers belong.

(3) Where a record is made in any service book in pursuance of this Act or of any rules made thereunder or otherwise in pursuance of air force duty, and purports to be signed by the commanding officer or by the officer whose duty it is to make such record, such record shall be evidence of the facts thereby stated.

(4) A copy of any record in any service book purporting to be certified to be a true copy by the officer having the custody of such book shall be evidence of such record.

(5) Where any person subject to this Act is being tried on a charge of desertion or of absence without leave, and such person has surrendered himself into the custody of, or has been apprehended by, a provost-marshal, assistant provost-marshal or other officer, or any portion of His Majesty's Forces, a certificate purporting to be signed by such provost-marshal, assistant provost-marshal or other officer, or by the commanding officer of that portion of His Majesty's Forces and stating the fact, date and place of such surrender or apprehension, shall be evidence of the matters so stated.

(6) When any person subject to this Act is being tried on a charge of desertion or of absence without leave, and such person has surrendered himself into the custody of, or has been apprehended by a police-officer not below the rank of an officer in charge of a police-station, a certificate purporting to be signed by such police-officer and stating the fact, date and place of such surrender or apprehension, shall be evidence of the matters stated.

(7) Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report may be used as evidence in any proceeding under this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Inserted* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule.

97. (1) If at any trial for desertion, absence without leave, overstaying leave or not rejoining *Reference by accused* when warned for service, the person tried states in his defence any sufficient to Government officer. or reasonable excuse for his unauthorised absence, and refers in support thereof to any officer in ^a[the service of the Crown], or if it appears that any such officer is likely to prove or disprove the said statement in the defence, the court shall address such officer and adjourn until his reply is received.

(2) The written reply of any officer so referred to shall, if signed by him, be received in evidence and have the same effect as if made on oath before the court.

(3) If the court is dissolved before the receipt of such reply, or if the Court omits to comply with the provisions of this section, the convening officer may, at his discretion, annul the proceedings and order a fresh trial by the same or another court-martial.

[a] *Substituted* by A. O. for "the civil, military or air force service of Government."

98. (1) When any person subject to this Act has been convicted by a court-martial of any *Evidence of previous convictions and service character.* offence such court-martial may inquire into, and receive and record evidence of, any previous convictions of such person, either by a court-martial established under this Act or any other enactment or by a criminal Court, and may further inquire into and record the service character of such person.

(2) Evidence received under this section may be either oral or in the shape of entries in, or certified extracts from, court-martial books or other official records; and it shall not be necessary to give notice before trial to the person tried that evidence as to his previous convictions or service character will be received.

99. When any property regarding which any offence appears to have been committed, or *Order for custody and disposal of property pending trial in certain cases.* which appears to have been used for the commission of any offence, is produced before a court-martial during a trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the trial, and if the property is subject to speedy or natural decay may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

CHAPTER VIII.

CONFIRMATION, REVISION, PARDON AND REMISSION OF SENTENCES.

Finding and sentence invalid without confirmation. **100.** No finding or sentence of a general or district court-martial shall be valid except so far as it may be confirmed as provided by this Act.

1. Section 98.—[1] "This section relates to evidence which may be adduced in a court-martial after the accused is convicted, relating to his previous convictions and general character. The section as originally drafted would appear to admit of evidence relating to a man's

private life and to that extent it was too wide. The section, therefore, is amended in order to admit only evidence relating to previous convictions and to a man's character as an officer or airman" — *Select Committee Report.*

Power to confirm finding and sentence of general court-martial.

[a] Substituted by A. O. for "Governor-General in Council."

Power to confirm finding and sentence of district court-martial.

any such authority.

Limitation of powers of confirming authorities.
may think fit.

Confirmation of finding and sentence of field general court-martial.

101. The findings and sentences of general courts-martial may be confirmed by the ^a[Central Government] or by any officer empowered in this behalf by warrant of the ^a[Central Government.]

102. The findings and sentences of district courts-martial may be confirmed by any authority having power to convene a general court-martial or by any officer empowered in this behalf by warrant of

103. A warrant issued under section 101 or section 102 may contain such restrictions, reservations or conditions as the authority issuing it

104. (1) Save as provided in sub-sections (2) and (3), a finding and sentence of a field general court-martial shall not require to be confirmed, and may be carried out forthwith.

(2) The finding and sentence of a field general court-martial shall require to be confirmed —

(a) in the case of the trial of an officer,

(b) in the case of a sentence of death or of imprisonment for a term exceeding two years, and

(c) in any other case if so ordered by the convening authority.

(3) Such finding and sentence may be confirmed by the convening authority or, if the convening authority so directs, by an authority, superior to the convening authority.

105. Subject to such restrictions as may be contained in any warrant issued under section 101 or section 102, a confirming authority may, if it confirms the sentence of a court-martial, mitigate or remit the punishment thereby awarded, or commute that punishment for any punishment or punishments lower in the scale laid down in section 19.

106. When any person subject to this Act is tried and sentenced by court-martial while on board ship, the finding and sentence so far as not confirmed and executed on board ship may be confirmed and executed in like manner as if such person had been tried at the port of disembarkation.

Revision of finding or sentence. **107.** (1) Any finding or sentence of a court-martial which requires confirmation may be once revised by order of the confirming authority; and on such revision, the court, if so directed by the confirming authority, may take additional evidence.

(2) The Court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.

(3) In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the Court shall proceed with the revision, provided that, if a general court-martial, it still consists of five officers, or, if a district court-martial, of three officers.

^a**108.** (1) Where a finding of guilty by a court-martial, which has been confirmed, or which does not require confirmation, is found for any reason to be invalid, or cannot be supported by the evidence, the authority which would have had power under section 110, to commute the punishment awarded by the sentence, if the finding had been valid, may substitute a new finding, if the new finding could have been validly made by the court-martial on the charge and if it appears that the court-martial must have been satisfied of the facts establishing the offence specified or involved in the new finding, and may pass a sentence for the said offence.

(2) Where a sentence passed by a court-martial, which has been confirmed, or which does not require confirmation, not being a sentence passed in pursuance of a new finding substituted under sub-section (1), is found for any reason to be invalid, the authority which would have had power under section 110 to commute the punishment awarded by the sentence if it had been valid may pass a valid sentence.

(3) The punishment awarded by a sentence passed under sub-section (1) or sub-section (2).

shall not be higher in the scale of punishments than or in excess of the punishment awarded by the sentence for which a new sentence is substituted under this section.]

[a] This section was substituted for the original section 108 by the Indian Army and Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 8. [13-8-1943.]

109. (1) Whenever, in the course of a trial by court-martial, it appears to the Court that *Provision where accused is a lunatic* the person charged is of unsound mind and consequently incapable of making his defence, or that such person committed the act alleged, but was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law, the Court shall record a finding accordingly, and the president of the Court shall forthwith report the case to the confirming authority, or, in the case of a field general court-martial, to the prescribed officer.

(2) A confirming authority to whom a case is reported under sub-section (1) may, if it does not confirm the finding, take steps to have the accused person tried by the same or another court-martial for the offence with which he was originally charged.

(3) A prescribed officer to whom a case is reported under sub-section (1) and a confirming authority confirming a finding in any case so reported to it shall order the accused person to be kept in custody in the prescribed manner, and, where the confirming authority is not itself the ^a[Central Government], shall report the case for the orders of the ^a[Central Government].

(4) On receipt of a report under sub-section (1) or sub-section (3), the ^a[Central Government] may order the accused person to be detained in a lunatic asylum or other suitable place of safe custody.

(5) Where an accused person, having been found by reason of unsoundness of mind to be incapable of making his defence, is in custody or under detention, the prescribed officer may —

(a) if such person is in custody under sub-section (3), on the report of a medical officer that he is capable of making his defence, or

(b) if such person is detained under sub-section (4), on a certificate such as is referred to in section 473 of the Code of Criminal Procedure, 1898,

take steps to have such person tried by the same or another court-martial for the offence with which he was originally charged or, provided that the offence is a civil offence, by a criminal court.

(6) A copy of every order made by the prescribed officer under sub-section (5) shall forthwith be sent to the ^a[Central Government].

[a] Substituted by A. O. for "Governor-General in Council."

110. (1) When any person subject to this Act has been convicted by a court-martial of any *Pardons and remissions.* offence, the ^a[Central Government] or the prescribed officer may —

(a) either without conditions or upon any conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded; or

(b) mitigate the punishment awarded, or commute such punishment for any less punishment or punishments mentioned in this Act.

(2) If any condition on which a person has been pardoned or a punishment has been remitted is, in the opinion of the authority which granted the pardon or remitted the punishment, not fulfilled, such authority may cancel the pardon or remission, and thereupon the sentence of the Court shall be carried into effect as if such pardon had not been granted or such punishment had not been remitted :

Provided that in the case of a person sentenced to imprisonment, such person shall undergo only the unexpired portion of his sentence.

(3) When under the provisions of section 23 a non-commissioned officer is deemed to be reduced to the ranks, such reduction shall, for the purposes of this section, be treated as a punishment awarded by sentence of a court-martial.

[a] Substituted by A. O. for "Governor-General in Council."

CHAPTER IX.

EXECUTION OF SENTENCES AND DISPOSAL OF PROPERTY.

111. In awarding a sentence of death a court-martial shall, in its discretion, direct that the *Sentence of death.* offender shall suffer death by being hanged by the neck until he be dead, or shall suffer death by being shot to death.

112. Whenever any person is sentenced under this Act to imprisonment, the term of his sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the president.

Commencement of sentence of imprisonment. ^a**[113.** Whenever any sentence of imprisonment is passed under this Act, or whenever any sentence so passed is commuted to imprisonment, the confirming officer, or, in the case of a sentence which does not require confirmation, the court or in either case such officer as may be prescribed may direct either that the sentence shall be carried out by confinement in a civil prison or by confinement in a military or air force prison, and the commanding officer of the person under sentence or such other officer as may be prescribed, shall forward a warrant in the prescribed form to the officer in charge of the prison in which the person under sentence is to be confined, and shall forward him to such prison with the warrant :

Provided that in the case of a sentence of imprisonment for a period not exceeding three months, in lieu of a direction that the sentence shall be carried out by confinement in a civil, military or air force prison, a direction may be made that the sentence shall be carried out by confinement in air force custody :

Provided further that on active service a sentence of imprisonment may be carried out by confinement in such place as the officer commanding the forces in the field may from time to time appoint.]

[a] *Substituted by the Indian Army and Air Force (Military Prisons and Detention Barracks) Act, 1943, (14 [XIV] of 1943), S. 5. [7-4-43].*

114. Whenever, in the opinion of the Air Officer Commanding His Majesty's Air Forces in India, any sentence or portion of a sentence of imprisonment cannot, for special reasons, conveniently be carried out in accordance with the provisions of section 113, such officer may direct that such sentence or portion of sentence shall be carried out by confinement in any civil prison or other fit place.

115. When any sentence of detention is passed under this Act, or when any sentence so passed is commuted to detention, the punishment shall be carried out by detaining the offender in any military or air force detention barracks, detention cells or other military or air force custody.

^a**[116.** Whenever an order is duly made under this Act setting aside or varying any sentence, order or warrant under which any person is confined in a civil, military or air force prison, a warrant in accordance with such order shall be forwarded by the prescribed officer to the officer in charge of the prison in which such person is confined.]

[a] *Substituted for the original section by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 9. [13-8-43].*

117. Where a sentence of transportation is imposed by court-martial under section 58, the offender, until he is transported, shall be dealt with in the same manner as if he had been sentenced to rigorous imprisonment, and shall be deemed to have been undergoing his sentence of transportation during the term of his imprisonment.

118. When a sentence of fine is imposed by a court-martial under section 58 whether the trial was held within British India or not, a copy of such sentence, signed and certified by the president of the Court or the officer holding the trial, as the case may be, may be sent to any Magistrate in British India, and such Magistrate shall thereupon cause the fine to be recovered in accordance with the provisions of the Code of Criminal Procedure, 1898, for the levy of fines as if it was a sentence of fine imposed by such Magistrate.

119. (1) After the conclusion of a trial before any court-martial, the Court or the authority confirming its finding or sentence or any authority superior to such authority, or in the case of a finding or sentence which does not require confirmation, the officer commanding the unit within which the trial was held, may make such order as it or he thinks fit for the disposal by destruction, confiscation, delivery to any person claiming to be entitled to possession thereof, or otherwise, of any property or document produced before the Court or in its custody, or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

(2) Where any order has been made under sub-section (1) in respect of property regarding which an offence appears to have been committed, a copy of such order signed and certified by the

authority making the same may, whether the trial was held within British India or not, be sent to a Magistrate in any presidency-town or district in which such property for the time being is, and such Magistrate shall thereupon cause the order to be carried into effect as if it was an order passed by such Magistrate under the provisions of the Code of Criminal Procedure, 1898.

Explanation.—In this section the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange whether immediately or otherwise.

Establishment and regulation of air force prisons and detention barracks. ^a[119A. (1) The Central Government may set apart any building or part of a building or any place under its control as an air force prison or detention barracks for the confinement of persons sentenced to imprisonment or detention under this Act.

(2) The Central Government may by rules provide —

(a) for the government, management and regulation of such air force prisons and detention barracks,

(b) for the appointment and removal and powers of inspectors, visitors, governors and officers thereof,

(c) for the labour of prisoners and persons undergoing detention therein and for enabling such prisoners or persons to earn by special industry and good conduct a remission of a portion of their sentence, and

(d) for the safe custody of such prisoners or persons and the maintenance of discipline among them and the punishment by personal correction, restraint or otherwise, of offences committed by them :

Provided that such rules shall not authorise corporal punishment to be inflicted for any offence nor render the imprisonment or detention more severe than it is under the law for the time being in force relating to civil prisons in British India.

(3) Rules made under this section may provide for the application to air force prisons or detention barracks of any of the provisions of the Prisons Act, 1894 relating to the duties of officers of prisons and the punishment of persons not prisoners.]

[a] *Inserted by the Indian Army and Air Force (Military Prisons and Detention Barracks) Act, 1943 (14 [XIV] of 1943), S. 6. [7-4-1943.]*

CHAPTER X.

SPECIAL RULES RELATING TO PERSONS AND PROPERTY.

Complaints against superior officers and airmen. **120.** (1) If an officer of the Indian Air Force thinks himself wronged by his commanding officer, or other superior officer, and on due application made to his commanding officer does not receive the redress to which he may consider himself entitled, he may complain to the ^a[Central Government] in order to obtain justice.

(2) If any airman thinks himself wronged in any matter by any officer other than the officer under whose command or orders he is serving, or by any airman, he may complain thereof to the officer under whose command or orders he is serving, and if he thinks himself wronged by the officer under whose command or orders he is serving, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to his commanding officer, and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to the prescribed officer; and every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of.

[a] *Substituted by A. O. for “Governor-General in Council.”*

Privileges of persons attending courts martial. **121.** (1) No president or member of a court-martial, no judge advocate, no party to any proceeding before a court-martial, or his legal practitioner or agent, and no witness acting in obedience to a summons to attend a court-martial,

shall, while proceeding to, attending on or returning from a court-martial, be liable to arrest under civil or revenue process.

(2) If any such person is arrested under any such process, he may be discharged by order of the court-martial.

Exemption from arrest for debt. **122.** (1) No officer or person enrolled in the Indian Air Force shall be liable to be arrested for debt under any process issued by, or by the authority of, any civil or revenue court or revenue officer.

(2) The Judge of any such Court may examine into any complaint made by such person or his superior officer of the arrest of such person contrary to the provisions of this section, and may, by warrant under his hand, discharge the person, and award reasonable costs to the complainant, who may recover those costs in like manner as he might have recovered costs awarded to him by a decree against the person obtaining the process.

(3) For the recovery of such costs no fee shall be payable to the Court by the complainant.

Property exempted from attachment. **123.** Neither the arms, clothes, equipment accoutrements or necessities of any person subject to this Act, nor any animal used by him for the discharge of his duty, shall be seized, nor shall the pay and allowances of any such person or any part thereof be attached, by direction of any civil or revenue court or any revenue-officer, in satisfaction of any decree or order enforceable against him.

Application to reservists. **124.** Every person belonging to the Indian Air Force Reserve shall, when called out for or engaged upon or returning from training or service, be entitled to all the privileges accorded by sections 122 and 123 to a person subject to this Act.

Priority of hearing by courts of cases in which persons subject to this Act are concerned. **125.** (1) On the presentation to any court by or on behalf of any person subject to this Act of a certificate, from the proper air force authority, of leave of absence having been granted to or applied for by him for the purpose of prosecuting or defending any suit or other proceeding in such court, the court shall, on the application of such person, arrange, so far as may be possible, for the hearing and final disposal of such suit or other proceeding within the period of the leave so granted or applied for.

(2) The certificate from the proper air force authority shall state the first and last day of the leave or intended leave, and set forth a description of the case with respect to which the leave was granted or applied for.

(3) No fee shall be payable to the Court in respect of the presentation of any such certificate, or in respect of any application by or on behalf of any such person for priority for the hearing of his case.

(4) Where the Court is unable to arrange for the hearing and final disposal of the suit or other proceeding within the period of such leave or intended leave as aforesaid, it shall record its reasons for having been unable to do so, and shall cause a copy thereof to be furnished to such person on his application without any payment whatever by him in respect either of the application for such copy or of the copy itself.

(5) If in any case a question arises as to the proper air force authority qualified to grant such certificate as aforesaid, such question shall be at once referred by the Court to an officer commanding a unit, whose decision shall be final.

Property of deceased persons and deserters. **126.** The following rules are enacted respecting the disposal of the property of every person subject to this Act who dies or deserts —

(1) The commanding officer of the unit to which the deceased person or deserter belonged shall secure all the moveable property belonging to the deceased or deserter that is in camp or quarters, and cause an inventory thereof to be made, and draw any pay and allowances due to such person.

(2) In the case of a deceased person who has left in a Government savings bank (including any post office savings bank, however named) a deposit not exceeding one thousand rupees, the commanding officer may, if he thinks fit, require the secretary or other proper official of the bank to pay the deposit to him forthwith, notwithstanding anything in any departmental rules, and after the payment thereof in accordance with such requisition, no person shall have any right in respect of the deposit except as hereinafter provided.

(3) In the case of a deceased person whose representative is on the spot and has given security for the payment of the service or other debts in camp or quarters (if any) of the deceased,

the commanding officer shall deliver over any property received under clauses (1) and (2) to that representative.

(4) In the case of a deceased person whose estate is not dealt with under clause (3), and in the case of any deserter, the commanding officer shall cause the moveable property to be sold by public auction, and shall pay the service and other debts in camp or quarters (if any), and, in the case of a deceased person, the expenses of his funeral ceremonies, from the proceeds of the sale and from any pay and allowances drawn under clause (1) and from the amount of the deposit (if any) received under clause (2).

(5) The surplus, if any, shall, in the case of a deceased person, be paid to his representative (if any), or, in the event of no claim to such surplus being established within twelve months after the death, be remitted to the prescribed person.

(6) In the case of a deserter, the surplus (if any) shall be forthwith remitted to the prescribed person and shall, on the expiry of three years from the date of his desertion be forfeited to His Majesty, unless the deserter shall in the mean time have surrendered or been apprehended.

^a[(7) In the case of a person dying or deserting while on active service, the references in the foregoing rules to the commanding officer shall be construed as references to the Standing Committee of Adjustment, if any, appointed in this behalf in the manner prescribed; and the power conferred by rule 2 to require payment of a deposit left in a Government savings bank shall be read as a power to require the payment from any deposit left in any bank, notwithstanding anything in the rules of the bank, of a sum, not exceeding one thousand five hundred rupees, equal to the nearest multiple of one hundred rupees above the amount estimated by the Standing Committee of Adjustment as necessary to meet the service and other debts in camp or quarters of the deceased.

(8) The decision of the commanding officer or the Standing Committee of Adjustment, as the case may be, as to what are the service and other debts in camp or quarters of a deceased person and as to the amount payable therefor shall, without prejudice to any jurisdiction otherwise exercisable by a court of law, be final.]

Explanation ^b[1].—A person shall be deemed to be a deserter within the meaning of this *Meaning of deserter.* section who has without authority been absent from duty for a period of twenty-one days and has not subsequently surrendered or been apprehended.

^b[*Explanation 2.* — The expression 'service and other debts in camp or quarters' includes for the purposes of this section money due as—

air force debts, namely, sums due in respect of, or of any advance in respect of —

(a) quarters,

(b) mess, band, and other service accounts,

(c) air force clothing, appointments and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death.]

[a] Rules 7 and 8 were added after Rule 6 by the Indian Air Force (Amendment) Act, 1945 (8 [VIII] of 1945), S. 2 [16-4-1945]. [b] The original explanation was numbered as 1 and explanation 2 was added *ibid*.

127. Property deliverable and money payable to the representative of a deceased person

Disposal of certain property without production of probate, etc. under section 126 may, if the total value or amount thereof does not exceed one thousand rupees, and if the prescribed person thinks fit, be delivered or paid to any person appearing to him to be entitled to

receive it or to administer the estate of the deceased, without requiring the production of any probate, letters of administration, certificate or other such conclusive evidence of title; and such delivery or payment shall be a full discharge to those ordering or making the same and to the ^a[Crown] from all further liability in respect of the property or money; but nothing in this section shall affect the rights of any executor or administrator or other representative, or of any creditor of a deceased person against any person to whom such delivery or payment has been made.

[a] Substituted by A. O. for "Secretary of State for India in Council."

128. The provisions of ^a[sections 126 and 127] shall, so far as they can be made *Application to lunatics and persons missing on active service.* applicable, apply in the case of a person subject to this Act becoming insane or who, being on active service, is officially reported missing:

Provided that, in the case of a person so reported missing, no action shall be taken under sub-sections (2) to (5), inclusive, ^b[of section 126] until one year has elapsed from the date of such report.

[a] The word and figures "Sections 126 and 127" were substituted for the words and figures "Section 126" by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943) S. 10. [13-8-1943.]

[b] Substituted for the words "of the said section", *ibid*.

CHAPTER XI.

SUPPLEMENTAL.

129. (1) The ^a[Central Government] may make rules^b for the purpose of carrying into effect the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for —

- (a) the discharge from the service of persons subject to this Act;
- (b) the specification of the punishments which may be awarded as field punishments under sections 21 and 25;
- (c) the assembly and procedure of courts of inquiry, and the administration of oaths or affirmations by such courts;
- (d) the convening and constituting of courts-martial;
- (e) the adjournment, dissolution and sittings of courts-martial;
- (f) the procedure to be observed in trials by courts-martial;
- (g) the confirmation and revision of the findings and sentences of courts-martial;
- (h) the carrying into effect sentences of courts-martial;
- (i) the forms of orders to be made under the provisions of this Act relating to courts martial and imprisonment;
- (j) the constitution of authorities to decide for what persons, to what amounts and in what manner, provision should be made for dependants under section 29, and the due carrying out of such decisions; and
- (k) any matter in this Act directed to be prescribed.

(3) All rules made under this Act shall be published in the ^c[Official Gazette], and on such publication, shall have effect as if enacted in this Act.

[a] Substituted by A. O. for "Governor-General in Council" [b] See the Indian Air Force Act Rules, published in the Gazette of India, 1933 Pt. I, pp. 374 to 434 as subsequently amended. [c] Substituted by A. O. for "Gazette of India".

130. [Amendments of certain enactments.] *Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Schedule.*

SCHEDULE — [Amendments.] *Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Schedule.*

THE INDIAN AIR FORCE VOLUNTEER RESERVE (DISCIPLINE) ACT, 1939.

STATEMENT OF OBJECTS AND REASONS.

"In order to provide additional personnel required to man Auxiliary Air Force units it is necessary to create an Indian Air Force Volunteer Reserve.

2. This force will on formation be subject to the Indian Air Force Act, 1932, in the same manner as persons belonging to his Majesty's Indian Air Force.

3. Legislation is therefore required for the following purposes :—

(a) To provide that members of the Indian Air Force Volunteer Reserve shall be subject to the Indian Air

Force Act, 1932, when under training or called into actual service.

(b) To impose on members of the Indian Air Force Volunteer Reserve penalties for failing to join a unit or attend at any place, when required so to join or attend for the purpose of undergoing training or of entering into actual service.

4. The Indian Air Force Volunteer Reserve (Discipline) Ordinance, 1939 (VII of 1939) will be repealed simultaneously with the passing of this Act."

— Gazette of India, 1939, Pt. V, p. 221.

ACT NO. XXXVI of 1939.^a

[29th September 1939.]

An Act to provide for the discipline of members of the Indian Air Force Volunteer Reserve raised in British India on behalf of His Majesty.

WHEREAS it is expedient to provide for the discipline of members of the Indian Air Force Volunteer Reserve raised in British India on behalf of His Majesty ;

It is hereby enacted as follows :—

[a] This Act has been applied to —British Baluchistan, *see* Gazette of India, 1940, Pt. I, p. 790; the Darjeeling district and the partially excluded areas of the Mymensingh district, by Bengal Government Notification No. 372, P., dated 19th January, 1940 ; the Chittagong Hill Tracts with effect from 6th January, 1940, by Bengal Government Notification No. 820-E. A., dated 23rd January, 1940.

Short title, extent and commencement.

1. (1) This Act may be called the Indian Air Force Volunteer Reserve (Discipline) Act, 1939.

(2) It extends to the whole of British India and applies to members of the Indian Air Force Volunteer Reserve wherever they may be.

(3) It shall come into force on such date^a as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

[a] The 6th January 1940, *see* Notification No. 15, dated 6th January, 1940, Gazette of India, 1940, Pt. I, p. 14.

Power to make rules for regulation of the Indian Air Force Volunteer Reserve.

2. The Central Government may make rules for the government, discipline and regulation of the Indian Air Force Volunteer Reserve.

3. Every member of the Indian Air Force Volunteer Reserve, while undergoing training in any unit, or otherwise, in pursuance of rules made under section 2, or when called into actual service in the Indian Air Force, in pursuance of the said rules, shall be subject to the Indian Air Force Act, 1932, in the same manner as a person belonging to His Majesty's Indian Air Force, and shall continue to be so subject until duly released from such training or service, as the case may be.

4. (1) If any member of the Indian Air Force Volunteer Reserve, when required, in pursuance of rules made under section 2, to join a unit or attend at any place for the purpose of undergoing training, fails without reasonable excuse to join or attend in accordance with such requirement, he shall be punishable with fine which may extend to two hundred rupees.

(2) If any member of the Indian Air Force Volunteer Reserve, when called into actual service in the Indian Air Force, and required by such call to join any unit or attend at any place, fails without reasonable excuse to comply with such requirement at or within such time as the Central Government may, by order, direct he shall be liable to be apprehended and punished, in the same manner as a person in or belonging to the Indian Air Force deserting or improperly absenting himself from duty, except that the punishment shall not exceed imprisonment which may extend to two years.

5. When any member of the Indian Air Force Volunteer Reserve is required, in pursuance of the rules made under section 2, to join any unit or attend at any place for the purpose of undergoing training or is called into actual service in the Indian Air Force, a certificate purporting to be signed by an officer appointed in this behalf under the said rules and stating that the said member failed to join or attend in accordance with such requirement or call shall, without proof of the signature or appointment of such officer, be evidence of the matter stated therein.

6. No court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try an offence punishable under sub-section (1) of section 4.

7. The Indian Air Force Volunteer Reserve (Discipline) Ordinance, 1939,^a is hereby repealed; and any rules made, anything done and any action taken under the said Ordinance shall be deemed to have been made, done or taken under this Act as if this Act had commenced on the 16th day of September, 1939.

[a] Ordinance 7 [VII] of 1939.

THE ANAND MARRIAGE ACT, 1909.

STATEMENT OF OBJECTS AND REASONS.

"The object of the Bill is to set at rest doubts which may be raised of the validity of the marriage rite of the Sikhs called "Anand."

This form of marriage has long been practised among the Sikhs but there are good reasons to believe that, in the absence of validating enactment, doubts may be thrown upon it and Sikhs may have to face great difficulties in future and incur heavy expenses on suits instituted in the Civil Courts. It is also apprehended that

in the absence of such law some Judicial Officers may be uncertain as to the validity of this orthodox Sikh custom.

It is desirable, therefore, that all doubts should be set at rest for the future by passing this enactment which merely validates and accepting the rite by following any new principles." — Gazette of India, 1908, Part V, page 357.

ACT NO. VII of 1909.^a

[22nd October 1909.]

An Act to remove doubts as to the validity of the marriage ceremony common among the Sikhs called Anand.

WHEREAS it is expedient to remove any doubts as to the validity of the marriage ceremony common among the Sikhs called Anand; It is hereby enacted as follows:—

[a.] For Report of Select Committee, *see* Gazette of India, 1908, Pt. V; 1909, Pt. V, p. 1034; and for Proceedings in Council, *see* *ibid*, 1908, Pt. VI, p. 156, and *ibid*, 1909, Pt. VI, pp. 156, 161 and 165.

Short title and extent. 1. (1) This Act may be called the Anand Marriage Act, 1909; and

(2) It extends to the whole of British India.

Validity of Anand marriages. 2. All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall be, and shall be deemed to have been with effect from the date of the solemnization of each respectively, good and valid in law.

Exemption of certain marriages from Act.

3. Nothing in this Act shall apply to —

(a) any marriage between persons not professing the Sikh religion, or

(b) any marriage which has been judicially declared to be null and void.

Saving of marriages solemnized according to other ceremonies.

4. Nothing in this Act shall affect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs.

Non-validation of marriages within prohibited degrees.

5. Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal.

THE ANCIENT MONUMENTS PRESERVATION ACT, 1904.

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1. Section 2.—"Clause 2 has been recast by us so as to make it cover Anand marriages already solemnized as well as those which may be solemnized hereafter, in order to prevent any doubts being raised as to the

validity of such marriages in the past. We have also omitted the reference to the re-marriages which seemed to us unnecessary, as the word "marriage" includes remarriage also." — *Select Committee Report.*

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STATEMENT OF OBJECTS AND REASONS.

"The object of this measure is to preserve to India its ancient monuments in antiquities and to prevent the excavation by unauthorised persons of sites of historic interest and value.

2. In 1898 the question of antiquarian exploration and research attracted attention, and the necessity of taking steps for the protection of monuments and relics of antiquity was impressed upon the Government of India. It was then apparent that legislation was required to enable the Government to discharge their responsibilities in the matter and a Bill was drafted on the lines of the existing Acts of Parliament modified so as to embody certain provisions which have found a place in recent legislation regarding the antiquities of Greece and Italy. This draft was circulated for the opinions of local Governments and their replies submitted showed that the proposals incorporated in it met with almost unanimous approval, the criticism received being directed, for the most part, against matters of detail. The draft has since been revised, the provisions of the Draft Bill prepared by the Government of Bengal have been embodied so far as they were found suitable and the present Bill is the result.

3. The first portion of the Bill deals with protection of "Ancient monuments" an expression which has been defined in clause 2 [now section 2]. The measure will apply only to such of these as are from time to time expressly brought within its contents through being declared to be "protected monuments." A greater number of more famous buildings in India are already in possession or under the control of the Government; but there are others worthy of preservation which are in the hands of private owners. Some of these have already been insured or are fast falling into decay. The preservation of these is the chief object of the clause of the Bill now referred to and the provisions of the Bill are in general accordance with the policy enunciated in Section 23 of the Religious Endowments Act, 1863 (20 [XX] of 1863), which recognises and saves the right of the Government "to prevent injury to and preserve buildings remarkable in their antiquity and for their historical or architectural value or required for the convenience of the public." The power to intervene is at present limited to cases to which Section 3 of the Bengal Regulation XIX of 1810 or Section 3 of the Madras Regulation VII of 1817 applies. In framing the present Bill the Government has aimed at having the necessity

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of good-will and securing the co-operation of the owners concerned and it hopes that the action which it is proposed to take may tend rather to the encouragement than to the suppression of private effort. The Bill provides that the owner or the manager of the building which merits greater care than it has been receiving may be invited to enter into an agreement for its protection and that in the event of his refusing to come to terms the collector may proceed to acquire it compulsorily or take proper course to secure its application. It has been made clear that there is to be no resort to compulsory acquisition in the case the monument is used in connection with religious observations, or in other case until the owner has had an opportunity of entering into an agreement of the kind indicated above; and it is expressly provided that the monument maintained by the Government under the proposed Act, shall not be used for any purpose inconsistent with its character or with purpose of its foundation, and that, so far as is compatible with the object in view the public shall have access to it free of charge. By the 4th proviso of clause 11 [now section 10] it is laid down that in assessing the value of the monument for the purpose of compulsory acquisition under the Land Acquisition Act, 1894 (1 [I] of 1894) its archaeological, artistic or historical merits shall not be taken into account. The object of the Government as purchaser being to preserve at the public expense and for the public benefit an ancient monument with all its associations, it is considered that the value of those associations should not be paid for.

[Note: — As the 4th proviso of clause 11 was the subject of unfavourable comment, it was omitted by the Select Committee.]

4. The second portion of the Bill deals with moveable objects of historical or artistic interest and these may be divided into two classes; the first consists of ornaments, enamels, silver and copper vessels, Persian and Arabian Manuscripts, and curios general. These are for the most part portable and consequently difficult to trace; they are as a rule artistic; are of historic interest and it would be impracticable even were it desirable to prevent a dealer from selling and a traveller from buying them. The sculptural carvings, images, bas-reliefs, inscriptions and the like form a distinct class by themselves, in that their value depends upon their local connection. Such antiquities may, as in the case of those of Swat, be found outside India or in Native States and this the

Legislature cannot reach directly; while as regards the British territory and under the existing law, it is impossible to go beyond the provisions of the Indian Treasure Trove Act, 1878 (6 [VI] of 1878). In these circumstances, it is proposed, by clause 18 of the Bill to take power to prevent the removal from British India of any antiquities which it may be deemed desirable to retain in the country, and at the same time to prevent importation. By thus putting a stop or draft in such articles it is believed that it will be possible to protect against spoilation a number of interesting places situated without and beyond British territory. Clause 19 aims at providing for antiquities such as sculptures and inscriptions which belong to another place and ought therefore to be kept *in situ* or deposited in local museums. The removal of these, it is proposed to enable the local Government to prohibit by notification and the clause also provides that, if the object is moveable, the owner may require the Government to purchase it out-right and that, if it is

immovable the Government shall compensate the owner for any loss caused to him by the prohibition. Clause 20 [now S. 19] deals with the compulsory purchase of such antiquities if that is found to be necessary for their preservation and the owner is not willing on personal or religious grounds to part with them. In such cases it is proposed that the price to be paid should be assessed by the Collector, subject to a right of appeal to the local Government; but it is for consideration whether the Land Acquisition Act of 1894 should be followed and reference to the Courts allowed.

5. The third portion of the Bill deals with excavations and gives power to make rules to prohibit or regulate such operations.

6. The general power to make rules is given by clause 22 [now S. 23], and clause 23 [now S. 24] is intended to protect acts done or in good faith intended to be done, under the law which it is now proposed to enact." — Gazette of India, 1903, Part V, page 513.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act XVIII of 1932.

—Adapted by A. O.

ACT NO. VII of 1904^a

[18th March, 1904.]

An Act to provide for the preservation of Ancient Monuments and objects of archaeological, historical, or artistic interest.

WHEREAS it is expedient to provide for the preservation of ancient monuments, for the exercise of control over traffic in antiquities and over excavation in certain places, and for the protection and acquisition in certain cases of ancient monuments and of objects of archaeological, historical or artistic interest. It is hereby enacted as follows:—

[a] For Report of the Select Committee, see Gazette of India, 1904, Pt. V, p. 57; and for Proceedings in Council, see *ibid.*, 1903, Pt. VI, pp. 166, 191; *ibid.*, 1904, Pt. VI, pp. 20 and 76. This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936, (IV of 1936), S. 3 and Schedule; and in the Angul District by the Angul Laws Regulation, 1936 (V of 1936), S. 3 and Schedule.

Short title and extent.

1. (1) This Act may be called the Ancient Monuments Preservation Act, 1904.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Sonthal Parganas and the Pargana of Spiti.

Definitions.
context, —

2. In this Act, unless there is anything repugnant in the subject or

(1) "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest, or any remains thereof, and includes —

(a) the site of an ancient monument;

(b) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and

(c) the means of access to and convenient inspection of an ancient monument;

(2) "antiquities" include any moveable objects which ^a[the Central Government], by reason of their historical or archaeological associations, may think it necessary to protect against injury, removal or dispersion:

(3) "Commissioner" includes any officer authorized by ^b[the Central Government] to perform the duties of a Commissioner under this Act:

(4) "maintain" and "maintenance" include the fencing, covering in, repairing, restoring and cleansing of a protected monument, and the doing of any act which may be necessary for the purpose of maintaining a protected monument or of securing convenient access thereto:

(5) "land" includes a revenue-free estate, a revenue-paying estate, and a permanent transferable tenure, whether such estate or tenure be subject to incumbrances or not: and

(6) "owner" includes a joint owner invested with powers of management on behalf of himself and other joint owners, and any manager or trustee exercising powers of management over

an ancient monument, and the successor in title of any such owner and the successor in office of any such manager or trustee :

Provided that nothing in this Act shall be deemed to extend the powers which may lawfully be exercised by such manager or trustee.

[a] *Substituted* by A. O. for "the Government." [b] *Substituted* by A. O. for "the Local Government."

3. (1) The ^a[Central Government] may by notification^b in the ^c[Official Gazette], declare *Protected monuments.* an ancient monument to be a protected monument within the meaning of this Act.

(2) A copy of every notification published under sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by the ^a[Central Government] within one month from the date when it is so fixed up will be taken into consideration.

(3) On the expiry of the said period of one month, the ^a[Central Government], after considering the objections, if any, shall confirm or withdraw the notification.

(4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act.

[a] *Substituted* by A. O. for "Local Government." [b] For notifications under this section, *see* General Rules and Orders and different Local Rules and Orders. [c] *Substituted* by A. O. for "Local Official Gazette."

Ancient Monuments.

Acquisition of rights in or guardianship of an ancient monument. 4. (1) The Collector, with the sanction of the ^a[Central Government], may purchase or take a lease of any protected monument.

(2) The Collector, with the like sanction, may accept a gift or bequest of any protected monument.

(3) The owner of any protected monument may, by written instrument, constitute the Commissioner the guardian of the monument, and the Commissioner may, with the sanction of the ^a[Central Government], accept such guardianship.

(4) When the Commissioner has accepted the guardianship of a monument under sub-section (3), the owner shall, except as expressly provided in this Act, have the same estate, right, title and interest in and to the monument as if the Commissioner had not been constituted guardian thereof.

(5) When the Commissioner has accepted the guardianship of a monument under sub-section (3), the provisions of this Act relating to agreements executed under section 5 shall apply to the written instrument executed under the said sub-section.

(6) Where a protected monument is without an owner, the Commissioner may assume the guardianship of the monument.

[a] *Substituted* by A. O. for "Local Government."

Preservation of ancient monument by agreement. 5. (1) The Collector may, with the previous sanction of ^a[the Central Government], propose to the owner to enter into an agreement with ^b[the Central Government] for the preservation of any protected monument in his district.

(2) An agreement under this section may provide for the following matters, or for such of them as it may be found expedient to include in the agreement —

(a) the maintenance of the monument;

(b) the custody of the monument, and the duties of any person who may be employed to watch it;

(c) the restriction of the owner's right to destroy, remove, alter or deface the monument or to build on or near the site of the monument;

(d) the facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner or the Collector to inspect or maintain the monument;

(e) the notice to be given to ^c[the Central Government] in case the land on which the monument is situated is offered for sale by the owner, and the right to be reserved to ^c[the Central Government] to purchase such land, or any specified portion of such land, at its market-value;

(f) the payment of any expenses incurred by the owner or by ^c[the Central Government] in connection with the preservation of the monument;

(g) the proprietary or other rights which are to vest in His Majesty in respect of the monument when any expenses are incurred by °[the Central Government] in connection with the preservation of the monument;

(h) the appointment of an authority to decide any dispute arising out of the agreement; and

(i) any matter connected with the preservation of the monument which is a proper subject of agreement between the owner and °[the Central Government].

a[* * * * *]

(4) The terms of an agreement under this section may be altered from time to time with the sanction of °[the Central Government] and with the consent of the owner.

(5) With the previous sanction of °[the Central Government], the Collector may terminate an agreement under this section on giving six months' notice in writing to the owner.

(6) The owner may terminate an agreement under this section on giving six months' notice to the Collector.

(7) An agreement under this section shall be binding on any person claiming to be owner of the monument to which it relates, through or under a party by whom or on whose behalf the agreement was executed.

(8) Any rights acquired by °[the Central Government] in respect of expenses incurred in protecting or preserving a monument shall not be affected by the termination of an agreement under this section.

[a]. Substituted by A. O. for "the Local Government." [b]. Substituted by A. O. for "the Secretary of State for India in Council." [c]. Substituted by A. O. for "the Government." [d]. Sub-section (3) was repealed by A. O.

6. (1) If the owner is unable, by reason of infancy or other disability, to act for himself, *Owners under disability or not in possession.* the person legally competent to act on his behalf may exercise the powers conferred upon an owner by section 5.

(2) In the case of village-property, the headman or other village-officer exercising powers of management over such property may exercise the powers conferred upon an owner by section 5.

(3) Nothing in this section shall be deemed to empower any person not being of the same religion as the persons on whose behalf he is acting to make or execute an agreement relating to a protected monument which or any part of which is periodically used for the religious worship or observances of that religion.

7. (1) If the Collector apprehends that the owner or occupier of a monument intends *Enforcement of agreement.* to destroy, remove, alter, deface, or imperil the monument or to build on or near the site thereof in contravention of the terms of an agreement for its preservation under section 5, the Collector may make an order prohibiting any such contravention of the agreement.

(2) If an owner or other person who is bound by an agreement for the preservation or maintenance of a monument under section 5 refuses to do any act which is in the opinion of the Collector necessary to such preservation or maintenance, or neglects to do any such act within such reasonable time as may be fixed by the Collector, the Collector may authorize any person to do any such act, and the expense of doing any such act or such portion of the expense as the owner may be liable to pay under the agreement may be recovered from the owner as if it were an arrear of land-revenue.

(3) A person aggrieved by an order made under this section may appeal to the Commissioner, who may cancel or modify it and whose decision shall be final.

8. Every person who purchases, at a sale for arrears of land-revenue or any other public demand, or at a sale made under the Bengal Patni Taluks Regulation, 1819, an estate or tenure in which is situated a monument in respect of which any instrument has been executed by the owner for the time being, under section 4 or section 5, and every person claiming any title to a monument from, through or under an owner who executed any such instrument, shall be bound by such instrument. *Purchasers at certain sales and persons claiming through owner bound by instrument executed by owner.*

9. (1) If any owner or other person competent to enter into an agreement under section 5 *Application of endowment to repair of an ancient monument.* for the preservation of a protected monument, refuses or fails to enter into such an agreement when proposed to him by the Collector, and if any endowment has been created for the purpose of keeping such monument in repair, or for that purpose among others, the Collector may institute a suit in the

Court of the District Judge, or if the estimated cost of repairing the monument does not exceed one thousand rupees, may make an application to the District Judge for the proper application of such endowment or part thereof.

(2) On the hearing of an application under sub-section (1), the District Judge may summon and examine the owner and any person whose evidence appears to him necessary, and may pass an order for the proper application of the endowment or of any part thereof, and any such order may be executed as if it were the decree of a Civil Court.

10. (1) If the ^a[Central Government] apprehends that a protected monument is in danger of being destroyed, injured or allowed to fall into decay, ^b[the Central Government] may direct the Provincial Government to acquire it] *Compulsory purchase of ancient monument.* under the provisions of the Land Acquisition Act, 1894, as if the preservation of a protected monument were a "public purpose" within the meaning of that Act.

(2) The powers of compulsory purchase conferred by sub-section (1) shall not be exercised in the case of —

(a) any monument which or any part of which is periodically used for religious observances; or

(b) any monument which is the subject of a subsisting agreement executed under section 5.

(3) In any case other than the cases referred to in sub-section (2) the said powers of compulsory purchase shall not be exercised unless the owner or other person competent to enter into an agreement under section 5 has failed, within such reasonable period as the Collector may fix in this behalf, to enter into an agreement proposed to him under the said section or has terminated or given notice of his intention to terminate such an agreement.

[a] Substituted by A. O. for "Local Government." [b] Substituted by A. O. for "the Local Government may proceed to acquire it."

^a[10A. (1) If the ^b[Central Government] is of opinion that mining, quarrying, excavating, blasting and other operations of a like nature should be restricted or regulated for the purpose of protecting or preserving any ancient monument, the ^b[Central Government] may, by notification in the ^c[Official Gazette], make rules —

(a) fixing the boundaries of the area to which the rules are to apply;

(b) forbidding the carrying on of mining, quarrying, excavating, blasting or any operation of a like nature except in accordance with the rules and with the terms of a licence; and

(c) prescribing the authority by which, and the terms on which, licences may be granted to carry on any of the said operations.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

(3) A rule made under this section may provide that any person committing a breach thereof shall be punishable with fine which may extend to two hundred rupees.

1. Section 10 — *Award by Court — Appeal on*—[1] Government actually acquiring immovable property under S. 10—The owners of the property have the full rights which they would have under the Land Acquisition Act, including the right to appeal to the High Court from an award of Court provided by S. 54 of the Land Acquisition Act. — (Vol 5) 1918 Bom. 245 (246).

Compensation. — [2] For factors that cannot be taken into consideration while fixing the compensation, see (Vol 5) 1918 Bom. 245 (246).

1. Section 10A. — "The Ancient Monuments Preservation Act, 1904, does not contain any provisions empowering the Government (i) to control excavation by or enlist the aid of archaeologists, whether Indian or foreign, outside the Department or Universities and learned societies in excavation work, or (ii) to regulate the disposal of antiquities found by such outside agencies . . . Experience of countries such as Egypt and Mesopotamia shows that the help of expert outside agencies as well as of learned bodies in India would materially assist in the expansion or archaeological exploration in India. . . . But if the aid of outside agencies is to be enlisted it is necessary that the operations of these agencies should be suitably controlled, both as regards the conduct of exploration and excavation and the disposal of the antiquities that may be discovered as a result of them." — See Gazette of India, 1931, Part V, p. 111. In order to achieve this object S. 10A was inserted and Ss. 20 to 20C were substituted by Act 18 [XVIII] of 1932.

(4) If any owner or occupier of land included in a notification under sub-section (1) proves to the satisfaction of the ^b[Central Government] that he has sustained loss by reason of such land being so included, the ^b[Central Government] shall pay compensation in respect of such loss.]

[a] Section 10A was inserted by the Ancient Monuments Preservation (Amendment) Act, 1932 (18 [XVIII] of 1932), S. 2. [b] Substituted by A. O. for "Local Government." [c] Substituted by A. O. for "Local Official Gazette."

11. (1) The Commissioner shall maintain every monument in respect of which the *Maintenance of certain Government has acquired any of the rights mentioned in section 4 protected monuments.* or which the Government has acquired under section 10.

(2) When the Commissioner has accepted the guardianship of a monument under section 4, he shall, for the purpose of maintaining such monument, have access to the monument at all reasonable times, by himself and by his agents, subordinates and workmen, for the purpose of inspecting the monument, and for the purpose of bringing such materials and doing such acts as he may consider necessary or desirable for the maintenance thereof.

12. The Commissioner may receive voluntary contributions towards the cost of maintaining *Voluntary contributions.* a protected monument and may give orders as to the management and application of any funds so received by him :

Provided that no contribution received under this section shall be applied to any purpose other than the purpose for which it was contributed.

Protection of place of worship from misuse, pollution or desecration. 13. (1) A place of worship or shrine maintained by the Government under this Act shall not be used for any purpose inconsistent with its character.

(2) Where the Collector has, under section 4, purchased or taken a lease of any protected monument, or has accepted a gift or bequest, or the Commissioner has, under the same section, accepted the guardianship thereof, and such monument, or any part thereof, is periodically used for religious worship or observances by any community, the Collector shall make due provision for the protection of such monument, or such part thereof, from pollution or desecration —

(a) by prohibiting the entry therein, except in accordance with conditions prescribed with the concurrence of the persons in religious charge of the said monument or part thereof, of any person not entitled so to enter by the religious usages of the community by which the monument or part thereof is used, or

(b) by taking such other action as he may think necessary in this behalf.

Relinquishment of Government rights in a monument. 14. With the sanction of ^a[the Central Government], the Commissioner may —

(a) where rights have been acquired by ^b[the Central Government] in respect of any monument under this Act by virtue of any sale, lease, gift or will, relinquish the rights so acquired to the person who would for the time being be the owner of the monument if such rights had not been acquired, or

(b) relinquish any guardianship of a monument which he has accepted under this Act.

[a] Substituted by A. O. for "the Local Government." [b] Substituted by A. O. for "Government."

15. (1) Subject to such rules as may after previous publication be made by ^a[the *Right of access to certain protected monuments.* Central Government], the public shall have a right of access to any monument maintained by ^b[the Central Government] under this Act.

(2) In making any rule under sub-section (1) ^a[the Central Government] may provide that a breach of it shall be punishable with fine which may extend to twenty rupees.

[a] Substituted by A. O. for "the Local Government." [b] Substituted by A. O. for "the Government."

16. Any person other than the owner who destroys, removes, injures, alters, defaces or *Penalties.* imperils a protected monument, and any owner who destroys, removes, injures, alters, defaces or imperils a monument maintained by ^a[the Central Government] under this Act or in respect of which an agreement has been executed under section 5, and any owner or occupier who contravenes an order made under section 7, sub-section (1), shall

1. Section 13.—The expression "place of worship or shrine" in sub-section (1) was substituted for the word "monument" by the Select Committee. The Committee has also added sub-section (2) which is intended to afford a safeguard against the desecration of any building periodically used for religious worship.

be punishable with fine which may extend to five thousand rupees, or with imprisonment which may extend to three months, or with both.

[a] *Substituted by A. O. for "Government."*

Traffic in Antiquities.

17. (1) If the ^a[Central Government] apprehends that antiquities are being sold or removed to the detriment of India or of any neighbouring country, ^b[it] may, by notification^c in the ^d[Official Gazette], prohibit or restrict the bringing or taking by sea or by land of any antiquities or class of antiquities described in the notification into or out of British India or any specified part of British India.

(2) Any person who brings or takes or attempts to bring or take any such antiquities into or out of British India or any part of British India in contravention of a notification issued under sub-section (1), shall be punishable with fine which may extend to five hundred rupees.

(3) Antiquities in respect of which an offence referred to in sub-section (2) has been committed shall be liable to confiscation.

(4) An officer of Customs, or an officer of Police of a grade not lower than Sub-Inspector, duly empowered by the ^e[Central Government] in this behalf, may search any vessel, cart or other means of conveyance, and may open any baggage or package of goods if he has reason to believe that goods in respect of which an offence has been committed under sub-section (2) are contained therein.

(5) A person who complains that the power of search mentioned in sub-section (4) has been vexatiously or improperly exercised may address his complaint to the ^e[Central Government], and the ^e[Central Government] shall pass such order and may award such compensation, if any, as appears to it to be just.

[a] *Substituted by A. O. for "Governor-General in Council."* [b] *Substituted by A. O. for "he".* [c] *See notification No. 110, dated 28th May 1917, Gazette of India 1917, Part I, p. 989, and Notification No. 1385, dated 8th July 1924, Gazette of India 1924, Part I, p. 641; General Rules and Orders, Vol. III.* [d] *Substituted by A. O. for "Gazette of India."* [e] *Substituted by A. O. for "Local Government."*

Protection of Sculptures, Carvings, Images, Bas-reliefs, Inscriptions or like objects.

18. (1) If ^a[the Central Government] considers that any sculptures, carvings, images, bas-reliefs, inscriptions or other like objects ought not to be moved from the place where they are without the sanction of ^b[the Central Government], ^a[the Central Government] may, by notification^c in the ^d[Official Gazette], direct that any such object or any class of such objects shall not be moved unless with the written permission of the Collector.

(2) A person applying for the permission mentioned in sub-section (1) shall specify the object or objects which he proposes to move, and shall furnish, in regard to such object or objects, any information which the Collector may require.

(3) If the Collector refuses to grant such permission, the applicant may appeal to the Commissioner, whose decision shall be final.

(4) Any person who moves any object in contravention of a notification issued under sub-section (1), shall be punishable with fine which may extend to five hundred rupees.

(5) If the owner of any property proves to the satisfaction of ^a[the Central Government] that he has suffered any loss or damage by reason of the inclusion of such property in a notification published under sub-section (1), ^a[the Central Government] shall either —

(a) exempt such property from the said notification,

(b) purchase such property, if it be moveable, at its market-value, or

(c) pay compensation for any loss or damage sustained by the owner of such property, if it be immovable.

[a] *Substituted by A. O. for "the Local Government."* [b] *Substituted by A. O. for "the Government."* [c] *For notification under this section, issued before the 1st April 1937, by the Government of — (1) Bengal, see Calcutta Gazette, 1908, Pt. I, p. 1248, and *ibid.*, 1909, Pt. I, p. 23; and p. 957 as to Gaya District. (2) Central Provinces, see C. P. Gazette, 1906, Pt. III, p. 616. (3) N. W. F. P. see Gazette of India, 1909, Pt. II, p. 1554.* [d] *Substituted by A. O. for "Local Official Gazette."*

19. (1) If ^a[the Central Government] apprehends that any object mentioned in a notification issued under section 18, sub-section (1), is in danger of being destroyed, removed, injured or allowed to fall into decay, ^a[the Central Government] may pass orders for the compulsory purchase of such object at its market-value, and the Collector shall thereupon give notice to the owner of the object to be purchased.

(2) The power of compulsory purchase given by this section shall not extend to —

(a) any image or symbol actually used for the purpose of any religious observance, or

(b) anything which the owner desires to retain on any reasonable ground personal to himself or to any of his ancestors or to any member of his family.

[a] Substituted by A. O. for "the Local Government."

^a[Archæological Excavation.

20. (1) If the ^b[Central Government] ^c[* * *] is of opinion that excavation for archaeological purposes in any area should be restricted and regulated in the interests of archaeological research, the ^b[Central Government] may, by notification in the ^d[Official Gazette] specifying the boundaries of the area, declare it to be a protected area.

(2) From the date of such notification all antiquities buried in the protected area shall be the property of ^e[the Crown] and shall be deemed to be in the possession of ^e[the Crown], and shall remain the property and in the possession of ^e[the Crown] until ownership thereof is transferred; but in all other respects the rights of any owner or occupier of land in such area shall not be affected.

[a] This heading and S. 20 were substituted by the Ancient Monuments Preservation (Amendment) Act, 1932 (18 [XVIII] of 1932), S. 3. [b] Substituted by A. O. for "Governor-General in Council." [c] The words "after consulting the Local Government" were repealed by A. O. [d] Substituted by A. O. for "Gazette of India." [e] Substituted by A. O. for "Government."

Power to enter upon and make excavations in a protected area.

^a[20A. (1) Any officer of the Archæological Department or any person holding a licence under section 20B may, with the written permission of the Collector, enter upon and make excavations in any

(2) Where, in the exercise of the power conferred by sub-section (1), the rights of any person are infringed by the occupation or disturbance of the surface of any land, ^b[the Central Government] shall pay to that person compensation for the infringement.]

[a] Inserted by the Ancient Monuments Preservation (Amendment) Act, 1932 (18 [XVIII] of 1932), S. 3.

[b] Substituted by A. O. for the "Government."

Power of Central Government to make rules regulating archæological excavation in protected areas.

^a[20B. (1) The ^b[Central Government] may make rules—

(a) prescribing the authorities by whom licences to excavate for archæological purposes in a protected area may be granted ;

(b) regulating the conditions on which such licences may be granted, the form of such licences, and the taking of security from licensees ;

(c) prescribing the manner in which antiquities found by a licensee shall be divided between ^c[the Central Government] and the licensee ; and

(d) generally to carry out the purposes of section 20.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

(3) Such rules may be general for all protected areas for the time being, or may be special for any particular protected area or areas.

(4) Such rules may provide that any person committing a breach of any rule or of any condition of a licence shall be punishable with fine which may extend to five thousand rupees, and may further provide that where the breach has been by the agent or servant of a licensee the licensee himself shall be punishable.]

[a] Inserted by the Ancient Monuments Preservation (Amendment) Act, 1932 (18 [XVIII] of 1932), S. 3. [b] Substituted by A. O. for "Governor-General in Council." [c] Substituted by A. O. for "Government."

^a[20C. If the ^b[Central Government] is of opinion that a protected area contains an ancient monument or antiquities of national interest and value, ^c[it] may direct the ^d[Provincial Government] to acquire such area, or any part thereof, and the ^d[Provincial Government] may thereupon acquire such area or part under the Land Acquisition Act, 1894, as for a public purpose].

[a] Inserted by the Ancient Monuments Preservation (Amendment) Act, 1932 (18 [XVIII] of 1932), S. 3.

[b] Substituted by A. O. for "Governor-General in Council". [c] Substituted by A. O. for "he".

[d] Substituted by A. O. for "Local Government".

General.

21. (1) The market-value of any property which Government is empowered to purchase at such value under this Act, or the ^a[* *] compensation to be paid by Government in respect of anything done under this Act, shall, where any dispute arises ^b[in respect] of such market-value or compensation, be ascertained in the manner provided by the Land Acquisition Act, 1894, Sections 3, 8 to 34, 45 to 47, 51 and 52, so far as they can be made applicable :

Provided that when making an inquiry under the said Land Acquisition Act, 1894, the Collector shall be assisted by two assessors, one of whom shall be a competent person nominated by the Collector, and one a person nominated by the owner or, in case the owner fails to nominate an assessor within such reasonable time as may be fixed by the Collector in this behalf, by the Collector.

[a] The words "amount of" were repealed by the Ancient Monuments Preservation (Amendment) Act, 1932, (18 [XVIII] of 1932), S. 4. [b] Substituted by S. 4, *ibid* for "touching the amount."

Jurisdiction. 22. A Magistrate of the third class shall not have jurisdiction to try any person charged with an offence against this Act.

23. (1) The ^a[Central Government] ^b[* * *] may make rules^c for carrying out any of the purposes of this Act.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

[a] Substituted by A. O. for "Governor-General in Council." [b] The words "or the Local Government" were repealed by A. O. [c] For rules made by the Madras Government before the 1st April 1937, for the decipherment, publication, and custody of Indian inscriptions on Stone and Copper, see Madras Rules and Orders.

24. No suit for compensation and no criminal proceeding shall lie against any public servant in respect of any act done, or in good faith intended to be done, in the exercise of any power conferred by this Act.

THE APPELLATE JURISDICTION ACT, 1929.^a

(19 GEO. V, C. 8.)

[5th February 1929.]

An Act to make further provision with respect to the constitution of the Judicial Committee of the Privy Council and to authorise the appointment of an additional Lord of Appeal in Ordinary.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows :—

[a] This Statute was published for general information under No. 12-III/29-P, dated 25th June 1929 — see Gazette of India dated 29th June 1929.

1. (1) His Majesty may by Letters Patent appoint two persons qualified as provided in this section to be members of the Judicial Committee of the Privy Council, and may from time to time fill any vacancies caused by death or otherwise in the offices of the persons so appointed.

Power to appoint Indian Judges, etc., as additional members of the Judicial Committee.

1. Section 21.—*Acquisition of antiquities by Government.*—[1] In ascertaining the market-value of moveable antiquities or the compensation to be paid to the

owners for acts done under this Act, only the provisions of the Land Acquisition Act enumerated in this section are to guide the Court. (Vol 5) 1918 Bom. 245 (246).

^a[(2) A person shall be qualified under this section if he is a Privy Councillor, and

(a) is or has been a Judge of the Federal Court in India, a High Court in British India or the High Court at Rangoon, or

(b) is a barrister, advocate or pleader of not less than fourteen years standing who practises, or has practised, in British India or British Burma.

In this sub-section the expression "High Court in British India" means a Court which is a High Court for the purposes of the Government of India Act, 1935, and, as respects any period before the commencement of Part III of that Act, a Court which was a High Court within the meaning of clause (24) of section 3 of an Act of the Indian Legislature known as the General Clauses Act, 1897.]

(3) A person appointed a member of the Judicial Committee under this section shall hold his office during good behaviour subject to a power of removal by His Majesty on an address presented to His Majesty by both Houses of Parliament, but shall retire therefrom on attaining the age of seventy-two years.

(4) There shall be paid to each person appointed a member of the Judicial Committee under this section a yearly salary of two thousand pounds, and the said salary shall be charged on and paid out of the Consolidated Fund or the growing produce thereof.

(5) If provision is made for the payment to any such person out of ^b[the revenues of the Federation of India, the revenues of the Governor-General of India in Council or the revenues of Burma, as the case may be] of any sum, not exceeding two thousand pounds, by way of increase of salary, that sum may be received by that person, and his salary shall be treated as being increased accordingly.

(6) His Majesty may, by Letters Patent, grant to any person appointed a member of the Judicial Committee under this section who having served as such member for a period of five years or upwards —

(a) retires on attaining the age of seventy-two; or

(b) is, before attaining such age as aforesaid, disabled by permanent infirmity from discharging the duties of his office, a pension by way of annuity, to be continued during his life, of one thousand pounds a year, and any such pension shall be charged on and paid out of the Consolidated Fund or the growing produce thereof.

(7) Section 80 of the Judicial Committee Act, 1883,^c and section 4 of the Appellate Jurisdiction Act, 1887,^d shall be repealed, but nothing in this repeal shall, in the case of any person who at the passing of this Act is entitled under those sections to attend the sittings of the Judicial Committee, affect his right so to attend, or the payment to him of the allowance which at the passing of this Act he is receiving under those sections.

[a] Sub-section (2) was substituted by A. O. (P). [b] Substituted for the words "the revenues of India", *ibid.* [c] 3 & 4 Will. IV, c. 41. [d] 50 & 51 Vict., c. 70.

2. His Majesty may appoint one Lord of Appeal in Ordinary in addition to the six Lords of Appeal in Ordinary whom he may appoint by virtue of the Appellate Jurisdiction Act, 1876,^e as amended by the Appellate Jurisdiction Act, 1913,^f and the provisions of section 6 of the Appellate Jurisdiction Act, 1876 (as amended by any subsequent enactment) with respect to the appointment of Lords of Appeal in Ordinary and their duties, tenure of office, rank, position, salary and pension shall apply to the making of appointments and to persons appointed under this section.

[a] 39 & 40 Vict. c. 59. [b] 3 & 4 Geo. V, c. 21.

Short title. 3. This Act may be cited as the Appellate Jurisdiction Act, 1929.

THE APPRENTICES ACT, 1850.

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ACT XIX of 1850.^a

[11th April, 1850.]

Concerning the binding of Apprentices.

FOR better enabling children, and especially orphans and poor children brought up by public charity, to learn trades, crafts, and employments, by which, when they come to full age, they may gain a livelihood; It is enacted as follows:—

[a] This Act has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 [XV] of 1874), S. 3.

It has been declared, by notification under the Scheduled Districts Act, 1874 (14 [XIV] of 1874), S. 3 (A) to be in force in the following Scheduled Districts, namely:—

SIND—See Gazette of India, 1880, Pt. I, p. 672. — West Jalpaiguri, the Western Duars, the Western Hills of Darjiling, the Darjiling Tarai, and the Damson Sub-Division of the Darjiling District, *ibid*, 1881, Pt. I, p. 74 — The District of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum; *ibid*, 1881, Pt. I, p. 504 — The Scheduled portion of the Mirzapur District, *ibid*, 1879, Pt. I, p. 383 — Jaunsar Bawar, *ibid*, 1879, Pt. I, p. 382 — The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. (Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N.-W. F. P., see Gazette of India, 1901, Pt. I, p. 857, and *ibid*, 1902, Pt. I, p. 575; but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation, 1900 (2 [II] of 1900), S. 3, *ibid*, 1886, Pt. I, p. 48) — The Scheduled Districts of the C. P., *ibid*, 1879, Pt. I, p. 771 — The Scheduled Districts in Ganjam and Vizagapatam, *ibid*, 1898, Pt. I, p. 870 — The District of Sylhet, *ibid*, 1879, Pt. I, p. 631 — The rest of Assam (except the North Lushai Hills), *ibid*, 1897, Pt. I, p. 299.

It has been extended, by notification under S. 5 of the last mentioned Act to the following Scheduled Districts, namely:— Kumaon and Garhwal, see Gazette of India, 1876, Pt. I, p. 606 — The Tarai of the Province of Agra, *ibid*, 1876, Pt. I, p. 505.

It has been declared, by notification under S. 3 (b) of the same Act, not to be in force in the Scheduled Districts of Lahaul. See Gazette of India, 1886, Pt. I, p. 301.

Instruments of apprenticeship executed by a Magistrate under this Act, or by which a person is apprenticed by or at the charge of a public charity, are exempted from stamp duty by the Stamp Act, 1899 (2 [II] of 1899), Sch. I, Art. No. 9.

1. Any child, above the age of ten, and under the age of eighteen years, may be bound as apprentice by his or her father or guardian to learn any fit trade, craft, or employment, for such term as is set forth in the contract of apprenticeship.

ticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or, in the case of a female, beyond the time of her marriage.

Evidence of age in questions as to right to service

2. The age set forth in the contracts shall be evidence of the age of the child, in all questions which arise as to the right of the master to the continuance of the service.

Powers of Magistrate or Justice acting for orphans, etc.

3. Any Magistrate or Justice of the Peace may act with all the powers of a guardian under this Act, on behalf of any orphan, or poor child abandoned by its parents, or of any child convicted before him, or any other Magistrate of vagrancy, or the commission of any petty offence.

4. Any orphan or poor child, brought up by any public charity, may be bound apprentice *Apprenticing of child brought up by public charity.* by the governors, directors, or managers thereof, as his or her guardians for this purpose.

5. [Apprenticing of such boy in sea-service.] *Repealed by the Indian Merchant Shipping Act, 1923 (XXI of 1923), section 296.*

6. [Apprenticing of such boy in ship of the East India Company.] *Repealed by the Repealing Act, 1870, (XIV of 1870).*

7. [Who to be agent of master of apprentice serving in ship.] *Repealed by the Indian Merchant Shipping Act, 1923 (XXI of 1923), section 296.*

8. Every contract of apprenticeship shall be in writing, according to the form given in the *Form and contents of contract of apprenticeship.* schedule (A) annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

9. Every such contract shall be signed by the person to whom the apprentice is bound, *Signatures to contract.* and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more at the time of binding; but, when the apprentice is bound by the governors, directors, or managers of a public charity, the signature of two of them, or of their secretary or officer, shall be sufficient on behalf of the persons binding the apprentice.

10. No such contract shall be valid unless it be executed in the manner aforesaid, nor *Contract not valid unless executed as prescribed, and deposited.* until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed, ^a[* * *]; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate ^b[* * *].

[a] The words "or if the apprentice is bound to the sea-service, in the office of the person appointed under Act, of 1841, to make registry of ship at the port where he is to begin his service" were *repealed* by the Indian Merchant Shipping Act, 1923 (21 [XXI] of 1923), S. 296. [b] The words "or Registering officer" were *repealed, ibid.*

11. The terms of service may be changed at any time during the apprenticeship, or the *Alteration of terms of service and termination of contract.* contract may be determined, with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice, if he is above the age of fourteen years: Provided that the changes agreed to or the termination of the contract shall be expressed in writing on the original contract, with the signature of the proper parties according to section [9]^a of this Act; and the Magistrate ^b[* * *] shall thereupon make under his hand corresponding endorsements on the office-copies, which shall be brought to him at the same time for that purpose.

[a] Substituted for "8" by the Amending Act, 1891, (12 [XII] of 1891). [b] The words "or Registering Officer" were *repealed* by the Indian Merchant Shipping Act, 1923 (21 [XXI] of 1923).

12. The master of any apprentice bound under this Act may, with the consent of the *Assignment of apprentice to new master.* person by whom he was bound, and with the consent of the apprentice if he is above the age of fourteen years, assign such apprentice to any other person, who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof: Provided that such person shall, by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the

agreements and covenants therein mentioned to be performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively : And every such assignment shall be certified on the office-copies of the contract under the hand of the Magistrate "[* * *]" according to the form given in Schedule (B) annexed to this Act.

[a] The words "or Registering Officer" were *repealed* by the Indian Merchant Shipping Act, 1923, (21 [XXI] of 1923).

13. Upon complaint made to any Magistrate in the said territories^a by or on behalf of

Powers of Magistrate in case of complaint by apprentice against master. any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, the Magistrate may summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated in the summons, to answer the complaint ;

and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium, or a less premium than fifty rupees was paid, not exceeding two hundred rupees ;

and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels, and if the offender shall not be the master, but his agent, by distress and sale of the goods and chattels of the master also.

[a] i. e., British India, the reference being to the expression "territories under the Government of the East India Company" which occurred in S. 5 *supra* since *repealed*.

14. No contract of apprenticeship shall be cancelled, nor shall any master or his

Power of master or his agent to chastise apprentice. agent be liable to any criminal proceeding, on account of such moderate chastisement for misbehaviour, given to any apprentice by his master or the agent of his master, as may lawfully be given by a father to his child; and the provision for enabling the contract of apprenticeship to be cancelled shall not bar any criminal

Liability of master or agent for assault, &c. proceeding against any master or his agent for an assault, or other offence committed against his apprentice, for which he would be liable to be punished, had it been against his child, whether or not any proceedings be taken for cancelling the contract of apprenticeship.

15. Upon complaint made to any Magistrate, by or on behalf of the master of any

Power of Magistrate in case of complaint by master against apprentice. apprentice bound to him under this Act, of any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear

and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order; and, if the offender be a boy of not more than fourteen years of age, may order him to be privately whipped: or, if the offender be a girl, or in the case of any boy the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

16. Upon complaint of wilful and repeated ill-behaviour on the part of the apprentice, and

Cancellation of contract for misconduct of apprentice. on the demand of the master, the Magistrate may order the contract of apprenticeship to be cancelled, whether or not the charge is proved; but only with the consent of the apprentice and of his father or guardian, if

the charge is not proved; and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case; and all sums so refunded shall be applied under the direction of the Magistrate for behoof of the apprentice.

17. The Magistrate may order any sum recovered for behoof of the apprentice on cancelling the contract to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

18. No Magistrate shall entertain a complaint on the part of a master against an apprentice under this Act, unless it be brought within one month after the cause of complaint arose; or, if the cause of complaint arose on board ship during a voyage, within one month after the arrival thereof at a port or place in the said territories; and no Magistrate shall entertain a complaint on the part of an apprentice against his master or the agent of his master under this Act, unless it be brought within three months after the cause of complaint arose; or, if the cause of complaint arose on board ship during a voyage, within three months after the arrival thereof at a port or place in the said territories.

19. If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined; and a proportionate part, corresponding to the unexpired portion of the term, of any premium, which shall have been paid to such master on the binding of the apprentice to him, shall be returned by the executors or administrators out of the estate of the deceased to the person or persons who shall have paid the same; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been employed, and shall, within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

20. If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors ^a[or] administrators on the original contract of apprenticeship; and also on the office copies thereof, by the Magistrate ^b[* * *]; and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

[a] Substituted for the word "and" by the Amending Act, 1891 (12 [XII] of 1891), Sch. II. [b] The words "or Registering Officer" were repealed by the Indian Merchant Shipping Act, 1923 (21 [XXI] of 1923).

21. Any apprentice bound under this Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months from and after the death of his master, out of the assets left by him: Provided that during such three months such apprentice shall continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they appoint.

22. The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall be adjudged to have committed an act of insolvency during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship, and, if any premium was paid on binding him as an apprentice, he or the person by whom he was bound, shall be entitled to claim the amount thereof, as a debt against the estate of the bankrupt or insolvent.^a

[a] Cf. the Bankrupt Law Consolidation Act, 1849 (12 and 13 Vict., c. 106), S. 170.

23. For the purposes of this Act, all British subjects, wherever or of whatever parents born, as well as other persons in ^a[British India] without the towns of Calcutta and Madras and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and Magistrates of ^b[British] India.

[a] Substituted by A. O. for the original words as amended by the Repealing Act 1874 (16 [XVI] of 1874).
[b] Inserted by A. O.

24. An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order.

25. In this Act the words "master," "owner," "person," and the pronoun "he" shall be understood to include several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless there is something in the context repugnant to such construction.

SCHEDULE A.

FORM OF AGREEMENT.

This agreement made the day of in the year between A. B., of and C. D., of , witnesseth that the said A. B. doth this day bind E. F., a boy (or girl) of the age of years completed, son (or daughter) of the said A. B. (or otherwise describing the relation in which A. B. and E. F. stand), to dwell with and serve the said C. D., as an apprentice, from this day forth for years (in the case of a girl add, or until the time of her marriage, which shall first happen), during all which term the said apprentice shall duly and faithfully serve the said C. D. according to his (or her) skill and ability in all lawful business, and demean and behave himself (or herself), honestly, orderly, and obediently, in all things toward the said C. D., and his (or her) family. And the said C. D. for himself (or herself) and his (or her) executors and administrators, in consideration (of the premium or sum of paid by the said A. B. to the said C. D., the receipt whereof the said C. D. hereby acknowledges, and) of the faithful service of the said E. F., doth covenant and agree with the said A. B., his (or her) executors and administrators, that he (or she) will teach or cause to be taught to the said E. F., in the best way and manner that he (or she) can, the trade (craft or employment) of a during the said term; and will also, during the said term, find and allow unto the said apprentice good, wholesome, and sufficient food, clothes, lodging, washing, and all other things necessary, fit, and reasonable for an apprentice: (and further, *here insert any special covenants*).

If there is no premium, the words between brackets may be omitted.

In witness whereof the parties have hereunto set their hands and seals, the day and year above written.

A. B.

L. S.

C. D.

L. S.

SCHEDULE B.

FORM OF ORDER OF ASSIGNMENT.

(To be endorsed on the Agreement.)

Be it known to all men that on the day of in the year personally appeared before G. H., Magistrate of , C. D. of , with E. F., his (or her) apprentice, and J. K., of , and desired that the agreement of apprenticeship, whereby the said E. F. was bound to the said C. D., might be assigned and made over to the said J. K. and the said G. H., having satisfied himself, by personal examination of the said E. F., and by other lawful ways and

If E. F. is not above the age of fourteen years, the words between brackets may be omitted. means, that such assignment is for the benefit of the said E. F. and is made with the consent of [the said E. F., and of] all persons whose consent thereunto by law is required, doth allow such assignment: and the contract of apprenticeship, whereby the said E. F. was on

the day of in the year bound to the said C. D., as an apprentice to learn the trade (craft or employment) of a , shall henceforth endure, unto the end of the said term, as if the said J. K. had been originally party to the said deed, and had executed the same, in the place and stead of the said C. D., and shall be bound, for himself (or herself) his (or her) executors or administrators, to fulfil the covenants by the said C. D. to be performed, and the said E. F. shall henceforth be bound unto the said J. K., in like manner as he (or she) was by the said agreement bound unto the said C. D.

C. D.

E. F.

J. K.

In witness whereof the said C. D., E. F., and J. K., have hereunto set their hands before me the day and year above written.

G. H., Magistrate.

THE ARBITRATION ACT, 1940.

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THE FOURTH SCHEDULE.—Enactments amended.

STATEMENT OF OBJECTS AND REASONS.

"The law of arbitration in British India is at present substantially contained in two enactments, the Indian Arbitration Act, 1899 (IX of 1899), and the Second Schedule to the Code of Civil Procedure, 1908. The operation of the 1899 Act is limited to the Presidency-towns and to such other areas as it may be extended by the appropriate Provincial Government: its scope is confined to "arbitration by agreement without the intervention of a Court." The Second Schedule to the Code of Civil Procedure deals with arbitrations outside the operation and scope of the 1899 Act: it relates for the most part to arbitration in suits, though arbitration without intervention of a Court is also briefly provided for. This Schedule also contains an alternative method whereby the parties to a dispute or any of them may file their arbitration agreement before a Court which after a certain procedure, refers the matter to an arbitrator.

The question of amending and consolidating this law is not new. The Civil Justice Committee in 1925 recommended several changes in the arbitration law. The Act of 1899 was based largely on the then English law, to which several substantial amendments have been effected by an Amending Act of Parliament in 1934 (24 & 25 Geo. V, c. 14). In 1938 the Central Government placed an officer on special duty to examine the question, and the present Bill is the outcome of this examination. The existing law, the amended English law and the recommendations of the Civil Justice Committee have been scrutinised together, and the present Bill, which, seeks to consolidate and standardise the law relating to arbitration throughout British India, in its detail extracts from the sources referred to those principles of law which, it is considered, are most suitable to British India. . . ."

— Gazette of India, dated 22nd July, 1939, Part V page 142.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act XXV of 1942.

—Repealed in part by Act VI of 1945.

COGNATE STATUTES AND PROVISIONS.

1. ARBITRATION (PROTOCOL AND CONVENTION) ACT VI OF 1937.
2. ELECTRICITY ACT, IX OF 1910, S. 52.

3. COMPANIES ACT, VII OF 1913, S. 152.

4. SPECIFIC RELIEF ACT, I OF 1877, S. 21.

ACT NO. X of 1940.^a

[11th March, 1940]

An Act to consolidate and amend the law relating to Arbitration Act.

WHEREAS it is expedient to consolidate and amend the law relating to arbitration in British India;

It is hereby enacted as follows:—

[a] For the Report of the Select Committee, see Gazette of India, 1940, Pt. V, page 85.

This Act has been applied to—

British Baluchistan, see Notification No. 168-N., dated 17th October 1940, Gazette of India, 1940, Pt. I, page 1478;

the whole of Chota Nagpur Division (excluding certain areas) except S. 1 (3), by Bihar Government Notification No. 1086—A-15/40 J. R., dated 31st August 1940;

the Darjeeling district and the partially excluded areas of the Mymensingh District, subject to certain modifications, by Bengal Government Notification No. 240-J., dated the 22nd January 1941,

CHAPTER I.

INTRODUCTORY.

Short title, extent and commencement.

1. (1) This Act may be called the Arbitration Act, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of July, 1940.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context, —

(a) "arbitration agreement" means a written agreement¹ to submit,² present or future differences³ to arbitration, whether an arbitrator is named therein or not.

[1899—S. 4 (b).]

Section 1. — [1] Section 2 of Act IX of 1899 has been omitted in the Act of 1940. That Section ran as follows:— "2. Subject to the provisions of S. 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with the leave of the Court or otherwise, be instituted in a Presidency town: Pro-

vided that the Provincial Government may, by notification in the Official Gazette, declare this Act applicable in any other local area as if it were a Presidency town."

SECTION 2 (a) — SYNOPSIS.

1. Arbitration agreement — Acceptance.

2. Arbitration agreement — Dispute.

Section 2 (contd.)

3. Arbitration agreement—Effect on right to sue.

4. Arbitration agreement — Form of.

5. Arbitration agreement — Writing and signature.

6. Option to one party.

7. Parties to agreement.

8. Present and future differences.

9. "Submit".

1. Arbitration agreement — Acceptance. — [1] Merely sending notes of contract of arbitration by one party to another without any notes confirming the contract by the other is not a "submission". (Vol 27) 1940 Bom 93 (94) : 1 L R (1940) Bom 249.

[2] Where parties agreeing to do business on certain terms, one of which is reference to arbitration, assent to those terms by conduct, such agreement amounts to submission. (Vol 18) 1931 Bom. 81 (84, 85).

[3] The claimants submitted to the Association a claim against the respondent which they signed and sent to the Association. The arbitrators appointed by the Association laid the document before the respondent and he wrote thereon in his own hand and over his signature, his answer to the claim. He was well aware that the object of the document was to lay before the arbitrators in writing the difference which was to be decided between the parties. It was held that the document constituted a written agreement to submit the difference to arbitrators. (Vol 8) 1921 All 273 (275) : 43 All 348.

2. Arbitration agreement — Dispute. — [1] Existence of a dispute is an essential condition for the arbitrator's jurisdiction to act. Mere failure to pay cannot be said to be a dispute. (Vol 18) 1931 Bom 164 (165, 166).

[2] In order to give jurisdiction to arbitrators to make an award in respect of a contract the party must show the existence of disputes regarding contract terms and that there is an agreement in writing to submit those disputes to arbitration. Where the very existence of the contract is denied, the arbitrators have no jurisdiction. (Vol 19) 1932 Bom 341 (343).

[3] Where, at the date of the reference, the claim, the subject-matter of submission, is statute-barred, there being no subsisting differences to be referred to arbitration, a party cannot be compelled to refer such differences. (Vol 13) 1926 Sind 209 (211) : 19 Sind L R 24.

[4] Failure to pay claims is itself a matter of difference under the Arbitration Act. (1911) 5 Sind L R 7 (9).

3. Arbitration agreement—Effect on right to sue.

—[1] Submission must be construed as a deprivation by a party of his right to have a dispute decided by a Court of law and it must appear from the terms of the submission that the party has so deprived himself. (1910) 34 Bom 1 (10).

4. Arbitration agreement — Form of. — [1] No special form of submission is necessary. It is enough for the purposes of the Act if the agreement is reduced to writing. A bond may contain a valid submission. (1910) 4 Sind L R 26 (28).

[2] An agreement to submit may be collected from a series of documents even though they are to be connected by parol evidence. (Vol 7) 1920 All 258 (260) : 42 All 525.

[3] Terms of agreement falling under S. 2 (a) need not be contained in one document. They may be found in correspondence. (Vol 26) 1939 Sind 357 (358, 359) : 1 L R (1939) Kar 769.

[4] The petition of compromise in a suit for accounts may amount to submission. (Vol 11) 1924 Lah 405 (407).

[5] Bye-laws under Bombay Cotton Contracts Act making reference compulsory in case of disputes, coupled with agreement of parties to abide by them, amount to submission in writing. (Vol 18) 1931 Bom 81 (86).

[6] The words 'office *dhara*' (office terms) do not constitute a written agreement to submit differences to arbitration. (1912) 6 Sind L R 278 (283).

[7] Marine insurance policy laid down that all disputes must be referred to arbitration in England for settlement; the clause amounted to a submission to arbitration. (Vol 11) 1924 Bom 381 (381).

[8] A bill of lading provided that all claims shall be determined at the port of destination according to British law, or at the ship owner's option, in the United Kingdom and to the exclusion of the jurisdiction of any other country. It was held that definition of "submission" in S. 4 (equivalent to S. 2 (a) in the Act of 1940) cannot be extended to include such agreement. (Vol 12) 1925 Bom 449 (450) : 49 Bom 854.

[9] A general reference to arbitration is enough to bind the parties and it need not state the exact points for determination. (1911) 5 Sind L R 7 (8).

[10] Letters of parties authorizing to arbitrate do not require stamps. (1895) 19 Bom 32 (33).

5. Arbitration agreement—Writing and signature.

—[1] Submission should be in writing in order to satisfy the Act. (Vol 11) 1924 Sind 91 (93, 94) : 17 Sind L R 93; (1909) 33 Bom 69 (69).

[2] Submission must be in writing but need not be signed. (1910) 4 Sind L R 149 (151); (Vol 6) 1919 Sind 101 (102) : 12 Sind L R 55; (Vol 16) 1929 Cal 97 (99) : 56 Cal 118.

[3] But in the following cases it is held that submission must be in writing and signed by both parties or their authorised agents. (Vol 13) 1926 Cal 933 (940) : 53 Cal 65 ; (1913) 19 Ind Cas 925 (926, 927).

[4] It is not necessary that there should be signatures of both the parties to the written document. One signed by one of the parties and accepted by the other is enough. (Vol 21) 1934 Cal 796 (797) : 61 Cal 702.

[5] Acceptance of the written agreement might be in the form of a signed document by both parties containing all the terms or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party, or, in the third case, an unsigned document containing the terms of the submission to arbitration agreed to orally by both parties. (Vol 18) 1931 All 136 (138) : 53 All 384.

6. Option to one party.—[1] Option to one of the parties does not remove the agreement from the operation of S. 2 (a). (Vol 13) 1926 Sind 27 (30). But in (Vol 16) 1929 Sind 83 (84) where option was provided in written agreement to submit to arbitration exercisable by one party only, it was held that the award was invalid.

7. Parties to agreement.—[1] Principal can authorise his agent to refer a dispute to arbitration. (1923) 73 I C 609 (611) (Pesh).

8. Present and future differences.—[1] The words of the definition of "submission" are wide enough to include cases where agreement is made without there being at the time when it is made, any difference between the parties either in existence or in contemplation. (Vol 26) 1939 Sind 357 (358, 359) : 1 L R (1939) Kar 769.

9. "Submit".—[1] The word "submission" was defined in the Act of 1899 to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." As to the meaning and scope of this definition see : (Vol 4) 1917 Sind 95 (95) : 10 Sind L R 1; (Vol 11) 1924 Sind 91 (93, 94) : 17 Sind L R 93; (Vol 4) 1927 Sind 95 (95) : 10 Sind L R 1; (Vol 11) 1924 Lah 405 (407).

(b) "award" means an arbitration award;

(c) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;

[1899—S. 4 (a).]

(d) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

(e) "reference" means a reference to arbitration.

CHAPTER II.

ARBITRATION WITHOUT INTERVENTION OF A COURT.

Provisions implied in arbitration agreement. 3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

[1899—S. 6.]

4. The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

[1899—S. 7.]

Authority of appointed arbitrator or umpire irrevocable except by leave of Court. 5. The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

[1899—S. 5.]

SECTION 2 (c).

1. Jurisdiction of the Court.—[1] To give the Court jurisdiction it is not necessary that the whole cause of action should arise there. The Court has jurisdiction also when the parties reside within its jurisdiction or the land was within its jurisdiction. All the trustees except 4 who lived in England, resided in Bombay. The trustees executed a lease of the trust property situate outside Bombay. The lease was executed outside Bombay. In the application by the trustees to set aside an award in respect of the aforesaid lease, it was held that the Bombay High Court had jurisdiction. (Vol 30) 1943 Bom 32 (34).

SECTION 2 (e).

1. Reference, meaning of.—[1] Reference is a delegation of authority to a named arbitrator and an agreement to be bound by the award of such authority. (Vol 11) 1924 Sind 91 (93, 94) : 17 Sind L R 93.

[2] The word "reference" does not necessarily involve a formal reference to arbitration on stamped paper. (Vol 11) 1924 Sind 91 (93, 94) : 17 Sind L R 93.

1. Section 3.—[1] The intention of the parties must be the sole guide for determining the mode of working out the submission and reaching a final decision. (Vol 21) 1934 Bom 476 (478).

[2] Paragraph 2 of Sch. I is, by virtue of this section, inapplicable where the agreement referring the dispute to arbitration provides for a reference to an umpire in case of difference of opinion between the arbitrators. (Vol 32) 1945 Lah 34 (35).

SECTION 5—SYNOPSIS.

1. General principles.

2. Revocation of reference to arbitrator.

1. General principles.—[1] Until acceptance, which need not be in writing, by arbitrator on reference signed by both parties, there is no appointment of arbitrator. (Vol 11) 1924 Sind 91 (93) : 17 Sind L R 93.

[2] Powers vested in Courts of revoking submission to named arbitrators ought to be sparingly used. They should be exercised only where substantial miscarriage of justice would otherwise result. (Vol 15) 1928 Sind 195 (195).

[3] The power of Court to revoke is discretionary and must be used only when the applicant will otherwise be subjected to multiplied expenses and interminable delay and there is no likelihood of a speedy end of the strife. (1909) 1 Ind Cas 14 (17) (Bom) (Per Davar J. in the judgment appealed from).

[4] A valid submission once made is irrevocable without leave of Court under S. 5 and if arbitrator refuses to act, S. 8 should be followed. (Vol 5) 1918 Sind 21 (22) : 11 Sind L R 101.

[5] If a matter in dispute is not within the jurisdiction of arbitrators the proper remedy of a party to the submission is to apply to Court for leave to revoke submission. (Vol 24) 1937 Mad 405 (406).

[6] Procedure for revocation is by motion in open Court and not by application in Chambers. (1909) 1 I. C. 14 (16) (Bom) (Per Davar J. in the order appealed from).

[7] A clause in an insurance policy provided for reference to arbitrator before certain tribunal. The reference actually made was, however, to another tribunal and did not refer to the clause in the policy. It was held that the award made by the latter tribunal was valid. (Vol 13) 1926 Sind 8 (9).

[8] Nomination or appointment of an arbitrator is complete when a party has communicated it in clear and unequivocal language in writing to other party or when it is communicated to both the parties by a third person as intended by the parties themselves. (Vol 12) 1925 Sind 12 (13, 14).

[9] Where arbitrators who are willing to act are nominated, any subsequent nomination of a new arbitrator is a nullity and does not affect the competency of

Arbitration agreement not to be discharged by death of party thereto.

6. (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

7. (1) Where it is provided by a term in a contract to which an insolvent is a party that *Provisions in case of any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.*

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to

Section 5 (contd.)

the arbitrators previously appointed. (Vol 12) 1925 12 (13, 14).

[10] The following cases decided prior to the 1899 Act to the effect that submission to arbitration is irrevocable except for good cause, may be consulted. (1867-69) 12 Moo. Ind App 112 (130) (P C); (1898) 20 All 145 (148); (1885) 7 All 273 (276); (1874-75) 8 Mad H C R 46 (56); (1890) 17 Cal 200 (207).

[11] Whether an appeal lies against an order granting leave to revoke authority, see Notes on S. 39.

2. Revocation of reference to arbitrator.— [1] No party to an agreement to refer to arbitration can, after a reference has been made, revoke the submission unless for good cause and a mere arbitrary revocation of the authority is not permitted. (1867) 12 Moo Ind App 112 (130) (P C); (1904) 27 Mad 112 (115); (Vol 1) 1914 Mad 280 (280); (Vol 19) 1932 All 348 (349); (1886) 7 All 273 (276); (Vol 1) 1914 Oudh 327 (328); 17 Oudh Cas 386; (Vol 4) 1917 Lah 65 (68); 1917 Pun Re No. 12; (1901) 4 Oudh Cas 17 (21).

[2] The following have been held to amount to "sufficient cause" for revoking a submission to arbitration —

(a) The fact that the arbitrator is colluding with the opposite party. (1906) 29 All 13 (14).

[See (Vol 24) 1937 Oudh 436 (438); 13 Luck 428. (Where the arbitrators though not partial to one party cannot yet command the confidence of the opposite party, it is wholly inequitable to compel the other party to submit themselves to their arbitration.)]

(b) The fact that the arbitrator is discovered to have been acting as a mukhtear for one of the parties without remuneration or to be indebted to such party. (1902) 29 Cal 278 (282).

(c) Unreasonable delay in the conduct of the proceedings before the arbitrators, not caused by the party seeking to revoke the submission. ('90) 17 Cal 200 (207, 208).

(d) Relationship of the arbitrator to one of the parties, unknown to the other. (Vol 20) 1933 Sind 68 (69, 70).

[3] The following do not constitute "sufficient cause" for revocation of a submission :

(i) Delay in the conduct of the proceedings, where such delay is caused by the very party seeking to revoke. (Vol 5) 1918 Pat 83 (86); 4 Pat L Jour 394.

(ii) The fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding

against the party seeking to revoke. (Vol 19) 1932 All 348 (349).

(iii) The fact that the arbitrator is entering into foreign matters and that a minor is likely to be interested in the arbitration and that he would not be bound by it. ('74) 21 Suth W R 395 (396).

[4] Where the arbitrator passed an award but had not filed it in Court, it was held that where an award has been given, the only question before the Court is whether the award is valid and the proper procedure is to direct the arbitrator to file it and not to consider whether the reference should be revoked. (Vol 24) 1937 All 141 (143) (S B).

Revocation of reference by death of a party.

[5] The death of a party pending reference does not revoke the reference. ('10) 4 Sind L R 14 (17); ('11) 14 Cal L Jour 188 (196). (Even in the case of submission without the intervention of Court, it is not revocable without just and sufficient cause.); ('11) 33 All 645 (647). (Death after application, but before order of reference — Arbitrator's authority not revoked.); (Vol 25) 1938 Oudh 125 (127); 14 Luck 65. (The test is what is the nature of the submission — Ordinary presumption is that the arbitration should not end on the death of any of the parties.)

[6] On the death of a party his representatives to whom the right to sue survives should be brought on record. ('04) 27 Mad 112 (116); (Vol 11) 1924 Lah 725 (726, 727). (If they are not brought on the record the award is not binding on them.)

[7] Where suit abates because of the expiry of period of limitation for bringing the legal representatives of the deceased on record, the award though made prior to such death cannot be filed in the Court. ('12) 36 Bom 105 (109).

[See however (Vol 25) 1938 Oudh 125 (127); 14 Luck 65. (Party dying after enquiry before arbitration is finished but before award is made — Award not invalid merely because the son of the deceased is not made a party.)]

1. Section 6. — [1] Under S. 5 of the old Act also, death of a party did not operate as revocation of a submission. (1910) 4 Sind L R 14 (17).

[2] A reference to arbitration signed by the representatives of a firm does not terminate by the death of such representatives. (Vol-20) 1933 Sind 115 (116).

arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

Power of Court to appoint arbitrator or umpire.

8. (1) In any of the following cases —

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

SECTION 8 — SYNOPSIS

1. Section 8.

2. Section 8 (1) (a).

3. Section 8 (1) (b).

4. Section 8 (2).

5. Section 8 (2)—Powers of arbitrator.

1. Section 8. — [1] This section, dealing with the Court's power to appoint an arbitrator in certain cases, reproduces with some verbal changes section 8 of the 1899 Act. The Select Committee in their Report on this section say: "We have removed an obscurity from clause 8 (1) (a) where it was not clear whether failure to concur in any one of the appointments or failure to concur in all the appointments was contemplated. We have omitted the words "or is removed" from section 8 (1) (b) and also from section 9 to remove the inconsistency which would otherwise exist between these sections and section 12, which gives to the Court and not to the parties power to appoint arbitrators in place of arbitrators removed by the Court."

[2] Section 8 (1) (a) of the 1899 Act ran as follows:—"In any of the following cases: (a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator", etc. As to meaning and scope of clause (a) see (Vol 18) 1931 Mad 170 (173); 54 Mad 198; (Vol 6) 1919 Bom 24; 43 Bom 809; (Vol 26) 1939 Sind 81 (83, 85); (Vol 14) 1927 Sind 177; (Vol 11) 1924 Sind 29 (32); 17 Sind L R 164; (Vol 30) 1943 Cal 484 (486); 1 I L R (1943) 2 Cal 298.

2. Section 8 (1) (a). — [1] A notice to name an arbitrator to act along with one appointed by the party issuing notice, does not amount to asking to concur in appointing a single arbitrator. (1909) 3 Sind L R 221 (222).

3. Section 8 (1) (b). — [1] Where an arbitrator refuses to act, the Court cannot compel him to arbitrate. ('85) 7 All 20 (21, 22); (Vol 8) 1921 All 361 (362); 43 All 101; ('85) 7 All 523 (526, 528); (Vol 17) 1930 Lah 125 (126); (Vol 7) 1920 Lah 202 (202).

[2] An arbitrator has full power to retract his resignation before it is accepted or acted upon by the Court and an award subsequently made is not invalid on account of the first refusal. ('88) 10 All 137 (145); ('71) 15 Suth W R 37 (38).

[3] Where the Court asks an arbitrator to reconsider his resignation or refusal, and he thereupon agrees to act, the award will not be invalid. (Vol 16) 1929 Bom 50 (51); 52 Bom 568; (Vol 24) 1937 All 582 (585); (Vol 15) 1928 All 740 (744); 50 All 955; ('75) 23 Suth W R 429 (431) (PC); ('71) 15 Suth W R 37 (38).

[4] Where an arbitrator demands his fees in advance and refuses to act further, a new arbitrator can be appointed. (Vol 24) 1937 Cal 523 (525).

[5] Refusal by the arbitrator cannot be implied from his conduct as, for instance, where he fails to submit the award within time fixed. (Vol 1) 1914 Cal 448 (449);

(Vol 24) 1937 Cal 523 (525); (Vol 24) 1937 All 582 (585); (Vol 20) 1933 Sind 115 (116). (Where an arbitrator neglects to act for nearly three years, another arbitrator may be appointed in his place.)

[6] An order which may be passed in the event of the death of an arbitrator, can only be made under the Arbitration Act and then only if the conditions as to written notices prescribed by S. 8 have been fulfilled. (Vol 18) 1926 Cal 730 (731, 732).

[7] There was a mutual agreement to refer to two arbitrators, one of whom refused to act. It was held that S. 8 (1) (b) applies, as the expression "an appointed arbitrator" can mean one of two appointed arbitrators. (Vol 16) 1929 Cal 177 (179); 56 Cal 548.

[8] The fact that the arbitrator refused to arbitrate is no ground for refusing to enforce the arbitration clause of the contract. Section 8 (1) (b) is applicable to such a case. (Vol 20) 1933 Sind 75 (77); 27 Sind L R 169.

[9] Parties jointly appointing two arbitrators. One dying, the Court can supply the vacancy under S. 8 (1) (b) read with S. 8 (2). (Vol 26) 1939 Sind 81 (81, 82).

4. Section 8 (2). — [1] The personnel of the arbitrators may be changed by mutual consent of the parties. (Vol 11) 1924 Cal 665 (666).

[2] After notice to the opposite party, all the parties may themselves appoint an arbitrator provided all the parties agree. (Vol 5) 1918 Lah 151 (152); 1918 Pun Re No. 112; ('66) 1 Agra H C R 109 (109, 110).

[3] A notice to the opposite party is essential before the Court acts under this section. (Vol 15) 1928 All 674 (674, 675); (Vol 18) 1931 All 761 (762, 764); 53 All 778. (No notice to opposite party—Act of Court in proceeding to make appointment of arbitrator is irregular); (Vol 16) 1929 All 144 (145); 51 All 501; (Vol 6) 1919 All 219 (220); 41 All 578; (Vol 12) 1925 Lah 374 (375); (Vol 20) 1933 Oudh 540 (542); 9 Luck 225; (Vol 12) 1925 Oudh 361 (364).

[4] If a party does not object to, and acquiesces in, the appointment by the Court of the nominee of the opposite party, it will be estopped from questioning the validity of the appointment. (Vol 16) 1929 All 559 (560); ('10) 1910 Pun L R No. 27, page 63 (64).

[5] The terms of the submission to arbitration were that an umpire should be selected from out of the seven persons named therein. The first umpire chosen declined to act. It was held that the Court must appoint a person from the remaining six arbitrators. ('71) 7 Mad H C R 72 (75, 76).

[6] In making a new appointment the Court cannot compel an unwilling party to pay remuneration to the arbitrator appointed by the Court, specially when there is no provision for the same in the original reference. (Vol 16) 1929 All 144 (145); 51 All 501.

[7] If the Court appoints an arbitrator before the expiry of the period mentioned in sub-section (2), it acts with material irregularity. (Vol 20) 1933 Oudh 540 (542); 9 Luck 225.

- (b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or
- (c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

[1899—S. 8; Civil Procedure Code, Sch. II, Para. 5.]

Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.

9. Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,—

- (a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

Section 8 (contd.)

[8] An order made without observing the formality of notice is materially irregular and may be revised. (Vol 16) 1929 All 144 (145) : 51 All 501; (Vol 18) 1931 All 761 (763) : 53 All 778; (Vol 6) 1919 All 219 (220) : 41 All 578; (Vol 20) 1933 Oudh 540 (542) : 9 Luck 225

5. Section 8 (2)—Powers of arbitrator — [1] An arbitrator is not bound by the technical rules of the Court. ('84) 1 Suth W R 12 (13); ('12) 1912 Mad W N 1076 (1079). (Reason for his decision need not be given by an arbitrator.)

[2] An arbitrator should act according to the rules of equity, good conscience and justice. ('12) 15 Cal L Jour 110 (112); (Vol 17) 1930 Lah 230 (281, 282). (An arbitrator is not bound by the Evidence Act.)

[3] An arbitrator can administer oath to the witnesses or the parties, and a party can agree before him to be bound by the oath of the opposite parties or witnesses. ('82) 4 All 283 (288); (Vol 3) 1916 Mad 533 (534).

[But see ('75) 1 All 535 (537). (Arbitrators had no power to administer oath).]

[4] An arbitrator cannot delegate his functions to another. ('93) 17 Bom 129 (141, 142, 145); ('67) 7 Suth W R 269 (270).

[5] An arbitrator can delegate to another functions which are merely of ministerial character. ('02) 29 Cal 854 (867, 868); (Vol 3) 1916 Cal 806 (807); (Vol 23) 1936 Nag 197 (200) : 1 L R (1936) Nag 44; (Vol 22) 1935 Oudh 349 (353) : 11 Luck 306.

SECTION 9 — SYNOPSIS

1. Scope.
2. Section 9 (a).
3. Section 9 (b).

1. Scope — [1] Section 9 applies only in absence of contract to the contrary. (Vol 8) 1921 Mad 58 (60) : 44 Mad 406.

[2] Where an arbitration clause provides that if a party on notice by the other party to appoint an arbitrator, does not appoint one within a fixed time, then, the party giving notice is at liberty to appoint another arbitrator. Section 9 does not apply. (Vol 20) 1933 Sind 6 (7, 8).

[3] Section 9 provides for substitution in case where each party is entitled to appoint an arbitrator. It does

not provide for the case where one party is entitled to appoint two arbitrators. (Vol 20) 1933 Sind 6 (7).

[4] Contract in contravention of S. 9 excludes operation of this section. The contract between A and B was that if the parties failed to appoint their arbitrators or the arbitrators chosen by them died, the vacancy would be filled in by C. Arbitrator chosen by A gave an award as the sole arbitrator. Held that in view of the contract S. 9 (b) did not apply and the award was invalid. (Vol 9) 1922 P C 374 (377, 378) : 49 Ind App 366 : 50 Cal 1 (P C).

[5] Where an arbitration clause provided for arbitration under the rules of the Bengal Chamber of Commerce or at the option of the sellers, by two European sugar importers and the sellers exercised such option but did not appoint their arbitrators nor did the buyers proceed under S. 9 held that the buyers were not entitled to revert to the other mode of arbitration and award made by Bengal Chamber of Commerce was set aside. (Vol 11) 1924 Cal 828 (829, 830) : 51 Cal 657.

[6] Official Receiver or trustee in bankruptcy is not party within S. 9, nor can he be compelled to be a party where the bankrupt's estate is debtor and not creditor. (Vol 13) 1926 Sind 209 (210) : 19 Sind L R 24.

2. Section 9 (a). — [1] Arbitrator's non-attendance on the date fixed may be construed as refusal to act. (Vol 17) 1930 All 675 (677).

[2] Where an arbitrator appointed by one party is made sole arbitrator under S. 9, the other party refusing to appoint its own, but he afterwards refuses to act, procedure to be followed is not that laid down in S. 8 (1) (b), but that in S. 9 and the sole arbitrator will be replaced by another arbitrator chosen by the first party. (Vol 16) 1929 Sind 55 (56). (Affirming (Vol 14) 1927 Sind 177.)

[3] In case more than one arbitrator is to be appointed, one has to be appointed as convener. (Vol 17) 1930 All 675 (677).

3. Section 9 (b). — [1] One of two arbitrators refused to act after appointment, and the other acted as sole arbitrator without complying with the procedure of S. 9 (b). His award must be set aside. (1928) 110 Ind Cas 290 (292) (P C).

[2] Award by arbitrator appointed by one party before expiry of the time allotted to the other to appoint one, is a nullity. (1909) 3 Sind L R 237 (239).

- (b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

[1899—S. 9.]

10. (1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

Power to Court to remove arbitrators or umpire in certain circumstances.

11. (1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

[1899—S. 11.]

Section 9 (contd.)

[3] When reference to two arbitrators one by each party is made each party has right to appoint another in place of the arbitrator refusing to act. One party refusing to appoint the other can appoint sole arbitrator after notice to other party. (Vol 12) 1925 Bom 469 (469) : 49 Bom 706.

[4] Where the contract is silent as to what party should appoint his arbitrator first, a party should himself nominate his arbitrator before calling upon his opponent to nominate an arbitrator under S. 9 (b). (Vol 16) 1929 Sind 58 (60).

[5] Where the arbitration clause in an indent provided for reference to two arbitrators and that if buyers failed to appoint arbitrator, the sellers would have power to appoint arbitrator on behalf of buyers but not *vice versa*. *Held*, buyers had their right under S. 9, to nominate the arbitrator appointed by them as the sole arbitrator. (Vol 20) 1933 Sind 328 (328, 329) : 27 Sind L R 186.

[6] Where the sole arbitrator is appointed without notice being given but the appointment is not objected to in time, the absence of notice under S. 9 (b) is deemed to be waived. (Vol 7) 1920 P C 128 (128, 129) (P C).

[7] There was a provision in a contract to appoint

two arbitrators, one by each. The contract also provided for a different course to be adopted if one of the parties failed to nominate an arbitrator. If the arbitrators appointed by one party refuse to give adjournment to move the High Court to have their appointment set aside, their refusal does not amount to misconduct. (Vol 8) 1921 Mad 58 (60) : 44 Mad 406.

1. Section 11.—[1] Misjoinder of parties and causes of action in arbitration proceedings do not involve a question of jurisdiction; but if a party objects to such misjoinder and if the arbitrators ignore the objection, they may be charged with misconduct. (1911) 11 Ind Cas 274 (276) (Sind).

[2] A servant of one of the parties can act as an arbitrator. The fact that the engineer of one of the parties to the contract, who was nominated as arbitrator in the contract, had a duty to watch the works in respect of which the contract was given and might already have formed an opinion upon the matters in dispute is not enough, in the absence of any evidence that he would not act fairly, to prevent him from being the proper person to decide the dispute. (Vol 20) 1933 Sind 75 (77) : 27 Sind L R 169.

[3] As to the meaning of the word "misconduct" see Notes on S. 30.

12. (1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators) the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

Power of Court where arbitrator is removed or his authority revoked.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either —

- (a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or
- (b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

13. The arbitrators or umpire shall, unless a different intention is expressed in the Powers of arbitrator. agreement, have power to—

- (a) administer oath to the parties and witnesses appearing;
- (b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;
- (c) make the award conditional or in the alternative;
- (d) correct in an award any clerical mistake or error arising from any accidental slip or omission;
- (e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

[1899—S. 10 ; Civil P. C., Sch. II, Para. 11.]

14. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

Award to be signed and filed.

SECTION 14 — SYNOPSIS

- 1. Section 14 (1).
- 2. Section 14 (2).
- 3. Section 14 (3).

1. Section 13. — [1] Umpire must give reasonable facilities for parties to appear and state their case and evidence. (1911) 5 Sind L R 89 (90).

[2] Umpire is not bound to state a special case. Aggrieved party should apply immediately to revoke the submission. If it fails to do this, it cannot question the award after it is passed. (Vol 8) 1921 Cal 576 (576).

[3] It is in the discretion of the arbitrators whether to state a special case or not and the Court has no power to enforce its rulings or directions upon them. (1909) 1 Ind Cas 14 (16) (Bom). (Per Davar's order appealed from); (Vol 15) 1928 Mad 107 (114).

[4] Opinion of Court is not binding on the arbitrators nor can it operate as res judicata. (Vol 12) 1925 Sind 88 (86).

[5] An arbitrator has jurisdiction to enquire and decide whether a party to the submission has signed it, or whether the signature is that of a partnership and if so, who the individual partners are. (1911) 11 Ind Cas 274 (275, 276) (Sind).

[6] Parties referred to arbitration certain matters of reference including disputes not forming subject-matter of the suit. On difference of opinion between the arbitrators special case was stated for the opinion of the High Court and a decision was passed. Held that the case fell under S. 13 so far as it related to the agreement which was not the subject of the Court's order. (1911) 35 Bom 130 (136, 137).

I. Section 14 (1).—[1] Award under S. 14 must be in writing and must be signed. (Vol 11) 1924 Rang 319 (320); (1910) 1910 Mad W N 53 (60).

[2] There is a distinct statutory provision that the award must be signed by the persons who made it. The want of signatures of some of the arbitrators from the award invalidates the award. (Vol 15) 1928 Pat 231 (232).

[3] An award was brought to Court by one of several arbitrators at the instance of a party. Written submission to arbitration by the parties was not filed along with the award as required by the Original Side Rules. Further, the award was signed only by one of the arbitrators and not by all. Held, that the award could not be made a rule of the Court. (Vol 16) 1929 Mad 31 (32). (Vol 3) 1916 Pat 190 (193): 1 Pat L Jour 306. (Decree passed in accordance with award not signed by arbitrators before filing it is invalid.)

[4] Where the parties agree to abide by the decision of the majority of arbitrators, the refusal of the minority to sign the award will not invalidate the proceedings provided they were present throughout the proceedings and took part in the deliberations. (Vol 3) 1916 Pat 156 (157): 1 Pat L Jour 90.

[5] The resignation of one arbitrator and his refusal

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment

Section 14 (*contd.*)

to sign the majority view does not invalidate the award. (Vol 10) 1923 Lah 411 (412).

[6] Where the agreement of reference requires that the award must be unanimous to bind the parties the requirement is fulfilled if all the arbitrators agree in a certain decision even though one of the arbitrators accidentally, inadvertently or deliberately fails to sign the award. (Vol 32) 1945 Pat 140 (145) : 23 Pat 719.

[7] Where a memorandum of award was prepared and signed by the arbitrators, but before engrossing the same on stamp paper, one of the arbitrators finds that owing to a misunderstanding of the language adopted in the memorandum, his opinion has to be changed, his refusal to sign the original memorandum engrossed on stamp paper is perfectly legal; when the memorandum was drawn up and signed there was no completed award in the strict sense, so as to exhaust the powers of the arbitrators to deal further with the matter. (1911) 14 Cal L Jour 189 (209, 211).

2. Section 14 (2).—[1] Under the present section it is obligatory on the Court to give notice of the filing of the award to the parties concerned. Under the corresponding old section (S. 11 of the Act of 1899) this obligation was on the arbitrators or the umpire.

[2] According to the contract between the parties, a dispute was referred firstly to arbitrators, then to an umpire and then to a committee of appeal. Held that the committee were really a fresh set of arbitrators called in by the parties and the award of the committee could be filed in Court. (Vol 14) 1927 Cal 647 (649, 651) : 55 Cal 180; (Vol 21) 1934 Bom 476 (480).

[Contra (Vol 14) 1927 Cal 391].

[3] The arbitrators must, at the request of one or other party, file the award or a copy of it in the Court. (1910) 7 Mad L Tim 355 (361).

[4] One of the arbitrators can, on behalf of himself and others, file an award in the Court. (Vol 14) 1927 Rang 197 (198) : 5 Rang 171; (Vol 1) 1914 Sind 90 (91, 92) : 8 Sind L R 302.

[5] A Court is not competent to act on an award unless it is not only signed by all the arbitrators, but is also properly placed before the Court by the arbitrators and by no other persons. Where award was sent to Court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to Court, the award was held not properly placed before the Court, and as such could not be acted upon by the Court. (Vol 16) 1929 Pat 178 (180).

[6] A Court cannot compel the arbitrators to file the award when their fees and charges are not paid. (Vol 27) 1940 Sind 144 (144).

[7] Arbitrators can refuse to produce the award in Court if their remuneration is not paid but they are not prohibited from producing award in Court on non-payment. (Vol 32) 1945 Nag 117 (118) : ILR (1945) Nag 323.

[8] An arbitrator can file an award in Court even in absence of an application for filing by a party. (Vol 32) 1945 Nag 117 (118) : ILR (1945) Nag 323.

[9] Limitation Act, Art. 178 (as amended by Arbitration Act) applies only to cases where a party applies to Court for filing award either under S. 14 (2) or under S. 88. But where the application is made by the arbitrator himself, the article has no application. (Vol 30) 1943 Sind 33 (34, 35) : ILR (1942) Kar 466.

[10] Although S. 38 does not expressly empower the applicant under it, who has obtained possession of an award through the assistance of the Court, to file the

award in Court, such a power can properly and necessarily be inferred from it. (Vol 30) 1943 Sind 33 (34) : ILR (1942) Kar 466.

[11] Order directing an award to be filed is not necessary under the Act. (Vol 15) 1928 Mad 107 (115).

[12] An order of a Court merely stating that the award be consigned to record room and the validity of the award shall be determined at the time of execution of the award is not a proper order filing the award. (Vol 31) 1944 All 66 (76) : ILR (1943) All 907.

[13] Where an application for filing an award is made by the arbitrators at the request of one of the parties to the arbitration, the proper procedure is to allow the parties to the arbitration to take up the litigation in their hands and relieve the arbitrators. If the application made by the arbitrators at the request of one of the parties is dismissed by the Court, the parties aggrieved can continue the revision application before High Court. And in such a case the High Court can, if necessary, set aside the order of the Court. (Vol 32) 1945 Nag 117 (119) : ILR (1945) Nag 323.

NOTICE.—[14] Where no notice has been given of the filing of the award, the decree passed in accordance with the award must be set aside. (Vol 8) 1921 Oudh 154 (154) : 24 Oudh Cas 263; (Vol 13) 1926 Cal 1018 (1019). (It is a ground for revision); (Vol 15) 1928 Nag 166 (167).

[15] The fact that parties might have received knowledge of the award having been filed in Court, *aliunde* does not amount to such a notice. (Vol 17) 1930 Lah 228 (229).

[16] Parties are entitled to notice even if they have knowledge of the date on which the award is filed. (Vol 12) 1925 Lah 619 (619).

[17] Where an award is filed without notice to the defendant and a decree is passed on the award before the expiry of the time allowed by Art. 158, Limitation Act, for filing objections, the procedure is illegal and the decree must be set aside. (Vol 8) 1921 Oudh 148 (148) : 24 Oudh Cas 234.

[18] Where the arbitrator recommends that the plaintiff's claim be decreed *ex parte* as the defendant had failed to appear before him, before passing a decree in terms of the award, the Court should issue notice to the defendant. (Vol 22) 1935 All 852 (853).

[19] Notice is not necessary where the parties are present in Court when the award is filed. (1913) 1913 Pun L R No. 310 page 1045 (1050).

[20] Where a notice of filing of an award is not given to the party but the order filing the award is communicated to his pleader and the pleader admits such communication, it is a sufficient compliance with the section having regard to O. 3, R. 5, Civil P. C. (Vol 14) 1927 Cal 619 (621).

[21] When the arbitrator himself brings in the award to the Court, the Court is bound to give notice to the parties that the award has been filed, and the Court cannot possibly pass a decree in terms of the award unless such notice has been given. But if the parties or their pleaders bring in an award and ask that it should be filed, and the Court informs the pleaders or the parties that they should file objections within the prescribed time then it cannot be said that no notice was given. In such a case no material irregularity is committed which entitles the Court to set aside the whole of the proceedings. (Vol 13) 1926 Bom 312 (312).

3. Section 14 (3).—[1] The Court is bound to give the parties an opportunity of objecting before it pronounces its opinion. (Vol 12) 1925 Bom 22 (25) : 48 Bom 668.

of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(g) Where the arbitrators or umpire state a special case under clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

[1899—S. 11; Civil P. C., Sch. II, Paras. 10, 11 and 20]

Power of Court to modify award.

15. The Court may by order modify or correct an award—

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

SECTION 15—SYNOPSIS

(1) Clause (a)

(2) Clause (b)

(3) Clause (c)

(4) "The Court may by order modify or correct an award."

1. Clause (a).—[1] If the Court considers that the arbitrators giving award in a case have gone beyond the scope of their authority and have determined a matter not referred to arbitration, it is its duty to take action under S. 15. (Vol 15) 1928 Lah 915 (916).

[2] In a suit for dissolution of partnership and for accounts, the plaintiff claimed interest but defendant denied it. The matter was referred to arbitration, one of the points referred being whether the defendant was liable to pay any money and, if so, the amount due. It was held that the arbitrator could include in his award the sum payable by the defendant as interest both on sums advanced to the firm and on those advanced to defendant for his personal use, and also for the period before and after the suit and up to the date of the award. (Vol 7) 1920 Cal 413 (414).

[3] Where a suit for injunction against joint owners of property, some of whom are minors, is referred to arbitration and no sanction of the Court is obtained in respect of the minors, the award is not separable and consequently cannot be corrected by separating it in respect of the minors and granting the injunction against the majors only. (Vol 25) 1938 Lah 592 (593).

2. Clause (b). — [1] The Court has no power to rectify or correct an award unless the award is imperfect in form or the obvious error is of such a character that it can be amended without affecting the decision of the arbitrator. It is well-settled that the Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator. (Vol 12) 1925 Cal 332 (333).

[2] Section 15 applies only if the "imperfection in form" exists in the award at the time when it is filed in Court by the arbitrator and not if it comes into existence at a subsequent stage on the happening of an unanticipated event. (Vol 17) 1930 Lah 26 (31) : 11 Lah 342.

[3] In adjudging the amount payable by one party to another, an arbitrator has full power to direct payment by instalments. The directions as to the number, amount, mode and time of payment of these instalments are, therefore, matters within the discretion of the arbitrator and the essential parts of an award which a Court has no power to modify. (Vol 17) 1930 Lah 26 (31) : 11 Lah 342.

[4] Where arbitrators decided that a certain property was not endowed property but that it should not be partitioned and must continue as endowed property, the award contains an obvious error and the Court

can modify and correct the award. ('09) 2 Ind Cas 858 (858) (All).

3. Clause (c).—[1] The Court is bound to correct any obvious mistakes or slips in an award as in the case of decrees. The award in accordance with which the Court has to pronounce judgment is the one that embodies the real intention of the parties. (1913) 24 Mad L Jour 483 (483, 484).

[2] The Court has no jurisdiction to modify or correct an award if the mistake is not merely clerical or arithmetical. (Vol 8) 1921 Bom 191 (192, 193) : 45 Bom 512; (Vol 12) 1925 Sind 89 (90).

[3] An award was made upon the basis of certain figures contained in certain documents relied on by both the parties and a decree was passed according to the award without any objection from any of the parties. It was subsequently found that there was a mistake in the figures, on which the award was based and the party who was affected by the mistake applied for correction of the error. It was held that the application was not to correct an error patent and apparent on the face of the record. (Vol 14) 1927 Mad 720 (722).

4. "The Court may by order modify or correct an award". — [1] If a Court goes beyond the powers conferred by this section and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances, it acts without jurisdiction. (Vol 3) 1916 Lah 4 (5) : 1916 Pun Re No. 78.

[2] The Court has no jurisdiction to go into the merits of the dispute and come to a conclusion of its own, with the result that a very distinct alteration is made in the award. When the parties agree to have their disputes decided by their arbitrators, they agree to accept the decision of the arbitrators whether it might be right or wrong and the Court can only alter the award within the limits laid down by the Act. (Vol 8) 1921 Bom 191 (192, 193) : 45 Bom 512.

[3] The power of the Court to modify an award is limited by Clauses (a), (b) and (c). Where the arbitrator decided that plaintiff had by efflux of time lost his right to a plot of land but as defendant had acquired the legal title without incurring any expense, he should compensate plaintiff by paying him Rs. 125, it was held that though the question of compensating the plaintiff had not been referred to arbitration, the Court had no power to modify the award by expunging the provision as to compensation. (Vol 20) 1933 Lah 139 (140).

[4] Where the legal effect of one of the alternative adjudication in an award is to invest the owner of an estate with the right to claim an "easement of necessity" over the road leading from the public street to the parent estate, this right must be claimed and established in appropriate legal proceedings against the owner of the servient tenement. It cannot be incor-

- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

[Civil P. C., Sch. II, Para. 12.]

16. (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—

- (a) where the award has left undetermined any of the matters³ referred to arbitration, or where it determines any matter not referred to arbitration² and such matter cannot be separated without affecting the determination of the matters referred; or

Section 15 (contd.)

porated in the award by order of the Court purporting to act under this section. (Vol 17) 1930 Lah 26 (32) : 11 Lah. 342.

[5] Where there is an accidental mistake in the award and a decree is passed in terms of the award, Court has power apart from S. 152, Civil P. C., to amend decree. (Vol 19) 1932 Oudh 293 (296).

[6] An arbitrator has no power to review his own award. (Vol 5) 1918 Lah 239 (240) : 1917 Pun Re No. 99.

SECTION 16 — SYNOPSIS.

1. Sub-section (1).
2. Sub-section (1), clause (a) — Award determining matter not referred to arbitration.
3. Sub-section (1), clause (a) — "Left undetermined any of the matters."
4. Sub-section (1), clause (b).
5. Sub-section (1), clause (c).
6. Sub-section (2).
7. Sub-section (3).

1. Sub-section (1)—[1] Section 16 empowers the Court to remit the award to the arbitrator himself for reconsideration where there are omissions or defects therein which are such as cannot be modified or corrected by the Court itself under Section 15. (1867) 7 Suth W R 406 (406, 407).

[2] The Court is confined to the specific grounds mentioned in this section and has no power to remit an award on other grounds. (1881) 3 All 636 (642); (Vol 22) 1935 Lah 113 (114). (Court remitting award when none of the grounds mentioned existed — Court acts without jurisdiction). (1911) 14 Oudh Cas 308 (311); (1911) M W N 151 (161) (F B). (Alleged defect in the tribunal which gave the award is no ground for remitting it.); ('84) 10 Cal 11 (13). (An objection by a party that he did not agree to the terms of the reference is not a ground under this paragraph.); (Vol 4) 1917 Mad 312 (313). (The fact that the obligations imposed under the award have been performed between the date of the award and the date of the application to file it is no ground.); (Vol 23) 1936 Nag 197 (198) : ILR (1936) Nag 44; (Vol 11) 1924 Sind 51 (55) : 19 Sind L R 152.

[See also (Vol 21) 1934 All 939 (940). (It is doubtful whether the want of provision in the promissory note for the payment of interest is a kind of objection to the legality under clause (c).)]

[See however (Vol 24) 1937 Bom 410 (416, 417).]

[3] The Court cannot remit the award in part only and treat the award as to the other part as final. (Vol 13) 1926 All 567 (570).

[But see (Vol 16) 1929 Sind 164 (165); (Vol 24) 1937 Bom 410 (416, 417).]

[4] When the Court decides to remit the award under this section it is not final and so long as it is not final

and is in the hands of the arbitrator, it can be altered by him; (1867) 7 Suth W R 406 (407); (Vol 13) 1926 All 567 (569); (Vol 13) 1926 Lah 519 (520) : 7 Lah 327. Compare S. 10 of the English Arbitration Act, 1889, which runs thus : — "In all cases of references to arbitration the Court or a Judge may from time to time remit the matters referred, or any part of them to the reconsideration of the arbitrators or umpire."

[5] The Court has a discretion to remit or not to remit an award. (Vol 13) 1931 Lah 215 (216); (1905) 1905 Pun Re No. 41, page 148.

[See also (Vol 20) 1933 Mad 697 (699). (In the absence of objection by party, Court is not bound *suo motu* to remit award.)]

[6] Where there is any circumstance in the position of the arbitrator such as tends to produce a bias in his mind, the Court will, in its discretion, refuse to remit the award to the arbitrator for reconsideration. (Vol 12) 1925 Sind 51 (52).

[7] There is no period of limitation for an application to the Court to remit the award. (Vol 20) 1933 All 643 (649); (Vol 6) 1919 Mad 877 (877).

2. Sub-section (1), clause (a). — Award determining matter not referred to arbitration. — [1] If the award decides matters not within the scope of the submission, it is void as regards the portion in excess of the submission. If such portion is separable from and independent of the remainder, effect can be given to the rest of the award. (Vol 3) 1916 Cal 806 (807); (Vol 26) 1939 Lah 303 (309). (Only share of minor in property referred — Arbitrator's decision that no partition should take place during minority is beyond terms of reference—Decision is void but rest of award declaring minor's share stands.)

[See also (Vol 10) 1923 Lah 411 (412).]

[2] If the extraneous matters cannot be separated without affecting the determination of the matters referred, the Court may remit the award for reconsideration. (Vol 20) 1933 Mad 862 (865); (1896) 1896 Pun Re No. 60; (Vol 13) 1926 Mad 201 (204); (Vol 22) 1935 Lah 52 (53). (In this case award was set aside.)

[See also (Vol 22) 1935 Lah 52 (53).]

[3] Unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him and the burden of proving that the arbitrator has awarded on matters not within the submission is on the party impeaching the award. (Vol 25) 1938 Sind 59 (62).

[4] The principle that when a separable portion of an award is bad, the remainder of the award is good and can be maintained is a general principle and is not limited in its application to cases in which the award determines matters in excess of those submitted for arbitration. (Vol 23) 1936 Oudh 72 (74). (Award dealing with immovable property and moveable property — Portion dealing with immovable property bad

Section 16 (contd.)

for want of registration — Such portion separable — It can be rejected and the rest of the award maintained.)

3. Sub-section (1), clause (a).—“Left undetermined any of the matters.” — [1] Where the arbitrators have not, in their award, decided any matter referred to them, the Court may, under clause (a), remit the award for reconsideration. (1881) 3 All 286 (291, 292); (Vol 20) 1933 Lah 530 (532). (Question referred to arbitration—Arbitrators giving only provisional order leaving certain questions to be decided by Court—Award should be remitted for reconsideration); (Vol 12) 1925 All 393 (394); (Vol 5) 1918 Cal 247 (247). (Reference authorising to proceed *ex parte* if a party absent—One party absent—Arbitrator's award without evidence—*Held* he should have heard the evidence of the other side and, therefore, award remitted under this clause); (Vol 1) 1914 Cal 497 (498); (1912) 1912 Mad W N 1076 (1077).

[2] It is open to the parties to waive remittal. (1894) 21 Cal 590 (600); 21 Ind App 47 (PC); (Vol 15) 1928 Pat 7 (10); 6 Pat 556; (1911) 14 Cal L Jour 188 (208).

[See however (Vol 10) 1923 Mad 576 (576, 577).] *Held* that under the circumstances there was no implied agreement that the award should be void unless an award were given in respect of all the matters referred for decision.]

[3] Where all the parties agree before the arbitrator that an incomplete award may be made or where they all represent that there is no longer any controversy between them upon a particular point, the fact that the award is incomplete or silent on such point will not vitiate it. (Vol 18) 1921 All 384 (387); 43 All 108; (Vol 17) 1930 Cal 255 (257). (Party affirming the award by taking benefits under it cannot turn round and say that the award is invalid); (1879) 4 Cal L Rep 92 (94). (Parties may allow the arbitrators to take *seriatim* the matters in dispute and to deliver series of awards); (Vol 15) 1928 Pat 7 (10, 11); 6 Pat 556. (Parties agreed to the partition by stages and asked that the properties remaining undivided should be the subject of a further award.)

[See also (Vol 12) 1925 All 103 (106). (Omission to partition one item of property on account of impossibility does not vitiate award); (Vol 6) 1919 Cal 1080 (1031). (Where some of the matters referred to have not been decided, the Court cannot allow a party without the consent of the other to withdraw his claim as to those matters.)]

[4] An award cannot be said to be incomplete because, in a suit involving a number of issues the arbitrators have not given a decision on each of them. It is enough if they give a decision on the whole matter in issue between the parties. (1902) 29 Cal 167 (186); 29 Ind App 51; 1902 Pun Re No. 25 (PC); (1899) 22 Mad 202 (204); (1911) 1911 Pun W R No. 13, page 31 (35); (1870) 2 N W P H C R 150 (151).

[5] It is well settled that the Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute. (Vol 25) 1938 Sind 59 (62).

4. Sub-section (1), clause (b) — [1] An award, to be capable of execution, ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrators' meaning or as to the nature and extent of the rights and duties imposed by it upon the parties. (Vol 8) 1916 Oudh 160 (161).

[See also (Vol 27) 1940 Lah 24 (26). (Joint property partitioned by arbitration without intervention of Court — Mere fact that no specific directions have been given about ventilators and drains existing on property does not tender award invalid on ground of being indefinite.)]

[2] The fact that a particular expression used in an award is capable of more than one interpretation does not show that it is so indefinite as to be incapable of execution. (Vol 3) 1916 Oudh 226 (228).

[3] Where the arbitrators give the method for calculating the amount awarded without specifying the actual amount due, the award can be considered as sufficiently certain. (1912) 15 Cal L Jour 360 (364); (Vol 17) 1930 Lah 22 (23); (Vol 9) 1922 Cal 447 (452).

[4] An award cannot be set aside on the ground of uncertainty upon a point on which there is no controversy between the parties. (Vol 25) 1938 Sind 59 (62). (*Cargay v. Aitchison*, (1823) 2 B & C 170 and *Plummer v. Lee*, (1837) 2 M & W 495, followed.)

5. Sub-section (1), clause (c). [1] Where the arbitrators decide a question specifically submitted to them for decision, but such decision happens to be erroneous in law, it cannot be said that there is any error apparent on the face of the award and the Court has no right to sit in judgment over the views of the arbitrator. (Vol 22) 1935 Rang 16 (17). (Wrong decision on question of succession of *orasa* sons among Burmans.); ('78) 2 All 181 (187, 191) (F B); (Vol 12) 1925 Sind 186 (188); 19 Sind L R 54; (Vol 8) 1916 Oudh 285 (285); 19 Oudh Cas 48; (1902) 29 Cal 167 (183); 29 Ind App 51; 1902 Pun Re No. 25 (P C); (Vol 28) 1936 Nag 197 (199); 1 L R (1936) Nag 44; (Vol 26) 1939 Cal 557 (557).

[2] *S* sued *V* and others for a share in the family properties. *V* contended in defence that *S* was born blind and that, therefore, he was not entitled to any share under the Hindu law. The suit was then referred to arbitration and the arbitrators awarded *S* a life interest in a fourth share of the properties subject to its becoming an absolute interest in case he married. It was held that the award was not vitiated by an error of law apparent on the face of the award. (Vol 5) 1918 Mad 296 (297); 41 Mad 1022.

[3] Where a question of law is not specifically submitted to the arbitrators for decision, and they state a wrong legal proposition and base their award on the matters referred to them on such proposition, there is an error of law on the face of the award. (Vol 12) 1925 Sind 186 (188); 19 Sind L R 54.

[4] “An error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous.” (Vol 10) 1923 P C 66 (69); 47 Bom 573; 50 Ind App 324 (P C). (Reversing (Vol 7) 1920 Bom 256); (Vol 27) 1940 Oudh 405 (408).

[5] *A*, an arbitrator, states a special case and gets an opinion of the Court. In making the award, he states that opinion and bases his award upon it. The appellate Court finds that the opinion as given is erroneous. There is an error in law on the face of the award which will entitle the appellate Court to remit the award for reconsideration. (1912) 1912 App Cas 673 (692). (*British Westing-house Company v. Underground Electric Railway Company*).

[6] A reference was made to arbitrators to divide family properties between a Hindu father and his sons. The eldest son had assisted the father to attain success in his business and thus to acquire the property. In consideration of that the arbitrators awarded him Rs. 11,000 in excess of his share describing it as “*Jyeshtha Bhagam*”. It was held that though the rule of “*Jyeshtha Bhagam*” is obsolete and illegal, the mere use of the term in the award did not make it illegal, when the Court is satisfied that the extra amount was really given to the eldest son for services rendered.

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

[1899—S. 13; Civil P. C., Sch. II, Paras. 14 and 15 (1).]

17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired,

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(Vol 17) 1930 Mad 38 (41); (Vol 12) 1925 Mad 301 (301, 302).

[7] See also the following cases as to what is and what is not illegality apparent on the face of the award. (1869) 1869 Pun Re No 12. (Open disregard by arbitrators of proved law or custom is a good ground for remitting the award.); (Vol 20) 1933 All 956 (957). (Reference of dispute to arbitration — Defendant's subsequent statement that if plaintiff made certain statement on oath decree might be passed as prayed for in plaint — Plaintiff making required statement on oath — There is no compromise as defined in O. 23, R. 3 and arbitrator is not deprived of his powers to give whatever award he thinks proper.); (Vol 20) 1933 Sind 260 (261): 27 Sind L R 96. (Partition suit — Question whether marriage expenses of plaintiff should be provided for was referred to arbitration — Arbitrator awarding for plaintiff — No error apparent on the face of the record.); (1868) 1868 Pun Re No. 101, p. 258 (260). (Award allowing set off founded on wagering transaction is illegal.); (Vol 6) 1919 Mad 877 (877). (Award when presented bore the signatures of only 2 out of 3 arbitrators — It is an illegality on the face of the award.); (1871) 15 Suth W R 331 (331). (Award given by arbitrators along with some others comes under clause (e).); (1872) 1872 Pun Re No. 3, page 3. (Plaintiff and one defendant agreed to reference — Award against all defendants is illegal.); (Vol 10) 1923 Cal 135 (138). (Private award made after institution of suit is illegal.); (Vol 2) 1915 Cal 745 (749). (An executor making reference to arbitration for modifying a will — Award based on such submission is illegal.); (1908) 30 All 505 (506, 507). (After an award was made and delivered, it was discovered that one of the plaintiffs had died during arbitration and before the award — No error apparent on the face of the award.); (Vol 11) 1924 Cal 1051 (1053). (Buyers complaining of inferior quality of goods but failing to produce them for inspection — Award against buyer not illegal.); (Vol 25) 1938 Pat 231 (233): 16 Pat 742. (Second Schedule is exhaustive — Award outside Court in favour of unregistered firm — Application for filing award — Objection under S. 69, Partnership Act, is not error in law on the face of award.); (Vol 26) 1939 Cal 739 (740). (A second or supplemental award given by the arbitrators in pursuance of a reservation made in the first award is not illegal, and it cannot be said to have been passed by the arbitrators at a time when they were *functus officio*.); (Vol 21) 1934 All 939 (940). (Suit on promissory note claiming interest — Reference to arbitration — Award granting interest — Held, it was doubtful whether the want of provision in the pro-note for the payment of interest was the kind of objection to legality of the award apparent on the face of it.); (Vol 24) 1937 Pat 343 (344). (Where the award does not bear the signature of one of the arbitrators and where

it further appears that he had taken no part in the proceedings there is an objection to the legality of the award apparent on the face of it.); (Vol 23) 1936 Nag 197 (200): 1 L R (1936) Nag 44. (Arbitrators appointed for partition of property, cash, movables, etc. — Allotment of cash to one's share and movables to share of another — Award binding even though shares not equal.)

[8] An arithmetical error in the award made by the arbitrator in arriving at the sums due by one party to another is not an illegality apparent on the face of the award. (Vol 12) 1925 Lah 86 (86).

[9] Where a dispute arising out of a contract is referred to arbitrators and a reference is made in the award to a contention of one party, it does not open the door to seeing first what the contention is and then going to the contract on which the rights of parties depend to see if that contention is sound. (Vol 10) 1923 P C 66 (69): 47 Bom 578: 50 Ind App 324 (P C).

[10] Where an award makes an allusion to the contract very guardedly and for the purpose only of earmarking the origin of the dispute in question, it does not enable a party to contend that the contract was incorporated into the award by the reference mentioned above and then to say that the award discloses an error in law in construing the terms of the contract. (Vol 14) 1927 P C 164 (165): 54 Ind App 427: 21 Sind L R 101: 55 Cal 126 (P C).

6. Sub-section (2).—[1] An order refusing to enlarge the time for the submission of an award remitted to the umpire on an application under S. 13 of the Arbitration Act, 1899, was held to be a judgment and hence appealable under the Letters Patent. (Vol 15) 1928 Mad 69 (71): 51 Mad 103.

7. Sub-section (3).—[1] Where an award is remitted to the arbitrators who decline to submit a fresh award, the award so remitted becomes void and the Court must try the case itself. (1889) 16 Cal 806 (808, 810); (1865) 3 Suth W R 168 (169); (1893) 1893 All W N 45 (45).

[2] In such a case the finding of corruption or misconduct is not necessary. (1867) 7 Suth W R 406 (407).

[3] Where after the remittal, the arbitrators on reconsideration come to the same conclusion as their previous one, the award does not become void. (1881) 1881 All W N 25 (26).

SECTION 17 — SYNOPSIS.

1. "After the time . . . expired".

1a. Application to set aside an award — See S. 30.

2. Binding effect of award.

3. Court acting as arbitrator.

4. Decree based upon invalid award — Appeal.

5. Decree in accordance with award — Finality of.

6. Decree not in accordance with award — Finality of.

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7. Decree without hearing objections to award — Appeal.

8. Enforcement of award.

9. Legislative changes.

10. "Pronounce judgement according to the award."

11. Revision.

12. Second appeal.

13. Suit to set aside award — See Notes on S. 32.

14. Valuer and arbitrator.

1. "After the time . . . expired."—[1] An application to set aside an award must, under Article 158 of the Limitation Act, as amended in 1940, be made within thirty days from the date of service of the notice of filing of the award. Section 5 of the Limitation Act does not apply to such applications and the Court cannot excuse the delay in the presentation thereof. (Vol 14) 1927 Lah 273 (273, 274) : 8 Lah 274 ; (1913) 18 Cal L Jour 35 (37) ; (Vol 4) 1917 Nag 211 (212) : 13 Nag L R 172.

[2] Under section 12 of the Limitation Act the time requisite for obtaining a copy of the award can be deducted. (Vol 20) 1933 Rang 38 (38) ; (Vol 19) 1932 Mad 588 (588) ; (1907) 29 All 584 (586) ; (Vol 6) 1919 Cal 224 (225) : 46 Cal 721 ; (1902) 29 Cal 167 (182, 183) : 29 Ind App 51 : 1902 Pun Re No. 25 (P O).

[3] The privilege which S. 4 of the Limitation Act confers on a party does not prejudice the right of the other party to obtain judgment in terms of the award within 30 days of the date of service of notice. (Vol 29) 1942 Cal 566 (567). (Limitation of 30 days expiring on Sunday — Judgment passed on next day — Application to set aside award also filed on same day — Judgment held valid.)

1A. Application to set aside an award.—See S. 30.

2. Binding effect of award. — [1] A judgment and decree passed in accordance with an award may constitute *res judicata* as much as a judgment and decree which result from the decision of the Court after the matter has been fought to the end. (1897) 21 Bom 465 (467) ; (1881) 7 Cal 727 (729) ; (1879) 5 Cal L Rep 388 (340).

[See (Vol 3) 1916 All 358 (359). (Award in mutation proceedings is not *res judicata* on a question of title and possession.)]

[See also (Vol 11) 1924 All 62 (62, 63) : 45 All 628. (Executing Court cannot go behind the decree based on award.)]

[2] A valid award operates to merge and extinguish all claims covered by the submission and is binding on the parties to the reference even though it has not been made a rule of Court under this section. (1892) 1892 All W N 238 (238) ; (1913) 1913 Pun L R No. 275 p. 919 (924) ; (Vol 7) 1920 Mad 615 (617). (Portion of award dealing with matters outside scope of suit and as such incapable of being basis of decree under this para. — Still it is binding on the parties.) ; (1911) 5 Sind L R 240 (242).

[3] An award does not become ineffectual or invalid as between the parties to the reference, merely because other parties to the suit have not joined in the reference. (Vol 8) 1921 Nag 176 (178). (Especially when it has been acted upon.)

[4] A person who is a stranger to the reference is neither bound by nor can enforce the award. (1883-84) 6 All 322 (328) : 11 Ind App 20 (P C). ; (1909) 5 Mad L Tim 199 (200).

3. Court acting as arbitrator.—[1] A consent by the parties to abide by the decision of the Court is not such a reference to arbitration as is contemplated by this Act. The decision of the Court in such a case, however,

operates as a consent decree and is, therefore, not appealable. (Vol 7) 1920 Mad 800 (802) : 42 Mad 625. (Same principle applies even if reference is made to presiding Judge and another person jointly.) ; (Vol 6) 1919 Mad 150 (152).

[See however (Vol 16) 1929 All 577 (577) : 51 All 886. (Decision is in nature of arbitrator's award and hence not appealable.) ; (1899) 23 Bom 752 (755) ; (1911) 38 Cal 421 (424). (Court cannot review such a decision.) ; (1902) 26 Mad 76 (77) ; (Vol 12) 1925 Nag 463 (464) : 21 Nag L R 84 ; (Vol 2) 1915 Mad 1074 (1074). (Award of Court is itself a decree and objections to award must be taken by way of appeal from the decree.)]

[2] Where the parties agree not to let in evidence but that the Court may make a local inspection, the decision of the Court in the suit is neither a consent decree nor an award and is, therefore, appealable. (Vol 16) 1929 All 116 (117).

4. Decree based upon invalid award—Appeal.

— [1] Under the old Civil Procedure Code, it was held that S. 522 presupposed a valid and legal award and that, therefore, an appeal lay against a decree based upon an invalid award. (1912) 6 Sind L R 168 (176) ; (1884) 6 All 174 (178) (FB) ; (1903) 1903 All W N 159 (160) ; (1883) 9 Cal 905 (906) ; (1888) 1888 Pun Re No. 134, page 362 (365) ; (1902) 5 Oudh Cas 13 (16) ; (1911) 4 Cal L Jour 143 (145) ; (1909) 31 All 450 (452) ; (1882) 1882 Pun Re No. 4, page 21 (25) (FB) ; (1902) 26 Mad 47 (48) ; (1906) 2 Nag L R 81 (86, 87) ; (1898) 25 Cal 141 (143, 144, 145) ; (1893) 17 Bom 357 (361) ; (1906) 33 Cal 498 (501).

[See (1899) 4 Cal W N 47n. (Objection taken in appeal for the first time—Not allowed.)]

[But see (1883) 6 Mad 414 (416). (But revision lies.) ; (1870) 14 Suth W R 33 (33).]

[2] After the Privy Council decision in (1902) 29 Cal 167 (183, 184, 185) : 29 Ind App 51 : 1902 Pun Re No. 25 (P O), it has been held by all the Courts except the Calcutta High Court that no appeal lay against a decree based even on an invalid award. (1913) 21 Ind Cas 989 (991, 992) (All) (F B) ; (Vol 10) 1923 All 502 (503) : 45 All 441 ; (Vol 11) 1924 Bom 324 (325) ; (Vol 2) 1915 Mad 484 (485) ; (Vol 20) 1933 Lah 426 (427) : 14 Lah 165 ; (Vol 19) 1932 Lah 239 (242) : 13 Lah 528 ; (Vol 18) 1931 Lah 126 (129) : 12 Lah 408 ; (Vol 16) 1929 Lah 476 (477) : 10 Lah 871 ; (Vol 14) 1927 Lah 362 (363) : 8 Lah 693 ; (Vol 22) 1935 Rang 94 (97) : 12 Rang 675 ; (Vol 19) 1932 Oudh 156 (158) : 7 Luck 642 ; (1936) 159 Ind Cas 1041 (1042) (Oudh) ; (Vol 5) 1918 Nag 191 (193). (No appeal lies.)

Cases under the Code of 1882 following 29 Cal 167 : (1906) 33 Cal 899 (902, 903) ; (1905) 2 Cal L Jour 153. (156) ; (1909) 32 Mad 510 (511) ; (1911) 1 Mad W N 151 (164) ; (Vol 1) 1914 Cal 723 (724).

[But see (Vol 25) 1938 Oudh 154 (156). (Where there is no valid submission, there can be no award on which a decree can be made by the Court and if it is so made it is passed on something which is not an award and is therefore appealable.) ; (Vol 8) 1921 Bom 32 (32) : 45 Bom 832. (Obiter.) ; (Vol 2) 1915 Lah 253 (254) : 1916 Pun Re No. 28. (Do.) ; (Vol 11) 1924 Nag 338 (340, 341). (Appeal lies.)]

According to the Calcutta view appeal lies even where validity of the reference is attacked : (Vol 28) 1941 Cal 202 (205) ; (Vol 18) 1931 Cal 211 (213, 219) : 58 Cal 628 ; (Vol 18) 1931 Cal 109 (109, 111) ; (Vol 6) 1918 Cal 232 (233) ; (Vol 5) 1918 Cal 336 (337) ; (1905) 9 Cal W N 873 (874) ; (1885) 11 Cal 37 (41) ; (1897) 24 Cal 469 (471) ; (Vol 12) 1925 Cal 812 (814) : 52 Cal 559. (Validity of reference attacked on the ground that Sch. II does not apply to execution proceedings.)

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[3] The intention of the Legislature is that objections to the award on the ground of its invalidity must be decided by the Court making the reference and that an appeal against the decree on such ground is incompetent. (Vol 1) 1914 All 446 (449) : 21 Ind Cas 989; (1891) 36 All 69 (75) (FB); (1912) 9 All L Jour 258 (259, 260); (1913) 39 Cal 822 (826, 827); (1931) 132 Ind Cas 180 (181) (Lah); (Vol 3) 1916 Mad 963 (963); (Vol 1) 1914 Mad 675 (675, 676) : 38 Mad 256; (Vol 2) 1915 Mad 484 (485); (Vol 3) 1916 Mad 660 (661, 662). (Per Phillips, J., Tyabji J. dissenting.); (Vol 3) 1916 Pat 190 (193, 194) : 1 Pat L Jour 306; (1912) 6 Sind L R 168 (175, 176); (Vol 23) 1936 Rang 240 (240); (Vol 22) 1935 Rang 94 (96) : 12 Rang 675; (Vol 26) 1939 Pat 526 (529) : 18 Pat 193 (202).

[4] The remedy in case where the Court has no jurisdiction to entertain the suit is by way of revision and not by an appeal. (1885) 8 Mad 235 (235, 236). (Decree on award under S. 522 in suit beyond the pecuniary jurisdiction of the Court—Decree set aside in revision.)

[See however (Vol 24) 1937 Lah 268 (269). (In this case the decision in (Vol 15) 1928 Lah 730 is distinguished on the ground that in that case objections to the award had been filed whereas in the present case no objection had been filed and so the Court had no option but to pass a decree in accordance with the award and it was not thereafter open to the parties to raise the objection afterwards.)]

[But see (Vol 15) 1928 Lah 730 (730, 731).]

5. Decree in accordance with award—Finality of.—[1] Objections relating to matters antecedent and leading up to the award cannot be raised after the award becomes final. In fact the Court is bound to pronounce judgment in accordance with the award, and pass a decree following it. (Vol 24) 1937 Lah 268 (269). (And it is not open to either party to object to the validity of the award on any ground by appeal or by revision.)

[2] In order to give effect to the general principle of finality of awards, it is declared by this section that no appeal shall lie from "such decree", i. e., a decree following a judgment which is in accordance with the award. (1902) 29 Cal 167 (183) : 29 Ind App 51; (1902) Pun Re No. 25 (P C); (Vol 23) 1936 Lah 466 (468); (1875) 23 Suth W R 429 (431) (P C); (Vol 30) 1943 Oudh 304 (305); (Vol 30) 1943 Pat 318 (319). (Reference pending at commencement of Arbitration Act is governed by Civil P. C., Sch II, Para 16.)

[See (Vol 23) 1936 Lah 136 (138). (Arbitrator fully empowered to make award—Applicant for reference cannot challenge award.)]

[3] Where, a decree is in accordance with the award no appeal will lie against it on the ground that the arbitrators were guilty of misconduct, or on the ground that the award is in excess of the powers conferred upon the arbitrators. (1908) 35 Cal 648 (659) : 1908 Pun Re No. 80 : 35 Ind App 88 (P C); (1907) 29 All 457 (462) (F B); (1902) 1902 Pun Re No. 88, page 371 (375) (F B); (Vol 26) 1939 Pat 526 (529) : 18 Pat 193.

[4] Prohibition as to appeal will apply only where the decree is pronounced after the expiry of the period of limitation for making an application to set aside the award. Where a decree is passed before the expiry of such period, an appeal is not barred by this Section. (1896) 18 All 422 (428, 429) (FB); (Vol 14) 1927 All 614 (615) : 50 All 51; (1873) 20 Suth W R 311 (311, 312); (1882) 1882 Pun Re No. 48, page 140 (141); (Vol 6) 1913 Mad 150 (152, 154).

[See also (Vol 16) 1929 Mad 789 (790). (High Court interfered in appeal.)]

[See however (1911) 9 Ind Cas 197 (198). (Mad.)

(Revision lies.); (Vol 9) 1922 Mad 179 (179, 180) : 45 Mad 466; (1912) 17 Ind Cas 431 (431) (Mad.) (Doubtful if appeal lies.); (Vol 8) 1921 Bom 32 (32) : 45 Bom 832; (Vol 8) 1921 Oudh 148 (148) : 24 Oudh Cas 234; (Vol 3) 1916 Sind 79 (80) : 9 Sind L R 183.]

[But see (1882) 1882 All W N 76 (77). (High Court exercised its power of revision.); (Vol 20) 1933 All 313 (314). (Court passing decree in terms of award without giving 10 days time—It is material irregularity—Decree set aside in revision.); (Vol 2) 1915 Lah 253 (254) : 1916 Pun Re No. 28. (The observation is, however, a casual and not a considered one.); (1878) 3 Mad 59 (60). (Appeal not allowed—Proper remedy is by way of review.); (Vol 20) 1933 Rang 38 (38). (Appeal is barred.); (Vol 12) 1925 Rang 103 (103). (Do.)]

[5] If the parties accept the award filed in Court and agree that a decree may be passed in terms of the award Court has power to pass the decree without waiting for the expiry of the period prescribed by Article 158 of the Limitation Act and the decree so passed is valid being a decree by consent of parties. (1913) 1913 Pun L Re No. 310 page 1045 (1051); (Vol 1) 1914 Lah 313 (313); (Vol 18) 1931 Nag 112 (113) : 27 Nag L R 240.

[See (1875) 7 N W P H C R 367 (370). (As to whether mere silence amounts to consent.)]

[See however (Vol 21) 1934 Mad 619 (620); (Vol 3) 1916 Sind 79 (81, 82) : 9 Sind L R 183.]

[But see (Vol 19) 1922 Mad 179 (179, 180) : 45 Mad 466. (Dissenting from obiter dicta in (Vol 1) 1914 Mad 875 : 38 Mad 256.)]

6. Decree not in accordance with award — Finality of. — [1] An appeal will lie from a decree based on an award where it is in excess of the award or is not in accordance with the award. (1865) 3 Suth W R 168 (169); (1869) 11 Suth W R 140 (141); (1913) 1913 Pun Re No. 52. (Court dismissing suit, ignoring award, on ground that no civil suit lies—Decree is appealable.); (1883) 1883 Pun Re No. 47; (1896) 1896 Pun Re No. 60, page 181; (Vol 6) 1919 Cal 1030 (1031). (Decree setting forth two awards by the same arbitrator, one modifying the other, is not one in accordance with the award.); (Vol 14) 1927 Lah 362 (364) : 8 Lah 693. (Persons not parties to reference raising objections — Decree on award showing them as parties—They, having submitted to the proceedings, cannot appeal on ground of decree being in excess of award.); (1881) 3 All 286 (291, 292); (1912) 1912 Pun L R No. 118 page 354 (355). (Revision does not lie.)

[See also (Vol 17) 1930 Lah 477 (478). (Held to be in accordance with award.)]

[2] Where the decree allows payment of the amount due by instalments or interest or costs not granted by the award, the decree is not in accordance with the award and an appeal will therefore lie. (1886) 8 All 449 (451); (1875) 23 Suth W R 105 (105); (1909) 1909 Pun L R No. 97 page 359 (360).

[Compare (Vol 17) 1930 Lah 477 (478).]

[3] An appeal will lie where a decree is based partly on an award and partly on the Court's findings. (Vol 13) 1926 All 567 (569).

[4] The mere fact that the judgment is in excess of the award will not give a right of appeal if the decree is in accordance with the award. (1908) 8 Cal L Jour 475 (477).

[5] An appeal will not lie against a decree based on a modified award, though it may not be in accordance with the original award. (Vol 17) 1930 Lah 219 (220); (Vol 19) 1932 Cal 713 (713, 714). (Decree not appealable even though grounds of appeal were directed against order modifying award — But the appeal may be converted into appeal from order modifying award under S. 104, Civil P. C.); (Vol 20) 1933 Lah 139 (139); (1906) 1906 Pun Re No. 13, page 47.

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[But see (1886) 8 All 449 (452). (Submitted not correct.) (Vol 22) 1935 Pat 109 (110). (Do.); (1909) 12 Oudh Cas 23 (24). (Do.); (Vol 22) 1935 Pat 109 (110). (Do.)]

[6] The appellant is not entitled to address the Court on all points raised before the lower Court. His appeal will lie only in so far as the decree and the award differ. (1908) 8 Cal L Jour 475 (477).

[7] Appellant's attack must be confined to the legality of the decree as compared with the award. (Vol 15) 1928 Lah 849 (850).

7. Decree without hearing objections to award — Appeal. — [1] Where a decree is passed in terms of an award although without considering the objections raised against it, yet the award forms the basis of a decree and therefore no appeal lies against the decree passed on such an award. In such cases the High Court can interfere only by way of revision. (Vol 3) 1916 Cal 806 (807); (Vol 3) 1916 Mad 927 (927); (Vol 21) 1934 Mad 619 (620); (Vol 20) 1933 Rang 38 (38). (No appeal lies.); (Vol 2) 1915 Lah 352 (352, 353).

[But see (Vol 14) 1927 All 120 (121): 49 All 178; ('89) 1889 All W N 15 (16); (1896) 18 All 422 (423, 429) (FB); (1882) 1882 Pun Re No. 184, page 539.]

[2] Where a decree based upon an award is attacked on the ground that a sufficient opportunity was not given to a party to substantiate his objections to the award, it has been held that the Court acts with material irregularity in the exercise of its jurisdiction and that the decree may be set aside in revision. (Vol 3) 1916 Cal 806 (807); (Vol 8) 1921 Lah 249 (250); (Vol 4) 1917 Oudh 240 (241); (Vol 21) 1934 Mad 619 (620).

[But see (Vol 12) 1925 Rang 238 (239). (Appeal lies in such a case — Submitted not correct.)]

8. Enforcement of award. — [1] Where a decree is passed in terms of an award, the award can be enforced only by way of execution of the decree and no separate suit will lie therefor. (Vol 12) 1925 P C 34 (35): 52 Cal 314: 52 Ind App 79 (PC).

[2] A suit will not lie to enforce an award which was declared void by the Court in proceedings under S. 20. (1907) 1907 Pun Re No. 19, page 86.

[3] Order in execution of an award is appealable. (Vol 16) 1929 Lah 228 (229); (Vol 8) 1921 Sind 132 (133): 16 Sind L R 245.

[4] Execution of an award filed in chartered High Courts is governed by Art. 183, Limitation Act. (Vol 14) 1927 Cal 853 (855): 55 Cal 499; (Vol 29) 1942 Bom 34 (35): 1 L R (1942) Bom 124.

Enforcement of award—Decisions under Act of 1899.

[5] Award filed becomes enforceable only after parties adversely affected are given opportunity to move for its remission or setting aside. (Vol 9) 1922 Sind 6 (8): 16 Sind L R 79.

[6] Award when filed is to be executed like a decree but is not decree itself. (Vol 9) 1922 P C 374 (377): 50 Cal 1:19 Ind App 366 (PC); (Vol 25) 1938 All 232 (233, 234): 1 L R (1938) All 389; (Vol 16) 1929 Lah 882 (883); (1918) 40 Cal 219 (230); (Vol 15) 1928 Cal 840 (841); (Vol 20) 1933 Sind 78 (79): 27 Sind L R 69; (Vol 18) 1931 Sind 160 (162): 25 Sind L R 528; (Vol 20) 1933 Pesh 66 (67).

[7] Award when filed in Court shall have the force of a decree. So no decree need be passed. (Vol 25) 1938 Pesh 3 (4); (Vol 14) 1927 Cal 562 (563); (Vol 20) 1933 P C 61 (62, 63): 60 Cal 670 (P C).

[8] Words 'enforceable as if it were a decree' do not exclude right of decree-holder to apply for execution periodically until 12 years have elapsed. All provisions of Civil Procedure Code and Limitation Act governing execution of decrees apply to enforcing of award. (Vol 11) 1924 Lah 544 (544); (Vol 11) 1924 Cal 117 (118).

[9] Proceedings for enforcement of an award are

governed by S. 47, Civil P. C. Objection that award was one without jurisdiction will not preclude this applicability. (Vol 21) 1934 Lah 49 (50).

[10] Order 21, R. 50, Civil P. C., applies to proceedings to enforce an award. (Vol 12) 1925 Sind 293 (294); (Vol 20) 1933 Bom 433 (435): 58 Bom 162.

[11] Order 21, R. 50, Civil P. C., applies to an award against the firm, filed under the Arbitration Act. Courts cannot refuse enforcement of such award unless it is remitted back to arbitrators or set aside. (Vol 16) 1929 Sind 28 (29): 23 Sind L R 422.

[12] Provisions of O. 21, R. 2, relating to decrees are equally applicable to awards under the Act. (Vol 14) 1927 Sind 66 (75).

[13] An award against a firm cannot be executed against the members individually unless they had notice of the arbitration and of the filing of the award. (Vol 14) 1927 Bom 428 (436).

[14] When award is made against two firms, question as to the partner constituting the firms is to be enquired into by the executing Court. (Vol 12) 1925 Sind 293 (294): 19 Sind L R 1.

[15] Dekkhan Agricultural Relief Act applies to execution proceedings taken for the enforcement of awards. (Vol 18) 1931 Sind 97 (99): 25 Sind L R 475 (FB). (Overruling (Vol 7) 1920 Sind 74: 14 Sind L R 217.)

[16] Order declaring shares only where award demanded actual partition by appointing a Commissioner for that purpose is not the enforcement of such award. (1912) 6 Sind L R 146 (146, 149).

[17] The holder of an award is entitled to execute the award although he may have transferred his rights under it unless and until such transferee applies to the Court under O. 21, R. 16, Civil P. C. (Vol 26) 1939 Cal 492 (484).

[18] Unless the want of jurisdiction is apparent on the face of the record, the execution Court cannot go into a question as to validity of the award made by the arbitrators. For want of jurisdiction judgment-debtor can institute a regular suit. (Vol 25) 1938 All 232 (233, 234): 1 L R (1938) All 389.

[19] Suit lies to have an award declared void, even though the award is enforced in execution. (Vol 9) 1922 P C 374 (377): 50 Cal 1: 49 Ind App 366 (P C).

9. Legislative changes. — [1] Section 15 (2) of the old Act has been incorporated into S. 13 (cl. (c)). The old S. 15 (1) broadly corresponds with the present section with the following changes. Under S. 15 (1), an award of the arbitrators was not incorporated into a decree but was enforceable as if it were a decree of the Court, whereas under the present section, the Court is to pronounce a judgment according to the award and upon the judgment so pronounced a decree is to follow. The provisions for allowing time to set aside the award and barring appeal from the decree passed on the award are new.

10. "Pronounce judgment according to the award." — [1] Where the Court sees no ground to remit an award and no application has been made to set aside the award or where such application has been refused, the Court has no option but to pronounce judgment according to the award. (Vol 11) 1924 Pat 603 (604): 3 Pat 539; (Vol 11) 1924 All 788 (789): 46 All 686; (1870) 2 N W P H C R 150 (153); (Vol 24) 1937 Lah 268 (269). (Objection taken to referring Court's jurisdiction to entertain suit but no objection raised to award—Court is bound to pass decree in terms of award—Award cannot then be challenged.)

[See also (Vol 20) 1933 Oudh 547 (548): 9 Luck 219. (Transfer of case to another Court after order of reference, but before award — Award filed before Court to which case transferred—Latter Court has jurisdiction to pass decree in terms of award.)]

Section 17 (contd.)

[2] If any portion of an award deals with matters outside the scope of the suit, the Court should not embody such portion of the award in its decree. (Vol 7) 1920 Mad 615 (617). (Award on matters not embodied in decree being outside the scope of suit is as binding as a decree.)]

[3] This section indicates that it is the function of the Court to pronounce judgment and not the function of the arbitrator. It is not, therefore, for the arbitrator to decree or dismiss the suit. (Vol 22) 1935 All 372 (372).

[4] Where the defendant does not file any application to set aside the award, and the Court pronounces judgment in accordance with it, the decree which follows thereupon is not an *ex parte* decree even though the defendant is absent at the time the decree is passed. (Vol 11) 1924 Pat 603 (604) : 3 Pat 839. (In this case although there was an application to set aside the award it was dismissed for default.). (1900) 1900 Pun Re No. 98, page 393.

[5] Where an application to set aside such a decree is refused, the order is not appealable. (Vol 11) 1924 Pat 603 (604) : 3 Pat 839.

[6] Where an application to set aside is dismissed for default, an application to restore the same is maintainable notwithstanding that a decree is passed in the meanwhile. (Vol 7) 1920 All 215 (215). (The validity of the decree in such a case would depend upon the finding of the Court after considering the objections on merits.).

[7] This section does not provide that the decree that is to follow upon the judgment must be the decree of the Court which grants the application for reference to arbitration. (Vol. 28) 1941 All 101 (104); ILR (1941) All 193.

11. Revision. — [1] An application for revision against a decree in accordance with an award does not lie merely on the ground of the erroneous decision of the lower Court in respect of any of the grounds of objections falling under Ss. 16 and 30. (1902) 29 Cal 167 (185) : 29 Ind App 51 : 1902 Pun Re No. 25 (P O); (Vol 23) 1936 All 740 (741); (Vol 19) 1932 All 76 (78); (Vol 16) 1929 Cal 831 (832); (Vol 12) 1925 Cal 475 (476). (Reference on behalf of minor without leave of Court—Court holding reference valid—No revision lies.) (1902) 1902 Pun Re No. 88 p.371 (374, 375) (FB); (Vol 25) 1938 Lah 434 (435); (Vol 23) 1936 Lah 466 (468); (Vol 23) 1936 Lah 301 (304); (Vol 20) 1933 Mad 697 (699). (Incomplete award—Decree passed in accordance with it owing to omission of party to take objection—No revision lies on this ground.); (Vol 19) 1932 Mad 157 (158). (No interference in revision unless there is an illegality and also some substantial harm arising therefrom.); (Vol 23) 1936 Oudh 1 (2) : 11 Luck 441. (Decree in accordance with award—No revision lies: Per King, C. J.); (1936) 159 I C 1041 (1042) (Oudh.); (Vol 20) 1933 Oudh 327 (327); (Vol 12) 1925 Oudh 227 (228); (Vol 12) 1935 Pat 16 (17); (Vol 14) 1927 Pat 135 (140); (Vol 23) 1936 Sind 172 (175) : 30 Sind L R 271. (The Court should not exercise its revisional jurisdiction in case of an application for setting aside an award in view of the principle of finality in cases of arbitration.) (Vol 9) 1922-Sind 1 (2) : 15 Sind L R 165.

[But see (Vol 18) 1931 Cal 53 (57) : 58 Cal 269. (Erroneous decision by Court as to misconduct of arbitrator—Revision lies.); (Vol 13) 1926 Mad 201 (204). (Arbitrators deciding matters not referred — Court not remitting but passing decree—Revision lies.)]

[2] Where the action of the Court with reference to the arbitration proceedings is attacked on any of the grounds mentioned in S. 115, Civil P. C., the High Court can revise a decree based upon an award. (Vol 24) 1937 All 65 (69, 70) : I L R (1937) All 317 (FB); (Vol 22) 1935 All 34 (35) : 57 All 482. (On the ground that reference to arbitration is illegal.); (Vol 20)

1933 All 648 (649); (Vol 26) 1939 Bom 296 (297); (Vol 12) 1925 Bom 341 (341) : 50 Bom 461; (Vol 8) 1921 Bom 32 (32) : 45 Bom 832. (Court passing decree before the expiry of the 10 days' time—Revision lies.); (Vol 16) 1929 Cal 831 (832). (Error of law or error of fact is no ground for revision.); (Vol 12) 1925 Cal 475 (475); (1902) 1902 Pun Re No. 89, p. 376 (378) (FB); (Vol 22) 1935 Lah 113 (114). (Award holding clearly that suit should be dismissed — Court remitting award for reconsideration acts without jurisdiction.); (Vol 8) 1921 Lah 396 (396). (Misconception of evidence on the part of the Court on the question of misconduct is a ground for revision.); (1873) 1873 Pun Re No. 39 p. 60 (61). (Reference in small cause suit—Decree not in terms of award—Revision lies.); (Vol 22) 1935 Mad 184 (185); (Vol 8) 1921 Mad 271 (271). (The Courts proceed very warily in allowing revision in award.); (Vol 27) 1940 Oudh 405 (407, 409) : 16 Luck 79; (Vol 20) 1933 Oudh 547 (548) : 9 Luck 219; (Vol 3) 1916 Pat 156 (157) : I Pat L Jour 90; (Vol 20) 1933 Rang 38 (39). (Refusal to consider objections to award filed in time is refusal to exercise jurisdiction and revision lies.); (Vol 24) 1937 Sind 174 (175) : 30 Sind L R 478; (Vol 24) 1937 Sind 171 (172). (Decree on award—Court referring matter to arbitrator and umpire on refusal of another arbitrator to act in spite of plaintiff's objection—Decree on such award—Plaintiff can apply in revision after decree to challenge order of Court referring matter to arbitration in spite of plaintiff's objection.); (Vol 23) 1936 Sind 172 (174) : 30 Sind L R 271. (Though ordinarily a revision application will not lie to set aside an award, a revision application will lie under S. 115 on the question of jurisdiction.); (Vol 3) 1916 Sind 79 (80); 9 Sind L R 183. (High Court should use revisional powers very sparingly.)

[3] Where a Court passes a decree on an award without giving notice of the filing of the award to the parties as required by S. 14 (2), it acts with material irregularity and revision lies against the decree. (1898) 20 All 474 (475). (Even if the party has received information of the award having been filed independently.) (1921) 63 Ind Cas 243 (243) (Cal); (1888) 11 Mad 144 (144, 145); (Vol 8) 1921 Oudh 154 (154) : 24 Oudh Cas 263; (Vol 13) 1926 Cal 1018 (1019).

[4] A decree passed without giving a party an opportunity to substantiate his objections by improperly refusing his application for adjournment is vitiated by material irregularity and is open to revision. (Vol 13) 1916 All 65 (66).

[See also (Vol 13) 1926 Lah 584 (585). (Court is not bound to fix a date for evidence *suo motu*.)]

[5] Where the lower Court has refused an adjournment in the judicial exercise of its discretion, the High Court cannot interfere in revision (Vol 1) 1914 Mad 675 (676) : 38 Mad 256; (Vol 3) 1916 Pat 403 (404).

[6] Where the Court compels an unwilling arbitrator to decide the matter referred to him, a decree passed upon such an award may be set aside in revision. (Vol 8) 1921 All 361 (362) : 43 All 101.

[7] Where the reference to arbitration is itself impugned as being invalid, it has been held by the High Court of Allahabad that a decree based on the award is open to revision on the ground of its being without jurisdiction. (Vol 14) 1927 All 563 (563) : 49 All 812; (Vol 13) 1926 All 238 (239) : 48 All 239.

[But see (Vol 4) 1917 All 183 (185, 186); 39 All 489.]

[8] The High Court of Lahore and the Chief Court of Oudh have taken a contrary view. (Vol 20) 1933 Lah 426 (427) : 14 Lah 165. (Provision of limited appeal bars revision.); (Vol 24) 1937 Lah 268 (269). (Objection to referring Court's jurisdiction to entertain suit.) (Vol 8) 1916 Lah 201 (202) : 1915 Pun Re No. 99. (Reference on behalf of minor without leave of Court)

or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

[1899—S. 15; Civil P. C., Sch. II, Paras 16 and 21]

18. (1) Notwithstanding anything contained in section 17, at any time after the filing of *Power of Court to pass the award, whether notice of the filing has been served or not, upon interim orders.* being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

Power to supersede arbitration where award becomes void or is set aside.

19. Where an award has become void under sub-section (3) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

[Civil P. C., Sch. II Para. 15 (2)]

Section 17 (contd.)

— No revision because remedy by suit to set aside decree is available.; (Vol 19) 1932 Oudh 156 (158) : 7 Luck 642.

[9] The mere fact that objection is raised to the validity of the reference and is erroneously overruled by the Court does not make revision competent and that revision would lie against such an order only if in passing it, the Court has acted illegally or with material irregularity. (Vol 24) 1937 All 65 (76) : ILR (1937) All 317 (FB); (Vol 26) 1939 Bom 296 (297); 41 Bom LR 485 (489).

[10] Failure to affix a copy of decree to the application for revision against an order confirming the award is not fatal to the application. (Vol 23) 1936 Sind 172 (174) : 30 Sind LR 271.

12. Second appeal. — [1] Where a decree is passed in accordance with an award and an appeal is wrongly entertained against it and the decree is set aside in appeal, a second appeal lies, the reason being that the decree of the lower appellate Court is not one in accordance with the award. (Vol 1) 1914 All 446 (449, 450) : 36 All 69 (FB) ; (1899) 9 All L Jour 258 (260); (1899) 22 Mad 172 (173); (1902) 26 Mad 76 (77); (Vol 13) 1926 Pat 164 (165); (Vol 5) 1918 Nag 191 (192, 193); (1905) 2 Cal L Jour 142 (143).

[See however (1911) 38 Cal 421; (1902) 6 Cal W N 614 (615). (No appeal lies.); (1870) 14 Suth W R 33 (33); (1910) 6 Ind Cas 963 (964) (Lah). (Appellate Court's interference even with consent is *ultra vires*); (Vol 4) 1917 Lah 379 (381) : 1916 Pun Re No. 115.]

[2] Where a Court of first instance wrongly refuses to pass a decree in accordance with an award and a Court of Appeal reverses the decree of the first Court and passes a decree in accordance with the award, such a decree is open to second appeal. (1906) 28 All 408 (410); (1907) 1907 All W N 110 (110); (1905) 2 Cal L Jour 80 (86); (1905) 2 Cal L Jour 153 (162); (1903) 8 Cal W N 390 (393, 394); (Vol 15) 1928 Oudh 1 (3) : 3 Luck 1 (FB).

[But see (1888) 10 All 8 (11, 12); (1904) 1904 Pun Re No. 89, page 333; (1890) 1890 Pun Re No. 26, page 75; (1913) 1913 Pun Re No. 52.]

[3] Where an award is modified and an appeal is filed not against the order modifying the award but against the decree passed in accordance with the modified award, a second appeal will lie. (Vol 22) 1935 Pat 109 (110).

13. Suit to set aside award. — See Notes on Section 32.

14. Valuer and arbitrator. — [1] Where the intention of the parties is that the person to whom the matter is referred should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, the case is one of arbitration. See (Vol 20) 1933 All 861 (879) : 56 All 39 (SB). (Agreement to abide by statement of particular witness is not reference to arbitration.)]

[2] Where a person is appointed to ascertain some matter for the purpose of preventing differences from arising and not of settling them when they have arisen, the case is not one of arbitration. (1903) 30 Cal 831 (842); (1901) 28 Cal 155 (163).

[3] No judgment can be given under this section on the basis of the valuator's decision. (1901) 28 Cal 155 (163).

[4] R filed a suit against C for injunction and damages for encroachment upon her property. In the suit a consent order was made that C was to purchase R's interest in the property at a price to be settled by certain referees. The referees settled the price and the lower Court gave judgment under this Section in favour of R treating the said valuation as an award. It was held by the appellate Court that the referees were valuers rather than arbitrators and, therefore, the lower Court could not give judgment under this Section. (1901) 28 Cal 155 (163).

[5] Where an agreement to lease contained a clause that at the expiration of the period of lease, the lessor should take over all the buildings then standing on the property at a value to be fixed by certain persons it was held that the valuation made by such persons was not an award and could not, therefore, be filed in Court. (1903) 30 Cal 831 (842).

CHAPTER III.

ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING.

20. (1) Where any persons have entered into an arbitration agreement¹⁰ before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter³ to which the agreement relates, that the agreement be filed in Court.¹¹

(2) The application shall be in writing and shall be numbered and registered as a suit¹⁴ between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown,¹⁵ the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties,⁷ whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

[Civil P. C., Sch. II Para. 17]

SECTION 20—SYNOPSIS.

1. Applicability and scope.
2. Agreement must relate to matters within Court's jurisdiction.
3. Agreement relating to appointment to public office.
4. Agreement to refer matters in a pending litigation.
5. Agreement to refer, who can enter into.
6. Appointment of Receiver.
7. "Arbitrator appointed by the parties."
8. Court's power to appoint an umpire.
9. Death or refusal of arbitrator to act.
10. "Entered into an arbitration agreement."
11. "Filed in Court."
12. Revision.
13. Revocation of reference to arbitration. See Notes on S. 5.
14. "Shall be numbered and registered as a suit."
15. "Where no sufficient cause is shown."

1. Applicability and scope.—[1] The provisions of this section apply only to cases where in pursuance of the agreement to refer, the arbitrators have not functioned and made their award. Where the award has actually been delivered, the proper course is to take proceedings under S. 14 to enforce the award. (Vol 2) 1915 All 369(371):38 All 85;(Vol 5)1918 Lah 284 (285). [See however (Vol 23) 1936 Bom 401 (401, 402). (An award was passed on a reference made under an agreement to refer future disputes — It was held that the agreement should be filed and not the award.)]

[2] Where an application is filed under this section, but before it is disposed of the arbitrators deliver their award, the application is rendered infructuous, and the remedy of the parties is to apply under S. 14. (Vol 15) 1928 Lah 170 (172).

[3] A mere *filing* of an application under this section does not oust the jurisdiction of the arbitrator to give his award. (Vol 19) 1932 All 348 (350).

[4] Arbitration in a pending suit stands on a different footing from an agreement made out of Court to refer a dispute to arbitration. In a pending suit, the authority of the arbitrator is derived from the order of the Court making the reference, and if this order is defective there is no proper reference and consequently there can be no legal award. On the other hand, in a private reference it is the *agreement* entered into between the parties which confers jurisdiction on the arbitrators to deal with the dispute. In such a case, if proceedings are taken under this section and a reference secured under sub-s. (4) thereof, it is not this reference which constitutes the arbitrator as a private tribunal. It is merely the machinery by which the tribunal already constituted by the agreement of parties is made to function. (Vol 15) 1928 Lah 170 (173).

[5] The provisions of this section are *permissive* and do not oblige a party to apply under this section. (Vol 18) 1931 Oudh 127 (129) : 6 Luck 591; (1897-'01) 2 Upp Bur Rul 286. (*Held*, suit not barred.)

2. Agreement must relate to matters within Court's jurisdiction.—[1] Before an application can be filed under this Section it is essential that the agreement to refer should relate to matters which the Court is competent to try and has *jurisdiction* to pass a final decree upon. (Vol 21) 1934 Sind 29 (32).

[2] Where an agreement relates to the partition of revenue-paying land, it cannot be filed under this Section as the Civil Court has no jurisdiction to partition the revenue. (Vol 4) 1917 Lah 218 (218).

[See also (1938) 40 Pun L R 966 (967). (Some of the matters included in agreement to refer, being within jurisdiction of Revenue Court, agreement cannot be filed.)]

[3] Where an agreement relates to matters partly within and partly beyond the jurisdiction of the Court, it has been held that the Court cannot strike out that portion of the agreement beyond its jurisdiction in order to give itself jurisdiction unless the parties agree to this being done with a view to the Court proceeding under this section. (1883)1883 Pun Re No. 5; (Vol 1) 1914 Lah 296 (297).

Section 20 (contd.)

[But see (Vol 17) 1930 Lah 836 (838, 839): 11 Lah 470. (Distinguishing on facts 1883 Pun Re No. 5 and (Vol 1) 1914 Lah 296 — *Jai Lal J.*, also doubted the correctness of the above two decisions.)]

[4] The refusal to refer to arbitration is a part of the cause of action for an application under this section. The application can, therefore, be filed in the Court within whose jurisdiction the refusal to refer was made. (Vol 20) 1933 Lah 18 (21).

3. Agreement relating to appointment to public office.—[1] The succession to the trusteeship of a public trust or charity is a matter affecting the public interests and a dispute regarding it cannot be referred to arbitration. (Vol 4) 1917 Pat 392 (392). (Dispute relating to appointment of mutwalli.); (1910) 32 All 503 (516).

[See also (Vol 2) 1915 Cal 745 (748). (Executor or administrator cannot make a reference contradicting a will.); (Vol 15) 1928 Cal 275 (276). (Do.)]

[2] It has been held by the High Court of Madras that an agreement to refer to arbitration, even if relating to a public office is not necessarily unlawful or opposed to public policy, but must be scrutinized by the Court for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the public. (Vol 9) 1922 Mad 429 (432)

4. Agreement to refer matters in a pending litigation. — [1] The provisions of this section cover only cases where parties, without recourse to litigation, agree to refer their differences to arbitration. (1913) 86 Mad 353 (356).

[2] An agreement to refer made by the parties to a litigation without the intervention of the Court cannot be recognized. (Vol 14) 1927 Sind 66 (72); (Vol 8) 1921 Sind 65 (67, 68): 16 Sind L R 174 (FB).

[See however (Vol 25) 1938 All 46 (46). (It was remarked in this case that there is nothing in Para. 20, Sch. II, Civil P. C., to suggest that it is only persons who are not parties to a litigation that can refer their differences to arbitration — But in this case, the suit was pending in a Revenue Court when the parties went to arbitration.)]

[3] Such an agreement cannot be filed under this section as if it was an agreement to refer without recourse to litigation. If an award has been passed on such a reference, it cannot be made the basis of a proceeding under S. 14. (Vol 17) 1930 Bom 98 (104): 54 Bom 197; (1902) 30 Cal 218 (228); (Vol 1) 1914 Bom 184 (186, 187): 38 Bom 687. (It cannot be recognized at all); (Vol 13) 1926 Sind 5 (6); (1912) 1912 Pun Re No. 115.

[4] As to whether such an agreement can be recognized, independent of this Schedule, as an adjustment of the suit under O. 23, R. 3, there was a conflict of opinions for which see AIR Commentaries on Code of Civil Procedure 4th (1944) Edn., O. 23, R. 3, Note 9 Now see Proviso to S. 47.

[5] Where after an agreement to refer was entered into in a pending suit, the suit itself was withdrawn, an application filed under this section subsequent to such withdrawal is not incompetent and an award made in pursuance of the same is valid. (Vol 17) 1930 Lah 1066 (1066); (Vol 22) 1935 Lah 59 (59); (Vol 20) 1933 Pesh 18 (22); (Vol 11) 1924 Pat 488 (491): 3 Pat 443.

[6] An agreement to refer relating to matters not involved in the suit is perfectly valid, though entered into pending suit. Thus, where during the pendency of probate proceedings the parties agreed to refer to arbitration the question of the division of the estate, and the agreement left untouched the powers of the Court to issue probate, and the arbitrators also did not deal with

that question, it was held that the agreement and the award thereon were valid. (Vol 10) 1923 Bom 365 (366).

[See also (Vol 24) 1937 Lah 843 (844): I L R (1937) Lah 433. (Agreement to refer dispute relating to division of property of deceased testator to arbitration—Subsequent proceedings by one of parties for letters of administration of will of deceased—Application by rest under Sch. 2, Para. 17, Civil P. C., during administration proceedings, to file agreement regarding arbitration is quite competent — Proper course for Court is to stop administration proceedings till application under Sch. 2, Para. 17 is decided.)]

5. Agreement to refer, who can enter into. —

[1] The mother of a Hindu minor who is his guardian can bind the minor by an agreement to refer the disputes in the family to the decision of arbitrators under this section if she finds that it is for the benefit of the minor. (Vol 26) 1939 Cal 557 (557).

[2] One partner in a firm cannot enter into an agreement to refer on behalf of the firm. (Vol 19) 1932 Lah 291 (292).

6. Appointment of Receiver.—[1] In a proceeding under the Arbitration Act, the Court has got power to appoint a Receiver when an application under sub-s. (1) has been made, even though no notices have been served on the parties as required under sub-s. (8) and though the proceedings have not become arbitration proceedings. (Vol 33) 1946 Pat. 70 (72, 73): 24 Pat 616.

7. "Arbitrator appointed by the parties."—[1] A submission to arbitration must be strictly construed as it deprives the party to the submission of the right, which he has under the common law, to have the dispute to which the submission relates, decided by a Court of law. (Vol 17) 1930 Sind 202 (203).

[2] The jurisdiction of the Court to order a reference under this section is derived from the agreement of the parties and the Court must refer in accordance with the terms of the agreement. (Vol 18) 1931 Mad 28 (32): 54 Mad 469. (One of the three arbitrators dying before completion of proceedings—Court cannot add the third arbitrator in lieu of one who died.); (Vol 21) 1934 Oudh 67 (69): 9 Luck 321. (Court cannot refer the matter to two out of three arbitrators named in the agreement where the third refuses to act.)

[See also (Vol 18) 1921 Pat 161 (162): 6 Pat L Jour 287. (Court cannot refer again, on the first reference proving abortive, on its own motion.)]

[3] If it fails to do so, it acts with material irregularity in the exercise of its jurisdiction. (1911) 1911 Pun Re No. 35.

[4] Where the agreement is to refer to the arbitration of two European merchants of Karachi, the Court has no power to order a reference to an Indian merchant of Amritsar. (1911) 1911 Pun Re No. 35.

[5] Where according to the terms of an agreement to refer an umpire should be appointed from out of seven persons named, the Court cannot appoint as an umpire, a person who is not one of the seven persons so named. (1871) 7 Mad H O R 72 (76).

[6] An order directing a party to nominate an arbitrator cannot be passed before the agreement is actually filed under the earlier portion. (Vol 13) 1926 Lah 505 (505).

[7] The word "arbitration" in sub-s. (5) means arbitration by the arbitrators appointed in accordance with the provisions of sub-s. (4). (Vol 33) 1946 Pat 70 (73): 24 Pat 616.

8. Court's power to appoint an umpire — [1]

Where the agreement to refer does not contain any provision for appointing an umpire in case of difference between the arbitrators, the Court cannot appoint an umpire under this Section. (1886) 8 All 64 (66); (1892) 1892 Pun Re No. 191, page 558 (558).

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[See also (Vol 18) 1931 Bom 529 (531, 532). (Court appointing umpire as sole arbitrator — *Held* not justified.)]

9. Death or refusal of arbitrator to act.—The following points touching this subject were decided under the provisions of Civil P.C., Sch. II, Paras. 17 (4), 19 and 5.

[1] As to the power of the Court to make an appointment under sub-para. (4) of Para. 17 the High Court of Allahabad has expressed the view that the expression "if there is no such provision and the parties cannot agree" covers also a case where there has been a provision for a particular arbitrator who is either dead or has retired. If he has died or refuses to act, it is as though there were no provisions. (Vol 9) 1922 All 133 (133) : 44 All 523; (Vol 25) 1938 All 414 (416).

[But see (Vol 6) 1919 All 48 (49) : 42 All 191.]

[2] But the High Court of Bombay has dissented from this view and has held that sub-para. (4) is not open to such a construction. (Vol 18) 1931 Bom 529 (531).

[3] Where the death or refusal of the arbitrator takes place subsequent to the agreement but before it is filed into the Court under this section, the agreement becomes incapable of performance on the death or refusal of the arbitrator and the Court cannot order such agreement to be filed under Para. 17. Where an agreement is to refer to the arbitration of three specified persons, and one of them dies pending arbitration proceedings, the Court cannot order the agreement to be filed under Para. 17 and direct the remaining arbitrators to act or appoint a new arbitrator in his place as it will not be consistent with the provisions of the agreement to do so. (1874) 12 Beng L R App 13 (14); (Vol 20) 1933 Rang 331 (333); (Vol 18) 1931 Mad 23 (31, 32) : 54 Mad 469; (1912) 1912 Mad W N 957 (958); (Vol 6) 1919 Lah 231 (231, 232) : 1919 Pun Re No. 155, page 414. (But where there is a distinct provision authorizing a party to appoint another arbitrator it does not become incapable of performance); (Vol 25) 1938 Lah 859 (861) : I L R (1939) Lah 23; (Vol 21) 1934 Oudh 67 (69) : 9 Luck 321; (Vol 22) 1935 Oudh 179 (180); (Vol 5) 1918 Low Bur 114 (115).

[See also (Vol 13) 1926 Cal 730 (731, 732); (Vol 25) 1938 Lah 859 (861) : I L R (1939) Lah 23. (Agreement to refer dispute to arbitrators nominated by each party — One of nominated arbitrators refusing to act — Court has no power to replace him by appointing another.)]

[4] The High Court of Allahabad has held that where an arbitrator refuses to act pending arbitration proceedings, the Court can, on a subsequent application under Para. 17, appoint a new arbitrator. (Vol 8) 1921 All 188 (190); (Vol 9) 1922 All 133 (133) : 44 All 523.

[5] According to the High Court of Lahore, where an arbitrator named refuses to act, the question whether a new arbitrator can be appointed is one depending on the intention of the parties. If the dominant intention is that the matter should be referred to arbitration then the fact that the parties agreed on the *personnel* makes no difference, and the Court can appoint a new arbitrator. If, on the other hand, the essence of the agreement is to refer the matter to a particular individual only, the Court has no power to appoint a new arbitrator. (Vol 20) 1933 Lah 18 (19, 20).

[See also (Vol 24) 1937 Cal 388 (389) : I L R (1937) 2 Cal 434. (An agreement to have a dispute settled by one or more individuals is one thing; an agreement to go to arbitration rather than to litigate in the Courts is quite another.)]

[6] Where the death or refusal of the arbitrator takes place subsequent to the filing of the award under this section, the power of the Court to appoint a new arbitrator has been assumed in the following cases.

Even in such cases the power of the Court to make a new appointment should be consistent with the terms of the agreement. (Vol 13) 1926 All 55 (56) : 48 All 27; (Vol 22) 1935 Oudh 179 (180); (Vol 21) 1934 Oudh 67 (69) : 9 Luck 321; (Vol 18) 1931 Bom 529 (531); (Vol 24) 1937 Cal 388 (389) : I L R (1937) 2 Cal 434.

10. "Entered into an arbitration agreement."—

[1] It is essential that the agreement to refer should be in *writing* before it can be *filed* under this section. (See S. 2 (a).) (1902) 30 Cal 218 (228) ; (Vol 22) 1935 All 886 (887).

[2] The agreement to refer need not be signed by the parties; any writing so long as it embodies the whole of the agreement would be sufficient. (Vol 22) 1935 All 886 (887).

11. "Filed in Court." — [1] The word "filed" was not used in the sense that the written agreement must be physically produced in the Court before it can be accepted or ordered to be acted upon. If it is proved that the parties agreed to refer the dispute between them by means of a written document, the fact that the particular piece of paper on which it is written is not available does not affect procedure under this section. Such agreement may be proved by secondary evidence when evidence of that nature is admissible under the Evidence Act. (Vol 32) 1945 Lah 264 (265). (Dissenting from (Vol 22) 1935 All 886 and (Vol 7) 1920 Lah 396.)

12. Revision. — [1] The omission of the Court to register and number the application as a suit is an irregularity. But if the irregularity is acquiesced in by the parties, it does not affect the merits of the case and affords no ground for interference in revision. (Vol 1) 1914 Lah 145 (146) : 1914 Pun Re No. 28.

[2] An application to challenge the validity of an arbitration agreement or to have the effect of that agreement determined does not fall either under this section or S. 39 (1) (iv). Hence, revision against the order refusing such an application lies. (Vol 30) 1943 Lah 295 (296).

13. Revocation of reference to arbitrator. — See Notes on Section 5.

14. "Shall be numbered and registered as a suit." — [1] An application under this section must be regarded as a suit for the purposes of the Civil Procedure Code, inasmuch as it has to be "numbered and registered as a suit." (Vol 14) 1927 Bom 259 (259); (Vol 15) 1928 Mad 969 (971).

[But see (Vol 8) 1921 Bom 389 (390) : 45 Bom 329; (Vol 8) 1921 Pat 161 (161) : 6 Pat L Jour 287. (Application under Para. 17.); (Vol 16) 1929 Lah 533 (533); (Vol 19) 1932 Lah 374 (375, 376) : 13 Lah 672; (Vol 1) 1914 Sind 122 (123) : 8 Sind L R 260; (Vol 14) 1927 Sind 103 (104) : 19 Sind L R 202.]

[2] The provisions of Civil Procedure Code O. 9, R. 13, O. 23 Rr. 1 and 3 and O. 38 R. 5 can be applied to such applications. (Vol 9) 1922 Pat 376 (378) : 1 Pat 48; (Vol 15) 1928 Mad 969 (971); (1904) 31 Cal 516 (518). (Withdrawal as per O. 23, R. 1.); (Vol 8) 1921 Lah 34 (38) : 2 Lah 114. (Compromise as per O. 23, R. 3.); (1910) 1910 Pun W R No. 38, p. 94 (99); (Vol 9) 1922 Oudh 189 (196) : 25 Oudh Cas 213. (Do.); (Vol 14) 1927 Bom 259 (260).

[3] An application under this section to file an award is a "suit" within the meaning of S. 16 of the Provincial Small Cause Courts Act. (Vol 22) 1935 Sind 208 (209, 210) : 30 Sind L R 12.

[4] An application under this section is not a "suit" within the meaning of—

(a) Limitation Act, 1908; (Vol 10) 1923 Rang (226, 227) : 1 Rang 256. (Benefit under S. 6 of Limitation Act, will not be available.)

CHAPTER IV.

ARBITRATION IN SUITS.

21. Where in any suit all the parties interested agree³ that any matter in difference¹⁵ between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced¹⁰ apply in writing to the Court⁵ for an order of reference.

[Civil P. C., Sch. II Para. 1.]

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[See also (Vol 2) 1915 All 360 (371) : 38 All 85 (91,)]

(b) the Dekkhan Agriculturists' Relief Act; (Vol 11) 1924 Sind 23 (24) : 17 Sind L R 178; (1897) 21 Bom 63 (67, 68).

(c) the Court-fees Act, 1870; (1884) 10 Cal 11 (14). (The proper court-fee on application to file an award is that prescribed for applications and not the court-fee upon a plaintiff.)

(d) Section 69, sub-section (1) of the Partnership Act, 1932; (Vol 23) 1936 Lah 136 (137).

(e) or for the purposes of the taxation of the pleader's fee on such applications; (Vol 17) 1930 Oudh 89 (90) : 5 Luck 678. (For pleader's fee it is governed by Oudh Civil Rules of 1929.)

15. "Where no sufficient cause is shown." —

[1] Agreements to refer to arbitration stand on the same footing as all other lawful agreements by which the parties are bound by the terms of what they have agreed to, and from which, i.e., the agreement to refer, they cannot retire, unless the scope and object of the agreement cannot be executed, or unless it be shown that manifest injustice will be the consequence of binding the parties to the contract. (1867) 12 Moo Ind App 112 (130, 131) (PC).

[2] All grounds on which a contract will be voidable such as fraud, misrepresentation, etc., which will enable a party to avoid a contract or which render a contract unenforceable against a party will constitute "sufficient cause" against filing the agreement under this section. (1921) 3 Lah L Jour 276 (278, 279). (Agreement of reference providing for appointment of new arbitrator in case the arbitrator originally appointed refuses to act — Resignation of such arbitrator is not "sufficient cause" for not filing the agreement.); (Vol 20) 1933 Sind 68 (70). (Sufficient cause is not confined to fraud, misrepresentation and undue influence.)

[3] Where the agreement to refer is shown to be vitiated by fraud or mistake or by misrepresentation or is not consented to by all the parties, the Court will decline to file the agreement. (1890) 3 C P L R 89 (92); (Vol 6) 1919 Lah 140 (142); (Vol 20) 1933 Sind 68 (69, 70). (Where the agreement was the result of misuse of confidence); (1893) 1893 Pun Re No. 49, page 216; (Vol 4) 1917 Upp Bur 6 (6).

[4] Where an agreement to refer is entered into by the *de facto* guardian of a Muhammadan minor, it cannot be filed under this section as such guardian has no authority in law to act for the minor. (Vol 8) 1921 Cal 818 (819) : 47 Cal 713.

[5] The guardian mother of a Hindu minor has authority to agree to refer the disputes that have arisen inside the family to the decision of arbitrators and such an agreement can be filed under this section. (Vol 26) 1939 Cal 557 (557).

[6] Where the conduct of the parties shows that they have abandoned and cancelled the agreement to refer, the Court will refuse to order the same to be filed. (Vol 7) 1920 Nag 29 (30). (Parties inactive for six years after reference to arbitration — Reference cancelled.)

[7] Delay in making the application may be a suffi-

cient cause for refusing to order the agreement to be filed, but it must be such as to lead to the inference that the parties had abandoned the reference to arbitration; anything short of it is not sufficient. (Vol 20) 1933 Lah 18 (21).

[8] An agreement, the submission under which has been revoked for good cause, cannot be filed under this section. (1890) 17 Cal 200 (207, 208).

[9] The words "sufficient cause" cover all the grounds of justice, equity and good conscience on which a Court thinks an agreement should not be filed. (Vol 24) 1937 Oudh 436 (437) : 13 Luck 428.

[10] Where the arbitrators, though not partial to one party, cannot command the confidence of the other party, it is wholly inequitable to compel such party to submit to their arbitration. (Vol 24) 1937 Oudh 436 (437) : 13 Luck 428.

[11] Where the original document embodying the agreement between the parties is not forthcoming and no copy proved to be the duplicate of the agreement has been produced, and the terms of the agreement cannot be ascertained exactly and therefore it would be impossible for the arbitrator to decide how to act, "sufficient cause" is shown for not ordering the agreement to be filed. (Vol 22) 1935 All 886 (889).

[12] Held that reference in arbitration clause to the Arbitration Act meant "statutory provisions relating to arbitration" and not the Arbitration Act, 1899, so that the clause could not be said to be meaningless where the said Act did not apply but Civil P. C., Sch. II, did. (Vol 27) 1940 Cal 105 (107) : I.L.R. (1939) 2 Cal 181.

SECTION 21 — SYNOPSIS

1. Agreement to abide by the decision of the Court.
2. Agreement to abide by a particular statement of a witness.
3. "All the parties interested agree."
4. Application must be by all the parties.
5. "Apply in writing to the Court."
6. Arbitration in execution proceedings.
7. Arbitration in insolvency proceedings.
8. Arbitration in probate proceedings.
9. Arbitration in suits for restitution of conjugal rights.
10. "At any time before judgment is pronounced."
11. Authority of agent to refer.
12. Authority of guardian or manager of joint Hindu family.
13. Authority of pleader to refer.
14. Form of agreement to refer.
15. "Matter in difference."
16. Matter outside suit.
17. Powers of appellate Court.
18. Revocation of reference to arbitration.
19. Withdrawal of suit after reference.

1. Agreement to abide by the decision of the Court. — [1] A consent by the parties to abide by the

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decision of the Court is not a reference to arbitration. (Vol 6) 1919 Mad 150 (151). (Doubting 26 Mad 76 and approving 23 Bom 752); (Vol 7) 1920 Mad 800 (801); 42 Mad 625. (Agreement to abide by the decision of Judge with two other persons.); (Vol 24) 1937 Oudh 224 (225); 13 Luck 152. (Consent to abide by decision of Court to be given after local inspection.)

[But see (12) 36 Bom 105 (109). (Where a contrary view was assumed.)]

[2] However, on general principles of jurisprudence, the award given by the Court in such a case is binding on the parties for they cannot retract their consent to abide by the decision of the Court after such decision is given. (Vol 6) 1919 Mad 150 (152); (Vol 16) 1929 Mad 800 (801); 42 Mad 625; (Vol 8) 1921 All 310 (310); 48 All 266; (1899) 23 Bom 752 (755); (Vol 24) 1937 Oudh 224 (225); 13 Luck 152.

2. Agreement to abide by a particular statement of a witness. — [1] An agreement that certain person should be appointed referee and that the suit should be decided in accordance with the statement of such person is not an agreement of reference to arbitration. (Vol 26) 1939 All 176 (176). (Following (Vol 20) 1933 All 861 (879); 56 All 39 (S B) — Statement made by such person will be binding on parties as admission under Evidence Act, S. 20.)

3. "All the parties interested agree." — [1] Foundation of the jurisdiction of the Court to make an order of reference is an *agreement* between all the parties interested. (1902) 29 Cal 167 (183); 29 Ind App 51; 1902 Pun Re No. 25 (P C); (Vol 13) 1926 All 238 (239); 48 All 239. (Subsequent agreement does not validate a reference which was invalid for want of consent of all.); (Vol 7) 1920 Cal 113 (114); 47 Cal 555 (F B); (1864) 1 Suth W R 80 (81). (A party cannot, unless specially authorised, assent to an arbitration on behalf of another.); (Vol 7) 1920 Mad 852 (854); 42 Mad 632. (*Ex parte* person is a "party interested."); (Vol 22) 1935 Pat 16 (17). (Pleader appointed on behalf of all defendants — Agreement to refer to arbitration signed by pleader as pleader — No objection taken to arbitration proceedings — All defendants held parties to reference.); (Vol 7) 1920 Sind 107 (110); 14 Sind L R 156.

[2] Court cannot force a submission on a reluctant party. ('66) 10 Moo Ind App 413 (425, 426) (P C); ('68) 1868 Pun Re No. 28, page 72 (73). (Consent should be voluntary.); ('69) 1869 Pun Re No. 52. (A submission to arbitration may be recommended but not ordered by the Court.)

[3] Where some of the parties do not agree, the order of reference is invalid against all the parties. (Vol 7) 1920 Cal 113 (114); 47 Cal 555 (F B); (Vol 26) 1939 All 49 (51). (Decree passed by the Court in terms of the award, based on a void reference, is not valid and is liable to be set aside.); (Vol 22) 1935 All 1014 (1015); (Vol 22) 1935 All 34 (35); 57 All 484. (Judgment-debtors jointly and severally liable for decree — Application for reference to arbitration by decree-holder and only some of them — Order of reference by Court is illegal.); (Vol 17) 1930 All 840 (841); 53 All 97. (Party to reference can object to illegality.); (Vol 11) 1924 Cal 353 (353). (The applicant for reference in this case wanted to set the award aside and it was set aside.); (Vol 4) 1917 Cal 481 (483). (Party to submission also can object to the validity of reference on the ground of non-joinder of parties interested — It is a matter of jurisdiction and consent cannot give jurisdiction.); (Vol 12) 1925 Cal 812 (814); 52 Cal 559. (Do.); (Vol 17) 1930 Mad 646 (647); (Vol 14) 1927 Mad 1154 (1155); (1926) 1926 M W N 391 (391). (Objection can be taken by any party.); (Vol 20) 1933 Oudh 384 (385); 9 Luck 73; (Vol 7) 1920 Sind 107

(109, 110); 14 Sind L R 156. (There is no estoppel where there is a clear violation of statutory laws.)

[But see (Vol 17) 1930 Sind 256 (259); 24 Sind L R 470. (Person who is party to reference cannot object to award on the ground that another person was a necessary party when the latter himself does not object.); ('83) 1883 Pun Re No. 130, page 399; (1929) 10 P L T 53 (57); (Vol 25) 1938 Pesh 47 (47, 48). (One of interested parties not joining in reference — Reference is not invalid — Award is binding on party to reference.))]

[4] Objection to validity of reference on the ground of non-agreement between all parties can be raised at any stage. (Vol 5) 1918 Cal 336 (336); (Vol 17) 1930 Mad 646 (647) (An objection can be raised in revision); (Vol 14) 1927 All 563 (563); 49 All 812.

[5] A subsequent consent by one of the parties, who did not join in the reference at the time the reference was made, does not make the arbitration proceedings valid. (Vol 12) 1925 Mad 621 (623, 624).

[6] All the parties to the suit need not agree to the reference. All *interested* parties must join in the reference. (Vol 15) 1928 Cal 108 (111); (Vol 11) 1924 Pat 33 (35, 36); 2 Pat 777.

[7] "All parties interested" means parties interested in the *specific dispute* referred to arbitration. (Vol 14) 1927 Sind 239 (239); 22 Sind L R 135; (Vol 15) 1928 Bom 248 (249); 52 Bom 408; (Vol 11) 1924 Pat 33 (34, 36); 2 Pat 777; (Vol 18) 1931 All 453 (454); 53 All 669; (Vol 21) 1934 All 658 (660). (Suit on pro-note executed by A in favour of B and assigned by B to C — No relief asked for against B — Reference to arbitration without B is not valid.)

[8] The question whether a party is "interested" or not depends on the facts of every case. (Vol 15) 1928 Bom 248 (249); 52 Bom 408; (Vol 20) 1933 All 739 (740, 741). (Suit on pro-note executed by A in favour of B and assigned to C — Relief claimed against A and in the alternative against B — B is interested person.); (Vol 21) 1934 Pat 19 (21). (The test is to see the nature of the suit and not the possibility of the omitted parties having any interest in a future litigation which may arise as a result of decree in the suit); (Vol 4) 1917 Pat 136 (138).

[9] A *necessary* or *proper* party is an "interested" party. (Vol 16) 1929 All 763 (765).

[10] An unnecessary or *pro forma* party is not an interested party. (1913) 35 All 107 (108, 109). (Unnecessary party.); (Vol 21) 1934 All 658 (660). (*Pro forma* defendant.); (Vol 21) 1934 Pat 19 (21). (Do.); (Vol 13) 1926 All 238 (239); 48 All 239. (Do.); (1897) 2 Hay 533; (1912) 14 Ind Cas 562 (562) (Mad); (Vol 4) 1917 Pat 136 (138).

[See also (1866) 10 Moo Ind App 413 (425, 426) (P C).]

[11] A person who has been exonerated at the time of reference is not an interested party. (Vol 10) 1923 Mad 502 (503).

[12] A person who is *ex parte* in a suit or a person against whom no relief is claimed is not necessarily a person not interested. (Vol 10) 1923 Mad 502 (503); (Vol 16) 1929 All 763 (765); 52 All 84; (Vol 16) 1929 Lah 174 (175); (Vol 22) 1935 Sind 212 (213); 29 Sind L R 399; (Vol 25) 1938 Oudh 154 (155); (Vol 12) 1925 Mad 621 (622, 623); (Vol 17) 1930 Sind 256 (258); 24 Sind L R 470; (Vol 14) 1927 Sind 239 (240); 22 Sind L R 135; (Vol 7) 1920 Mad 852 (854); 42 Mad 632; (Vol 16) 1929 Lah 477 (478); (Vol 4) 1917 Cal 481 (483); (Vol 25) 1938 Oudh 154 (155). (If a person is *ex parte* in a suit, he does not thereby cease to be a party interested in the reference.)

[13] A defendant who makes a complete admission of the plaintiff's claim entitling the latter to a judgment under O. 12, R. 16 of the Civil P. C., is no longer

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"interested" and need not join the reference by the plaintiff and other defendants. (Vol 12) 1925 Oudh 201 (202).

4. Application must be by all the parties.—

[1] All the parties interested must agree to the reference and also *apply* to the Court. If, before the application is made to the Court, one of the parties resiles from the agreement, no order of reference can be passed on the ground that he previously agreed to a reference being made. (1911) 1911 Pun Re No. 17; (1933) 34 Pun L R 247 (248).

5. "Apply in writing to the Court."—[1] A commissioner was appointed for the examination of witnesses and on the day fixed for appearance before the commissioner, the parties presented to him an application addressed to the Court and stating that they had agreed to refer their dispute to arbitration. The commissioner forwarded the application together with the proceedings recorded by him to the Court which referred the matter to arbitration. It was held that in the circumstances of the case, the presentation of the application to the commissioner was sufficient. (Vol 20) 1933 Oudh 521 (522); 9 Luck 203.

6. Arbitration in execution proceedings.—

[1] Court executing a decree cannot refer the matter in execution proceedings to arbitration. (Vol 12) 1925 Cal 812 (814); 52 Cal 559. (Party to reference can afterwards plead that Court had no jurisdiction to refer.); (Vol 22) 1935 All 125 (125). (A reference made in execution is invalid.); (Vol 23) 1936 All 378 (380); 58 All 797. (*Held* Seb. II, Civil P. C., did not apply of its own force to proceedings under O. 21, R. 58 nor was it rendered applicable under the provisions of S. 141.); (Vol 25) 1938 Pesh 80 (80); (Vol 24) 1937 Bom 111 (112); 1 L R (1937) Bom 144.

[But see (Vol 30) 1943 Oudh 304 (306). ("Suit" includes execution.)]

7. Arbitration in insolvency proceedings.—

[1] An insolvency Court has no power to refer the whole insolvency proceedings to arbitrators to decide whether a person should or should not be declared an insolvent. (Vol 3) 1916 Lah 170 (171); 1916 Pun Re No. 50.

8. Arbitration in probate proceedings.—

[1] A dispute relating to genuineness of a will cannot be referred to arbitration. (Vol 17) 1930 All 840 (841); 53 All 97.

[2] An application for revocation of the grant of probate cannot be referred to arbitration. (1894) 1894 Pun Re No. 72, page 240 (241).

9. Arbitration in suits for restitution of conjugal rights.—[1] A suit for restitution of conjugal rights can be referred to arbitration. (Vol 21) 1934 Oudh 494 (494); (Vol 32) 1945 Mad 269 (270); 1 L R (1946) Mad 134.

[But see (Vol 5) 1918 Lah 357 (358); (Vol 20) 1933 Lah 532 (532).]

[2] The factum or validity of a marriage, in a suit for restitution of conjugal rights, can be referred to arbitration. (Vol 16) 1929 Lah 394 (395); (Vol 5) 1918 Lah 357 (358); (Vol 16) 1929 Lah 177 (178).

10. "At any time before judgment is pronounced."—[1] The parties are entitled to have the matter in difference between them referred to arbitration at any time before the judgment is pronounced. The Court has no discretion to reject an application for a reference to arbitration. (Vol 2) 1915 Cal 70 (70). (Notwithstanding that much time of the Court may have been occupied in hearing a case.)

[See also (1911) 33 All 645 (645, 647). (Appellate Court also cannot decline to make reference.)]

[2] Where in a partition suit the parties agree as to their respective shares in the properties and a preliminary decree is passed incorporating such agreement, the question as to how the properties are to be divided may be referred to arbitration and the division of the properties as made in the final decree may be based on the award of the arbitrators. (Vol 26) 1939 Pat 526 (528); 18 Pat 193.

11. Authority of agent to refer.—[1] An authorized agent can make a reference on behalf of his principal. (1886) 12 Cal 173 (178); (1883) 1883 Pun Re No. 170, page 530 (531); (1882) 1882 Pun Re No. 48, page 140 (140).

[2] An authorized agent does not require special power in order to enable him to refer on behalf of his principal. (1893) 1893 Pun Re No. 51, page 234 (234, 237) (FB).

[3] The principal can subsequently ratify the agent's act of reference. (1886) 9 Mad 451 (452); (1897) 24 Cal 469 (472).

[4] A partner cannot make a reference on behalf of his firm. (1910) 11 Cal L Jour 658 (664); (Vol 13) 1926 All 238 (240); 48 All 239; (Vol 19) 1932 Lah 291 (292); (Vol 19) 1932 Cal 343 (343); (1900) 22 All 135 (138). (Reference cannot be made without special authority.); (Vol 6) 1919 Mad 1161 (1162). (Do.); (Vol 13) 1926 Lah 91 (93). (Reference made by one partner on behalf of firm is invalid—All partners must join.); (Vol 19) 1932 Bom 516 (519).

[5] Reference by the *managing* partner is binding on the firm. (Vol 17) 1930 Sind 40 (41); (Vol 10) 1923 Lah 212 (213).

[See also (Vol 20) 1933 All 924 (925). (Defendant's son managing the business agreeing to reference—Parties appearing before arbitrator—Substantial justice done—High Court will not interfere in revision in such a case.)]

[But see (Vol 19) 1932 Lah 291 (292).]

12. Authority of guardian or manager of joint Hindu family.—[1] The next friend or a natural guardian can refer disputes to arbitration, where there is no suit pending in respect of them, if the reference is for the benefit of the minor. (Vol 7) 1920 Bom 32 (34); 44 Bom 202, (1903) 27 Bom 287 (291); (Vol 2) 1915 Low Bur 110 (111); (1892) 19 Cal 334 (335); (1864) 2 Mad H C R 47 (49); (1864) 1 Suth W R 230 (231). (If injurious to the minor the award will be set aside.); (Vol 23) 1936 Nag 197 (200); 1 L R (1936) Nag 44.

[See (Vol 19) 1932 P C 76 (80); 7 Luck 1; 69 Ind App 92 (PC). (But the mother of a minor Muhammadan cannot as *de facto* guardian agree to refer to arbitration on behalf of the minor.)]

[2] The manager of a joint Hindu family can refer the family disputes to arbitration. (1911) 14 Cal L Jour 188 (201). (Arbitration without recourse to litigation.); (1894) 16 All 231 (233). (Award out of Court.); (Vol 6) 1919 Mad 878 (879). (Do.); (Vol 14) 1927 Lah 362 (364); 8 Lah 693. (Arbitration pending suit.); (Vol 22) 1935 All 452 (453). (The award made on such a reference, if in other respects valid, will be binding on the sons unless it be shown that the father's act in referring the suit to arbitration was tainted with fraud or collusion or was otherwise done in bad faith.); (Vol 26) 1939 Cal 500 (503).

[See also (Vol 22) 1935 Lah 667 (669). (*Karta* of joint Hindu family authorizing coparcener who is also managing member of joint family firm to make reference to arbitration—Such member can make valid reference so as to bind other member.); (Vol 22) 1935 Sind 235 (239). (Joint family—Powers of guardian—Guardian of minor referring certain matter to arbitration with intention of preserving property in family by

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way of family settlement — Direction empowering arbitrator to give portion of entire property for charity is within guardian's powers — It does not vitiate reference.)]

[3] As to the powers of a guardian *ad litem* to agree to refer the subject-matter of the suit to arbitration, see the A. I. R. Commentaries on the Civil Procedure Code, 4th (1944) Edn., O. 32, R. 7, Note 15.

13. Authority of pleader to refer. — [1] A pleader has no authority to refer the matter in difference to arbitration. (Vol 4) 1917 Pat 136 (137, 138); (Vol 6) 1919 Cal 232 (233); (Vol 11) 1924 Nag 338 (342, 343); (Vol 16) 1929 Lah 171 (172); (Vol 19) 1932 Cal 343 (344). (Attorney.); (Vol 22) 1935 Pat 16 (17). (Vakalatnama conferring power to compromise suit—It was assumed in this case that this gave power to sign agreement to refer to arbitration.)

[See (Vol 16) 1929 Cal 322 (324) : 56 Cal 21. (Vakalatnama using words 'shalisham' or 'solenama karibain'—*Held*, pleader was vested with sufficient authority to refer the matter to arbitration.)]

[But see (Vol 3) 1916 Sind 79 (81) : 9 Sind L R 183; (Vol 17) 1930 Sind 190 (191) : 25 Sind L R 20. (Pleader can refer on strength of vakalatnama without special authority.)]

[2] A *counsel* has implied authority to refer to arbitration matters in dispute. (Vol 19) 1932 Lah 373 (374) : 13 Lah 775.

[3] Neither a *counsel*, nor a pleader who has an express authority to refer, can delegate his power to another pleader. (Vol 19) 1932 Lah 373 (374) : 13 Lah 775. (Counsel.); (Vol 18) 1926 Lah 563 (564). (Pleader.)

[4] A reference to arbitration by *counsel*, who had express instructions against the reference, is not binding on the party. (Vol 15) 1928 Cal 378 (380).

[5] A pleader has no authority to revoke the appointment of an arbitrator by the party, without the latter's knowledge or instructions. (Vol 9) 1922 Nag 39 (40) : 13 Nag L R 140.

[6] Where unequivocal power is given by the client (purdanashin lady) to the pleader in the power-of-attorney to refer the suit to arbitration, a separate express authority is not necessary for reference to arbitration. (Vol 31) 1944 Lah 280 (281, 282).

[7] Where an advocate is authorized by his client to appear for him in appeal but not to act for him, the signature of the advocate on the application to refer the dispute to arbitration would be unauthorized, but his oral consent would bind his client. (Vol 33) 1946 All 1 (3).

14. Form of agreement to refer. — [1] Agreement to refer must clearly state the matters in dispute which are referred to arbitration. (Vol 17) 1930 All 319 (320); (Vol 6) 1919 Pat 74 (76); (Vol 22) 1935 Oudh 499 (500) : 11 Luck 475. (Where the parties agree that the arbitrators should decide matter in dispute between the parties as set out in the pleadings the reference cannot be said to be vague—It is sufficiently definite as regards the points of difference between the parties.); (1879) 1879 Pun Re No. 67, page 182 (183).

[2] It has been held in cases arising under the corresponding provision of Para. 1 of Sch. II, Civil P. C., that the provision of the requirement of an *application* in writing to the Court is only *directory* and not *mandatory*. Hence, an award is not invalid on the ground of absence of a *written* application if it is clear that the parties did agree to refer. (1900) 27 Cal 61 (63); (Vol 15) 1928 Mad 48 (49); (1908) 30 All 32 (35); (Vol 22) 1935 Oudh 499 (500) : 11 Luck 475. (Record of agreement in Court's proceedings bearing signature of parties constitutes sufficient compliance with Para. 1 of Sch. II.); (1911) 9 Ind Cas 412 (413)

(Oudh). (Subsequently the parties appeared in person before the arbitrator and even evidence was taken in their presence); (1935) 155 Ind Cas 290 (291) (Oudh). (Parties to appeal expressing their desire to refer dispute to arbitration — Order of reference by Court is valid.); (Vol 20) 1933 Rang 407 (408) : 12 Rang 1; (Vol 11) 1924 All 540 (540) : 46 All 208. (Oral consent of both parties recorded by Court.)]

[See however (Vol 11) 1924 Oudh 400 (401); (1912) 36 Bom 105 (109).]

[But see (1879) 1879 Pun Re No. 67.]

[3] Where the parties have agreed and applied to the Court for a reference, the mere fact that one of them has not affixed his signature to the application does not vitiate the reference. (Vol 2) 1915 P C 79 (80); 43 Cal 290 : 43 Ind App 1 (PC); (Vol 33) 1946 All 1 (3) : I L R (1945) All 882; (Vol 32) 1945 Lah 34 (35). (Pleader authorised to refer — No signature by client—Reference is valid.)

[See also (Vol 6) 1919 Lah 381 (382) : 1919 Pun Re No. 77. (One party not signing application but making oral application and taking part in arbitration—He is estopped from disputing award on ground that reference was not signed by him.); (Vol 17) 1930 Lah 523 (524). (Some of the parties not joining — All parties appearing before arbitrator through pleader—Defect in reference cured.)]

[4] Where a pleader duly authorised signs the application for his client, the reference is valid. (Vol 14) 1927 Lah 362 (364) : 8 Lah 693.

[See also (Vol 22) 1935 Pat 16 (17). (Pleader appointed in suit on behalf of all defendants — Agreement to refer signed by pleader as pleader—No objection taken to arbitration proceedings — *Held* all defendants were parties to reference.)]

[5] The guardian *ad litem* of the minor was present in the Court and assented to the application for reference. He did not sign the reference. It was held that the reference was valid. (Vol 2) 1915 P C 79 (80) : 43 Cal 290 : 43 Ind App 1 (PC).

15. "Matter in difference." — [1] A matter in difference is a matter in dispute which implies an assertion of right by one party and the repudiation thereof by another. (Vol 18) 1931 Bom 164 (166). (Mere non-payment by one partner does not amount to dispute.)

[2] A dispute as to uncertified payment or adjustment can be a matter in difference. (Vol 12) 1925 Cal 812 (813) : 52 Cal 559.

[3] The matter in difference must have arisen at the time of reference; it need not have arisen at the time of the agreement to refer. (Vol 18) 1931 Bom 164 (166); (1903) 30 Cal 831 (839, 840); (Vol 1) 1914 Bom 123 (124) : 38 Bom 638; (Vol 7) 1920 Cal 143 (143) : 46 Cal 534; (Vol 17) 1930 All 319 (320).

[4] In a partition suit the parties agreed as to their respective shares but did not agree as to how the properties should be divided. It was held that the question was a matter in difference. (Vol 26) 1939 Pat 526 (527) : 18 Pat 193.

[5] Whether there is any matter in difference has to be decided on facts of each case. (Vol 7) 1920 Cal 143 (143, 144) : 46 Cal 534.

[6] Matter in difference must be one arising in the *suit* and between the *parties* to the suit. The Court has no power to refer to arbitration any questions other than those in question in the suit, or any questions in which any person, *not* a party to the suit, is concerned. (Vol 12) 1925 P C 293 (297) : 53 Ind App 1 : 53 Cal 258 (PC). (Confirming (Vol 11) 1924 Cal 567.)

[7] A reference is competent on a question of law or a question of fact. (1902) 29 Cal 167 (168) : 29 Ind App 51; 1902 Pun Re No. 25(PC); (Vol 2) 1915 Cal 745 (748).

Appointment of arbitrator.

22. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

[Civil P. C., Sch. II Para. 2.]

23. (1) The Court shall, by order, refer⁵ to the arbitrator the matter in difference³ which he is required to determine, and shall in the order specify such time as it thinks reasonable⁴ for the making of the award.²

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

[Civil P. C., Sch. II Para. 3.]

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[8] An error made by the arbitrators on point of law referred to them does not vitiate the award. (Vol 3) 1916 Oudh 285 (285) : 19 Oudh Cas 48.

[9] The matter in difference must relate only to the *private rights* of the parties. A suit under S. 92, Civil P. C., is not one for the determination of the private rights of the parties to the litigation, hence such matter cannot be referred to arbitration. (Vol 10) 1923 Nag 112 (114).

[See (Vol 21) 1934 All 368 (370) : 56 All 721. (Parties litigating for title and possession of mutt in their own right — Mutt not of nature of public charity — Disputes *inter se* can be referred to arbitrator.)]

[See however (1901) 11 Mad L Jour 337(338); (1896) 19 Mad 498, followed.; (1903) 26 Mad 361 (361). (Under S. 16 of the Religious Endowments Act, a Court may refer any matter in difference in the suit for decision by an arbitrator but not the whole suit.)]

[10] The selection of the guardian for a minor cannot be referred to arbitration. (Vol 11) 1924 Mad 484 (484) : 47 Mad 459.

[11] A criminal complaint cannot be referred to arbitration. (Vol 16) 1929 Lah 394 (395).

[12] Where a question arises as to what the matter was that was referred to arbitration, it is for the Court to decide what was referred to arbitration. (Vol 13) 1926 Mad 752 (753).

[13] When the whole case is referred to arbitration, the question of costs is also referred to arbitration. (Vol 5) 1918 Nag 108 (109).

16. Matters outside suit. — [1] Matters outside the suit cannot be referred to arbitration under this section. (Vol 8) 1921 Mad 709 (709) ; (Vol 12) 1925 P C 293 (297) : 53 Ind App 1 : 53 Cal 258 (P C) ; (Vol 24) 1937 Sind 174 (175) : 30 Sind L R 478. (Property not referred to in plaint but mentioned in written statement is not a subject-matter of suit — Judge raising issues as to — Effect—Arbitrators have no jurisdiction to decide questions as to such property.)

[2] Agreement to recognize an award made on matters beyond the scope of the matters in difference mentioned in the reference is void. (Vol 15) 1928 Sind 81 (81) : 21 Sind L R 253.

[3] An application for reference included matters outside the suit. The Court ordered a reference only as to the matters in difference in the suit. It was held that the reference was not illegal. (Vol 14) 1927 Cal 52 (54).

[See however (Vol 22) 1935 Mad 1053 (1054). (Reference to arbitration through Court—Question not in suit also referred to arbitration — Reference illegal and award cannot be enforced.)]

[4] Parties applied for reference to arbitration of matters in difference between them *in the suit* and on the same day made a separate reference as to matters outside the suit. It was held that the order of reference made by the Court with regard to the subject-matter of the suit was valid. (Vol 14) 1927 Cal 52 (54).

[See also (1865) 3 Suth W R Misc. 27 (28). (They

should be distinctly separated and not mixed up together.)

17. Powers of appellate Court. — [1] Where the appellate Court remits a case under O. 41, R. 25, Civil P. C., the lower Court has no power to refer the case to arbitration. (1885) 7 All 523 (526, 527).

[2] The appellate Court by its order of remand cannot direct the lower Court to refer the matter to arbitration. (1874) 22 Suth W R 396 (396).

[3] The appellate Court can with the consent of the parties refer the matter to arbitration. (1911) 38 All 645 (647) ; (1875) 7 N W P H O R 243 (248, 249) (FB); (1891) 18 Cal 507 (509); (1886) 12 Cal 173 (177); (1880) 3 Mad 78 (79).

[But see (1874) 21 Suth W R 210 (211) (FB).]

[4] Where the lower Court passes a decree not in accordance with the award but the appellate Court, holding that the award is not open to any objection, passes a decree in accordance with the award, it is final. (1888) 10 All 8 (11, 12).

18. Revocation of reference to arbitration — See Notes on S. 5.

19. Withdrawal of suit after reference. — [1] The Court has no jurisdiction to allow a withdrawal of the suit after reference. (1887) 9 All 168 (172) ; (Vol 25) 1938 All 56 (57) : I L R (1938) All 146.

[2] A suit cannot be allowed by the Court to be withdrawn after an award on reference has been made. (1902) 7 Cal W N 186 (187) ; (1884) 6 All 211 (213); (Vol 3) 1916 Oudh 141 (141) ; (Vol 6) 1919 Cal 1030 (1031). (Portion of the claim under reference cannot be withdrawn without the consent of other party.)

1. Section 22.—[1] It is essential that the parties should either name the arbitrators or consent to the nomination of the arbitrators by the Court. An award made by the arbitrators selected by the Court cannot be forced upon the parties in the absence of consent of the parties. (1865) 5 Suth W R 21 (24) (PC).

[2] A party may waive an irregularity in the appointment of arbitrators. If a party appears before the arbitrators under protest, he cannot be held to have forfeited his right to question the validity of the proceedings. (1865) 5 Suth W R 21 (25) (PC).

[3] Whether the arbitrators nominated are willing to act as arbitrators should be first ascertained by the Court. Till then no reference should be made. (1864) 1864 Suth W R Gap 338 (339).

[4] As to agreement to abide by the decision of the Court, see S. 21, Note 1.

SECTION 23 — SYNOPSIS

1. Effect of order of reference.
2. "Making of the award."
3. "Matter in difference."
4. "Shall specify such time as it thinks reasonable."
5. "The Court shall, by order, refer."

1. Effect of order of reference. — [1] Where a Court makes an order of reference to arbitration, its

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jurisdiction to deal with the case, so long as the proceedings are pending before the arbitrator, is suspended. It cannot, therefore, deal with the case except as provided in this Act. (Vol 13) 1926 Nag 37 (39); (Vol 17) 1930 Lah 26 (30) : 11 Lah 342; (1868) 10 Suth W R 398 (400); (Vol 24) 1937 Pesh 49 (50); (Vol 24) 1937 Oudh 507 (508) : 13 Luck 609.

[See (Vol 21) 1934 Lah 162 (162). (In a suit attacking the original agreement to refer to arbitration the subject-matter is not the same as in the reference to arbitration and the suit attacking the agreement should not be stayed.)]

[2] After an order of reference is made the Court cannot dismiss the suit under Civil P. C., O. 9, R. 3; or under O. 9, R. 8, or remove the arbitrator or substitute a new one; or record a compromise between the parties; or deal with the case on the merits. (Vol 10) 1923 Pat 115 (116); (Vol 4) 1917 Lah 379 (381) : 1916 Pun Re No. 115. (Suit dismissed for default pending arbitration proceedings — Subsequent restoration and arbitrators directed to proceed — Award filed without objection — *Held* award legal.) : (1910) 1910 Pun L R No. 29; (Vol 24) 1937 Pesh 49 (50); (1886) 10 Bom 381 (389); (Vol 11) 1924 Cal 722 (724) : 51 Cal 432, (1902) 24 All 312 (314); (Vol 19) 1932 All 183 (184) : 54 All 122. (Question of costs referred to arbitration — Court cannot deal with it.)

[3] Even after an order of reference is made the Court can deal with an application to appoint an interim receiver or to grant an injunction. (Vol 12) 1925 Sind 102 (102) : 18 Sind L R 303; (Vol 15) 1928 Cal 256 (258) : 55 Cal 249.

[4] The Court has no power to direct that money should either be deposited or paid to the arbitrators for their remuneration unless the parties had specifically agreed to such a course. (1894) 1894 Pun Re No. 94, page 340; (1881) 6 Cal 809 (810).

[See also (Vol 20) 1933 Sind 300 (301).]

[5] For withdrawal of suit after reference, see S. 21, Note 19 and for an application to bring legal representatives of a deceased party, see S. 5, Note 2.

2. "Making of the award." — [1] An award is made when the arbitrators have drawn up, executed and signed it. It is the *making* of the award that should be within the time fixed. The filing thereof into Court after the time fixed will not vitiate the award. (1904) 26 All 105 (107); (Vol 22) 1935 Cal 359 (363); (1905) 27 All 459 (461); (1889) 13 Bom 119 (124); (Vol 2) 1915 Cal 101 (103); (1907) 1907 Pun Re No. 89, page 433 (434); (1899) 22 Mad 22 (24); (Vol 3) 1916 Pat 21 (23); (Vol 5) 1918 Oudh 14 (15).

[But see (1886) 8 All 543 (544).]

3. "Matter in difference." — [1] Where it is found that one matter in difference agreed to be referred has been omitted from the reference and that consequently the arbitrators have not given any decision thereon, the party interested should bring the omission to the notice of the Court so that the Court may send the case back to the arbitrators with a fresh reference on the point omitted. If he does not do so, the Court is not wrong in deciding the point itself. (1870) 14 Suth W R 247 (248).

[2] The decision of the arbitrators on matters not in dispute, nor referred to them, is null and void for want of jurisdiction. (1871) 15 Suth W R 172 (173); (Vol 20) 1933 Mad 862 (864). (Scope of enquiry is that of suit — Arbitrators have no jurisdiction to extend it as regards the subject-matter or parties affected by it.)

Also see Section 21, Note 15.

4. "Shall specify such time as it thinks reasonable." — [1] These words are mandatory and imperative and the Court is bound to specify in its order of reference, a time for the making of the award. (1891) 13 All 300 (303) : 18 Ind App 55 (PC).

[See also (1854) 6 Moo Ind App 134 (156, 157) (PC). (Case under the Bombay Regulation, 7 [VII] of 1827, but on analogous provisions.)]

[2] The power to specify the limit of time cannot be delegated to the arbitrators themselves. (Vol 10) 1923 Cal 410 (412, 414). (Dissenting from (Vol 2) 1915 Cal 832); (1911) 9 Ind Cas 241 (243) (Oudh).

[3] Where the order of reference did specify a time but described it as one specified for the *hearing of the suit* instead of for making the award, it was held that it was only an irregularity which may not vitiate the reference. (1891) 13 All 300 (303) : 18 Ind App 55 (PC).

[See also (1913) 16 Oudh Cas 233 (237). (Time fixed for filing award and not for making it — Award filed that date not bad.)]

[4] Where the order of reference does not specify a date but the Court subsequently intimates to the arbitrator the time within which the award should be filed, the irregularity, if any, will not affect the validity of the award. (Vol 24) 1937 All 141 (143) (SB).

[See also (Vol 23) 1936 Rang 240 (241). (Where Court leaves it to discretion of the arbitrator to complete the award within a reasonable time and he does so, it cannot be said that there has been substantial miscarriage of justice merely because the Court did not fix any time within which the award was to be submitted.)]

[5] An award made beyond the time specified is liable to be set aside under S. 30. (See Note 7 on that section.)

As to the power of the Court to extend time specified, see S. 28.

5. "The Court shall, by order, refer." — [1] Where the parties apply to the Court for an order of reference, the Court is *bound* to make an order of reference and has no discretion in the matter. (Vol 31) 1944 Lah 280 (281). (If so required by the parties, a suit for declaring an alienation by a widow invalid can be referred to arbitration.)

[2] In the absence of an order of reference by the Court, the arbitration proceedings and the award made therein are illegal. (1884) 1884 Pun Re No. 35, page 86 (88).

[See also (Vol 24) 1937 All 141 (143) (S B). (Where the arbitrator is fully aware of the terms of the order of reference and accepts the office of arbitrator, the mere fact that the order of reference was not formally communicated to him will not vitiate the arbitration.)]

[3] Where the parties applied for adjournment of the suit from time to time on the ground that the matters in dispute had been referred to arbitration and the Court granted time, it was held that the order granting adjournment on the application of the parties should, under the circumstances of the case, be construed as an order of reference. (Vol 4) 1917 All 71 (73) : 39 All 401.

[4] In order to vest jurisdiction in the arbitrators to deal with a pending suit, it is necessary that the Court should make an order under sub-s. (1) of this section referring the suit to them and should specify in the order such time as it thinks reasonable for the making of the award. It is only then the Court ceases to have jurisdiction to deal with the suit or such matters therein as are referred to arbitration. Hence, where the Court, in a suit for partition, upon a memo filed by the parties

24. Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

Provisions applicable to arbitrations under this Chapter.

25. The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter:

Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

CHAPTER V.

GENERAL.

Application of Chapter.

26. Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations.

Power of arbitrators to make an interim award.

27. (1) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

Power to Court only to enlarge time for making award.

28. (1) Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

Section 23 (contd.)

stating that they had all executed a *muchilika* to *panchayatdars* for settling the suit and praying that the documents filed in the Court might be returned to them for being placed before the *panchayatdars*, passed an order directing delivery of the books to the plaintiffs' pleader for production before the *panchayatdars*, it was held that the order could not be construed as order of reference to arbitration within the meaning of S. 23 (1) and that in the circumstances, it was open to one of the defendants to move the Court for the recall of the account books from the *panchayatdars* and to post the suit for trial. (Vol 33) 1946 Mad 86 (86, 87).

1. Section 28 (1).—[1] The Court can extend the time for making an award before the award is made whether the time originally specified has expired or not. (Vol 21) 1934 Bom 398 (399); (Vol 17) 1930 Bom 462 (463) : 54 Bom 408; (Vol 8) 1921 Bom 419 (421) : 45 Bom 1071; (Vol 7) 1920 Cal 115 (117) : 46 Cal 1059; (Vol 3) 1916 Lah 80 (82); (Vol 13) 1926 Sind 8 (8); (1912) 6 Sind L R 146 (146).

[2] Once the award is made the Court cannot extend the time originally fixed. (91) 13 All 300 (304) : 18 Ind App 55 (P C); (Vol 21) 1934 Bom 398 (399); (1886) 9 Mad 475 (476); (1887) 6 Moo Ind App 134 (161) (P C); (1911) 38 Cal 522 (524, 525).

[But see (Vol 26) 1939 Cal 260 (264) : I L R (1938) 2 Cal 482. (Dissenting from 38 Cal 522); (Vol 18) 1931 Bom 125 (126) : 55 Bom 452.]

[3] Where an award is signed but not announced to the parties or sent to the Court, time for making the award can be extended. (Vol 15) 1928 Lah 753 (755).

[4] Court must consider all circumstances before

extending time. (Vol 12) 1925 Sind 150 (153) : 19 Sind L R 251; (Vol 1) 1914 Sind 20 (20) : 8 Sind L R 269.

[5] Court must extend time only for cogent reasons; a party who has been negligent or guilty of dilatory tactics cannot get extension. (Vol 22) 1935 Lah 191 (192).

[6] If the Court thinks fit to refuse leave to the petitioner to revoke the submission, it can extend the time for the making of the award. (Vol 24) 1937 Mad 405 (405).

[7] Order passed by Court for extending time must refer back to the date of application. (Vol 27) 1940 Mad 926 (926).

[8] An application will have to be made for extension of time and a notice of the application to the other party should be served. (Vol 18) 1931 Bom 125 (126) : 55 Bom 452.

[9] An oral application for extension of time is not incompetent. (Vol 11) 1924 Bom 380 (380). (Distinguishing 3 Mad 59.)

[10] Extension of time for making award can be granted even by appellate Court. (Vol 7) 1920 Cal 115 (117) : 46 Cal 1059.

[11] An order of extension of time can be implied from the proceedings of the Court. (Vol 12) 1925 Cal 475 (476). (On the date fixed for filing the award the Court ordered : "The arbitrators have not submitted their award; issue *takid* at once fixing the 10th November for hearing"—*Held*, that the order may be taken as an order extending the time for filing the award.)

2. Section 28 (2).—[1] Arbitrators themselves cannot extend time for passing of the award and an award passed after the time fixed therefor has expired is bad. (Vol 10) 1923 Mad 222 (223).

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

[1899—S. 12; Civil P. C., Sch. II Para 8.]

29. Where and in so far as an award is for the payment of money the Court may in the *Interest on decree order interest*, from the date of the decree at such rate as the Court *awards.* deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

Grounds for setting aside award. **30.** An award shall not be set aside except on one or more of the following grounds, namely—

- (a) that an arbitrator or umpire has misconducted⁹ himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration¹⁸ or after arbitration proceedings have become invalid under section 35;
- (c) that an award has been improperly procured⁵ or is otherwise invalid.⁶

[1899—S. 14; Civil P. C., Sch. II Para 15.]

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[2] As to whether time can be extended by agreement acquiesced in between the parties, *see* (Vol 6) 1919 Pat 93 (98). (Case decided under Civil P. C., Sch. 2, Para. 8.)

[3] Parties may be estopped by their conduct from questioning an award passed out of time. (Vol 6) 1919 Pat 93 (98); (Vol 6) 1919 Lah 27 (29); 1 Lah 158. (Parties acquiescing in Court's order of extension cannot question the same.); (Vol 23) 1936 Lah 466 (467).

SECTION 30 — SYNOPSIS.

1. Appeal — See Notes on Section 39.
2. Application.
3. Evidence of arbitrator.
4. Expiry of period allowed by Court — Award made after.
5. "Improperly procured."
6. "Is otherwise invalid."
7. Jurisdiction.
8. Limitation.
9. Misconduct, what is.
 10. Misconduct, acts amounting to.
 11. Misconduct, acquiescence in acts amounting to.
 12. Misconduct, acts not amounting to.
13. Order superseding arbitration — Award made after.
14. Suit to set aside award—See Section 32.

1. Appeal. — See Notes on Section 39.

2. Application.—[1] It is not competent to apply to set aside an award till the award has been filed in Court. (Vol 31) 1944 Cal 304 (305); ILR (1943) 2 Cal 392; (Vol 29) 1942 Bom 101 (102); I L R (1942) Bom 452.

[2] Order 1, Rule 8, Civil P. C., applies to petitions to set aside awards under Section 30. (Vol 23) 1936 Bom 250 (255); 60 Bom 645.

3. Evidence of arbitrator. — [1] An arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and as to every matter of fact with reference to the making of the award. But a party cannot examine him as to why and how he arrived at a particular decision and scrutinize his decision on matters within his jurisdiction and on which his decision is final. (Vol 1) 1914 P C 105 (108); 36 All 336; 17 Oudh Cas 120 (PC). (Approving the case in (1871) 5 H L 418, *Bucclench v. Metropolitan Board of Works.*)

[See (Vol 15) 1928 Sind 171 (172); 22 Sind L R 295. (Before determining whether arbitrator has misconducted in overvaluing property, he must be allowed to offer explanation.)]

4. Expiry of the period allowed by Court — Award made after. — [1] An award made out of time is not *per se* a nullity, but only affords a ground or reason for *setting aside the award* if the parties so desire to assert their rights. (1912) 39 Cal 822 (827); (Vol 20) 1933 Oudh 563 (564). (The power of setting aside an award on this ground will be exercised on broad grounds of justice, equity and good conscience.); (Vol 3) 1916 Lah 80 (82); (Vol 6) 1919 Pat 93 (95); 4 Pat L Jour 265.

[2] If no application is made to set aside the award on that ground, or if an application is made and refused, the award becomes final. (Vol 3) 1916 Lah 80 (82); (Vol 20) 1933 Oudh 563 (564); (Vol 6) 1919 Pat 93 (95); 4 Pat L Jour 265.

[See also (Vol 23) 1936 Lah 466 (467). (Arbitrator submitting award beyond date fixed — Parties submitting to arbitration and conducting case before arbitrator after due date — Consent of parties can be inferred — Award is valid though filed out of time.)]

5. "Improperly procured." — [1] An objection that consent to submission was obtained by misrepresentation falls under S. 30. (Vol 17) 1930 Sind 195 (197).

[2] Under clause (b) of Para. 15 (1) of Sch. II of Civil P. C., which corresponds to the present section, an award could be set aside if either party had been guilty of fraudulent concealment of any matter which he ought to have disclosed or of wilfully misleading or deceiving the arbitrator or umpire. This section does not contain such words. But it is conceived that the expression "improperly procured" in clause (c) of the present section would cover cases falling under Sch. II, Para. 15, Civil P. C. The cases decided under Para. 15 (1), Civil P. C., bearing on fraudulent concealment of any matter by the arbitrator are noted below: — There should be *uberrima fides* on the part of all the parties concerned in relation to the selection of the arbitrator and his appointment and every disclosure as regards his selection and fitness for the post ought to be made. (1898) 25 Cal 141 (144); (Vol 20) 1933 Sind 63 (69, 70).

[3] In the following cases the award made by the arbitrator was held liable to be set aside under clause (b) of Para. 15, Civil P. C.:—

(a) Where the arbitrator was the retained pleader of one of the parties; (1898) 25 Cal 141 (144).

(b) Where the arbitrator was related to him; (Vol 12) 1925 Sind 150 (152); 19 Sind L R 251; (Vol 22)

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1935 Oudh 349 (352, 353) : 11 Luck 306. (Arbitrator related to one defendant and having monetary dealings with another.)

(c) Where the arbitrator was interested in the subject matter of the suit. (Vol 13) 1926 Oudh 307 (309) : 1 Luck 139.

6. "Is otherwise invalid."—[1] An objection to an award on the ground that it is invalid *for any cause whatever* must be taken in the Court in which the award is filed and if no objection is there taken or if it is made and disallowed, the award becomes final and cannot be challenged subsequently. (Vol 11) 1924 Bom 324 (325); (Vol 22) 1935 Rang 94 (97) : 12 Rang 675; (Vol 1) 1914 All 446 (448, 449) : 36 All 69 (FB); (Vol 3) 1916 Sind 79 (80) : 9 Sind L R 168; (Vol 9) 1922 Sind 1 (3) : 15 Sind L R 165; (Vol 17) 1930 Bom 431 (438) : 54 Bom 696. (Objections to the validity of the award—A separate suit for that purpose will not lie—The remedy lies under S. 30 (c).; (Vol 26) 1939 Pat 526 (529) : 18 Pat 193 (202); (Vol 23) 1936 Oudh 1 (3) : 11 Luck 441. (Objection on ground of award going outside terms of reference.); (Vol 24) 1937 All 65 (69) : ILR (1937) All 317 (FB); (Vol 26) 1939 Lah 69 (70). (Where the objection that the arbitrator exceeded his powers in drawing an award is not taken before the Court passing the decree upon the award under S. 30, a separate suit will not lie to set aside the decree on that ground.); (1936) 1936 Oudh W N 16 (20); (Vol 23) 1936 Lah 466 (468).

[See (1933) 1933 Mad W N 1475 (1476). (Agent referring to arbitration without authority—Principal becoming aware long after proceedings are over—He has right to institute a suit to set aside award.)]

[2] An award made otherwise than in accordance with the authority conferred by the order upon the arbitrators is an award which is "otherwise invalid" and which may be set aside by the Court under this section. (Vol 12) 1925 P C 293 (296) : 53 Ind App 1 : 53 Cal 258 (P O).

[3] Where the arbitrators treat a person, who is not a party to the suit which has been referred to them, as a party to it and decide disputes between parties to the suit or any of them and such person, it was held that the arbitrators exceeded their jurisdiction and the award was invalid. (Vol 14) 1927 Sind 193 (193, 194).

[4] Where the arbitrators go beyond the scope of the submission and decide matters outside the scope of the suit, the Court will be justified in setting aside the award as invalid. (Vol 12) 1925 Sind 51 (52). (Award must not exceed submission in substance or form.); (1901) 23 All 394 (404, 405) : 28 Ind App 190 (PC); (Vol 25) 1938 Cal 341 (343). (Terms of reference directing physical partition—Award ordering sale of premises and dividing sale proceeds—Award should be set aside.); (Vol 31) 1944 PC 83 (84) : I L R (1945) Kar PC 1 (PC). (Reference to arbitration pending appeal—Agreement to refer using the words "for settlement of all our disputes in this case"—Award settling whole dispute and not merely the matter of the appeal, held did not go beyond the scope of submission.); (Vol 17) 1930 Sind 170 (172) : 24 Sind L R 145. (Arbitrators acting within authority given by reference—No misconduct.)

[See (Vol 26) 1939 Lah 69 (70). (Where objection that arbitrator exceeded his powers in drawing award is not taken before the Court passing the decree upon the award under S. 30, a separate suit will not lie to set aside decree on that ground.)]

[5] It has been held that an award of the kind mentioned above cannot be treated partly as one made on a reference through Court and partly as an award by private agreement. (Vol 11) 1924 Cal 567 (573).

[6] Where simultaneously with the order of reference the parties agree to refer to the same arbitrators matters

outside the suit and separate awards are made and it appears that the view of the arbitrators in the latter award could not have influenced their minds in deciding the former, the award is not vitiated. (Vol 14) 1927 Cal 52 (54).

[See also (Vol 13) 1926 Mad 366 (366). (Arbitrators acting beyond scope of reference and giving award on a matter to which all parties agreed—Award on this part is enforceable by suit.)]

[7] An award may be set aside if in the award is found some legal proposition which is the basis of the award and which is patently erroneous. (Vol 22) 1935 Lah 52 (53).

[8] It was held that an objection to an award on the ground of its having been passed in favour of one partner against another for a specific sum (a claim for a specific sum by one partner against another is generally not maintainable in law) is not such an objection as is covered by cl. (c) of this section. (Vol 25) 1938 Lah 604 (605).

[9] The fact that the award deals with some properties not within the jurisdiction of the Court would not necessarily invalidate the award as a whole. It will depend upon whether the part of the award dealing with such property was separable or not. (Vol 26) 1939 Bom 296 (298).

[10] An objection to the validity of the reference to arbitration comes within the purview of this section. (Vol 24) 1937 All 65 (69) : I L R (1937) All 317 (F B); (Vol 19) 1932 Lah 239 (241) : 13 Lah 528.

[But see (Vol 18) 1931 Cal 109 (110, 111); (Vol 18) 1931 Cal 211 (216, 218) : 58 Cal 628.]

[11] The words "is otherwise invalid" are not *ejusdem generis* with the other cases mentioned in this section, but are meant to include all cases of invalidity on grounds other than those mentioned. Therefore, an award is invalid if a minor who is a party to the arbitration is not properly represented in the proceedings. (Vol 6) 1919 Mad 1029 (1031, 1032); (Vol 26) 1939 Sind 241 (243, 244) : I L R (1940) Kar 22 (FB). (Overruling (Vol 9) 1922 Sind 1 : 15 Sind L R 165.)

[See also (Vol 7) 1920 Mad 195 (196).]

[12] A party may be estopped by his conduct from questioning the validity of an award. (Vol 22) 1935 Oudh 499 (500) : 11 Luck 475. (Objection as to the application for order of reference to arbitration not being in writing not taken in time.)

[13] Where the original appointment of arbitrators was bad, the tribunal constituted is without jurisdiction and the award is invalid. (Vol 28) 1941 Sind 111 (112). (Subsequent attempt to rectify matters are of no avail.)

[14] See also the following cases: (Vol 25) 1938 Oudh 125 (127) : 14 Luck 65. (Award made on proper reference—Substantial justice done—Defect in procedure is no ground for setting it aside—Failure of one of arbitrators to sign does not render award invalid.); (Vol 24) 1937 Sind 156 (157) : 31 Sind L R 8. (Reference to arbitration pending criminal proceedings—Prosecution withdrawn by District Magistrate on application of parties before award—Reference and award held not illegal.); (Vol 20) 1933 All 372 (372). (Award not saying, "I dismiss the suit" is not defective in form—It is the function of the Court to pronounce judgment—It is not for the arbitrator to dismiss or decree the suit.)

7. Jurisdiction—[1] Application to set aside award lies only in that Court in which award is sought to be filed. (Vol 15) 1928 Sind 169 (170) : 23 Sind L R 427.

[2] Award can be set aside by the Court. The jurisdiction of the Court to set award aside under S. 30, cannot be ousted by agreement of parties. (1909) 13 Cal W N 63 (71).

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[3] Agreement that neither party shall take objection to award or file appeal is not binding. (Vol 4) 1917 Sind 38 (39) : 11 Sind L R 43.

8. Limitation. — The period of limitation for filing an application to set aside an award is thirty days under Art. 158, Limitation Act, from the date of service of notice on the party to the effect that award has been filed in the Court. (Vol 29) 1942 Cal 566 (567) : 1 L R (1942) 2 Cal 160.

9. Misconduct, what is. — [1] The word "misconduct" when applied to the proceedings of arbitrators does not necessarily imply moral turpitude; it is used in the sense of breach or neglect of such duties and responsibilities as devolve on the arbitrators acting judicially and as the Courts of justice expect from them before allowing finality to their awards. (1887) 9 All 253 (266) ; (1889) 12 Mad 113 (113). (One of the arbitrators not attending the meeting when witnesses were examined by the other arbitrators — Award held invalid by reason of misconduct.) ; (Vol 13) 1926 Oudh 307 (309) : 1 Luck 139. (Arbitrator taking down pencil notes of depositions of witnesses and subsequently fairing them and omitting to file pencil notes and to obtain signatures on the transcriptions, is judicial misconduct.) ; (Vol 22) 1935 Bom 127 (130) : 59 Bom 268. (If opportunity is afforded to one side to get advantage with arbitrator over another, and if there is possibility of such advantage influencing mind of arbitrator, proceedings are vitiated—Arbitrator sending for one of parties merely to sort papers, held did not amount to misconduct.) ; (Vol 24) 1937 Pat 343 (344) ; (Vol 24) 1937 Bom 410 (411). (Misconduct really lies in the conduct of the arbitration proceedings, and the onus of proof lies on the party who alleges it.) ; (Vol 11) 1924 Sind 132 (133) ; (Vol 11) 1924 Sind 75 (83, 84) : 17 Sind L R 133 (F B). (Breach of duty though honestly caused is legal misconduct as distinguished from moral misconduct.)

[2] Misconduct comprehends action on the part of the arbitrator which, upon the face of it, is opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide questions in difference referred to him by the parties ; (1889) 1889 All W N 124 (125). (Omission to take evidence and to give party an opportunity of proving his case amounts to misconduct.)

[3] Where it is proved that an arbitrator has been guilty of misconduct, it is not necessary to prove *pre-judice* in order that the award may be set aside. (Vol 18) 1931 Mad 619 (621). (Such irregularity may be cured by waiver.)

[4] A party will not be precluded from impeaching an award on the ground of misconduct of the arbitrator even if the appointment of the particular person as arbitrator has been suggested by such party. (Vol 24) 1937 Bom 410 (411).

[5] Misconduct contemplated is one arising before the making of the award and not subsequent. (Vol 13) 1926 Sind 242 (243).

[6] An award under the English Arbitration Act of 1889 duly made in accordance with the English law, cannot be set aside by an Indian Court on any ground of misconduct or irregularity on the part of the arbitrator. (Vol 13) 1926 Cal 938 (941) : 53 Cal 65.

Also see Section 11, sub-section (2).

10. Misconduct, acts amounting to—*Award outside reference*. — [1] Arbitrators asked to lay down scheme of management—Some of arbitrators appointed themselves as managers — Held that award was not within terms of reference and was bad. (Vol 9) 1922 Oudh 276 (277) : 26 Oudh Cas 1.

Delay in making award. — [2] Where an award is made after a delay of five years, it will amount to misconduct unless the delay is properly explained. (Vol 15) 1928 Bom 49 (50) : 52 Bom 116 ; (1875) 1875 Pun Re No. 41, Page 119. (Delay owing merely to inattention and failure to attend on 2 or 3 successive occasions—No misconduct.)

[See (1912) 13 Ind Cas 48 (49) (All). (Delay waived by parties objecting.)

[3] It is the duty of the arbitrator to see that the proceedings are conducted with reasonable diligence and not doing so is a failure in his ordinary duties as an arbitrator.

[4] Where delay in making an award is caused by the voluntary absence of one of the parties, that party cannot impugn the validity of the award on the ground of delay. (Vol 5) 1918 Pat 83 (86) : 4 Pat L Jour 394.

Delegation of function. — [5] An arbitrator has no authority to delegate his functions to a stranger. (Vol 3) 1916 Cal 806 (806) ; (Vol 22) 1935 Lah 113 (114). (Arbitrator undertaking to be bound by decision of certain persons acts illegally.)

[6] But he can take help in the performance of acts of a merely ministerial character. (1902) 29 Cal 854 (867, 868) : 29 Ind App 168 : 1902 Pun Re No. 87 (P C) ; (Vol 22) 1935 Oudh 349 (353) : 11 Luck 306. (Writing of a part of award to the dictation of the arbitrator is a ministerial act.)

[7] Where an arbitrator merely takes advice upon the general rules of law bearing upon the case and does not leave to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, the award is not vitiated by misconduct. (Vol 18) 1931 P O 289 (293) : 58 Ind App 381 (P C) ; (1902) 29 Cal 854 (867) : 29 Ind App 168 : 1902 Pun Re No. 87 (P C).

[See (Vol 15) 1928 Mad 107 (115). (Arbitrator taking independent legal opinion on questions to be decided is guilty of misconduct.)]

[8] It would be prudent and discreet for arbitrators when they desire to put themselves on the best footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject. (1902) 29 Cal 854 (867) : 29 Ind App 168 : 1902 Pun Re No. 87 (P C).

Exorbitant costs. — [9] Arbitrator authorized to deal with costs as they would be dealt with by Court — Dismissal of suit by arbitrators but plaintiff awarded Rs. 2000 as costs — Ordinary costs being about Rs. 100 even though not claimed in suit or even before arbitrator—Award must be set aside. (Vol 20) 1933 Sind 295 (296) : 27 Sind L R 327.

Illegal gratification. — [10] Where one of the arbitrators is guilty of misconduct in having accepted an illegal gratification from one of the parties, the award ought to be set aside in its entirety, inasmuch as it is difficult to say how far the other arbitrators were influenced by the biased and interested opinion of one of them. (1913) 18 Ind Cas 92 (94, 95) (Oudh) ; (Vol 22) 1935 Cal 359 (365). (Arbitrator taking money for charges or as fee from one of the parties may be sufficient to set aside award; but, where one party has paid it by mutual arrangement between parties, award is not vitiated.)

[See (1912) 5 Sind L R 240 (243). (Fraud and dishonesty on part of an arbitrator amount to misconduct and afford good cause for a competent Court to set aside the award.)]

Mistaken decision. — [11] Arbitrators themselves doubting the correctness of their decision—Award is not valid. (1878) 3 Cal 375 (379).

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[12] Award not deciding the real question at issue held vitiated by misconduct. (Vol 17) 1930 Sind 103 (104).

[13] Mere mistakes in award is no ground for avoiding award but it is possible that the mistakes are so gross and palpable as to afford strong evidence of misconduct. (Vol 23) 1936 Nag 197 (199) : 1 L R (1936) Nag 44.

No proper hearing.—[14] If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award. (Vol 1) 1914 P O 105 (107) : 36 All 336 : 17 Oudh Cas 120 (P O).

Non-disclosure of vital facts.—[15] Where an arbitrator is indebted to one of the parties at the time of the reference or becomes indebted after the reference or has a personal interest in the subject-matter of the dispute or where he has come to know of the facts of the case in the capacity of an adviser of one of the parties and where such fact is not disclosed to the other party, the award is vitiated by misconduct. (1902) 29 Cal 278 (282); (Vol 22) 1935 Oudh 349 (353) : 11 Luck 306 ; (Vol 26) 1939 Pat 170 (171); (Vol 2) 1915 Cal 332 (333); (Vol 22) 1935 Mad 349 (349) ; (1921) 68 Ind Cas 1007 (1008) (Lah) ; (1897-1901) 2 Upp Bur Rul 13.

[16] If the parties with full knowledge of the facts select an arbitrator who has to perform other duties which will not permit of his being an impartial person in the ordinary sense of the word, the Court will not release them from the bargain upon which they have agreed (Vol 22) 1935 Mad 349 (350). (But in this case, where one of the parties was an illiterate woman, it was held that the mere fact that she was aware that the arbitrator had an interest in the dispute was not sufficient but that it must be shown that she thoroughly comprehended the transaction and was made aware of the implications and consequences of her act and as this onus was not discharged, her application for revocation of the reference was accepted.)

[17] A pleader is not incompetent to be an arbitrator simply because he was engaged by one of the parties as his pleader on some former occasions. (Vol 5) 1918 Cal 399 (399).

Notice to party.—[18] Where the parties are not given notice of any meeting at which they should appear and represent their case or are not given a fair and reasonable opportunity to prove their case, that would amount to misconduct on the part of the arbitrators. (Vol 11) 1924 Bom 149 (149) ; (Vol 19) 1932 Bom 68 (69) ; (1889) 1889 All W N 124 (125). (Award without taking evidence and without giving opportunity to a party to prove his case—*Held* this amounted to misconduct.)

[19] The omission to give notice of a meeting to a party who had, prior to such meeting, notified to the arbitrator his withdrawal from the submission, does not invalidate the award. (1905) 29 Mad 44 (45) ; (Vol 1) 1914 Upp Bur 53 (54) : 2 Upp Bur Rul 26; (Vol 3) 1916 All 278 (283).

[*See also* (Vol 4) 1917 Lah 65 (68) : 1917 Pun Re No. 12. (Defective notice—Party not objecting to it—He cannot object to award.)]

[20] The arbitrators can make an *ex parte* award if the parties do not attend the hearing after receipt of sufficient notice. (Vol 1) 1914 Sind 62 (62) : 8 Sind L R 136.

[*See* (Vol 22) 1935 Sind 228 (232). (Where from the conduct of the objectors to an award it is abundantly clear that they had no intention of appearing before arbitrators, the arbitrators are justified in proceeding *ex parte*.)]

[21] If a reasonable excuse for not attending the appointment can be shown, an *ex parte* award can be set aside. (Vol 1) 1914 Sind 148 (148) : 8 Sind L R 110.

[22] *Personal knowledge.*—An arbitrator has no right to decide a matter referred to him on his personal knowledge and an award based on such knowledge cannot be maintained. (Vol 6) 1919 All 98 (99); 42 All 185; (Vol 22) 1935 Mad 152 (155, 156). (But Court will not interfere unless award has been substantially affected by such knowledge); (Vol 13) 1926 Mad 752 (754); (Vol 7) 1920 Nag 129 (130); (Vol 22) 1935 Pesh 69 (71, 72).

[23] Where the submission to arbitration gives him power to decide a case upon his own personal knowledge or where a particular arbitrator has been selected only because of his personal knowledge of the matters in dispute, it is not misconduct on the part of the arbitrator to import into the consideration of the case his own personal knowledge. (Vol 12) 1925 Mad 1086 (1086); (Vol 6) 1919 All 98 (99) : 42 All 185 ; (Vol 12) 1925 Oudh 741 (742) ; (Vol 15) 1928 Mad 48 (50, 52). (Guardian of a minor can consent to arbitrator's decision on personal knowledge); (Vol 13) 1926 Bom 527 (529); (Vol 22) 1935 Mad 152 (155). (It is desirable in such cases that arbitrator should tell the parties what his personal knowledge is and give them opportunity to rebut it.); (Vol 16) 1929 Mad 144 (145). (Arbitrator selected on account of personal knowledge—Used it only in understanding and appreciating evidence—*Held* award not bad.); (Vol 3) 1916 Bom 4 (7) : 41 Bom 518.

[*See* (Vol 18) 1931 Cal 53 (57) : 58 Cal 269.]

Perverse decision.—[24] Where the decision of an arbitrator is perverse, it amounts to misconduct. (1912) 5 Bur L Tim 55. (It was provided in reference to arbitration that the dispute should be decided according to Mahomedan law—Arbitrators deciding contrary to the well-known rules of law—Decision held perverse); (1869) 12 Suth W R 93 (93). (Decision contrary to all the evidence which they believed.)

Presence of arbitrators.—[25] Where more than one arbitrator is appointed, the presence of all of them at all meetings and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award. Absence of some of the arbitrators at some of the meetings is misconduct within the meaning of this section. (1885) 7 All 523 (528); (Vol 19) 1932 Mad 157 (157) ; (Vol 21) 1934 Rang 24 (26) : 12 Rang 128. (Award signed by four—Meeting of only three—Fifth not given notice of proposed meeting—Award is not valid—Refusal to sign by fifth at place where arbitrators had assembled for some other purpose does not affect question); (Vol 6) 1919 Mad 877 (877); (Vol 5) 1918 Cal 865 (866) ; (1911) 14 Cal L Jour 143 (145); (1882) 1882 Pun Re No. 55, page 158 (159); (Vol 9) 1922 Oudh 276 (277) : 26 Oudh Cas 1 ; (Vol 2) 1915 Oudh 110 (111) ; (Vol 6) 1919 Pat 74 (77).

[*See* (Vol 22) 1935 All 90 (91). (Arbitrators arriving at decision but waiting for signing award—One of them changing his mind and not signing it—No misconduct is constituted.)

(Vol 23) 1936 Nag 291 (292) : 1 L R (1937) Nag 35. (Agreement that award should be by three arbitrators—Only two arbitrators making enquiries and giving award—Award is bad for misconduct.)]

[But *see* (Vol 24) 1937 Pat 343 (344). (Absence of arbitrator from proceedings due to some justifiable cause such as illness, is not misconduct—12 Mad 113, dissented from.)]

[26] The facts that the agreement of reference provided for a valid award by the majority of the arbitrators and that a majority of them were present at all the meetings will not make the award valid. (Vol 5) 1918

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Cal 865 (866) ; (Vol 19) 1932 Mad 157 (157) ; (Vol 11) 1924 Rang 153 (154). (Though the remaining arbitrators may be of the same opinion, the award is invalid); (Vol 5) 1918 All 274 (275).

[27] Where a reference was made to three persons and the award purported to be made by four persons, it was set aside on the ground that the association of the fourth person might have influenced the decision of the others. (1875) 7 N W P H C R 367 (371).

[28] The absence of an arbitrator at some of the meetings does not amount to misconduct if the act done at such meetings is merely ministerial in its character and is not of a judicial nature. (Vol 11) 1924 Mad 274 (277). (Received written statement and documents—*Held* award not bad.); (Vol 18) 1931 Cal 53 (54) : 58 Cal 269; (1912) 15 Cal L Jour 360 (366) ; (Vol 7) 1920 Mad 288 (289).

[29] Submission clause empowering arbitrators (two in number) to call in third as umpire in case of difference—Umpire's award to be considered final—*Held* that arbitrators' absence at sitting held by umpire or want of their signatures on award did not vitiate award by umpire. (Vol 13) 1926 Sind 242 (244).

Private enquiries.—[30] An arbitrator who makes private enquiries and bases his award on information so obtained, which the parties had no opportunity to check, is guilty of legal misconduct. (1907) 4 All L Jour 159 (159) ; (Vol 21) 1934 Pat 550 (550, 551) ; (Vol 9) 1922 All 64 (65) ; (1911) 13 Cal L Jour 399 (402) ; (Vol 18) 1931 Lah 111 (112); (Vol 18) 1931 Lah 65 (65); (Vol 2) 1915 Cal 713 (714). (An arbitrator acts illegally in not disclosing to the parties the documents on which he acts.); (Vol 8) 1921 Mad 271 (272). (Such knowledge communicated to co-arbitrators in the presence of parties—Award is valid.); (Vol 9) 1922 Lah 480 (480). (Inquiry made in the presence of parties is not objectionable.); (Vol 12) 1925 Rang 383 (384) : 3 Rang 387. (Arbitrators not acting upon such knowledge—Award is not vitiated.); (Vol 22) 1935 Pesh 69 (71, 72). (Though private enquiries made by arbitrator, award based merely on documentary evidence is not vitiated.); (Vol 22) 1935 Pat 16 (17). (Arbitrator should take evidence in presence of parties); (Vol 23) 1936 Nag 291 (292) : I L R (1937) Nag 35.

[31] Where the parties agree to be bound by the decision of an arbitrator in whatsoever manner he might see fit to arrive thereat, the award will not be bad if based on private enquiries made by the arbitrator. (Vol 9) 1922 All 69 (69); (Vol 13) 1926 Oudh 383 (384): 29 Oudh Cas 258 ; (Vol 10) 1928 Mad 301 (302, 304) : 47 Mad 30. (But guardian of minor cannot so agree, though an adult can do so.); (Vol 30) 1943 All 284 (285): I L R (1943) All 666. (Do.); (Vol 22) 1935 Pesh 69 (71, 72); (Vol 21) 1934 Pat 550 (551).

Reception of evidence.—[32] An arbitrator ought not to hear or receive evidence, oral or documentary, from one side in the absence of the other. (1894) 18 Bom 299 (312) ; (Vol 22) 1935 Mad 184 (186) ; (Vol 13) 1926 Mad 1158 (1158). (Questioning parties on different dates is not misconduct so long as opportunity of meeting representation of other side is given.); (Vol 8) 1921 Cal 657 (659) ; (1921) 64 Ind Cas 706 (708) (All) ; (Vol 3) 1916 All 278 (282) ; (1911) 13 Cal L Jour 399 (402); (Vol 14) 1927 Lah 425 (426): 8 Lah 329; (Vol 12) 1925 Lah 570 (571) ; (Vol 12) 1925 Sind 287 (288) ; (Vol 11) 1924 Sind 91 (95) : 17 Sind L R 93. (Documents and correspondence read in the absence of one party—No misconduct.); (Vol 18) 1931 Mad 619 (621).

[See (Vol 27) 1940 Mad 905 (906). (Where the inaction of a party is an obstacle known to all the parties concerned to the examination of one party in the presence of the other parties.)]

[33] It has been held that there is no misconduct where an opportunity was given to the other side of meeting and answering such evidence. (Vol 13) 1926 Mad 1158 (1158).

[34] Where the arbitrator takes evidence in the absence of the parties with their consent, the award made thereafter is not bad for misconduct. (Vol 13) 1926 Cal 116 (118) ; (1910) 1910 Pun W R No. 73 P. 175 (176) ; (Vol 25) 1938 Cal 166 (167); I L R (1937) 2 Cal 465.

[35] Where any party deliberately absents himself from the hearing, the award made is not bad for misconduct. An award will be set aside when important evidence is improperly admitted by the arbitrator. (Vol 5) 1918 Cal 644 (645) ; (Vol 3) 1916 All 278 (283) ; (Vol 22) 1935 Mad 184 (188).

[36] It is misconduct on the part of an arbitrator when he examines no witnesses where the nature of the dispute is such that it cannot be determined without evidence. (Vol 18) 1931 Lah 65 (65) ; (1897-1901) 2 Upp Bur Rul 4.

Refusal to examine witness.—[37] The refusal of an arbitrator to examine witnesses produced by either party is misconduct. (1883) 12 Cal L Rep 564 (565, 566) ; (1889) 1889 Pun Re No. 58, page 187 (188) ; (1937) 39 Pun L R 582 (583) ; (Vol 23) 1936 Rang 191 (192). (Arbitrator must hear parties, and, if requested, their witnesses, unless absolved therefrom by terms of submission—Failure to do so amounts to misconduct within the meaning of this section.)

[See also (Vol 20) 1933 Sind 300 (301). (Parties given opportunity to produce evidence—Evidence not produced—Arbitrators are not guilty of misconduct in deciding on the evidence already on record.) (Vol 24) 1937 Bom 410 (414). (If a material piece of evidence is tendered and rejected, it may amount to misconduct. *Williams v. Wallis and Cox.*, (1914) 2 K B 478, followed.); (Vol 22) 1935 Sind 235 (239). (Direction in agreement of reference giving discretion to arbitrator to take evidence or not is not bad.)]

[38] In order to impeach an award on the ground of refusal of the arbitrator to examine witnesses, it must be shown that a witness was distinctly tendered to the arbitrator. (Vol 4) 1917 Low Bur 68 (71); (1912) 15 Cal L Jour 360 (366).

[39] It is not misconduct to refuse to admit evidence which was unnecessary and which would not have, in any way, helped or affected the decision. (1909) 3 Sind L R 164 (166, 167) ; (Vol 5) 1918 Cal 399 (400). (Arbitrator can decline to summon witnesses in the exercise of his discretion.)

11. *Misconduct, acquiescence in acts amounting to.*—[1] The cases mentioned in this Note are to be understood subject to the principle that the parties may agree that a reference may be conducted in a particular way. ('94) 18 Bom 299 (312). (Such agreement may be express or implied from the conduct of the parties during the arbitration.)

[2] An objection to the irregular or improper conduct of an arbitrator may be waived by the parties either expressly or by conduct, provided the party waiving it has full knowledge of the defect. (Vol 17) 1930 Sind 79 (81, 82) ; 24 Sind L R 351. (This principle of waiver applies to every kind of irregularity not affecting jurisdiction of arbitrator.); (Vol 22) 1935 Oudh 349 (352) : 11 Luck 306. (But waiver must be an intentional act with knowledge of one's legal rights.); (Vol 6) 1919 Mad 22 (23). (Do.); (Vol 17) 1930 Cal. 255 (257). (Award by 4 out of 5 arbitrators—Parties affirming award and asking 3 arbitrators to complete it—*Estoppel.*); (Vol 11) 1924 Cal 665 (666). (Three arbitrators appointed—One refused to act—Change in the personnel of the arbitrators made with consent of

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defendants.); (Vol 7) 1920 All 249 (252) : 42 All 661. (Acquiescence in objection to jurisdiction.); (Vol 5) 1918 Sind 13 (19, 20) : 13 Sind L R 75. (Waiver — Arbitrator getting information in the absence of one party.); (1911) 1911 Pun W R No. 13 p. 36. (Party closing his case and leaving it to arbitrator to call further evidence cannot complain of insufficient inquiry.); (Vol 15) 1928 Pat 7 (10, 11) : 6 Pat 556. (Arbitrators selected to construe a will can deviate from its terms if agreed to by legatees and executors.); (Vol 16) 1929 Rang 166 (167) : 7 Rang 136. (Signature of party may not estop him from disputing correctness.); (Vol 18) 1931 Mad 619 (621, 622). (Do.)

[See (Vol 19) 1932 Bom 68 (69). (But taking part in proceedings after making protest does not amount to waiver of right to object.)]

[3] The principle is that Courts will not permit a party to lie by or act in an indecisive manner so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not. (Vol 19) 1932 Mad 157 (157). (Party, though present, allowing proceedings to go on in absence of one of the arbitrators, cannot subsequently object to award.); (1877) 26 Suth W R 10 (16) (P C).

[4] Where one of several arbitrators is absent at some of their meetings and a party participates in subsequent proceedings without objecting to the irregularity or where the arbitrators examine the plaintiff's witnesses in the absence of the parties and the defendant who is aware of this makes no protest at that time or later on, the party will be deemed to have waived his right to object to the award. (Vol 9) 1922 Cal 181 (181); (Vol 20) 1933 Mad 862 (865); (Vol 18) 1931 Mad 619 (622); (Vol 16) 1929 Sind 200 (203).

[5] A stipulation in an agreement of reference precluding the parties from impeaching the validity of the award is within the mischief of Section 28 of the Contract Act and will not therefore prevent the Court from setting aside the award on any of the grounds mentioned in this section. (1883) 6 Mad 368 (369, 370); (Vol 3) 1916 Lah 89 (91) : 1916 Pun Re No. 117.

[See (Vol 9) 1922 Mad 179 (180) : 45 Mad 466. (Can have award set aside on the ground of illegality on the face of it.)]

[But see (Vol 3) 1916 Lah 80 (83). (Dissented from in (Vol 3) 1916 Lah 89 : 1916 Pun Re No. 117.)]

[6] The reason is that the grounds mentioned in this section suggest the requisites of a valid agreement as well as of a valid award. (1883) 6 Mad 368 (370).

12. Misconduct, acts not amounting to misconduct. — [1] Courts must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. (1905) 1905 App Cas 78 (80), *Andrews v. Mitchell*. (Cited in (Vol 12) 1925 Rang 383 : 3 Rang 387.)

[2] Courts will not set aside an award for misconduct of the arbitrators unless there has been something radically wrong and vicious in the proceedings before the arbitrators. (Vol 12) 1925 Rang 383 (383, 384) : 3 Rang 387; (Vol 22) 1935 Rang 308 (310).

Instances of acts that do not amount to misconduct. — [3] It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence. (1888) 11 Mad 85 (87).

[4] The honest though mistaken admission by an arbitrator of a document in violation of a rule of evidence introduced *pro hac vice* (for the occasion) will not be a ground for setting aside an award. (Vol 1) 1914

Bom 274 (277) : 38 Bom 60. (Reversing 14 Bom L R 1007 (1019)).

[5] Where a party does not object to the communications between parties in the course of negotiations between them, being received in evidence on the ground that they are inadmissible, it cannot later on be made a ground for setting aside the award. (1879) 4 Cal 231 (236).

[See (Vol 15) 1928 Bom 55 (55). (Such a letter perused by arbitrator and rejected—*Held* no misconduct.)]

[6] If a party offers to abide by the oath of the opposite party, the arbitrator can make his award accordingly. (1882) 4 All 283 (288); (1878) 1 All 535 (539). (Per Pearson, J., Spankie, J., *contra*.)

[7] The absence of the notes by the arbitrator of the proceedings before him is not a ground for setting aside the award and especially so if the party objecting did not make any protest until after the award was made. (Vol 1) 1914 P C 105 (107) : 36 All 386 : 17 Oudh Cas 120 (P C). (Affirming 14 Oudh Cas 308 (316)).

[See (Vol 23) 1936 Lah 492 (493). (Arbitrator should make enquiry but he is not bound to keep a record of such enquiry.)]

[See however (Vol 13) 1926 Oudh 307 (308) : 1 Luck 139. (Pencil notes transcribed and filed—Suspicious circumstances—*Held* to be misconduct.)]

[8] Until an award is finally published, the arbitrator has a right to reconsider the award he has already made. Once it is published his authority is exhausted; he is *functus officio* and has no power thereafter to correct or modify the award. (1879) 4 Cal 231 (235); (Vol 22) 1935 Lah 491 (492); (1910) 1910 Pun W R No. 73, p. 175 (176, 177). (A fresh award is valid and legal even if it is different in its terms from the original one.) (Vol 6) 1919 Pat 74 (78); (1911) 14 Cal L Jour 188 (198); (Vol 5) 1918 Lah 239 (240); 1917 Pun Re No. 99; (1883) 9 Cal 575 (579).

[9] When a cause or matter in difference is referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. (Vol 10) 1923 P C 66 (68) : 47 Bom 578 : 50 Ind App 324 (P C); (Vol 22) 1935 Lah 52 (53). (But an award may be set aside if in the award there is found some legal proposition, which is the basis of the award, and which is patently erroneous — See Notes on S. 16.)

[10] Courts will not sit as Courts of appeal to consider the correctness of an award on the merits in respect of matters of fact or even of law. (1902) 29 Cal 167 (183) : 29 Ind App 51 : 1902 Pun Re No. 25 (P C); (Vol 31) 1944 P C 83 (85) : 1 L R (1945) Kar P C 1 (P C). (Submission to non-lawyer — Award just as expected from layman — Award cannot be impugned.); (Vol 11) 1924 All 800 (800). (An arbitration in substance ousts the jurisdiction of the Court except for the purposes of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award.); (1910) 35 Bom 153 (156, 157). (An award cannot be disturbed on the ground of inequality of benefit which either party may eventually have received from it.); (Vol 8) 1921 Cal 657 (661). (Award not to be set aside merely because the Court differs from the decision of the arbitrator.); (Vol 8) 1921 Lah 34 (38) : 2 Lah 114. (Conditions of appointment not compelling arbitrators to expressly apply personal law — Award cannot be set aside on the ground that personal law was not applied.); (1923) 75 Ind Cas 198 (199) (Pesh). (The fact that the award seemed to be unreasonable one is no ground for setting it aside.); (Vol 18) 1931 Mad 619 (624). (Though Limitation Act is applicable to arbitration, error on a question of limitation will not make award invalid.); (Vol 12) 1925 Oudh 269 (270) : 28 Oudh Cas 74. (An award cannot be set aside merely because the reference to arbitration is not made in writing.); (Vol 11) 1924

Jurisdiction. **31. (1)** Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

Section 30 (contd.)

Pat 488 (491); 3 Pat 443. (Arbitrators are judges of law as well as of facts and error of law does not vitiate the award.); (Vol 11) 1924 Sind 151 (152); 18 Sind L R 78. (Courts are not to investigate beyond award and documents incorporated therein.); (1901) 14 C P L R 94 (96). (An award of proprietary rights cannot be questioned on the ground that the devolution of property is opposed to Hindu law.); (Vol 15) 1928 Oudh 1 (7); 3 Luck 1 (FB). (Award setting aside deed of gift on condition of donor's paying to donee compensation to the extent of benefits received by donor is valid.); (Vol 23) 1936 Nag 197 (199); ILR (1936) Nag 44; (Vol 26) 1939 Cal 500 (503). (Where arbitrators have allotted, through error of judgment an asset of uncertain and fluctuating value upon the basis of a gross overvaluation, to one branch of the family instead of to all the branches according to their respective shares, this does not amount to misconduct within the meaning of the law of arbitration.); (Vol 26) 1939 Cal 557 (557). (The mere fact that the tribunal has erred in law is no ground for interference.)

[11] An error in calculation in the award, unless so palpable and gross as to be strong evidence of misconduct, is no ground for interference by the Court. (Vol 18) 1931 Mad 619 (623).

[See also (Vol 23) 1936 Nag 197 (199); ILR (1936) Nag 44. (Mistakes in award in themselves are no ground for avoiding award—But it is possible that the mistakes may be so gross and palpable as to afford strong evidence of misconduct.)]

[12] The committing of a mistake in law and letting it be visible on the face of the award is a form of judicial misconduct. (Vol 14) 1927 P C 164 (165); 54 Ind App 427; 21 Sind L R 101; 55 Cal 126 (PC); (Vol 11) 1924 Sind 75 (83, 84, 87); 17 Sind L R 133 (FB).

[13] An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusion. (1912) 23 Mad L Jour 290 (297).

[14] An award made by the arbitrators which merely embodies a compromise arrived at before them by the parties is not invalid. (Vol 12) 1925 Mad 56 (57). (Relying on 1885 All W N 259 and 1892 All W N 79.); (1900) 22 All 224 (228); (Vol 7) 1920 Lah 220 (222); (Vol 7) 1920 Mad 195 (196). (But the consent of the parties should have been regarded by the arbitrators as evidence that the settlement proposed is fair to all.); (Vol 15) 1928 Lah 915 (916). (Dispute between partners referred — Two partners compromising and others consenting — Arbitrators can go into the question of compromise and pass award in its terms.); (Vol 20) 1933 Mad 862 (865). (Partition suit referred to arbitration — Compromise without Court's sanction consented to by guardians on behalf of minors and accepted by arbitrators — Such guardians cannot subsequently plead that consent will not affect minors' rights.)

[See also (1877) 1877 Pun Re No. 79, p. 209 (210). (Settlement of dispute by parties themselves—Petition by arbitrators embodying terms of settlement, no award.)]

[15] Where the arbitrators accept a fee as remuneration for their services at the suggestion and with the consent of all the parties, such acceptance of a fee does not involve any misconduct on their part. (1905) 29 Mad 44 (45); (Vol 22) 1935 Cal 359 (365). (Arbitrators taking money for charges or as fee from one of parties may be sufficient to set aside award — But where one of parties has paid it by mutual arrangement between parties, award is not vitiated.) (1934) 38 Cal W N 784 (793).

[16] See also the following cases: (Vol 12) 1925 Oudh

227 (228). (Arbitrators evenly divided in their opinion — Reference to umpire—Umpire deciding by casting lots — No misconduct.); (Vol 22) 1935 Bom 127 (130); 59 Bom 268. (Arbitrator sending for one of parties merely to sort papers does not amount to misconduct.); (Vol 22) 1935 Oudh 349 (353); 11 Luck 306. (Contents of award leaking out before it is pronounced — In the absence of evidence showing that arbitrator took the party into his confidence; no misconduct.); (Vol 11) 1924 Cal 1051 (1054). (Arbitration clause providing for survey as one mode of ascertaining quality—Award without survey is not bad.); (Vol 23) 1936 Lah 492 (493). (Arbitrator considering vouchers said to have been signed by minors—Objection not raised before arbitrator — Arbitrator not bound to decide legality—Failure to make enquiry is not judicial misconduct.); (Vol 8) 1921 Mad 58 (60); 44 Mad 406. (Refusal to adjourn a case not falling within S. 9 in order to enable the parties to move the Court to set aside the appointments of arbitrators is not misconduct.); (Vol 17) 1930 Mad 723 (725). (Umpire required to assess damages for breach of contract — Umpire passing award considering all circumstances—Award cannot be set aside.); (1909) 4 Ind Cas 359 (361) (Sind). (Arbitrator proceeding with a reference in spite of a private notice of revocation from a party which is not sanctioned by the Court cannot be said to be guilty of misconduct.); (Vol 11) 1924 Mad 274 (277). (Arbitrators are not guilty of misconduct if they take their fees in advance.)

13. Order superseding arbitration — Award made after. — [1] Where the power of the arbitrator is revoked by the Court passing an order superseding the arbitration, the arbitrators have no longer *seisin* of the reference, and they are *functi officio* and cease to have any more power to make an award than the man in the street. (1896) 18 All 422 (427) (FB).

[2] Where an award was not made in time and consequently the reference to arbitration was cancelled, it was held that the Court had no power to look at the award subsequently made and base its judgment on it, as if it were the report of a commissioner. (Vol 9) 1922 Lah 194 (195).

14. Suit to set aside an award.—See Section 32.

SECTION 31 — SYNOPSIS.

1. "Award may be filed."
2. Jurisdiction.
3. Questions relating to agreement.
4. Questions relating to award.
5. Repudiation of contract containing arbitration clause.—See Notes on S. 34.
6. Suit to enforce an award.—See Note on S. 32.
7. Suit to set aside an award.—See S. 32.

1. "Award may be filed." — [1] Only an award made pursuant to a submission under the Arbitration Act can be filed, for it is only over such an award that the Court has complete control, the provisions of the Act in many respects being inapplicable to awards made under any other Act, (Vol 13) 1926 Cal 938 (941); 53 Cal 65.

2. Jurisdiction.—[1] Where according to the contract, goods were to be sent from Cawnpore to Karachi but they were not so sent and thereupon reference to arbitration followed, it was held that award of the arbitrators could be filed in Karachi, though the contract was broken at Cawnpore. (Vol 9) 1922 Sind 32 (33); 15 Sind L R 74.

[2] Application by arbitrator to District Judge for filing award—District Judge transferring file to another

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

Section 31 (contd.)

Bar to suit contesting arbitration agreement or award. Judge—Award filed by the Court and decree passed — In the meanwhile designations of Courts altered and Court of Divisional Judge becoming Court of District Judge—Fresh application by arbitrator and one of parties for filing of award — District Judge granting it — Order of District Judge held to be nullity — All the proceedings were complete when the award was filed by the arbitrator subject to any action which might be taken by the Court under Ss. 13 and 14 of the 1889 Act (now Ss. 16 and 30). (Vol 23) 1936 Pesh 2 (3).

3. Questions relating to agreement.—[1] Court can restrain the defendants from proceeding to arbitration when action brought impeaches the instrument containing the agreement for reference. (Vol 8) 1921 Sind 114 (117) : 14 Sind L R 5.

[2] Injunction to restrain arbitration may be issued when agreement to refer to arbitration is impeached and not otherwise. (1910) 4 Sind L R 187 (191, 192).

[3] See also Section 33.

4. Questions relating to award. — [1] Decision of the same question by a Court and by an arbitrator is not permitted; if the dispute before the two tribunals is *identical* the decision of the arbitrator is invalid. But if the dispute is not the same then the jurisdiction of the arbitrator is not ousted. (Vol 16) 1929 Lah 564 (566); (Vol 9) 1922 Lah 369 (372) : 3 Lah 296.

[2] It is for the Court to find whether there was a proper reference to arbitration and whether the matters were validly before the arbitrators and the umpire. (Vol 15) 1928 Mad 107 (110, 111).

[3] Court hearing an objection to arbitration should insist on having either the evidence properly brought before it, or deliberately withdrawn or abandoned by parties raising the objection. (1922) 64 Ind Cas 706 (707) (All).

[4] Party who makes an objection must prove that he objected at the time to the umpire, to his proceeding in making a final award without hearing his witnesses. Burden of proof lies on objector to establish unjust conduct of umpire, when his award is filed in Court. (1922) 64 Ind Cas 706 (707) (All).

[5] The mere fact that no evidence was led on the date fixed for hearing or that additional evidence of misrepresentation was discovered would not entitle the plaintiff to have the matter retried. (Vol 17) 1930 Sind 195 (197).

[6] Acceptance of benefit even under protest may preclude party from objecting to the award, but a party obeying an award is not so estopped. (Vol 17) 1930 Sind 195 (198).

5. Repudiation of contract containing arbitration clause — See Notes on S. 34.

6. Suit to enforce an award. — See Note on S. 32.

7. Suit to set aside an award. — See S. 32.

1. SECTION 32.

[1] The first part of S. 32 prevents a suit to challenge the existence of an arbitration agreement. Its second part prevents the setting aside, etc., of an arbitration agreement otherwise than as provided by the Act. (Vol 32) 1945 Bom. 494 (495).

[2] Claim to set aside arbitration awards or challenge arbitration agreements should be made by applications to Court and decided on affidavits, or on other evidence if deemed expedient by the Court, and not by means of a suit. (Vol 28) 1941 Cal 527 (528) : 1 L R (1941) 2 Cal 123.

[3] No separate suit lies to question the existence, validity or effect of the award, which can be done only by resort to Ss. 32 and 33. (Vol 32) 1945 Mad 371 (372).

[4] Enforcement of award must be only through proceedings under S. 14. Separate suit to enforce award does not lie even in the case of successful party. (Vol 32) 1945 Mad. 371 (378).

[But see (Vol 31) 1944 Nag 24 (25) : 1 L R (1944) Nag 340.]

[5] Where an application to set aside an award is refused and a decree is passed in accordance with it, no suit will lie thereafter to set aside the award. (Vol 32) 1945 Oudh 92 (93). (Only remedies open to an aggrieved party are either to file objections before the award is made a decree or to appeal against the decree on grounds stated in S. 16.); (Vol 23) 1936 Lah 865 (870). (Case under Arbitration Act, 1899.); (Vol 6) 1919 Low Bur 12 (12) : 10 Low Bur Rul 106.

[6] A minor can sue to set aside a decree against him based on an award on the ground that the reference to arbitration was made without obtaining the leave of the Court as required by O. 32, R. 7, Civil P. C. (Vol 4) 1917 Mad 672 (679) : 39 Mad 853.

Arbitration agreement or award to be contested by application.

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

[1899—S. 19; Civil P. C., Sch. II Para. 18.]

1. SECTION 33.

[1] Proceedings under S. 33 are entirely different from the proceedings under Ss. 14, 15, 16 and 17 of the Arbitration Act. A Court dismissing the application under S. 33 is not bound to pronounce a judgment in accordance with the award. (Vol 31) 1944 All 188 (188) : ILR (1944) All 375.

[2] Application under S. 33 is not one for securing order that agreement to refer to arbitration be not filed. Such application cannot be made under the Act. A person who does not want an agreement to be filed can oppose the application made by his opposing party to have the agreement filed. (Vol 30) 1943 Lah 295 (296).

[3] Section 33 does not take away the right to set up as a defence the non-existence of an agreement when the agreement is propounded under S. 34 by the other side. The section provides for a case where a party wants a declaration of non-existence of an agreement for his own use. (Vol 32) 1945 Bom 494 (495, 496).

[4] Where a case under S. 33 involves many complicated and contested questions of fact and law the Court will normally decide the case on evidence and not merely on affidavits. (Vol 33) 1946 Nag 5 (8) : I L R (1946) Nag 634.

[5] An amendment of an application under S. 33, for declaration that the award was invalid which does not alter the nature of the application and does not displace it or convert it into an application of an inconsistent nature can be allowed, when it is made at an early stage. (Vol 33) 1946 Nag 5 (8) : I L R (1946) Nag 634.

[6] An application to set aside an award is not, as a rule, within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. (Vol 10) 1923 All 31 (32, 33).

[7] Question whether contract is gaming and wagering, cannot be tried on affidavits. (Vol 28) 1941 Cal 527 (528) : ILR (1941) 2 Cal 123.

[8] For an application under S. 33 to set aside an award, court-fee of 12 annas under Art. 1 (b) of Sch. II, Court-fees Act, as amended in Madras, is correct. (Vol 33) 1946 Mad 104 (105).

[9] An order passed by a Single Judge under S. 33, Arbitration Act, challenging the validity of an arbitration agreement, is not appealable to the Privy Council. (Vol 30) 1943 Bom 196 (196, 197).

SECTION 34 — SYNOPSIS.

1. Appeal. See S. 39 (v).
2. Applicability and scope.
3. Application to stay proceedings.
4. Burden of proof.
5. Commences legal proceedings.
6. Court should be satisfied of grounds.
7. Court which can grant stay.
8. "Matter agreed to be referred."
9. "Ready and willing."
10. Repudiation of contract containing arbitration clause — Effect.
11. Revision.
12. Stay not obtained — Award given — Effect.
- 12a. Stay order—Removal of.
13. Stay order—Restrictions in.
14. Stay order whether finally disposes the suit.
15. Stay when may not be granted.
16. "Steps in the proceedings."
17. Waiver.
18. Who may apply.

1. Appeal.—See S. 39 (v).

2. Applicability and scope. — [1] A defendant, a party to arbitration agreement, cannot seek specific performance of the arbitration agreement, nor set it up as a bar to a suit brought against him in contravention of the agreement. (Vol 6) 1919 Cal 479 (480) : 46 Cal 1041.

[See also (Vol 22) 1935 Lah 775 (779).]

[2] Section 34 is in the nature of a summary procedure. (Vol 27) 1940 Bom 93 (95) : ILR (1940) Bom 249.

[3] Section 34 provides for stay only where there is a submission. (Vol 20) 1933 Lah 79 (79).

[4] It was held in (1910) 34 Bom 372 (373), decided under the 1899 Act, that the Act only applied to cases where references were made before taking any legal proceedings. Hence, where a submission was made after the commencement of proceedings, it was not competent for any party to apply under S. 19 (corresponding to S. 34 of the present Act), to stay the proceedings. This decision is now of doubtful authority in the light of the provisions contained in S. 25.

Section 34 (contd.)

[5] English decisions subsequent to English Arbitration Act should not be applied as main reasons for refusing stay order. (Vol 16) 1929 Bom 119 (123) : 53 Bom 271.

3. Application to stay proceedings. — [1] The power vested in a Court to stay a suit is purely discretionary and can be exercised only on an application by one of the parties to the suit at or before the settlement of issues. (Vol 1) 1914 Lah 436 (437, 438) : 1913 Pun Re No. 92.

[2] A party to submission must apply to the Court for stay at the earliest opportunity, i. e., immediately after appearance or before taking any step in the proceeding. (Vol 15) 1928 Sind 94 (95) : 22 Sind L R 269; (Vol 10) 1923 All 139 (139, 140).

[3] Petition for stay filed three years after suit and after framing of issues — Sch. II, Para. 18, Civil P. C. (corresponding to this section) held not complied with and stay refused. (Vol 25) 1933 Mad 205 (206).

[4] If suit is filed despite reference to arbitration specific performance cannot be enforced but only stay of suit can be asked for. (Vol 8) 1921 Cal 244 (245) : 47 Cal 849.

[5] A clause in a bill of lading excluding the jurisdiction of the Courts in India to decide questions arising under the bill of lading and giving the same to the foreign tribunal of the country of export has the effect only as a submission to arbitration of disputes arising out of bill of lading to the foreign tribunals. The clause cannot afford a valid plea to the shipping company to urge that no suit can be instituted against them for the recovery of the amount due on account of loss or damage sustained by the holder in India. The only remedy for the shipping company is to apply for stay of suit. (Vol 23) 1936 Sind 85 (86) : 30 Sind L. R. 25.

[6] Jurisdiction of Court is not ousted by arbitration clause. If a suit is instituted ignoring the arbitration clause the defendant can sue for damages for breach of the contract to refer or indirectly enforce it by applying for stay of proceedings. He cannot after suit and without stay of proceedings nominate arbitrators. If he does so and gets an award he will be offending S. 14. (1913) 7 Sind L R 1 (3, 4).

[7] Suit by Official Receiver of the property of an insolvent guarantee broker against employer to recover the balance of guarantee deposit cannot be referred to arbitration under S. 34 without the leave of the Court under S. 16 (2) of the Provincial Insolvency Act. (Vol 1) 1914 Sind 59 (59, 60) : 8 Sind L R 60.

[8] Suit stayed and matter referred to arbitration — During arbitration proceedings mistake in plaintiff's name corrected by Court — Suit does not become new suit — Arbitrators do not lose their jurisdiction on the original reference. (Vol 13) 1926 Cal 722 (725).

4. Burden of proof. — [1] Fact that a submission in writing exists must be established by the person who applies for the stay order. (Vol 27) 1940 Bom 93 (94) : 1 L R (1940) Bom 249.

[2] The onus of showing that the stay should not be granted lies on the party who opposes the stay. (Vol 16) 1929 Bom 119 (125) : 53 Bom 271; (Vol 8) 1921 Cal 244 (247) : 47 Cal 849; (Vol 6) 1919 Cal 479 (480) : 46 Cal 1041; (Vol 9) 1922 Lah 97 (97) : 2 Lah 19; (1921) 3 U. P. L R (Lah) 43 (48); (Vol 22) 1935 Sind 62 (66) : 28 Sind L R 366; (Vol 5) 1918 Sind 35 (36) : 12 Sind L R 34.

5. Commences legal proceedings. — [1] Within the meaning of S. 84, the legal proceedings shall be deemed to commence only when the defendants have been supplied with a copy of the plaint. (Vol 28) 1941 Lah 64 (64).

6. Court should be satisfied of grounds. — [1] Before an order staying proceedings can be made it must be proved that there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission, that the applicant was and is ready to do all things necessary to the proper conduct of the arbitration. (Vol 7) 1920 Cal 795 (796) : 47 Cal 1020.

[2] Arbitration agreement does not deprive any party of its right to sue. The party sued can apply to the Court to stay the proceedings pending before it, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, may make an order, staying the proceedings. (Vol 20) 1933 Lah 79 (79).

[3] Although a Court has a discretion to stay or to refuse to stay a suit, it is its duty to act upon the agreement to refer to arbitration unless it sees sufficient reason why the dispute should not be referred. It cannot be said that the Court exercises its discretion in an unjudicious or capricious manner, where it refuses to stay the suit, holding that there was no valid admission and that there was no contract regarding arbitration between the parties. (Vol 24) 1937 Lah 206 (207, 208).

[4] A bill of lading contained a clause to the effect that "Failing an amicable understanding between the parties, the aggrieved one can proceed only before the Judicial authority in Genoa." The aggrieved party in contravention of the restricting clause brought the suit in the Bombay High Court, while the proceedings were already started at Genoa. Held, that the clause was a valid submission and the suit should be stayed pending the decision of the Court at Genoa. (Vol 17) 1930 Bom 185 (186) : 54 Bom 278.

[5] The plaintiff was appointed as medical referee by the defendant, an insurance company, under a written agreement, which provided for a reference to arbitration, in disputes respecting the rights, liabilities and duties of parties. The plaintiff brought a suit for remuneration and damages for wrongful dismissal. The company had a right to have the suit stayed. (Vol 28) 1941 Cal 503 (504).

[6] Where the questions involved are not of such intricacy as cannot be determined appropriately by the arbitrators, stay should not be refused. (Vol 28) 1941 Lah 427 (429) : 1 L R (1942) Lah 788.

[7] When granting stay under Sch. II, Para. 18, Civil P. C. (corresponding to this section), the Court ought not to adjourn the case "*sine die*." It is the duty of the Court to see that the parties do not delay the arbitration proceedings unduly. (Vol 25) 1933 Mad 205 (206).

7. Court which can grant stay. — [1] It is the Court in which the suit is filed which has power to stay the suit under S. 4 read with S. 19, Arbitration Act (1899). (Vol 6) 1919 Sind 57 (61) : 13 Sind L R 8; (Vol 18) 1931 Lah 644 (646) : 13 Lah 59.

[2] Where a suit is pending in the Court of the Judicial Commissioner, separate proceedings for stay must be started by an application under S. 34. (Vol 20) 1933 Sind 75 (75, 76) : 27 Sind L R 169.

8. "Matter agreed to be referred." — [1] An order of stay will be passed only when the subject-matter of the suit is the same as that agreed to be submitted to arbitration. (Vol 8) 1921 Cal 255 (259).

[See also (Vol 9) 1922 Lah 353 (353, 354). 2 Lah 335. (Arbitration clause in indent—Agreement to accept bills notwithstanding dispute—Suit on bills—No stay.)]

9. "Ready and willing." — [1] Time in respect of readiness and willingness to refer to arbitration is to be determined when a party brings suit and other party

Section 34 (*contd.*)

called upon to appear. (Vol 15) 1928 Sind 97 (99) : 22 Sind L R 286.

10. Repudiation of contract containing arbitration clause—Effect. — [1] If any party who has contracted to settle a dispute by arbitration backs out of it and institutes a suit in disregard of the contract, and if the other party wishes to bind the party suing to their contract for settling the matter by arbitration, he must apply to the Court to stay the suit. But if neither party wishes to have recourse to arbitration, the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute. (Vol 26) 1939 Pat 118 (120) : 17 Pat 293.

[2] Where a party to a contract containing a clause enabling the parties to refer to arbitration, repudiates the contract he cannot be permitted to rely upon a subsidiary term in the contract and demand a reference to arbitration. (Vol 7) 1920 Sind 27(29) : 14 Sind L R 91.

[3] Where a contract is sought to be avoided for reasons 'de hors,' the arbitration clause in such contract cannot be resorted to, because it is liable to be set aside along with other terms of the agreement. (Vol 16) 1929 Bom 242 (243) : 53 Bom 573.

[4] Where the defendant claims to have rescinded the contract on the ground of breach by the plaintiff, the dispute is one arising out of agreement and the defendant is entitled to stay order under S. 34. (Vol 29) 1942 Cal 83 (85) : ILR (1941) 2 Cal 534.

[5] Stay order cannot be refused because the defendant repudiates liability under the contract. (Vol 30) 1943 Pat 53 (59) : 21 Pat 544.

[6] Where plaintiffs brought a suit for declaration and injunction restraining the defendants from proceeding to arbitration, after repudiating a contract containing an arbitration clause, it was held that suit was not maintainable till after the award had been given. (Vol 18) 1931 Lah 66 (67).

[7] An arbitration clause in a contract can be regarded as a thing apart from the main conditions of a contract and it is not a necessary clause in the contract. The main contract deals with the performance of mutual obligations and how they are to be performed, whereas the arbitration clause deals only with the procedure for determining liabilities created by the contract, and the arbitration clause itself creates no liability. Hence, where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case a buyer should make default, the arbitration clause is not wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and therefore reference to arbitration can be made in pursuance of the arbitration clause. (Vol 33) 1946 Lah 116 (126, 130) (FB); [(Vol 28) 1941 Lah 427 : ILR (1942) Lah 788 and (Vol 30) 1943 Lah 295 overruled.]

[8] Where a contract contained an arbitration clause but no party tried to avail of it before the institution of the suit it cannot be pleaded that the institution of the suit amounts to negation of the arbitration clause. Such passive attitude is no reason for refusing the stay of suit under S. 34. (Vol 31) 1944 All 253 (254) : I L R (1944) All 341; (Vol 30) 1943 Bom 199 (201); (Vol 16) 1929 Cal 97 (98) : 56 Cal 118.

[9] Stay pending arbitration can be claimed as of right. Omission to object to litigation for considerable time is no ground for refusing stay. (Vol 11) 1924 Mad 336 (337) : 47 Mad 164.

11. Revision. — [1] There is nothing in S. 39 or S. 41 to deprive the High Court of the powers conferred on it by S. 115, Civil P. C. Where in not accepting the defendant's position under S. 34 that the case fell

within the arbitration clause the Court did not apply the principles laid down in S. 34 correctly, it was held that the Court acted with material irregularity in the exercise of its jurisdiction or powers under S. 34 and therefore the High Court was entitled to interfere in revision. (Vol 32) 1945 All 146 (147) : I L R (1945) All 162.

[2] Where the Court, wrongly holding that the parties were bound to refer the dispute between them to arbitration, stayed the suit, it was held that High Court could interfere in revision. (Vol 15) 1928 Bom 275 (278) : 52 Bom 420.

12. Stay not obtained—Award given—Effect.—

[1] Contract containing arbitration clause — Reference after institution of suit—Suit not stayed — Award is of no effect unless the suit has been stayed pending arbitration. (Vol 8) 1921 Cal 770 (770) : 47 Cal 752; (Vol 13) 1926 Sind 86 (88).

[2] If a party to a contract has gone to Court instead of referring a dispute to arbitrators in accordance with its terms, he may be liable to pay damages for breach of the contract. But the arbitrators will not be able to function and give a valid award during the pendency of the suit, unless the suit is stayed by the Court itself. (Vol 22) 1935 Lah 916 (917) : 17 Lah 291.

[3] When one of the parties to reference to an arbitration subsequently resiles from it and files a suit in respect of the subject-matter, the arbitrator becomes *functus officio* on the filing of the suit and the award subsequent to it is *ultra vires* and a decree embodying the award cannot legally be passed. (Vol 5) 1918 Mad 719 (719, 720) : 41 Mad 115.

[But see (Vol 7) 1920 Upp Bur 6 (7) : 3 Upp Bur 210. (Arbitration pending suit — Award is bar to decision of suit by Court until it is set aside.)]

[4] Suit filed before arbitration began. Award come to during suit—Stay of suit not obtained — Award is not invalid but it cannot be filed till stay application is disposed of—In such cases the correct order is to reject award and order it to be represented after Court disposes of application under S. 19. (Vol 11) 1924 Sind 146 (147, 149) : 17 Sind L R 228.

[5] If before the application for stay is made or disposed of the arbitrators have made their award, the proper course for opposite party is to plead the award in bar of suit, and not to obtain a stay order. (Vol 24) 1937 Lah 851 (857).

[6] In order to apply the doctrine that an award made during the pendency of a suit is invalid, the person instituting the suit must be party to the agreement to refer; the party wishing to stay the suit must have the right to apply to the Court to stay it, and the subject-matter of the dispute must be the same before the arbitrator and before the Court. Where some of the partners of a partnership refer their dispute concerning partnership as regards their rights *inter se*, and the remaining partners institute a suit for partnership accounts, an award made pending such a suit is not *ultra vires*. (Vol 14) 1927 Lah 465 (468).

[7] The validity of the agreement entered into prior to the suit is not affected by the institution of the suit and it is only the subsequent award that is invalid. Hence, though an award is made subsequent to suit, the Court can nevertheless stay the suit in order to enable the defendant to have invalid award set aside and thereafter recommence the arbitration proceedings. Otherwise a party to the agreement can nullify the entire arbitration proceedings by filing a suit at the last moment when the award is about to be delivered without giving the opponent any time to obtain a stay of the suit. (Vol 10) 1923 Cal 135 (138).

12a. Stay order — Removal of.—[1] Where the Court has stayed a suit, before it is revived, the stay should

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be removed and then the Court should decide the suit on its merits. (Vol 24) 1937 Sind 247 (248). (Court hearing suit on merits without vacating stay order by separate order—Stay must be deemed to have been vacated by implication.)

[2] Civil P. C., Sch. II, Para. 18 does not apply if an order for stay of a suit is vacated owing to the refusal of one of the arbitrators to act and the suit is proceeded with. (Vol 6) 1919 Cal 295 (295).

13. Stay order, restrictions in.—[1] An order for stay under S. 34 ought not to be restricted by a time limit. (Vol 5) 1918 Sind 41 (43) : 12 Sind L R 41.

14. Stay order whether finally disposes the suit. — [1] Suit stayed and an award and decree thereon passed; stay order is sufficient to dispose of suit and no final decree dismissing the suit is necessary. (Vol 8) 1921 All 275 (276) : 43 All 279; (Vol 8) 1921 All 219 (220) : 43 All 553; (Vol 30) 1943 Oudh 378 (381).

15. Stay when may not be granted.—[1] Where a dispute to be referred to arbitration involves a charge of fraud, there cannot be a stay of the suit instituted by the party charged with fraud to have the matter investigated publicly in a Court of law. If, on the other hand, it is within the terms of the reference and the facts alleged to constitute the fraud would have mere evidentiary value, those facts are no ground for refusing the stay. If on the other hand, they are matters which would be directly in issue, and the party against whom these charges are made wants the matter to be investigated in public by a suit he ought to be allowed to do so. (Vol 30) 1943 Cal 238 (240) : I L R (1942) 2 Cal 589.

[2] What is sufficient cause for refusing stay under S. 34 depends on the particular facts of each case. The fact that the submission clause does not include all matters in a suit, fraud or forgery of a party, may be sufficient cause. (Vol 22) 1935 Sind 62 (67) : 28 Sind L R 366.

[3] *Prima facie* leaning of the Court is towards stay of suit except in cases of grave fraud. Where *prima facie* case of fraud is made out, Court will not stay the suit. (Vol 11) 1924 Cal 796 (800); (Vol 11) 1924 Mad 336 (337) : 47 Mad 164; (Vol 30) 1943 Pat 53 (59) : 21 Pat 544; (Vol 24) 1937 Lah 851 (858) : I L R (1939) Lah 351.

[4] The Court may refuse to grant stay where misrepresentation is alleged. (Vol 30) 1943 Pat 53 (59) : 21 Pat 544; (Vol 24) 1937 Lah 851 (858) : I L R (1939) Lah 351.

[5] Where the misrepresentation or fraud alleged was something quite distinct from and previous to the contract, application for stay of suit does not lie. (Vol 24) 1937 Lah 851 (858) : I L R (1939) Lah 351.

[6] An order staying suit, if made on fraudulent misrepresentation, can be reversed by the Court making the order. High Court is empowered under S. 151, Civil P. C., to intervene for the ends of justice. (Vol 27) 1940 Lah 265 (266).

[7] Where the point is one of law and more fitted to be decided by a Judge, the Court will refuse the application for stay. (Vol 13) 1926 Sind 286 (288) : 19 S L R 168; (Vol 52) 1945 All 146 (146, 147) : I L R (1945) All 162; (Vol 11) 1924 Mad 336 (337) : 47 Mad 164.

[8] It is for the Court to exercise a judicial discretion whether the nature of the dispute between the parties is of such a character as could be more satisfactorily disposed of by a Court than an arbitrator. Thus, where the point is one of law and more fitted to be decided by a Judge, the Court should refuse the application for stay. (Vol 13) 1926 Sind 286 (288) : 19 Sind L R 168.

[9] Where the contract between the parties provides for reference to arbitration, the arbitrators are not

deprived of their jurisdiction merely because a question of law has arisen between the parties. (Vol 13) 1926 Sind 286 (288) : 19 Sind L R 168; (Vol 5) 1918 Sind 35 (36) : 12 Sind L R 34; (Vol 29) 1942 Sind 57 (59) : I L R (1941) Kar 587.

[10] Suit cannot be refused to be stayed on ground that difficult questions of law are involved. Arbitrators are competent to decide all questions. (Vol 7) 1920 Sind 61 (62) : 13 Sind L R 201.

[11] Under this section a suit can only be stayed when it is in respect of any matter agreed to be referred but not otherwise. If it is not in respect of the same matter which is agreed to be referred, there can be no stay of suit and there can be no question that the arbitrators are *functus officio* until such suit is stayed. (Vol 22) 1935 Sind 228 (229, 230) : 37 Or L Jour 175.

[12] Where the plaintiff is not aware, before the institution of the suit, that there is a difference between him and the defendant or of nature of the difference, he cannot be said to have gone back upon his agreement to refer to arbitration or was attempting to go back upon it, by rushing to Court. The Court under these circumstances would be justified in the exercise of its discretion in refusing to stay the suit. (Vol 27) 1940 Cal 105 (107, 109) : I L R (1939) 2 Cal 181.

[13] When a Court finds that the agreement for reference to arbitration provides for the appointment of an umpire who will be partial the Court should retain its jurisdiction to try the suit. (Vol 5) 1918 Sind 41 (45) : 12 Sind L R 41.

[14] Suit on a cross contract by a party, merely for the determination of amount payable by one to the other cannot be stayed pending reference when arbitration clauses of a contract are only applicable where delivery of goods purports to be the true object of contract. (Vol 7) 1920 Sind 36 (37).

[15] Where there is agreement to refer and one party institutes a suit, the defendant may take recourse to arbitration or may waive such course. If he has in any way misled the plaintiff in bringing action, he will be punished with costs. If he has misrepresented that he would submit to the jurisdiction of the Court instead of choosing a path of arbitration, he would be estopped from applying for stay of the suit and this would be sufficient ground for the Court for refusing stay. (Vol 11) 1924 Mad 336 (337) : 47 Mad 164.

[16] If the existence of the arbitration agreement itself is disputed, the arbitrators have no jurisdiction and the Court would refuse a stay order. (Vol 27) 1940 Bom 93 (94) : I L R (1940) Bom 249.

[17] Where the agreement to refer has become inoperative owing to death of one of the arbitrators specified in the agreement, the Court has no power to stay the suit under Sch. II, Para. 18, Civil P. C. (Vol 18) 1931 Mad 28 (32) : 54 Mad 469.

[18] Where a suit was filed impeaching the very agreement containing the agreement clause, held that the Court could order stay of the arbitration proceedings. (Vol 6) 1919 Cal 1042 (1042).

[19] Agreement to refer dispute to three named arbitrators—Application under Sch. II, Para. 18, Civil P. C., to stay suit—Lower Court's finding that matter not covered by arbitration—Appeal—One arbitrator dying during pendency of appeal—*Held*, agreement rendered impossible of performance and hence the suit could not be stayed. (1936) 1936 Mad W N 407 (407).

[20] Stay must be refused if agreement does not amount to submission. (Vol 21) 1934 Sind 200 (202) : 28 Sind L R 223.

[21] A private agreement between parties to a suit, entered into after institution of the suit, to refer their dispute to an arbitrator is not a valid ground for stay—

35. (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

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ing the suit. (Vol 1) 1914 Bom 184 (185, 186) : 38 Bom 687.

[22] Where the agreement to refer to arbitration has become a dead letter in view of the fact that neither party has any desire to enforce it, the Court will proceed with the trial of the suit. (Vol 1) 1914 All 275 (276).

[23] An arbitration clause cannot be said to be an incident of the contract for sale or purchase. Unless parties definitely mean to bind themselves with such clause there is no valid submission, and a stay order cannot be got under S. 34. (Vol 21) 1934 Cal 796 (798): 61 Cal 702.

[24] Partnership agreement contained a provision for referring disputes to arbitration. One partner failed to pay up and render accounts even after being called upon to do so by the other. Suit was filed against the failing partner. It was held that the suit could not be stayed as there was no occasion for reference to arbitration. (Vol 18) 1931 Bom 164 (165, 166).

16. "Steps in the proceedings." — [1] In order to constitute "a step in the proceedings" the act in question must be : (a) an application made to the Court or something in the nature of an application, e. g., attending on summons for directions, (b) such an act as would indicate that the party is acquiescing in the method adopted by the other side of having the disputes decided by the Court. (Vol 30) 1943 Cal 484 (487, 488) : ILR (1943) 2 Cal 298.

[2] An application for an adjournment of a case to enable the defendant to file a written statement is *prima facie* a step in the proceedings within the meaning of S. 34. (Vol 32) 1945 All 24 (25) : I L R (1944) All 681 ; (Vol 30) 1943 Bom 228 (229) : I L R (1943) Bom 298.

[3] A verbal prayer by defendant's counsel for further time to file a written statement in reply to the Court's question is taking a step in the proceedings. (Vol 11) 1924 Cal 789 (790).

[But see (Vol 28) 1941 Lah 64 (64).]

[4] Defendant not served and not having entered appearance, applied for copy of plaint and for leave to enter appearance. These acts are not steps in proceedings. Any act in the nature of an application to the Court indicating that a party was willing that the suit should proceed would be a step within S. 34. (Vol 12) 1925 Cal 801 (804) : 52 Cal 458.

[5] Application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of S. 34. (Vol 22) 1935 Sind 62 (67) : 28 Sind L R 366.

[6] Application for time is a "step in the proceedings" within S. 34. Even a mere acquiescence in a proceeding initiated by the other party is a 'step in the proceedings'. (Vol 4) 1917 Sind 12(12):10 Sind L R 190.

[7] In a suit for damages for breach of a contract containing an arbitration clause the defendant applied for stay. But before the application was heard, adjournment was obtained by consent without prejudice. Held that the obtaining of such adjournment did

not in the circumstances amount to taking a step in the proceedings within the meaning of S. 34. (1937) I L R (1937) 2 Cal 63 (64, 65).

[8] A mere intimation to the Court of future application for stay is not a step in suit. (Vol 15) 1928 Sind 97 (99) : 22 Sind L R 286.

17. Waiver.—[1] Suit was filed in spite of agreement for reference—Defendant in not applying for stay of suit under S. 34 must be deemed to have waived his right. (Vol 9) 1922 All 48 (49) : 44 All 292.

18. Who may apply.—[1] It is sufficient if one of the several defendants applies for stay order under S. 34. (Vo 19) 1932 Sind 111 (114) : 26 Sind L R 497.

1. SECTION 35.

[1] Section 35 relates to the effect of subsequent legal proceedings on a pending reference. Such proceedings will not affect the reference unless (a) they relate to the whole of the referred matter, and (b) all the parties to the reference are impleaded in the proceedings. Where these conditions are fulfilled, the legal proceedings will nullify the arbitration proceedings on the expiry of the time within which an application to stay the legal proceedings may be made or on the refusal of such an application. (See *Statement of Objects and Reasons*). "We have substituted the words 'unless a stay of proceedings is granted under S. 34' for the words 'on the expiry of the time for making an application under S. 34 or on the rejection of such an application', because the giving of notice to the arbitrators should be the time after which arbitration proceedings become invalid and invalidity should only result if the Court does not grant a stay of proceedings." (*Select Committee Report*.)

[2] The rule which existed before S. 35, was that the moment a party to an arbitration started a suit touching the matter referred to the arbitrators, the arbitrators become '*functi officio*' on the ground that there cannot be two tribunals concurrently exercising jurisdiction over the same dispute since the domestic forum must give way to the public forum. But the Legislature decided to modify this rule and the result is S. 35. The modifications are these : (a) that the rule no longer applies unless the legal proceedings are upon the whole of the subject-matter of the reference, (b) that the rule does not come into operation until notice has been given to the arbitrators or the umpire, and (c) that it is only the further proceedings which, unless a stay has been granted under S. 34, will be invalid, the old rule having been that if there was anything left to arbitrate about after the legal proceedings were finished, the arbitration had to start *de novo*. (Vol 32) 1945 Bom 497 (502, 503).

[But see (Vol 27) 1940 Lah 265 (265). (This was a case decided under the 1899 Act holding that any proceedings taken after the institution of a suit on a reference made prior to the institution of the suit are null and void.)]

[3] Section 35 is the corollary or counterpart of S. 34. This section is new and is intended to modify the English common law rule which had prevailed in India before 1940. The legal proceedings which are liable to

Power of Court where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

36. Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

Limitations.

37. (1) All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred.

Section 35 (contd.)

be stayed under S. 34 are proceedings 'in respect of any matter agreed to be referred'. But the legal proceedings in S. 35 must be the legal proceedings 'upon the whole of the subject-matter of the reference'. What the Legislature had in mind by 'the subject-matter of the reference' was the questions which arose on the pleadings, if any, in the reference or, at all events, the question which the arbitrators were investigating. (Vol 32) 1945 Bom 497 (501, 502).

[4] The Court cannot set aside an award which was made at a time when no actual legal proceedings were pending at all, merely on the ground that one of the arbitrators had notice that such proceedings were intended and that subsequently such proceedings were in fact commenced. (Vol 32) 1945 Bom 497 (503, 504).

[5] A notice to one of two joint arbitrators is, for the purposes of S. 35, notice to both. (Vol 32) 1945 Bom 497 (504).

[6] Pendency of arbitration proceedings is no bar to a suit relating to matters referred to arbitration. An award by the arbitrators after filing up of suit is no bar for the Court to adjudicate on the matter. (Vol 7) 1920 Sind 124 (126) : 13 Sind L R 193.

[7] Institution of a suit by one of the parties to the contract disputing the validity of the contract containing a submission clause is no bar to the arbitrators proceeding with reference upon the matters that are not con-

tested in the suit. (Vol 15) 1928 Sind 91 (92) : 22 Sind L R 429.

[8] Award passed during pendency of a suit relating to the same dispute—Suit withdrawn or dismissed—Award is revived and hence valid. (Vol 15) 1928 Sind 169 (170) : 23 Sind L R 427.

[9] An award pending suit which is not stayed is of no effect. If the Court refuses to stay, it is the Court alone that can decide the matter to the exclusion of the arbitrators. (Vol 8) 1921 Cal 770 (770) : 47 Cal 752.

[10] See also the following case decided under Civil P. C., Sch. II, Para. 18 dealing with the subject of a suit instituted by a party after a reference made to arbitration. (Vol 10) 1923 Cal 135 (138).

1. Section 37.—[1] Where an award has been filed in a Court it shall be governed by Art. 182 or Art. 183 accordingly as it is filed in a High Court or not. (Vol 14) 1927 Cal 853 (854, 855) : 55 Cal 499. (Vol 11) 1924 Lah 544 (544) relied on.]

[2] Article 178, Limitation Act, does not apply where an application for filing the award is made by the arbitrator and not by the party under S. 38 or S. 14 (2), notwithstanding the rules of the Sind Chief Court in this matter. (Vol 30) 1943 Sind 33 (34, 35) : ILR (1942) Kar 466.

[3] Under an agreement a reference was to be made within 3 years of 25th May 1938 which was a Sunday. Reference made on 26th May 1941 was within time. (Vol 30) 1943 Bom 197 (197) : I L R (1943) Bom 280.

38. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application *Disputes as to arbitrator's remuneration or costs.* in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

[1899—S. 17; Civil P. C., Sch. II Para. 13.]

CHAPTER VI.

APPEALS.

39. (1) An appeal shall lie from the following orders passed under this Act (and from no *Appealable* others) to the Court authorised by law to hear appeals from original decrees *orders.* of the Court passing the order:—

An order—

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award.

1. SECTION 38.

[1] In the absence of any provision in the award in the matter of costs it is open to the Court seized of the proceedings to make an order as to costs under S. 38. (Vol 17) 1930 Oudh 89 (90) : 5 Luck 678; (1912) 6 Sind L R 226 (227).

[2] Omission of the Court to fix the fees before preparation of the decree does not prevent the Court from fixing it later. (Vol 6) 1919 All 185 (185).

[3] The provision relating to the arbitrator's fees made in the award itself is part of the costs of arbitration. Even if there is no award, the Court has power to award the arbitrator's fees as part of the costs of the arbitration and as costs of the proceedings incidental to the suit under S. 35, Civil P. C. (Vol 27) 1940 Sind 190 (190) : 1 L R (1940) Kar 34.

[4] Costs incurred in filing award in Court must be determined by Court. (Vol 11) 1924 Sind 91 (96) : 17 Sind L R 93.

[5] The costs incurred in the processes of obtaining an order from the Court are within the discretion of the Court and not of arbitrators but an award is not bad merely because of their inclusion. (Vol 1) 1914 Sind 62 (62) : 8 Sind L R 136.

[6] The term "costs of the arbitration" is a wide and general term and there is no justification for limiting it to such costs as might be represented by travelling expenses and the summoning of witnesses although it does include such matters. The Court can grant costs to the arbitrators for their services. (Vol 21) 1934 Nag 199 (200) : 31 Nag L R 85.

[7] An arbitrator has no interest in the award apart from his fees and costs. (Vol 30) 1943 Sind 33 (35) : 1 L R (1942) Kar 466.

[8] Where the Court holds that there is no valid reference to arbitration, it has no jurisdiction to pass an order as to costs of the award. (Vol 15) 1928 Mad 370 (371).

[9] Where the submission to arbitration does not express a contrary intention, the arbitrator or umpire may himself fix his remuneration. But unless the arbitrator has fixed his fees in advance by a written agreement, a party is entitled to compel him to file the award in Court and to accept the remuneration fixed by the Court. A party after paying the fee cannot object to and recover back what he has already paid. The award is binding unless the procedure in S. 38 has been adopted or it is set aside. (Vol 32) 1945 Sind 71 (73, 74) : 1 L R (1944) Kar 354.

[10] All the matters in dispute were referred to arbitration but the award did not deal with costs. It was held that the Court could not deal with the question of costs incurred up to the date of reference but could only award the costs incurred subsequently thereto. (Vol 19) 1932 All 183 (184) : 54 All 122.

[11] An order awarding fees to the arbitrator is a 'case decided' within the meaning of S. 115, Civil P. C., and is revisable. (Vol 27) 1940 Sind 190 (190) : 1 L R (1940) Kar 34.

1. SECTION 39.

[1] No appeal lies against an order granting leave to revoke authority of the appointed arbitrator. (Vol 31) 1944 Nag 152 (153) : 1 L R (1944) Nag 447.

[2] An order of the trial Judge superseding the arbitration on the ground that there was no valid reference to arbitration is not an order superseding the arbitration made under the Arbitration Act as it does not

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council.

CHAPTER VII.

MISCELLANEOUS.

Small Cause Court not to have jurisdiction over arbitrations save arbitrations in suits before it.

Procedure and powers of Court.

40. A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save on application made under section 21.

41. Subject to the provisions of this Act and of rules made thereunder —

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

42. Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement or if there is no such provision, either —

(a) by delivering it to the person on whom it is to be served, or

Section 39 (contd.)

come under Ss. 19, 25 or 30 of the Act and, therefore, no appeal lies from that order. (Vol 30) 1943 Pesh 8 (9).

[3] An order granting stay of suit under S. 19 of Act 1899 was appealable. (Vol 12) 1925 All 154 (155) : 47 All 179.

[But see (Vol 7) 1920 Cal 795 (796) : 47 Cal 1020.]

[4] Where a Judge finds that there was no subsisting agreement to refer to arbitration and, therefore, a suit was not liable to be stayed under Para. 18, Civil P. C. (corresponding to S. 34) this order is appealable under S. 104 (e), Civil P. C. (Vol 4) 1917 Lah 261 (265, 266) : 1917 Pun Re No. 62.

[5] No second appeal lies under Cl. 15 of the Letters Patent (Mad.) from the order passed in appeal under S. 39 in view of S. 39 (2) and Cl. 44 of the Letters Patent (Mad.). (Vol 32) 1945 Mad 184 (185) : I L R (1945) Mad 564.

[6] Section 39 (2) saves existing right of appeal to His Majesty in Council but does not create a new right. (Vol 30) 1943 Bom 196 (196, 197).

[7] Order remitting an award owing to arbitrator's misconduct is not appealable. (Vol 11) 1924 Rang 47 (47) : 1 Rang 661.

[8] Whether an award should be set aside or remitted can be determined by the Court of first instance and appellate Court will not set aside its decision unless discretion is misused. (Vol 11) 1924 Sind 132 (133).

[9] There is nothing in S. 39 or S. 41 to deprive the High Court of its revisional jurisdiction under S. 115, Civil P. C. (Vol 32) 1945 All 146 (147) : I L R (1945) All 162.

[10] Application challenging validity of arbitration agreement falls neither under S. 20, nor S. 39 (1) (iv) — Revision lies against an order refusing an application. (Vol 30) 1943 Lah 295 (296).

[11] Objections to the validity of an award which were not taken in the lower appellate Court cannot be raised in revision under S. 115, Civil P. C. (Vol 31) 1944 Lah 280 (282).

[12] Where an objection to the validity of an award, under Para. 15, Sch. II, Civil P. C. (corresponding to S. 30) is rejected, and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie except as under Para. 16 (i. e. S. 17). The High Court can on appeal convert the proceedings in proper circumstances into an application in revision, if it is satisfied that interference is called for. (Vol 29) 1942 All 85 (86, 87) : I L R (1941) All 807.

[13] Where Court directed office to make certain adjustments in award as agreed by the parties and objection is taken to amendments made by office, order deciding objection is not open to appeal or revision. Proper remedy is appeal from decree. (Vol 28) 1941 Oudh 598 (599) : 17 Luck 17.

[14] Where there is no separate order passed filing the award, the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal which is in substance an appeal from an implied order filing the award. (Vol 28) 1941 Cal 202 (204) : I L R (1940) 2 Cal 551. ((Vol 12) 1925 All 404 (404) : 47 All 743, followed.)

[15] A person who was a party to arbitration even if successful in appeal challenging the reference as being without jurisdiction is generally deprived of costs. But in revision such a person should not be given any relief. (Vol 29) 1942 Cal 230 (232) : I L R (1941) 2 Cal 366.

1. SECTION 40.

[1] A Small Cause Court has jurisdiction to entertain a suit to enforce an award. The jurisdiction to entertain such a suit by that Court is not barred by S. 40. (Vol 31) 1944 Nag 24 (25) : I L R (1944) Nag 340.

1. SECTION 41.

[1] Clause (a) of S. 41, Arbitration Act, makes O. 23, Rr. 1 and 3 of Civil P. C., applicable to proceedings under the Arbitration Act. Parties have a right to ask Court to set aside award and substitute another arrangement, (Vol 32) 1945 Pesh 41 (43).

- (b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in British India and registered under Chapter VI of the Indian Post Office Act, 1898.

Power of Court to issue processes for appearance before arbitrator.

43. (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

[Civil P. C., Sch. II, Para. 7.]

Power to High Court to make rules.

44. The High Court may make rules consistent with this Act as to—

- (a) the filing of awards and all proceedings consequent thereon or incidental thereto;
- (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;
- (c) the staying of any suit or proceeding in contravention of an arbitration agreement;
- (d) the forms to be used for the purposes of this Act;
- (e) generally, all proceedings in Court under this Act.

[1899 — S. 20]

Crown to be bound.

45. The provisions of this Act shall be binding on the Crown.

[1899 — S. 22]

46. The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12, 36^a and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

[a] The figure "36" was inserted by the Repealing and Amending Act, 1942 (25 [XXV] of 1942), S. 3 and Sch. II. [1-10-1942].

47. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

1. Section 43.

[1] An arbitrator should notify the date of the hearing to the parties. He cannot take evidence in the absence of the parties and without their knowledge. (Vol 12) 1925 Mad 1086 (1087).

[2] Where after notice the party fails to appear or notifies his withdrawal from the submission, the arbitrator can proceed *ex parte*. (1906) 29 Mad 44 (45); (Vol 1) 1914 Sind 62 (62); 8 Sind L R 136.

[3] An *ex parte* award cannot be set aside unless sufficient cause is shown for the non-appearance of the party. (Vol 12) 1925 Sind 150 (152); 19 Sind L R 251.

[4] An arbitrator should take only such evidence as is required by the terms of the agreement referring the question in dispute to arbitration. (1869) 2 Beng L R (App) 25 (26).

[5] There is nothing illegal in the parties to an arbitration agreeing before the Panchayatdars to have evidence taken after the administration of any reasonable form of oath to the witnesses. (Vol 3) 1916 Mad 583 (586).

[6] The expression "refusing to give evidence" refers to persons who refuse when placed on oath and not to persons who elect to produce no evidence. (1911) 8 All L Jour 929 (930).

1. SECTION 44.

[1] A rule framed by the High Court but not in accordance with the Arbitration Act will not be given effect to. (1918) 40 Cal 219 (230, 231).

[2] Where the written submission to arbitration was not filed with the award as required by the High Court Rules it was held that the award could not be accepted by the Court. (Vol 16) 1929 Mad 31 (32).

1. SECTION 47.

[1] The Act does not apply to an award made before it came into force. (Vol 30) 1943 Bom 463 (464); ILR (1943) Bom 750.

[2] The proviso to S. 47 leaves the provisions of O. 23, R. 3, Civil P. C., untouched. (Vol 32) 1945 Mad 294 (295); ILR (1946) Mad 39.

48. The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply.

49. [Repeals and amendments]. *Repealed by the Repealing and Amending Act, 1945 (VI of 1945) S. 2 and Sch. I. [16-4-45].*

THE FIRST SCHEDULE.

(See section 3.)

IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS.

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.
2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.
3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.
4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators. [Civil P. C., Sch. II, Para. 9]
5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.
6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.
7. The award shall be final and binding on the parties and persons claiming under them respectively.
8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by, whom and in what manner, such costs or any part thereof shall be

1. SECTION 48.

[1] Any award made upon a reference that was pending at the date of the commencement of the Arbitration Act of 1940 is saved from the application of the Act. (Vol 31) 1944 Bom 12 (13) : ILR (1944) Bom 477.

[2] All applications made under the Arbitration Act, 1899, must be governed by that Act even though the new Act of 1940 has come into force at the time of the hearing of such applications. (Vol 28) 1941 Cal 415 (416).

[3] There is a distinction between a reference to arbitration and a suit. Proceedings on reference culminate in the award but the suit remains pending until it is decreed. Hence, where an award is made before the enforcement of the Arbitration Act, and an order setting it aside is made after its enforcement, an appeal under Section 39 (1) (vi) from such order is not barred by the provisions of S. 48. (Vol 32) 1945 Oudh 1 (1, 2).

SCHEDULE I, Rule 1.

[1] Reference is ordinarily to single arbitrator. An intention to refer to more than one arbitrator must be plain and clear. (1911) 5 Sind L R 97 (101).

SCHEDULE I, Rule 2.

[1] Where there is a clear provision in the agreement of reference to arbitration that the arbitrators would be entitled to appoint an umpire only if they happened to

disagree, the arbitrators could not have appointed an umpire unless they had made up their minds and had decided to differ from each other. This provision in the agreement must be held to contain an intention different from what has been expressed in Para. 2 of Sch. I. (Vol 32) 1945 Lah 34 (35).

SCHEDULE I, Rule 4.

[1] Where there is disagreement between the arbitrators and an umpire is appointed he must re-hear evidence if so requested. (Vol 8) 1921 Sind 27 (29) : 15 Sind L R 68.

[2] Award of umpire without hearing parties is against principles of equity and justice—Award of costs without mentioning the amount is bad. Umpire can award costs only for the reference and award—The costs of obtaining an order from the Court is at the discretion of the Court. (1911) 5 Sind L R 89 (90, 91).

[3] In a reference to arbitration one of the arbitrators absented himself. After the expiry of the time for award the umpire approached the Court for direction. The Court directed him to proceed under Para. 9 (a), Sch. II, Civil P. C. *Held*, that it was a fair inference that the arbitrators had allowed the time to expire without making an award and that under the circumstances the umpire by himself was entitled to make an award. (Vol 15) 1928 All 674 (674).

paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

THE SECOND SCHEDULE.

(See section 41.)

POWERS OF COURT.

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.
2. Securing the amount in difference in the reference.
3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
4. Interim injunctions or the appointment of a receiver.
5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

THE THIRD SCHEDULE.—[Enactments repealed.] *Repealed by the Repealing and Amending Act, 1945 (VI of 1945), S. 2 and Sch. I. [16-4-45].*

THE FOURTH SCHEDULE — [Enactments amended.] *Repealed by the Repealing and Amending Act, 1945 (VI of 1945), S. 2 and Sch. I. [16-4-1945].*

ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937.

STATEMENT OF OBJECTS AND REASONS.

"The Government of India have had for some time past under consideration the question of India's adherence to the Geneva Protocol on Arbitration Clauses (1923) and the International Convention on the Execution of Foreign Arbitral Awards (1927). The object of these Instruments is to meet the widely expressed desire of the commercial world that arbitration agreements should be ensured effective recognition and protection. A large number of countries including many of first class commercial and industrial importance, e. g., the United Kingdom, France, Germany, the Netherlands, have adhered to these Instruments.

After consulting Local Governments, High Courts and commercial bodies, a majority of whom were found to be in favour of India's accession to these Instru-

ments, the case was placed before the Commerce Department Standing Advisory Committee of the Legislature who recommended that India should adhere to the Instruments. These have accordingly been signed at Geneva on behalf of India, subject to reservations limiting India's obligations under the Instruments to commercial contracts and excluding the Indian States from the scope of the Instruments.

The Instruments provide for their ratification by a contracting party before they are enforced in respect of that party. Prior to ratification it is necessary to enact legislation to implement certain obligations contracted under these Instruments, and the present Act incorporates the legislation needed in this respect."

— *Gazette of India*, 1936, Part V, Page 10.

ACT NO. VI of 1937.^a

[as amended by Act XXXII of 1940.]

[4th March 1937.]

An Act to make certain further provisions respecting the law of arbitration in British India.

WHEREAS India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations

in respect thereof to contracts which are considered as commercial under the law in force in British India;

AND WHEREAS it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in British India, to make certain further provisions respecting the law of arbitration;

It is hereby enacted as follows:—

[a] For Report of the Select Committee, *see* Gazette of India, 1937, Part V, page 73.

Short title, extent and operation.

1. (1) This Act may be called the Arbitration (Protocol and Convention) Act, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) The provisions of this Act, except this section, shall have effect only from such date as the ^a[Central Government] may, by notification in the ^b[Official Gazette], appoint in this behalf, and the ^a[Central Government] may appoint different dates^c for the coming into effect of different provisions of the Act.

[a] *Substituted* by A. O. for "G.-G. in C." [b] *Substituted* by A. O. for "Gazette of India." [c] Section 3 came into effect on the 30th November, 1937 : *see* Gazette of India, 1937 Pt. I, page 1945; and Ss. 2 and 4 to 10 on the 23rd January, 1938 : *see* *ibid.*, 1938, Part I, page 25.

2. In this act "foreign award" means an award on differences relating to matters considered as commercial under the law in force in British India, made after the 28th day of July, 1924,—

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the ^a[Central Government], being satisfied that reciprocal provisions have been made, may, by notification^b in the ^c[Official Gazette], declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the ^a[Central Government], being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For such notification, *see* Gazette of India 1938, Part I, page 24. [c] *Substituted* by A. O. for "Gazette of India."

3. Notwithstanding anything contained in the ^a[Arbitration Act, 1940], or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings ; and the Court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

[a] *Substituted* for "Indian Arbitration Act, 1899" by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Sch. II.

1. Section 3—*Stay of proceedings.*—[1] Under the provisions of S. 34 of the Arbitration Act, 1940, the Court has discretion to grant or refuse a stay of proceedings. "India's undertakings under the Protocol require that it should be obligatory on a British Indian Court to stay proceedings when these arise in regard to an

agreement to submit to arbitration differences relating to commercial matters made by parties subject respectively to the jurisdiction of different contracting states. Clause 3 (i. e. S. 3) makes special provision accordingly for this limited class of submissions"—*Statement of Objects and Reasons, note on clause 3.*

4. (1) A foreign award shall, subject to the provisions of this Act, be enforceable in British India as if it were an award made on a matter referred to arbitration in British India.

Effect of foreign awards. (2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in British India, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Filing of foreign award in Court. **5.** (1) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

6. (1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Conditions for enforcement of foreign awards. **7.** (1) In order that a foreign award may be enforceable under this Act it must have —

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,
- (c) been made in conformity with the law governing the arbitration procedure,
- (d) become final in the country in which it was made,
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India,

and the enforcement thereof must not be contrary to the public policy or the law of British India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that —

- (a) the award has been annulled in the country in which it was made, or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence. **8.** (1) The party seeking to enforce a foreign award must produce —

- (a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (a), (b) and (c) of sub-section (1) of section 7 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in British India.

Saving. 9. Nothing in this Act shall —

(a) prejudice any rights which any person would have had of enforcing in British India any award or of availing himself in British India of any award if this Act had not been passed, or

(b) apply to any award made on an arbitration agreement governed by the law of British India.

Rule-making powers of the High Court. 10. The High Court may make rules consistent with this Act as to —

(a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

(b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in Court under this Act.

THE FIRST SCHEDULE.

PROTOCOL ON ARBITRATION CLAUSES.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE SECOND SCHEDULE.

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS.

Article 1.—In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary :

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto ;
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon ;
- (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure ;
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending ;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2.—Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied :

- (a) That the award has been annulled in the country in which it was made ;
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case ; or that, being under a legal incapacity, he was not properly represented ;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can,

if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3.—If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4.—The party relying upon an award or claiming its enforcement must supply, in particular :

- (1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made ;
- (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made ;
- (3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5.—The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6.—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

Article 7.—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8.—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9.—The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article 10.—The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Article 11.—A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

THE INDIAN ARMS ACT, 1878.

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STATEMENT OF OBJECTS AND REASONS.

"The law relating to arms, ammunitions has long been felt to be in an unsatisfactory state. In some particulars it has been found defective, and on many points it presents difficulties of construction which might at any time prove embarrassing to the Government or entail hardship on innocent persons.

2. So far back as the year 1870 a Bill was introduced to remedy this state of things; but, owing in part to pressure of work and in part to other causes, it was allowed to stand over.

3. The present Bill is in the main a consolidation of the existing law, and a re-enactment of it in a simpler form with such improvements in points of detail as the experience of the working of the Arms Act of 1860 has shown to be desirable. On two points only does it propose to introduce changes of any importance.

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4. The first of these points is dealt with in S. 7, which, taken with the second schedule, imposes duties on the importation by sea of arms and parts of arms, etc. Those duties, it will be observed, are fixed without reference to the value of the articles on which they are imposed, and they are so fixed and are pitched, at what may seem at first sight to be high rates, expressly with a view to check the importation of a cheap class of arms, the importation of which has of late years largely increased.

5. Such arms cannot, from their inferior make, be intended for sporting purposes, and there is reason to suspect that a considerable proportion of them finds its way into the hands of the criminal classes in the interior of the country or of the hostile tribes on our frontiers. It has been found very difficult to prevent

the transit of such arms from the sea-ports into the interior of the country and towards the frontiers when once they are imported, and it is believed that the simplest method of checking their importation, and the method least calculated to interfere with the legitimate trade in arms of a superior class, is to impose an uniform duty of the nature proposed.

6. The other point on which the Bill goes to introduce a material change in the existing law is that of the possession of arms. At present the mere possession of arms is prohibited only in certain provinces, which, to use the language of Act XXXI of 1860, have been "disarmed", throughout the rest of the country, though no person can go armed or carry arms except under a special exemption or by virtue of a licence, the mere possession of arms other than cannon is not restricted.

7. Now there is good reason to believe that this complete absence of restriction in the districts which have not been disarmed has led to the law prohibiting the transport of arms and the export of arms across the frontiers being extensively evaded. As long as all persons indiscriminately may have arms in their possession to any amount they please in the districts which have not been disarmed, it is practically impossible to prevent such arms being passed on to the disarmed districts, to the predatory classes in Native States, and to the hostile tribes on our frontiers.

The only remedy seems to be to place the possession of arms throughout the whole of British India under

control, and this it is proposed to do by S. 11 [now S. 14] of the Bill, which requires all such possession to be under a licence.

8. It will, however, be observed that ample safeguards are provided to prevent this prohibition pressing unfairly against respectable persons desiring to possess arms for legitimate purposes. Section 11 allows a period of three months after the Bill becomes law within which the possession of arms in the districts not hitherto disarmed will not be illegal, and during which any person in such districts can apply for a licence; S. 25 enacts that in these districts no person shall be prosecuted for possessing arms without the previous sanction of the Magistrate of the District; S. 26 imposes special and very stringent conditions on searches for arms; and lastly, under S. 23 [now S. 27], the Government may exempt any class of persons from the operation of the prohibition altogether.

9. On the whole it may be safely affirmed that, with a system of licences granted either without charge or on the payment of small fees, and in cases where it is safe so to grant them for reasonably long periods, the Bill will not, as regards the possession of arms, materially affect the position of any persons to whom the right to possess arms can, with a due regard to the public peace and safety, be conceded.

10. It need only be added that S. 3 [now S. 1] of the Bill maintains in force all exemptions granted under the present law." — *Gazette of India, 1877, Part V, Page 650.*

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts XX of 1919 and XLIX of 1920.

—Amended in Bengal by Bengal Acts XXI of 1932, and VII of 1934.

—Amended in N.-W.F.P. by N.-W.F.P. Act I of 1934.

—Adapted by A. O.

—Repealed in part by Acts XII of 1891; VIII of 1930; and I of 1938.

COGNATE ACTS AND PROVISIONS.

1. CRIMINAL PROCEDURE CODE, 1898, S. 184.

2. EXPLOSIVES ACT, IV OF 1884, S. 15.

3. INDIAN PORT ACT, XV OF 1908, S. 27.

4. INDIAN TARIFF ACT, XXXII OF 1934, S. 2, SCH. I, SECTION XIX.

5. MALABAR WAR-KNIVES ACT, XXIV OF 1854.

6. PENAL CODE, 1860, SS. 122, 144, 148, AND 149.

7. SEA CUSTOMS ACT, VIII OF 1878, S. 88.

ACT NO. XI of 1878.^a

[15th March 1878.]

An Act to consolidate and amend the law relating to Arms, Ammunition and Military Stores.

Whereas it is expedient to consolidate and amend the law relating to arms, ammunition and military stores: It is hereby enacted as follows :—

[a] For discussions, in Council, see *Gazette of India, 1877, Supplement, pp. 3016 and 3030; ibid, 1878, Supplement, pp. 435 and 453.*

This Act has been declared to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 [I] of 1929); S. 2; and except S. 15, in the Santhal Parganas by the Santhal Parganas Settlement Regulation (3 [III] of 1872), in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch., and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch.

It is in force throughout the Province of Assam except the Lushai Hills, see Notification No. 2443-T., dated the 1st June 1914, *Assam Gazette, 1914, Pt. II, p. 843.*

It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 [XIV] of 1874), to be in force in the Districts of Hazaribagh, Lohardaga and Manbhum, and in Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see *Gazette of India, 1881, Pt. I, P. 504.* The District of Lohardaga included at this time the present District of Palaman, which was separated in 1894; Lohardaga is now called the Ranchi District, see *Calcutta Gazette, 1899, Pt. I, p. 44.*

It has been extended to British Baluchistan by Notification under sections 5 and 5A of the Scheduled Districts Act, 1874, with certain modifications and exceptions, see p. 97 of the Baluchistan Local Rules and Orders, Edition 1926.

PREAMBLE

1. Interpretation of the Act. — [1] A penal enactment like Arms Act must be construed in favour

of individual person where any doubt exists. (Vol 15) 1923 Nag. 219 (220) : 29 Cri L Jour 575.

[2] The Act being a highly penal Act should be strictly construed. (1893) 15 All 129 (131).

Its application to the Pargana of Spiti is barred by S. 14 of the Spiti Regulation 1873 (1 [I] of 1873). As to Upper Tanawal in the Hazara District, see Ss. 3 and 6 (4) of the Hazara (Upper Tanawal) Regulation, 1900 (2 [II] of 1900).

As to the possession, manufacture and export of arms, ammunition and gun-powder in the Chittagong Hill Tracts, see the Chittagong Hill Tracts Regulation, 1900, (1 [I] of 1900), Ss. 11 and 12.

I. — PRELIMINARY.

1. This Act may be called the INDIAN ARMS ACT, 1878: and it extends to the whole of *Short title. Local extent.* British India.

Savings. But nothing herein contained shall apply to —

- (a) arms, ammunition or military stores on board any sea-going vessel and forming part of her ordinary armament or equipment, or
- (b) the manufacture, conversion, sale, import, export, transport, bearing or possession of arms, ammunition or military stores by order of ^a[any Government in British India], or by a public servant or ^b[a member of either of the forces constituted by the Indian Territorial Force Act, 1920, or the Auxiliary Force Act, 1920] in the course of his duty as such public servant or ^c[member].

[a] Substituted by A. O. for "the Government." [b] Substituted by S. 35 of the Auxiliary Force Act, 1920 (49 [XLIX] of 1920) for "a Volunteer enrolled under the Indian Volunteers Act, 1869." [c] Substituted by S. 35, *ibid* for "Volunteer."

2. This Act shall come into force on such day^a as the ^b[Central Government] by notification *Commencement.* in the ^c[Official Gazette] appoints.

[a] 1st October 1878 — see Gazette of India, 1878, Pt. I, p. 389. [b] Substituted by A. O. for "Governor-General in Council." [c] Substituted by A. O. for "Gazette of India."

3. [Repeal of enactments]. *Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Schedule.*

Interpretation clause.

4. In this Act, unless there be something repugnant in the subject or context,—

"cannon" includes also all howitzers, mortars, wall-pieces, mitrailleuses and other ordnance and machine-guns, all parts of the same, and all carriages, platforms and appliances for mounting, transporting and serving the same :

"arms" includes fire-arms, bayonets, swords, daggers, spears, spearheads and bows and arrows, also cannon and parts of arms, and machinery for manufacturing arms :

"ammunition" includes also all articles specially designed for torpedo service and submarine mining, rockets, gun-cotton, dynamite, lithofracteur and other explosive or fulminating material, gun-flint, gun-wads, percussion-caps, fuses and friction-tubes, all parts of ammunition and all machinery for manufacturing ammunition, but does not include lead, sulphur or saltpetre :

"military stores", in any section of this Act as applied to any part of British India, means any military stores to which the ^a[Central Government] may from time to time, by notification in the ^b[Official Gazette], specially extend such section in such part, and includes also all lead, sulphur, saltpetre and other material to which the ^a[Central Government] may from time to time so extend such section :

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India."

"license" means a license granted under this Act, and "licensed" means holding such license.

1. SECTION 1

[1] The sale of arms by Nazir of the Court, in execution of a decree, is a sale by a public servant in discharge of his duty, and, therefore, excluded by S. 1, cl. (b), from the operation of this Act. (1885) 9 Bom 518 (520).

[2] Held that a Sub-Inspector of Police not of the first grade, who had been presented by Government with a revolver, committed no offence by possessing and going armed with a dagger. (1907) 1907 Upp Bur Rul 1 (1, 2). (Decided with reference to Government of India Notification No. 518 of 1879 and S. 15.)

SECTION 4 — SYNOPSIS.

1. Air-gun.
2. Ammunition.
3. Arms, scope of definition.
4. Arms, meaning of.
5. Arms, what are.
- 5a. Fire-arms.
6. "Parts of arms".
7. Spear.
8. Sword.
9. Unserviceable arms.

1. Air-gun.—[1] Where air-gun found was similar to gem air-guns which are not adapted for use with explosive substances and which have been classed as toys

Section 4 (contd.)

by the Government for the purposes of the Tariff Act, it was held that the air-gun was a toy and did not come under the definition of arms within the meaning of the Arms Act. (1906) 4 Cri L Jour 239 (239).

2. Ammunition.—[1] Gun-powder even if intended for the manufacture of fireworks, is "ammunition" and hence its possession without licence is an offence under S. 19. (1885) 8 Mad 202 (204).

[2] The expression "all parts of ammunition" as used in S. 4 includes empty cartridge cases. (1905) 2 Cri L Jour 449 (451). (Vol 11) 1924 All 215 (215) : 46 All 107 : 25 Cri L Jour 727 ; (1909) 10 Cri L Jour 573 (574) : 32 All 152 ; (Vol 23) 1936 All 392 (393) : 37 Cri L Jour 727. (Section 95, Penal Code, applied to case of possession of empty cartridges not meant to be reloaded.)

[But see (1890) 1890 Pun Re No. 20 (Cr) page 44 (45) ; (Vol 13) 1926 All 255 (256) : 27 Cri L Jour 136, (Empty cartridges are not ammunition unless they can be reloaded in India and used as ammunition by the person with whom they are found.) ; (Vol 12) 1925 All 498 (498) : 26 Cri L Jour 1039 : 47 All 629. (Empty cartridges which cannot be reloaded in India are not ammunition.)]

[3] Though lead as such is not ammunition, piece of lead in the shape of a bullet or shot is ammunition. (Vol 23) 1936 All 392 (393) : 37 Cri L Jour 727.

[4] The words 'other explosive or fulminating material' in S. 4, must be interpreted in the light of the foregoing examples of explosives, and include only such material as could be used for any military purpose. As *patakhas* are quite useless for such purposes they are not "ammunition" within the meaning of the Act. (Vol 18) 1931 All 17 (17) : 32 Cri L Jour 564 : 53 All 226.

[5] "Rockets" referred to in S. 4 under the definition of "ammunition" are war-rockets. (1882) 5 Mad 159 (160).

[6] An instrument for re-capping cartridge cases of the Martini-Hurley rifles is not machinery for manufacturing ammunition within the meaning of the Act. (1890) 1890 Pun Re No 20 Cr. 44 (45).

[7] Where there is no notification extending S. 19 of the Act to saltpetre in a district, a person cannot be convicted under S. 19 of the Arms Act, for keeping saltpetre without a license. (1886) 1886 Rat Un Cr C 227 (227).

3. Arms, scope of definition. — [1] There is no exhaustive definition in the Arms Act, of the expression "arms," which, though necessarily include the articles specified in the section may also be held to apply to other instruments or weapons. (1900) 1900 Pun Re No. 20 Cr p. 45; (Vol 6) 1919 Lah 472 (473) : 20 Cri L Jour 11; (Vol 21) 1934 Cal 368 (369) : 35 Cr L Jour 766 : 60 Cal 1477. (Every type of air-gun whether is excluded from definition.); (1905) 1 Weir 654 (654). (A battle axe is an arm.); (Vol 1) 1914 Oudh 285 (286) : 15 Cr L Jour 685. (Definition is not happy.)

[2] If any thing is not, in the opinion of the Court, an arm within the meaning of the Arms Act, it is immaterial whether Government have or have not excluded it from the operation of the Act. *Das* of the kind described in the Government of India, Home Department Notification No. 827, dated 15th June 1893, as excluded from the operation of the Act, are not arms within the meaning of the Act, and it is, therefore, unnecessary to exclude them from the operation of Act. (1893-1900 Low Bur Rul 416. [1893-1900 Low Bur Rul 320, overruled.]

4. Arms, meaning of. — [1] Whatever can be used as an instrument of attack or defence, and is not an ordinary implement for domestic purposes falls

within the term "arms." (Vol 6) 1919 Lah 472 (473) : 20 Cr L Jour 11 : 1918 Pun Re No. 32 (Cr); (1907) 6 Cr L Jour 227 (227, 228) : 34 Cal 749. (A sword-stick.) (1900) 1900 Pun Re No. 20 Cr p. 45; (Vol 9) 1922 Lah 138 (139) : 23 Cr L Jour 63 : 2 Lah 291; (Vol 6) 1919 Lah 211 (211) : 20 Cr L Jour 577.

[2] The purpose for which an implement is primarily intended regulates whether it is an arm or not. (1905) 2 Cri L Jour 372 (374); (Vol 14) 1927 Lah 162 (163); 28 Cri L Jour 199; (1910) 11 Cri L Jour 153 (L B); (Vol 15) 1928 Rang 49 (50) : 29 Cri L Jour 115 : 5 Rang 710. (A clasp-knife $5\frac{1}{2}$ inches long is an arm.); (1900-02) 1 Low Bur Rul 271 (272). (A clasp-knife is not ordinarily an arm.); (Vol 27) 1940 Lah 468 (469, 470) : 42 Cri L Jour 144. (*Takwas* are not arms.)

[See however (1893-1900) 1893-1900 Low Bur Rul 487. (A clasp-knife is not a dagger and is not designed or suitable for warfare. Therefore, it does not come within the definition of "arms.")]

[3] The Act contains no exhaustive definition of "arms," and the true meaning of the term must be arrived at in some cases by a consideration of the circumstances attending them. Where the circumstances of a case show that a weapon or instrument is carried or possessed for the purpose of offence or defence, and not for agricultural purposes or as an article of domestic utility, there is no reason why such a weapon or instrument should not be held to fall within the category of "arms." (1900) 1900 Pun Re No. 16 (Cr), p. 37 (38).

[4] The mere fact that the use of a weapon may probably cause death, does not make it "arms." (Vol 1) 1914 Oudh 285 (286) : 15 Cri L Jour 685. (A plain *lathi* with a detachable blade attached to it is not "arms.")

[5] The true criterion is not whether any given *dah* is an "u-pyat" but what was the intention of the maker as regards its purpose. (Vol 10) 1923 Rang 23 (23) : 23 Cr L Jour 594.

[6] See also Note 5.

5. Arms, what are.—[1] Whether any instrument is a fire-arm or not is a question of fact to be determined according to circumstances. (1898) 21 Mad 360 (362).

[2] A hunting knife sharpened on one side only is "arm" within S. 4. (Vol 11) 1924 Cal 714 (715) : 25 Cri L Jour 1119 : 51 Cal 573.

[3] A sword-stick is a sword sheathed in a cane-stick and comes within the definition of arms in S. 4. (1907) 6 Cri L Jour 227 (227, 228).

[4] A battle-axe is an arm for the purposes of Arms Act. (1905) 1 Weir 654 (654).

[5] Every air-gun or air pistol is not excluded from the definition of arms. (Vol 21) 1934 Cal 368 (369) : 35 Cr L Jour 765 : 60 Cal 147..

[5a] Clasp-knives are not arms. (Vol 1) 1914 Low Bur 259 (260) : 15 Cr L Jour 585.

[6] A clasp-knife which has a blade $5\frac{1}{2}$ inches long with a pointed end and is fitted to a long handle and turns over into the handle falls within the meaning of the word "arms." (Vol 15) 1928 Rang 49 (50) : 29 Cri L Jour 115 : 5 Rang 710.

[7] Clasp-knives with dagger shape are arms. (1905) 2 Cri L Jour 372 (374).

[8] A hunting knife sharpened on one side only is "arm" within S. 4. (Vol 11) 1924 Cal 714 (715) : 25 Cri L Jour 1119 : 51 Cal 573.

[9] Instrument consisting of a *lathi* and an axe-like blade and not one used for domestic purposes is "arm." (Vol 15) 1928 Lah 295 (296) : 29 Cri L Jour 961 : 9 Lah 137.

[10] Chavi is a weapon having large axe-like blade, curved or otherwise, with an arrangement of rings for

II.—MANUFACTURE, CONVERSION AND SALE.

Unlicensed manufacture, conversion and sale prohibited.

5. No person shall manufacture, convert or sell, or keep, offer or expose for sale, any arms, ammunition or military stores, except under a license and in the manner and to the extent permitted thereby.

Nothing herein contained shall prevent any person from selling any arms or ammunition which he lawfully possesses for his own private use to any person who is not by any enactment for the time being in force prohibited from possessing the same; but every person so selling arms or ammunition to any person other than a person entitled to possess the same by reason of an exemption under section 27 of this Act shall, without unnecessary delay, give to the Magistrate of the district, or to the officer in charge of the nearest police-station, notice of the sale and of the purchaser's name and address.

Section 4 (*contd.*)

binding it to the handle which is of considerable length. It is an arm. (Vol 1) 1914 Lah 280 (280) : 15 Cri L Jour 506; (Vol 6) 1919 Lah 211 (211) : 20 Cri L Jour 577.

[10a] A handle three and a half feet long and a blade seven and a half inches in length — This is a weapon which would be used as weapon of offence. (1900) 1900 Pun Re No. 16 (Cr), page 37 (39).

[11] An old-fashioned muzzle-loading gun-barrel in good condition and with the touchhole in a good order is a fire-arm within the meaning of S. 14. There is nothing in S. 14 inconsistent with S. 4. (1907) 5 Cri L Jour 435 (436) : 3 Nag L R 53.

[12] A carving knife manufactured for culinary purposes even though carried about in a sheath like dagger is not an "arm." A knife, not otherwise an "arm," is not converted into an "arm" by the mere addition of a sheath to carry it, unless the character of the knife is altered, say, by grinding and making it double-edged. (1910) 11 Cri L Jour 153 (153) (L B).

See also Note 4 and Notes on Sections 5, 14 and 19.

5a. Fire-arms. — [1] The word 'fire-arms' means arms that are fired by means of gun-powder or other explosives. (Vol 2) 1915 Cal 719 (723) : 16 Cri L Jour 9 : 42 Cal 1153.

6. "Parts of arms." — [1] In including parts of arms within the definition of "arms," the Legislature intended to provide against the importation of and retention of arms in parts which might be put together any moment and used as fire-arms. (1883) 6 Mad 60 (60, 61) (FB).

[2] Possession of loose parts of a revolver with nothing to show that they cannot be assembled together as to be capable of being used as a fire-arm is an arm. (Vol 20) 1933 Cal 495 (495) : 34 Cri L Jour 916.

[3] Parts of arms are arms. (Vol 10) 1923 Lah 617 (618) : 25 Cri L Jour 539. (Bolts and bars of rifles are arms.); (1900) 1900 Pun Re No. 20 Cr, p. 45 (45). (Chavies are arms.); (1889) 1889 Pun Re No. 38 Cr, p. 142 (142), (Sword hilts are arms.); (1899) 12 C P L R 10 (11) Cr. (A gun-barrel is an arm.)

[4] A broken and unserviceable gun will not fall under the designation of "parts of arms" within the meaning of S. 4. (1884) 7 Mad 70 (71).

[5] By using both the words 'spears' and 'spear-heads' in S. 4 the Legislature clearly intended to differentiate and distinguish between spears and spear-heads. In accordance with that section 'arms' includes 'parts of arms' and if the Legislature intended spear-heads to be taken as parts of spears there was no necessity for introducing the word 'spear-heads' after the use of the word 'spears' in the section. Further, parts of the arms specifically mentioned in S. 4 have not been mentioned in that section. It is, therefore, clear that the Legislature in S. 4 enumerated only arms and not parts thereof. It follows that spear-heads cannot within

the meaning of this section be taken to be parts of spears. (Vol 24) 1937 All 228 (229) : 38 Cri L Jour 511.

7. Spear. — [1] 'Spear' is spear even if it is called by another name such as *Nishan Saheb* and is used for religious purpose. (Vol 28) 1941 Lah 340 (341) : 43 Cri L Jour 76 : ILR (1941) Lah 789.

[2] Whether the word 'spear' used in a Gazette notification will necessarily include 'spear-head' as being 'part of the arm', see. (Vol 24) 1937 All 228 (229) : 38 Cri L Jour 511.

[3] See also (1905) 1 Weir 660 (660) which is based on the Government of India notification excluding spears of all kinds from the operation of any prohibition and direction contained in the Act so far as regards the Presidency of Madras.

8. Sword. — [1] A sword-stick is a 'sword' within the meaning of the term 'sword' in the Arms Act. (Vol 20) 1933 Bom 438 (439) : 35 Cri L Jour 104 (1).

9. Unserviceable arms. — [1] A revolver, the trigger of which is out of order, is a fire-arm within the meaning of the Arms Act. In such cases, the question is not so much whether the particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm. (1898) 21 Mad 360 (362) (FB). [Overruling (1883) 6 Mad 60 (60, 61) (FB).]; (1908) 7 Cri L Jour 350 (352) (Lah); (1909) 9 Cri L Jour 259 (260, 261) (FB); (Vol 10) 1923 Lah 617 (618) : 25 Cri L Jour 539; (Vol 20) 1933 Cal 495 (495) : 34 Cri L Jour 916; (Vol 30) 1943 Mad 661 (661) : 45 Cri L Jour 124; (Vol 24) 1937 Nag 213 (215) : 38 Cri L Jour 639 : I L R (1937) Nag 488. (Gun without percussion cap is arm.)

[But see (1884) 7 Mad 70 (71).]

[2] See also S. 19 Cl. (f) Note 12.

SECTION 5 — NOTE

[1] A sikh is not exempted from the operation of prohibition as to manufacture of Kirpans, though he can possess them. (Vol 10) 1923 Lah 267 (267) : 25 Cri L Jour 342 : 3 Lah 437.

[2] In the Arms Act, the word "repair" appears neither in the provision prescribing a licence, nor in the provision prescribing a penalty, the word "convert" being used in substitution therefor. The term "manufacture" cannot be construed to include "repair". (1905) 1 Weir 653 (653); (1905) 1 Weir 656 (656).

[3] The word "manner" as used in S. 5 appears to have reference to the conditions under which a licence for the weapon is given, e.g., as to how it is to be kept, and used and as to its being produced at the time required. Hence altering a match-lock into percussion-gun, is not punishable, as this does not amount to conversion. (1887) 10 Mad 131 (132).

[4] The section does not at all speak about permission to sell. An application by the accused for permission to sell his gun amounts to giving notice under S. 5. (1883) 6 Mad 60 (61) (FB).

[5] The manufacture or possession of fire-works, including rockets which are mere fire-works, does not

III.—IMPORT, EXPORT AND TRANSPORT.

6. No person shall bring or take by sea or by land into or out of British India any arms, ammunition or military stores except under a license and in the manner and to the extent permitted by such license.

Unlicensed importation and exportation prohibited.

Nothing in the first clause of this section extends to arms (other than cannon) or ammunition imported or exported in reasonable quantities for his own private use by any person lawfully entitled to possess such arms or ammunition; but the Collector of Customs or any other officer empowered by the ^a[Central Government] in this behalf by name or in virtue of his office may at any time detain such arms or ammunition until he receives the orders of the ^a[Central Government] thereon.

Importation and exportation of arms and ammunition for private use.

Explanation.—Arms, ammunition and military stores taken from one part of British India to another by sea or across intervening territory not being part of British India, are taken out of and brought into British India within the meaning of this section.

[a] Substituted by A. O. for "Local Government."

Sanction of Central Government required to warehousing of arms, etc.

7. Notwithstanding anything contained in the Sea Customs Act, 1878, no arms, ammunition or military stores shall be deposited in any warehouse licensed under section 16 of that Act without the sanction of the ^a[Central Government].

[a] Substituted by A. O. for "Local Government."

8. [Levy of duties on arms, etc., imported by sea.] *Repealed by the Amending Act, 1891 (XII of 1891).*

9. [Power to impose duty on import by land.] *Repealed by the Amending Act, 1891 (XII of 1891).*

Power to prohibit transport.

10. The ^a[Central Government] may from time to time by notification in the ^b[Official Gazette],—

- (a) regulate or prohibit the transport of any description of arms, ammunition or military stores over the whole of British India or any part thereof, either altogether or except under a license and to the extent in the manner permitted by such license and,
- (b) cancel any such notification.

Explanation.—Arms, ammunition or military stores transhipped at a port in British India are transported within the meaning of this section.

[a] Substituted by A. O. for "Governor-General in Council." [b] Substituted by A. O. for "Gazette of India."

11. The ^a[Central Government] ^b* * * * may, at any places along the boundary-line between British India and foreign territory, and at such distance within such line as it deems expedient, establish searching-posts at which all vessels, carts and baggage-animals, and all boxes, bales and packages in transit, may be stopped and searched for arms, ammunition and military stores by any officer empowered by ^c[the Central Government] in this behalf by name or in virtue of his office.

Power to establish searching stations.

[a] Substituted by A. O. for "Local Government." [b] Words "with the previous sanction of the Governor-General in Council," were repealed by A. O. [c] Substituted by A. O. for "such Government".

12. When any person is found carrying or conveying any arms, ammunition or military stores, whether covered by a license or not, in such manner or under such circumstances as to afford just grounds of suspicion that the same are being carried by him with intent to use them, or that the same may be used, for any unlawful purpose, any person may without warrant apprehend him and take such arms, ammunition or military stores from him.

Arrest of persons conveying arms, etc., under suspicious circumstances.

Procedure where arrest made by person not Magistrate or Police officer.

Any person so apprehended, and any arms, ammunition or military stores so taken by a person not being a Magistrate or Police-officer, shall be delivered over as soon as possible to a Police-officer.

All persons apprehended by, or delivered to, a Police-officer, and all arms and ammunition seized by or delivered to any such officer under this section shall be taken without unnecessary delay before a Magistrate.

Section 5 (contd.)

come within the prohibition of S. 5. (1882) 5 Mad 159 (160).

[6] The sale of ammunition by an agent of a licensee holder effected on the premises covered by the license is

not illegal. (1889) 12 Mad 473 (475).

[7] Under S. 5 it is a proper thing for the Court to give notice when ordering the sale of arms. (1885) 9 Bom 518 (520).

[8] See also Note on Section 19 Cl. (a).

IV.—GOING ARMED AND POSSESSING ARMS, ETC.

Prohibition of going armed without license.

13. No person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby.

Any person so going armed without a license or in contravention of its provisions may be disarmed by any Magistrate, Police-officer or other person empowered by the ^a[Central Government] in this behalf by name or by virtue of his office.

[a] *Substituted by A. O. for "Local Government."*

Unlicensed possession of fire-arms, etc. **14.** No person shall have in his possession or under his control any cannon or fire-arms, or any ammunition or military stores, except under a license and in the manner and to the extent permitted thereby ^a[* * * *].

[a] Last three paras. were repealed by the Amending Act, 1891 (12 [XII] of 1891).

SECTION 13 — SYNOPSIS.

1. "Going armed."
2. Servant of a licensee going armed.
3. "To the extent and in the manner permitted thereby."
4. "Under a license."

1. "Going armed." — [1] The term "going armed" in S. 13 means "carrying arms." (1905) 1 Weir 663 (663).

[But see (1897-1901) 1 Upp Bur Rul 1. (Carrying arms does not necessarily equal going armed.)]

[2] Taking blunt spear, capable of being sharpened, to parade ground for gymnastic purposes is "going armed." (Vol 17) 1930 Bom 174 (175): 31 Cri L Jour 1109.

[3] A man who is found going about with a pistol, gun or sword, must, in the absence of proof to the contrary, be presumed to be carrying it with intention of using it, should an opportunity arise. Hence, he goes armed within the meaning of this section. (Vol 24) 1937 Nag 213 (214): 38 Cri L Jour 639: 1 L R (1937) Nag 488.

[4] A person, who appears in a public place or issues from his own property or abode, having about his person a weapon of the sort described in S. 4, and not covered by a licence goes armed within the meaning of S. 13 of the said Act. (1893-1900) Low Bur Rul 284.

[5] Where the accused was found in another man's house wearing dagger and did not allege that the dagger was not his or that he had not brought it to the house but specified the purpose for which the dagger was used, held, that the offence of "going armed with a dagger in contravention of S. 13" had been committed by the accused. (1897-1901) Upp Bur Rul Vol 1, 4 (4, 5).

[6] To be in possession or control of arms other than those mentioned in S. 14 is not an offence, though it is an offence to go armed with them, as provided in S. 13. (Vol 20) 1933 Cal 692 (694): 60 Cal 1432: 35 Cr L Jour 125; (1892-1896) 1 Upp Bur Rul 1 (1).

[7] The accused, who was found wearing a dagger, was wanted by the police for the commission of theft for which he was sentenced. It was held that in the circumstances of the case the accused was going armed. (1897-1900) 1 Upp Bur Rul 4 (5).

[8] See also Section 19, Note 5.

2. Servant of licensee going armed. — [1] A servant carrying some arms of his master having no control over the use of them, cannot be said to be going armed. (1897-1901) 1 Upp Bur Rul 1.

[2] Servant of an exempted person carrying or using gun of his master with his permission commits no offence. (Vol 6) 1919 All 160 (160): 20 Cr L Jour 432; (1899) 3 CWN 394 (395); (1912) 13 Cr L Jour 860 (860): 37 Bom 181. (A servant sent by his master to bring back a gun left at a village cannot be convicted for possession of the gun while he is bringing it back.); (1881) 1881 All W N 7 (8). (Gun lent to servant to shoot

game.); (Vol 4) 1917 All 327 (328): 18 Cri L Jour 297. (Do.)

[But see (1911) 12 Cri L Jour 122 (122). (A servant going out with his master's gun, at the request of his master, to shoot duck for him is guilty of "going armed.")]

[3] Where a person was allowed under a notification to carry a gun for his "personal use," held, that the servant of such person cannot be convicted for carrying the gun and using it for the purpose of shooting game for his master, because such use comes within the expression "personal use." (1900) 22 All 118 (120).

[4] A licence to carry arms including a retainer, authorizes any retainer to carry the arms specified in the licence with the permission of his master. The licence should not be so construed as to restrict the retainer to carry the arms only in the presence of the master. (1893) 20 Cal 444 (446).

[5] See also Section 19, cl. (f), Note 9.

3. "To the extent and in the manner permitted thereby." — [1] A licence prescribed that arms should not be carried in a religious procession or a public assemblage. When arms were carried in a marriage procession, it was held that the accused did not break the condition of the licence as marriage procession is neither the religious nor the public assemblage. (Vol 15) 1928 Nag 219 (220): 29 Cri L Jour 575.

[But see (Vol 10) 1923 Bom 35 (36): 23 Cri L Jour 450. (Marriage procession becomes a public assemblage as soon as it emerges into a public road.)]

[2] Where a licence to go armed is granted for protection only, the licensee cannot use it for sport or display. (1905) 1 Weir 663 (663).

4. "Under the license." — [1] Section 13 prohibits any person from going armed except under the licence. These words cannot be held to mean that the licensee is bound to take his licence with him whenever he goes armed. (1905) 1 Weir 661 (661): (Vol 8) 1921 Oudh 149 (149): 22 Cri L Jour 755: 24 Oudh Cas 265.

[2] If the bearer of arms on being required to show his licence is prepared to produce it on being given a reasonable opportunity to get it, and such licence exists, he should not be prosecuted. The production of the licence at the trial is a sufficient answer to the charge of infringing the Arms Act. (1893) 20 Cal 444 (446).

SECTION 14 — SYNOPSIS.

1. Manner and extent.
2. Military stores.
3. Persons exempted from licence.
4. Possession and licence.

1. Manner and extent. — [1] The word "extent" in S. 14 is not limited in its meaning to territorial extent. (Vol 20) 1933 Cal 218 (219): 34 Cr L Jour 363: 60 Cal 445.

[2] Where a licence for breach loading gun authorizes licensee to keep cartridges, the licensee is not

15. In any place to which section 32, clause 2, of Act No. XXXI of 1860^a applies at the time this Act comes into force or to which ^b[the Central Government] may by notification in the ^c[Official Gazette] specially extend this section,^d no person shall have in his possession any arms of any description, except under a license and in the manner and to the extent permitted thereby.

[a] Act 31 [XXXI] of 1860 was repealed by S. 3 of this Act. [b] Substituted by A. O. for "the Local Government with the previous sanction of the Governor-General in Council." [c] Substituted by A. O. for "Local Official Gazette." [d] Section 15 has been especially extended to—(1) Places in Bombay, see Bom. R. and O. (2) Places in Madras, see Mad. R. and O. (3) Places in Punjab, see Punjab Gazette, 1899, Pt. I, p. 285; *ibid* 1900 Pt. I, p. 810. (4) Places in U. P., see U.P.R. and O. (5) Places in Assam, see Assam Gazette, Extra, dated 23-3-1923.

^a**16.** (1) Any person possessing arms, ammunition or military stores the possession whereof has, in consequence of the cancellation or expiry of a license or of an exemption or by the issue of a notification under section 15 or otherwise, become unlawful, shall without unnecessary delay deposit the same

In certain cases arms to be deposited at police-stations or with licensed dealers.

Section 14 (contd.)

debarred from possessing powder for purpose of re-loading cartridges. The word "manner" in S. 14 must not be given a restricted meaning. (Vol 33) 1946 Oudh 124 (125).

[3] Where the licence is for a full-sized gun, possessing under it half barrel gun is an offence. (Vol 15) 1928 Lah 759 (759) : 29 Cri L Jour 472.

[4] In a District where bisons were notoriously in the habit of injuring crops, a licence for a gun was given under Form 11 Rule 16 to kill wild beasts doing damage to crops. It was held that the licence-holder could use the gun for shooting bison for sport. (1893) 5 Mad 26 (27, 28).

2. Military stores.—[1] Dalwes, spears and forks do not come within the term "military stores" in S. 14, and they can be possessed. (1892-96) 1 Upp Bur Rul 1 (1).

3. Persons exempted from licence. — [1] The petitioner, who was promoted from the rank of Havildar to the rank of Jamadar on 30th August, with retrospective effect from the 1st June, was held to be a commissioned officer from the 1st June, and therefore was held to fall within one of the classes exempted by the Government of India from the operation of the prohibition contained in S. 14 of the Arms Act. (1895) 1885 Pun Re No. 27 Cr p. (64).

[2] If it is established that an accused had no licence and if he could not prove himself to be exempted under the Act or Rules he would be a person within the provisions of S. 14. (Vol 19) 1932 Rang 180 (182) : 34 Cri L Jour 112.

[3] Held that under Sch. 7, Item (c) of the Rules of 1924, a person would not be entitled to be exempt from a licence though he may be exempted from payment therefor. (Vol 19) 1932 Rang 180 (182) : 34 Cri L Jour 112.

[4] See also Section 19, Cl. (f) Note "exemptions."

4. Possession and licence.—[1] Throughout the Act the word "possession" must be taken to mean something different from mere "control." A servant using a gun belonging to his master would no doubt have the weapon under his control but its possession is with his master only. (1908) 8 Cri L Jour 13 (19).

[2] The possession of a gun without a licence by the servant of a person exempted from keeping licence is not an offence under S. 14. (1885) 1885 Pun Re No. 27 Cr p. (64).

[3] The unserviceable remains of a gun could not be fairly described as 'fire-arm' within the meaning of S. 14 of this Act and do not require to be protected by a licence under that section. (1899) 12 C P L R 8 (9) Cr. (1893) 6 Mad 60 and 7 Mad 70, referred to.)

[4] A gun-barrel is not a "fire-arm" within the

meaning of S. 14, nor does it fall under any of the other articles mentioned in that section. It can be possessed without licence. (1899) 12 CPLR 10 (11) (Cr).

[5] A person who possesses an arm after the expiry of the licence commits an offence under S. 19 (f). (Vol 24) 1937 Pesh 30 (31) : 38 Cri L Jour 396; (Vol 20) 1933 Cal 218 (219) : 60 Cal 445 : 34 Cri L Jour 363. (Even for a month.)

[6] Upon the death of a licence-holder, the person succeeding him to the management of his property did not renew the licence for a gun. The gun was, two years after the death, found in possession of one of the servants. It was held that the servant was guilty. (1912) 13 Cri L Jour 525 (525).

[7] An order extending time for renewal of licence keeps a licence already granted in force till the expiry of the time extended. The licensee cannot be convicted of an offence of possession of arms before the extended time. (1899) 3 Cal W N 394 (394).

[8] A licence for a gun was granted under Form 16 but was not renewed before the period prescribed for renewal. It was held that possession of the gun after the expiry of such period was an offence. The fact that there is a provision for renewing the licence during a further period on payment of certain fees does not affect the position. (Vol 29) 1942 Lah 300 (301) : 44 Cri L Jour 101 : 11LR (1943) Lah 756.

[9] From the fact that accused are members of an organisation, the object of which is to commit terroristic offences, it would not follow, in the absence of other evidence, that the accused were also parties to a criminal conspiracy for the definite and specific purpose of possessing fire-arms in contravention of the Act. This prosecution must specially prove. (1936) 37 Cri L Jour 840 (842).

1. SECTION 15.

[1] The possession of bayonets without a licence is not an offence punishable under the Arms Act except in districts proclaimed under S. 15 of that Act. (1872-92) 1872-92 Low Bur Rul 426.

[2] Under the U. P. Arms Rules and Orders (1924), R. 35, a repairer of arms in possession of guns for repairs cannot be convicted of offence of being in possession of arms without licence—Length of justifiable time of possession depends upon circumstances. (Vol 16) 1929 All 720 (720) : 30 Cri L Jour 984 : 52 All 92.

[3] The possession of a sword or dagger without a licence in a place to which S. 15 has not been rendered applicable, is not punishable under S. 19 (f). (1905) 1 Weir 666 (666).

[4] Held that in the absence of any notification under S. 15, the possession of any arms in the Badami Taluka was not punishable. (1885) 9 Bom 478 (482).

either with the officer in charge of the nearest police-station or, at his option and subject to such conditions as the ^b[Central Government] may by rule prescribe, with a licensed dealer.

(2) When arms, ammunition or military stores have been deposited under sub-section (1) or before the first day of January 1920, under the provisions of any law for the time being in force, the depositor shall, at any time before the expiry of such period as the ^b[Central Government] may by rule prescribe, be entitled —

- (a) to receive back any thing so deposited the possession of which by him has become lawful, and
- (b) to dispose, or authorize the disposal, of any thing so deposited by sale or otherwise to any person whose possession of the same would be lawful; and to receive the proceeds of any such sale :

Provided that nothing in this sub-section shall be deemed to authorize the return or disposal of anything the confiscation of which has been directed under section 24.

(3) All things deposited as aforesaid and not returned or disposed of under sub-section (2) within the prescribed period therein referred to shall be forfeited to His Majesty.

(4) (a) The ^b[Central Government] may make rules consistent with this Act for carrying into effect the provisions of this section.

(b) In particular and without prejudice to the generality of the foregoing provisions, the ^b[Central Government] may by rule prescribe —

- (i) the conditions subject to which arms, ammunition and military stores may be deposited with a licensed dealer, and
- (ii) the period after the expiry of which things deposited as aforesaid shall be forfeited under sub-section (3).]

[a] *Substituted* by the Indian Arms (Amendment) Act, 1919 (20 [XX] of 1919), S. 2 for the original section. [b] *Substituted* by A. O. for "Local Government".

V. LICENCES.

17. The ^a[Central Government] may from time to time by notification in the ^b[Official Gazette], make rules to determine the officers by whom the form in ^cPower to make rules as to which, and the terms and conditions on and subject to which, any license shall be granted^c; and may by such rules among other matters —

- (a) fix the period for which such license shall continue in force;
- (b) fix a fee payable by stamp or otherwise in respect of any such license granted in a place to which section 32, clause 2, of Act No. XXXI of 1860^d applies at the time this Act comes into force or in respect of any such license other than a license for possession granted in any other place;
- (c) direct that the holder of any such license other than a license for possession shall keep a record or account, in such form as the ^e[Central Government] may prescribe, of anything done under such license, and exhibit such record or account when called upon by an officer of Government so to do;
- (d) empower any officer of Government to enter and inspect any premises in which arms, ammunition or military stores are manufactured or kept by any person holding a license of the description referred to in section 5 or section 6;
- (e) direct that any such person shall exhibit the entire stock of arms, ammunition and military stores in his possession or under his control to any officer of Government so empowered; and
- (f) require the person holding any license or acting under any license to produce the same, and to produce or account for the arms, ammunition or military stores covered by the same when called upon by an officer of Government so to do.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India". [c] For rules as to licenses, see the Indian Arms Rules, General Rules and Orders, Vol. II; [d] Act 31 [XXXI] of 1860 was repealed by S. 3 of this Act; [e] *Substituted* by A. O. for "Local Government."

1. SECTION 17.

[1] Licence-holder must apply for renewal before expiry of license—Possession of gun after expiry is offence under S. 19 (f). (Vol 29) 1942 Lah 300 (300) : 44 Cri L Jour 101 : ILR (1943) Lah 756.

[2] Persons who are granted licenses to carry arms to kill lions which are notoriously in the habit of injur-

ing crops will be justified in going armed for the purposes of sport and no separate licence under S. 17 is necessary. (1882) 5 Mad 26 (27).

[3] When, receiving applications for licences a District Magistrate acts as an executive officer and not as a Court. Hence the rules framed by the High Court do not apply. (1908) 4 Nag L R 134 (136).

Cancelling and suspension of license.

18. Any license may be cancelled or suspended—

- (a) by the officer by whom the same was granted or by any authority to which he may be subordinate, or by any Magistrate of a district, or Commissioner of Police in a presidency-town, within the local limits of whose jurisdiction the holder of such license may be, when for reasons to be recorded in writing, such officer, authority, Magistrate or Commissioner deems it necessary for the security of the public peace to cancel or suspend such license; or
- (b) by any Judge or Magistrate before whom the holder of such license is convicted of an offence against this Act, or against the rules made under this Act; and

^a[the Central Government may by a notification in the Official Gazette cancel or suspend all or any licenses throughout the whole or any portion of British India].

[a] *Substituted by A. O. for* "the Local Government may at its discretion [by a notification in the local official Gazette cancel or suspend all or any licenses throughout the whole or any portion of the territories under its administration."

VI. PENALTIES.

For breach of sections 5, 6, 10, 13 to 17.

19. Whoever commits any of the following offences (namely) :—

- (a) manufactures, converts or sells, or keeps, offers or exposes for sale, any arms, ammunition or military stores in contravention of the provisions of section 5;
- (b) fails to give notice as required by the same section;
- (c) imports or exports any arms, ammunition or military stores in contravention of the provisions of section 6;
- (d) transports any arms, ammunition or military stores in contravention of a regulation or prohibition issued under section 10;
- (e) goes armed in contravention of the provisions of section 13;
- (f) has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section 14 or section 15;
- (g) intentionally makes any false entry in a record or account which, by a rule made under section 17, clause (c), he is required to keep;
- (h) intentionally fails to exhibit anything which, by a rule made under section 17, clause (e), he is required to exhibit; or
- (i) fails to deposit arms, ammunition or military stores, as required by section 14 or section 16;

shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

[a] Offences under this section are bailable, *see* Schedule II, Code of Criminal Procedure, 1898 (Act V of 1898).

PROVINCIAL AMENDMENT

S. 19A

Bengal.—After section 19 the following section shall be *inserted*, namely :—

For breaches of sections 6, 13, 14 and 15 in respect of certain arms. "19A. Notwithstanding anything contained in section 19, whoever commits an offence under clause (a), (c), (e) or (f) of section 19 shall if the offence is committed in respect of a pistol, revolver, rifle or shot gun, be punished with transportation for life or any shorter term, or with imprisonment for a term which may extend to fourteen years, or with fine."

— BENGAL ACT XXI OF 1932, S. 3, [12-1-1932] as amended by BENGAL ACT VII OF 1934 [29-3-1934].

SECTION 19—SYNOPSIS

1. Section 19—General.
2. Section 19, clause (a).
3. Section 19, clause (c).
- 3a. Section 19, clause (d).
4. Section 19, clause (e)—General.
5. Section 19, clause (e)—"Goes armed."
6. Section 19, clause (f)—Exemptions.
7. Section 19, clause (f)—General.
8. Section 19, clause (f)—Illustrative cases.
9. Section 19, clause (f)—Possession by servant of a license-holder.

10. Section 19, clause (f)—Possession of accused must be proved to be exclusive.
11. Section 19, clause (f)—Possession of arms found in a house belonging to a joint family.
12. Section 19, clause (f)—Possession of arms in unserviceable condition.
13. Section 19, clause (i).
14. Sanction—See S. 29, Note 3.

1. Section 19—General.—[1] An offence under S. 19 is not triable summarily. (1905) 1 Weir 654 (654).

[2] Under the provisions of S. 19 a Magistrate, on finding the accused guilty, is bound to pass some sen-

Section 19 (*conid.*)

tence, though, of course, it is open to him to pass a nominal sentence. (1905) 1 Weir 654 (654).

[3] Solitary confinement cannot be awarded for offences under the Arms Act. (Vol 11) 1924 Lah 667 (667) : 25 Cri L Jour 120.

[4] A joint trial of the accused for offences under S. 29, Frontier Crimes Regulation and S. 19, Arms Act, is not open to any objection. (Vol 20) 1933 Pesh 90 (94) : 35 Cri L Jour 399.

[5] An order confiscating a gun because of delay in renewing a licence is illegal. The proper order is imposition of a fine and detention of the gun in police-station till the production of the licence. (Vol 2) 1915 Mad 130 (130) : 15 Cri L Jour 21.

[6] Accused charged under S. 120B, Penal Code, read with Ss. 19 and 20, Arms Act — Accused when arrested found in possession of arms—*Held*, two cases were wholly independent and separate proceedings could be taken under Arms Act. (Vol 20) 1933 Lah 231 (231) : 34 Cri L Jour 637.

[7] Where a person is found in possession of a stolen revolver there is no legal bar to two trials and two punishments, one under Arms Act, S. 19 and the other under S. 411, Penal Code. (Vol 20) 1933 All 461 (462) : 34 Cri L Jour 1018.

2. Section 19, clause (a).—[1] Keeping of arms under S. 19 (a) must be a keeping for sale and not a mere keeping. (Vol 2) 1915 Cal 719 (723) : 42 Cal 1153 : 16 Cri L Jour 9.

[2] Where the accused, who had a licence under the Explosives Act to manufacture and sell gunpowder and fire-works on certain premises, manufactured fire-works at a different place, it was held that the accused could not be convicted under the Arms Act. (1905) 1 Weir 656 (656).

[3] The mere possession or sale of fire-works, without a licence, is no offence under the Arms Act. But the possession of gunpowder without a licence, even though for the innocent purpose of making fire-works, is an offence. (1889) 12 Mad 473 (475).

[4] A person, in possession of a quantity of gunpowder without licence is liable to be convicted under S. 19, although he may intend to employ the powder in the manufacture of fire-works or other harmless purposes, inasmuch as gunpowder is a material capable of being used for purposes of warfare. (1885) 8 Mad 202 (204).

[5] There is nothing in the Arms Act or the rules, which renders a sale of sulphur and ammunition by the agent of a license-holder illegal. (1889) 12 Mad 473 (475).

[6] An order extending the time for renewal of a licence has the effect of keeping a licence previously granted practically in force. (1899) 3 Cal W N 394 (395).

[7] One of the rules in the Arms Manual provided that lead required in good faith for industrial and manufacturing purposes (other than the manufacture of bullets or birdshot) is excepted from all the prohibitions and directions in the Arms Manual. It was held that the Magistrate should have, in his examination of the accused, put some questions with a view to elucidating from them whether they were *prima facie* vendors of lead for industrial purposes. (Vol 17) 1930 Rang 349 (350) : 32 Cri L Jour 206.

[8] See also Note on Section 5.

3. Section 19, clause (c). — [1] Even a servant carrying a gun for the purpose of having it repaired, which has no license acknowledged by the British Government, will not be protected from the provisions of

S. 19, cl. (c). (Vol 16) 1929 Oudh 157 (158) : 30 Cri L Jour 543.

[2] Under S. 19 (c), the offence of possessing arms unlawfully by a person entering British India is complete the moment he enters with the arms in his possession. No particular intention in the mind of the offender is necessary. (1912) 13 Cri L Jour 776 (777) : 35 Mad 596.

3a. Section 19, clause (d). — [1] Ordering gun from dealer in Bombay ostensibly for another but really for himself does not amount to offence under S. 19 (d). (Vol 16) 1929 Mad 864 (864, 865) : 31 Cri L Jour 273 : 52 Mad 999.

4. Section 19, clause (e) — General. — [1] No Magistrate of the second class has the power to try an offence under S. 19 (e) of the Arms Act. (1905) 1 Weir 660 (660).

[2] Accused is a *lambardar* of 30 years' age. There is no reason to show leniency by not sentencing him but only taking security under S. 562, Criminal P. C. His age and the fact that the offence is a first offence are no considerations. (Vol 24) 1937 Pesh 51 (51, 52) : 38 Cri L Jour 610.

[3] As to the cases decided with respect to notifications issued by the Government and rules framed, see (1862-68) Rai Un Cr C 507 (508) ; (1901) 14 C P L R 112 (113) Cr.

[4] The accused was arrested in a street having in his possession a loaded revolver, a jemmy and an auger. He was prosecuted in separate cases and was convicted and sentenced to separate punishments under S. 19 (e) and S. 30 of Rangoon Police Act, 1899—*Held*, that the prosecution under S. 30 of the Rangoon Police Act was improper. (1906) 3 Low Bur Rul 218 (219) (FB).

5. Section 19, clause (e) — "Goes armed".

[1] The essence of the offence is the going armed, i. e. carrying a weapon with the intention of using it as a weapon, when the necessity or opportunity arises. (1902) 24 All 454 (455) ; (Vol 12) 1925 Mad 585 (585) : 26 Cri L Jour 1028 ; (1891) 1891 All W N 208 (208). ("Going armed" does not include taking arms for the purpose of repair.) ; (1893) 15 All 27 (28). (Unless he is licensed to carry the weapon and is not exceeding the terms of his license, he may be properly convicted under S. 19 (e)) ; (Vol 16) 1929 Bom 283 (285, 286) : 30 Cri L Jour 1059 : 58 Bom 604. (Going need not be habitual. An isolated act of carrying a weapon without license is enough to constitute offence.)

[2] "Armed" includes carrying an arm not capable of immediate use. (Vol 12) 1925 Sind 177 (178) : 25 Cri L Jour 448 : 18 Sind L R 272 ; (Vol 24) 1937 Nag 213 (214, 215) : 38 Cri L Jour 639 : ILR (1937) Nag 488.

[3] Where the accused, the servant of a license-holder was in possession of his master's gun on behalf of master who was away and who had left the place where the accused was guarding his master's money for a short time only it was held that the accused was not liable to be convicted. (Vol 20) 1933 Pat 600 (600) : 35 Cri L Jour 127.

[4] Use of a gun by the servant of a licensee for his own purposes is an offence though the servant can carry legally the gun for the purposes of his master or in the presence of his master. (Vol 11) 1924 Mad 668 (669) : 25 Cri L Jour 975 : 47 Mad 438.

[5] The word "arms" as defined in S. 4, includes part of arms. It would, therefore, include a gun minus a percussion cap, and a person carrying that gun would be going armed with arms and the person carrying such a gun without licence would be guilty under S. 19 (e). (Vol 24) 1937 Nag 213 (214) : 38 Cri L Jour 639 : ILR (1937) Nag 488.

Section 19 (*contd.*)

[6] The possession of a gun without ammunition, in the absence of a licence, is not punishable under S. 19 (*e*). (1882) 5 Mad 26 (28).

[7] To carry a weapon not in the hands but tied to the cycle in the manner of a piece of luggage amounts to going armed within the meaning of cl. (*e*). (Vol 28) 1941 Pat 284 (285) : 42 Cri L Jour 341.

[8] Where an accused who was charged under Ss. 395 and 457, Penal Code, and S. 19 (*e*) of the Arms Act, for being armed with a pistol at the time of the dacoity, but for that charge there was no evidence except his own confession which had been found to be suspicious and not voluntary and an exculpatory statement of the co-accused which could not be taken into consideration as such under S. 30 of Evidence Act, it was held that the conviction of the accused under S. 19 (*e*), Arms Act, was not proper. (Vol 32) 1945 Bom 484 (488, 489) : 47 Cri L Jour 252.

[9] See also Section 13, Note 1.

6. Section 19, clause (f) — Exemptions. — [1] Person claiming exemption must prove that he comes within it. (Vol 9) 1922 Lah 141 (142) : 23 Cri L Jour 78.

[2] Sikhs are exempt from prosecution under S. 19 (*f*) for possessing a sword or *Kirpan*. (Vol 11) 1924 Lah 600 (601) : 26 Cri L Jour 661 : 5 Lah 308 ; (Vol 17) 1930 Bom 153 (154) : 31 Cri L Jour 847. (*Kirpan* nine to ten inches long are not swords) ; (Vol 9) 1922 Lah 141 (142) : 23 Cri L Jour 78. (Though *Kirpan* means sword, every sword cannot be a *Kirpan* within the meaning of the word.)

[3] Held, that the possession of a double barrelled gun by the accused, who was a reservist, did not constitute any offence. (1902) 1902 Pun L R No. 1 p. (16).

[4] The exemption of volunteers from the operation of the Arms Act, by Government of India notification is not confined merely to purposes of volunteering. A volunteer is, by virtue of such exemption, entitled to keep fowling pieces and to use them for the purpose of protecting his cultivation. (1900) 22 All 323 (326).

[5] Possession of *jambia* is not offence in Bombay Presidency under S. 19. (Vol 17) 1930 Bom 159 (159) : 31 Cri L Jour 932.

[6] See also Section 14, Note 3.

7. Section 19, clause (f) — General. — [1] Section 19 (*f*) of the Arms Act does not make the mere possession of a gun punishable; it makes possession contrary to the provisions of S. 14 of that Act punishable. The snatching up of a gun, which was in the hands of another, and firing it at a mad dog, do not constitute the possession contemplated by S. 14 of the Arms Act. (1908) 7 Cri L Jour 112 (113) : 35 Cal 219.

[2] Offence under S. 19 is complete as soon as accused is found in possession of arms and ammunition in contravention of S. 14 or S. 15. (Vol 22) 1935 Pat 465 (467) : 37 Cri L Jour 100.

[3] Recovery of arms not in presence of witnesses cannot be relied on. (Vol 10) 1923 Lah 466 (466).

[4] Conviction under Arms Act, S. 19 (*f*) should not be altered in revision to one under Explosives Act, unless the conviction under the latter Act was obviously correct and unless the accused was prejudiced by being charged under the Arms Act. (Vol 18) 1931 All 17 (18) : 32 Cri L Jour 564 : 53 All 226.

[5] Minor in possession of arms without licence can be convicted under S. 19 (*f*). (Vol 5) 1918 All 107 (108) : 19 Cri L Jour 447 : 40 All 420.

[6] It is for the prosecution to prove definitely that the number of cartridges in the actual possession of the accused on any particular date exceeded the number covered by his licence. The Court cannot be called upon to draw an inference that he had in fact a larger

number of cartridges in his possession. (Vol 20) 1933 Lah 166 (166) : 34 Cri L Jour 190.

[7] Offence under S. 19 (*f*) is cognizable by Police. (1936) 1936 Mad W N 624 (625).

[8] In the case of illegal possession of revolver while preparing for dacoity, S. 239 (*d*), Criminal P. C., applies and the accused can be jointly tried under S. 399, Penal Code, and S. 19 (*f*), Arms Act. (Vol 24) 1937 Lah 793 (794) : 39 Cri L Jour 141.

[9] Conviction under Ss. 411 and 414, Penal Code, in respect of possession of stolen revolver is no bar to a conviction in respect of it under S. 19 (*f*), Arms Act. (Vol 20) 1933 Oudh 470 (472) : 35 Cri L Jour 86.

[10] Use of pistol by accused, with reckless disregard to consequences, against a police constable who was chasing him, the bullet remaining lodged inside the body of the police-man — Accused is guilty both under S. 307, Penal Code, and S. 19 (*f*), Arms Act. (Vol 20) 1933 Lah 852 (854) : 35 Cri L Jour 171 : 14 Lah 820.

[11] A person cannot be convicted both under Ss. 20 and 19 (*f*) in respect of the same revolver. (Vol 20) 1933 Cal 594 (597) : 35 Cri L Jour 226.

[12] Where an article, the possession of which is forbidden by the Indian Arms Act, has been discovered by reason of information given by an accused person, his conviction based upon that evidence is valid. (Vol 14) 1927 Lah 900 (900) : 28 Cri L Jour 250.

[13] License-holder cannot transfer privilege to possess rifle to non-license-holder for his own private use. But that if possession of the non-license-holder is not for any unlawful purpose, though his actual possession is unlawful, a nominal sentence will be sufficient to meet the ends of justice. (Vol 22) 1935 Pesh 103 (104) : 36 Cri L Jour 1204.

[14] The sentence of one year's rigorous imprisonment under S. 19 (*f*), Arms Act, for the offence of being in possession of unlicensed revolver is not appropriate sentence. (Vol 23) 1936 All 850 (851) : 38 Cri L Jour 137 : 1 L R (1937) All 308. (Sentence was enhanced to two years' rigorous imprisonment.)

8. Section 19, clause (f) — Illustrative cases. — [1] Accused's brother held license — Accused fired blank shots to warn would be mischief makers — Accused was not guilty. (Vol 12) 1925 All 396 (397) : 26 Cri L Jour 987 : 47 All 606.

[2] Son of a licensee (the latter not being entitled to hand over gun to retainer by the letter of the licensee) was convicted for possessing father's gun for shooting birds, though the spirit of law was not contravened. (Vol 12) 1925 All 175 (176) : 26 Cri L Jour 479 : 47 All 267.

[3] The carrying of a gun *without ammunition*, by an unlicensed person, is an offence under S. 19 (*f*) but not under S. 19 (*e*). (1905) 1 Weir 661 (662).

[4] Section 19 (*f*) — Agreement of parties is an overt act expressing intention to possess fire-arms making offence complete — To prove conspiracy to possess fire-arms conspiracy in respect of particular fire-arms need not be proved. (Vol 14) 1927 Cal 265 (266) : 28 Cri L Jour 241.

[5] Forbidden weapon discovered by reason of information from accused — His conviction based upon that evidence is valid. (Vol 14) 1927 Lah 900 (900) : 28 Cri L Jour 250.

[6] In a District which has not been disarmed, the possession of a sword without a license is not an offence under the Act, unless the person in possession goes armed with it. (1905) 1 Weir 666 (666).

[7] Collection of fire-arms by the custodian of a temple for use as objects of worship without either obtaining a licence or an exemption under S. 27 is an offence under S. 19 (*f*). (1882) 8 Cal 473 (476).

Section 19 (*contd.*)

[8] Before entering house to be searched police saw some men throwing something from their persons—Police discovered cartridges under *Chowki* on which accused sat conversing with others—Charge against them rested on suspicion—Their possession or knowledge not proved—They cannot be convicted under S. 19 (f). (Vol 16) 1929 Cal 302 (303) : 30 Cri L Jour 1038.

[9] Where a licensee of gun had gone out for shooting along with his friend and after returning left gun with his friend with intention of returning shortly afterwards for him and the friend did not use it in any way, held that the friend could not be convicted under S. 19 (f) nor licensee under S. 21. (Vol 28) 1941 Pat 209 (211) : 42 Cri L Jour 97.

[10] The term "arms" includes part of arms. Therefore, the possession of a gun-barrel and nipple, without a license, in serviceable condition is an offence under S. 19 (f). (1884) 7 Mad 70 (71).

[11] The case is not within the ambit of S. 19 (f), Arms Act, where two persons make temporary use of revolver with a view to foist a false case upon another person. (1937) 1937 M W N 572 (2) (574).

[12] A having license going out with B for shooting—On way back, on hearing of promulgation of order under S. 144, Cr. P. C., in the town A depositing gun at B's house and going away with intention to return and take back gun—House searched and gun recovered—Held, convictions of B under S. 19 (f) and A under S. 21 were not proper. (Vol 28) 1941 Pat 209 (211) : 42 Cri L Jour 97.

[13] Where it was found that the accused was a rebel against the Crown and in possession of unlawful deadly weapons, it was held that it was immaterial whether the accused used those weapons in acts of aggression or of resistance. (Vol 21) 1934 Cal 221 (228) : 35 Cri L Jour 334.

[14] Accused made over gun to another a year and a half ago to keep for him, he cannot be convicted of an offence under S. 19 (f) of the Act. (1911) 12 Cri L Jour 197 (198) (Cal).

[15] Where in a search of two persons, revolver cartridges are found on the person of one of them but nothing incriminating is found on the other, S. 34, Penal Code, does not apply and a conviction of the latter under S. 19 (f), Arms Act, is not proper nor can he be convicted for abetment. (Vol 20) 1933 Cal 132 (136) : 60 Cal 618 : 34 Cri L Jour 299.

[16] Mere negotiation for sale to an unlicensed person is no offence. (Vol 20) 1933 Cal 218 (219) : 60 Cal 445 : 34 Cri L Jour 363.

9. Section 19, clause (f)—Possession by servant of licence-holder.—[1] Exemption from the operation of the Act applies to the possession of a gun, so long as it is the property of the licensee and the mere fact that it happened at the time to be carried by a servant, does not make the servant liable for not having himself a license under the Act. (1899) 3 Cal W N 394 (395); (Vol 27) 1940 Mad 257 (258) : 41 Cri L Jour 400.

[2] Where the accused, a servant, was found using a gun which was lent to him by his master who held a license for the gun for his own purpose, it was held that the act of the accused was an infringement of the provisions of S. 19 (f) of the Arms Act. (1909) 13 Cal W N 124 (125).

[3] A temporary custody of the gun by the servant does not amount to the "possession" or "control" contemplated by S. 19 (f). (1908) 4 Nag L R 146 (148) (Cr); (1913) 14 Cri L Jour 377 (377, 378); 41 Cal 11. (Possession by servant for carrying it to the Magistrate for the purpose of renewal.); (1894) 16 All 276 (277); (1885) 8 Mad 202 (204).

[4] In the case of an unlicensed weapon neither the actual owner of the gun nor anybody to whom he entrusts it, can be said to be engaged in a legal act, for the possession in that case is illegal whether it be in the possession of the master or of a servant. But where it is not proved that the accused had knowledge that the gun which he was carrying for his master was unlicensed, the offence does not call for a serious punishment. (Vol 24) 1937 Pat 347 (348) : 38 Cri L Jour 409.

[5] Possession by a servant of a gun is legal if his master has a license for the gun. But the master cannot authorise the possession of that gun by his servant for an unlawful purpose. Thus, where the servant uses the gun in a riot, he is guilty under S. 19 (f), Arms Act. (Vol 22) 1935 All 916 (919) : 37 Cri L Jour 35.

[6] Possession of a pistol by servant of the accused was held not to be possession on account of the accused when a pistol was a thing that was not reasonably expected to be sold at the shop of the accused where the pistol was found. (Vol 10) 1923 All 83 (34) : 23 Cri L Jour 729.

[7] See also Section 13, Note 2.

10. Section 19, clause (f) — Possession of accused must be proved to be exclusive. — [1] There is nothing in S. 19 (f), Arms Act, about "exclusive" or "sole" possession or "exclusive" or "sole" control. The test provided by the section is not as to whom the arms belong but whether they are in the "possession" or under the "control" of the person charged. What is contemplated by S. 19 (f) is actual and physical possession and control and not merely a "possession" or "control" by construction of law. It is not a liability to be found in a merely constructive or presumed possession or control which the law might for other purposes import into the facts of the case. (Vol 27) 1940 All 449 (451) : 42 Cri L Jour 59 : I L R (1940) All 657; (Vol 21) 1934 Oudh 200 (207) : 35 Cri L Jour 978. (Arms found concealed underneath a gunny cloth spread inside a bullock cart. Persons found sitting inside the bullock cart jumping out of it and trying to escape.)

[2] Unlicensed gun recovered from Railway premises within Railway fencing, a place where public could not ordinarily go, though it was accessible to them — Recovery made on information given by accused in his statement made in police custody—Gun found concealed from view — It was held that the accused must be deemed to be in possession and control of the gun. (Vol 24) 1937 All 497 (500) : I L R (1937) All 710 : 38 Cri L Jour 910.

[3] When the house of the accused was searched by the police, an unlicensed muzzle loading pistol was found concealed under a heap of grain inside a vessel and inside the barrel of the pistol some percussion caps were also found on removing a wad of cloth from the muzzle of the pistol and it appeared that only the accused and his sons and their wives were living in the house in which the pistol was found, it was held that the accused must have been aware of the presence of the pistol in his house and he was "in possession and control" of it within the meaning of S. 19 (f). (Vol 21) 1934 All 548 (549) : 33 Cri L Jour 428.

[4] When it is not shown that the accused had exclusive possession of the room in which arms are found, or that arms were placed there by him, or belonged to him, or that he knew they were there, the accused cannot be convicted of the offence under S. 19. (1901) 1901 Pun L R No. 75, p. 240.

[5] Where the house belonging to the accused consisted of several *kothas* which were occupied by the accused, his sons and tenants, and unlicensed arms were found in a vacant *kotha* of the house, the accused cannot be liable under S. 19 unless it was shown that the *kotha* in which the arms were found was occupied

Section 19 (*contd.*)

by the accused. (Vol 30) 1943 Pesh 20 (21) : 44 Cri L Jour 385.

[6] Joint possession of *chhavi* by two accused—Exclusive possession by one of them could not be proved—Benefit of doubt must go to the accused. (Vol 10) 1923 Lah 513 (513) : 25 Cri L Jour 399.

[7] Pistol found in room frequented by many persons other than accused — Accused is not in possession. (1926) 27 Cri L Jour 301 (301) (All).

[8] Cartridges were found during an investigation in a theft case in the house of accused. Accused did not know who kept them. Offence under S. 19 (f) is not made out. (Vol 14) 1927 Lah 726 (726) : 28 Cri L Jour 339.

[9] Where the two accused were found lying on a bed in the house of another and in the bedding a *chhavi* was found wrapped in a cloth, it was held that it was impossible to say which of the two was actually in possession and the conviction was illegal. (1922) 23 Cri L Jour 95 (95) (Lah).

[10] Before the Police entered the house which was to be searched, certain persons inside were seen throwing down something from their person, and on a search being made certain cartridges were discovered under the Chowki on which the accused were sitting conversing with others. The cartridges were not proved to be in their possession, nor was it proved that they knew that they were there. *Held*, that the charge against them rested on suspicion and their guilt not being proved they could not be convicted under S. 19 (f). (Vol 16) 1929 Cal 302 (303) : 30 Cri L Jour 1038.

[11] Accused was charged under S. 19 (f) of the Arms Act. The only evidence against him was that at his instance a place was dug up in another person's house, from where a pistol along with some cartridges was recovered. He was not alleged to have been armed with pistol during the commission of the robbery. Moreover, the person from whose house the pistol and cartridges were recovered, was suspiciously withheld by the police. *Held*, that such exclusive possession was not established against the accused as would justify his conviction for the offence of possessing a pistol without a license. (Vol 24) 1937 Lah 561 (562) : 39 Cri L Jour 119.

[12] The house occupied by the accused and others was searched by the police in connection with a burglary case. The police found a room locked in the *senana* portion of the house. The accused, a boy of 18 years, was ordered to bring the key. He got the key from a woman in the *senana* and when the room was searched a gun and some cartridges were found. It was held that accused could not be convicted under S. 19 (f). (Vol 18) 1931 Oudh 115 (116) : 32 Cri L Jour 699.

[13] Accused led the police to a shed near the house in which he was living with his father and brother and pointed out the place where a revolver was lying. *Held*, that mere knowledge of the fact that the revolver was lying in the shed or the pointing out of the place from which it was found without proof that the place was in the exclusive possession of the accused was not sufficient to hold the accused guilty under S. 19 (f), Arms Act. (Vol 20) 1933 Lah 314 (315) : 34 Cri L Jour 1256.

[14] Where the two accused were found in the joint exclusive possession of a room from which the arms were recovered and no one was willing to take the responsibility, the only possible presumption the Court can make is that they are in joint control. (Vol 29) 1942 Oudh 448 (449) : 43 Cri L Jour 666.

[15] Arms found concealed in a hut—Presumption of knowledge of occupier would arise unless others too can have access to the place. (Vol 1) 1914 Cal 456 (472) : 15 Cri L Jour 385 : 41 Cal 350.

11. Section 19, clause (f) — Possession of arms found in a house belonging to a joint family.—[1] Exclusive possession or control of any particular person over an incriminating article is not required under S. 19 (f), Arms Act, and S. 5, Explosive Substances Act. Court must consider each case and come to a conclusion whether it is proved that the incriminating article is in the possession or under the control of any particular person or in the possession or under the control of more than one person. If on the evidence the Court cannot hold possession or control by any person or persons, then the case is not established. (Vol 31) 1944 Lah 339 (344) : 46 Cri L Jour 1 : 1 L R (1945) Lah 137 (F B).

[2] Mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish *prima facie* the guilt of any particular person or all of them jointly. The onus is on the prosecution to prove guilt of accused. (Vol 31) 1944 Lah 339 (340) : 46 Cri L Jour 1 : 1 L R (1945) Lah 137 (F B). [(Vol 19) 1932 All 441 : 33 Cri L Jour 719, Dissented.]

[3] Where incriminating articles under S. 19 (f), Arms Act, and S. 5, Explosive Substances Act, are recovered from a place in the occupation or possession of more persons than one and it is not possible to fix the liability on any particular individual, a Court is not bound to hold that the said articles were in possession or under the control of the head of the family. (Vol 31) 1944 Lah 339 (343, 344) : 1 L R (1945) Lah 137 : 46 Cri L Jour 1 (F B). [(Vol 15) 1928 Lah 272 : 29 Cri L Jour 481 and (Vol 17) 1930 Lah 884 : 31 Cri L Jour 352, Overruled.]

[4] House occupied by person, his wife and father aged 80 — *Chhavi* blade was found in wife's possession — Mere fact of father being 80 years old is not sufficient to establish his possession of *chhavi* as the head of the joint family. (Vol 16) 1929 Lah 872 (872) : 30 Cri L Jour 668.

[5] A dagger was found in a room in a house. The room and the house were jointly occupied by a father and his adult son. There was no evidence to show that either of them was aware of its existence. It was held that neither of them could be convicted of an offence under S. 19. (1906) 3 Cri L Jour 71 (73) : 1905 Pun Re No. 52 Cr.

[6] Unlicensed arms found at place belonging to joint Hindu family but not in use or occupation of particular individual — Possession must be deemed to be with manager and not with other members of family. (Vol 33) 1946 All 4 (6, 7) : 47 Cri L Jour 437 : (Vol 24) 1937 Pesh 73 (74) : 38 Cr L J 838. (It is of course open to him to rebut that presumption by any evidence which he can adduce) : (Vol 31) 1944 Lah 64 (64, 65) : 45 Cri L Jour 404. (Do.) : (Vol 28) 1941 Nag 296 (297) : 43 Cri L Jour 62 : 1 L R (1942) Nag 523. (The strength of the presumption would vary according to the improbability that the article owing to its size, etc., could have escaped the notice of the head of the family.)

[7] Where two loaded cartridges were found in a corn bin in the house of the accused, and he was prosecuted on the ground that he being the head of the family should be held responsible for the arms recovered, it was held that in all such cases it was necessary to prove not only the presence of the article in the house but the possession of some particular person over the article in order to justify a conviction. (Vol 20) 1933 All 112 (112) : 34 Cri L Jour 517 : 55 All 112. [(Vol 19) 1932 All 441 : 33 Cri L Jour 719, Dissented.]

[8] Where weapons are found in a house occupied by a Hindu family living jointly, possession is not necessarily that of the managing member only, yet in all such cases, where it is sought to establish that possession and control are with some member of the family,

20. Whoever does any act mentioned in clause (a), (c), (d) or (f) of section 19, in such manner

For secret breaches of sections 5, 6, 10, 14 and 15. as to indicate an intention that such act may not be known³ to any public servant as defined in the Indian Penal Code, 1860, or to any person employed upon a railway or to the servant of any public carrier,

and whoever, on any search being made under section 25, conceals² or attempts to conceal *For concealing arms, etc.* any arms, ammunition or military stores,

shall be punished with imprisonment for a term which may extend to seven years, or with fine or with both.

PROVINCIAL AMENDMENTS

Bengal.—At the end of section 20 the following proviso shall be *added*, namely :—

“Provided that if an offence committed under this section is in respect of a pistol, revolver, rifle or shot gun the offender shall be punished with transportation for life or any shorter term, or with imprisonment for a term which may extend to fourteen years, or with fine.”

— BENGAL ACT XXI OF 1932, S. 4 [12-1-1932].

S. 20A

After section 20: the following section shall be *inserted*, namely :—

“20A. Notwithstanding anything contained in this Act, whoever goes armed with a pistol, revolver, rifle or *Enhanced punishment* other fire-arm in contravention of the provisions of section 13, or has any such fire-arm in his possession or under his control in contravention of the provisions of section 14 or section 15, under circumstances indicating that he intended that such fire-arm should be used for the commission of any offence of murder shall, if he is tried by Commissioners appointed under the Bengal Criminal Law Amendment Act, 1925, be punished with death, or with transportation for life or any shorter term or with imprisonment for a term which may extend to fourteen years, to which fine may be added.”

— BENGAL ACT VII OF 1934, S. 4 [29-3-1934].

Section 19 (*contd.*)

other than the managing member, there must be good and clear evidence of the fact before the Court can arrive at such a conclusion. (1893) 15 All 129 (131).

[9] Arms found in joint family house being accessible to many. The arms cannot be said to be in possession of any one of them. (Vol 4) 1917 Cal 406 (407) : 18 Cri L Jour 781.

[10] Where unlicensed arms are found concealed upon the premises which, though legally the joint property of a joint Hindu family, are in fact, at the time of the finding, in the exclusive possession and control of one member of the family, that member of the family can properly be held to be in possession of such arms. (1906) 3 Cri L Jour 88 (90).

[11] Where weapon is found in a house belonging to a joint family, in the absence of proof that the room in which the weapon was kept was in the exclusive or particular possession of any member of the family, it cannot be inferred that the weapon was in the possession of any other person than the head of the family. (Vol 23) 1936 Pat 512(512):15 Pat 696:38 Cri L Jour 100.

12. Section 19, clause (f).—Possession of arms in unserviceable condition.—[1] A fire-arm even though it is unserviceable but can be repaired is a fire-arm the possession of which without license would amount to an offence. (Vol 30) 1943 Mad 661 (661) : 45 Cri L Jour 124.

[2] Possession of empty cartridges which cannot be re-loaded in India is not an offence. (Vol 13) 1926 All 255 (256) : 27 Cri L Jour 136.

[3] Arms and ammunitions found in accused's house which was locked were unserviceable. Accused was in the habit of living at three different houses. No evidence to prove when accused last resided in that house. *Held*, that accused could not be convicted. (Vol 24) 1937 Mad 975 (976) : 39 Cri L Jour 147.

[4] See also Section 4, Note 9.

13. Section 19, clause (i).—[1] Section 14 as it now stands makes no provision for the deposit of any arms; the words, therefore, “fails to deposit arms as required by S. 14” contained in S. 19 (i) cannot be made to relate to that section.

[2] There is no provision in S. 14 requiring a person

to deposit a spear; and if there is no other basis for his conviction, the conviction will not stand. (Vol 3) 1916 Mad 624 (624).

[3] The offence of failing to deposit arms under 19 (i) was not triable by a second class Magistrate under S. 8, Criminal P. C., 1872. (1905) 1 Weir 660 (660).

14. Sanction—See S.29, Note 3.

SECTION 20 — SYNOPSIS.

1. Applicability and scope.
2. “Conceals.”
3. “Intention that such act may not be known.”
4. Power of superior Court.
5. Procedure.
6. Sanction.
7. Sentence.

1. Applicability and scope. — [1] Section 20 applies only where the possession is such as to indicate an intention that such act may not be known to any public servant. It does not apply to every case of possession or concealment of arms. Something more than a mere ordinary concealment should be established in order to bring the possession within the meaning of S. 20. (Vol 12) 1925 Lah 395 (396) : 26 Cri L Jour 733. (Gun was upon a *charpoy* upon which accused was sitting—Gun was covered with *dotahi* — Conviction under S. 20 was altered to S. 19 (f).) (Vol 2) 1915 Cal 719 (723) : 42 Cal 1153: 16 Cri L Jour 9.

[2] Section 20 is not restricted to cases of importation and exportation of arms in bulk. There must be intention to conceal arms. (Vol 20) 1933 Cal 692 (694) : 35 Cri L Jour 125 : 60 Cal 1432.

[3] Section 20 is not confined to cases where an import or export of arms is attempted but applies to cases where a person is concealing a weapon from railway officials while he is at a railway platform. (Vol 18) 1931 Lah 663 (664) : 32 Cri L Jour 995.

[But see (Vol 12) 1925 Lah 395 (396) : 26 Cri L Jour 733: 6 Lah 151. (The section applies only to cases where the import or export of arms is attempted.) ; (1913) 14 Cri L Jour 41 (42). (Do.)]

[4] Concealment at the time of search is specifically dealt with in the second part of the section, yet the first

Section 20 (*contd.*)

part of the section does apply to cases where arms are found on a search being made under S. 25. The two parts of S. 20 are independent of one another. (Vol 20) 1933 Cal 516 (517) : 34 Cri L Jour 879 : 60 Cal 545.

[5] The first part of S. 20 creates offences distinct from and graver than those under S. 19. (Vol 4) 1917 Low Bur 96 (98) : 18 Cri L Jour 357 (F B).

[6] Mere possession of an unlicensed weapon is punishable under S. 19. But if the circumstances are such as to indicate an intention that the possession may not be known to authorities, *e.g.*, the Police, the offence is punishable under S. 20. (Vol 20) 1933 Cal 516 (518) : 34 Cri L Jour 879 : 60 Cal 545.

[7] An unlicensed person going armed with a revolver may be convicted under either S. 13 or S. 14 and therefore may be convicted under S. 20. (Vol 20) 1933 Cal 692 (694) : 35 Cri L Jour 125 : 60 Cal 1432.

[8] Keeping ammunition and parts of arms hidden under clothes falls under S. 20 and not under S. 19. (Vol 13) 1926 Lah 61 (61) : 26 Cri L Jour 1459.

[9] Possession of spear-head and sandhewa, a burglar's implement, hidden in loin cloth. *Held*, that the offence committed was one under S. 20, Arms Act, and not under S. 19. (Vol 26) 1939 Lah 17 (18) : 40 Cri L Jour 279.

2. "Conceals." — [1] The first paragraph of S. 20 does not deal with cases of concealment or of attempt at concealment made by a man who has arms in his immediate personal possession. It is meant to deal with cases of concealment before arrest. This seems to be indicated by the second paragraph of S. 20, which expressly provides for cases of concealment and attempts at concealment when a house is being searched under S. 25 of the Act. The words "conceals or attempts to conceal" appear to have been used in order to distinguish the acts contemplated by this paragraph from the acts mentioned in the first paragraph of the section. (11) 12 Cri L Jour 234 (235).

[2] Each case of concealment of arms must be decided on its own facts. (Vol 10) 1923 Lah 79 (80) : 23 Cri L Jour 609. (On the facts proved in the case it was held that the gun appeared to have been placed in the corn bin in order to conceal it from the Police and therefore S. 20 was applicable.)

[3] The mere denial, on the part of a person, whose house is being searched by the Police for unlicensed arms, that he has any such arms in his possession does not constitute a concealment or attempt to conceal arms on search being made by the Police within the meaning of the second paragraph of S. 20. (1906) 3 Cri L Jour 88 (90) : 28 All 302.

[4] In the absence of any other evidence of possession by the accused, it cannot be presumed that because he knew where the rifle was he had concealed it himself. (Vol 10) 1923 Lah 288 (289).

[5] A person carrying a revolver in his pocket without a licence to keep arms is guilty only under S. 19 (*f*). He cannot be said to be *concealing* the revolver. (Vol 2) 1915 Lah 193 (195) : 16 Cri L Jour 637.

3. "Intention that such act may not be known." — [1] An essential ingredient of S. 20 of the Arms Act is that the man doing any act mentioned in *cls. (a), (c), (d), or (f)* of S. 19, should do it in such a manner as to indicate an intention that such act may not be known to any public servant. (Vol 18) 1931 Lah 561 (561) : 33 Cri L Jour 346. (Keeping chavi in one's house and a stick fitting into it is punishable under S. 19 (*f*) and not under S. 20.)

[2] In order that S. 20 may apply, indication of intention to conceal arms from public servant must be shown. (Vol 15) 1928 Lah 193 (196) : 29 Cri L Jour 577 :

9 Lah 550 ; (Vol 13) 1926 Lah 262 (263) : 27 Cri L Jour 625 : 7 Lah 65.

[3] A strong presumption arises against a person who is found in unlicensed possession of a revolver and who cannot or will not account for such possession that he has procured it for unlawful purposes and has a fixed intention that such possession shall not become known to the authorities. This presumption is, however, one that can be rebutted. (Vol 20) 1933 Cal 516 (517) : 34 Cri L Jour 879 : 60 Cal 545.

[4] In a prosecution under S. 20, the question whether the circumstances justify the intention as indicated in S. 20, depends on the particular circumstances of each case. (Vol 20) 1933 Pat 493 (493) : 34 Cri L Jour 890 ; (Vol 20) 1933 Cal 516 (518) : 34 Cri L Jour 879 : 60 Cal 545; (Vol 1) 1914 Lah 591 (592, 593) : 16 Cri L Jour 412 : 1915 Pun Re No. 8 Cr. (Accused concealing arms in his waist-band in a largely attended fair where extra police are sent.)

[5] Where the circumstances under which a pistol was recovered from the accused led to a clear inference that his intention was that the possession of the pistol by him may not be known to any public servant, conviction should be one under S. 20. (1926) 27 Cri L Jour 934 (934) (Lah); (Vol 20) 1933 All 627 (630) : 35 Cri L Jour 573 : 55 All 681. (Accused in possession of a stolen revolver and attempting to run away with it is guilty under S. 19 (*f*) read with S. 20.)

[6] Carrying unlicensed fire-arms in sack while travelling is an offence under S. 20. (Vol 29) 1942 All 349 (351) : 43 Cri L Jour 854 : 1 L R (1942) All 899.

[7] The concealment of arms recovered from the possession of the accused on information given by him was held clearly with the intention referred to in S. 20. (Vol 10) 1923 Lah 434 (435).

[8] For S. 20 to apply there must be some special indication of an intention to conceal the possession of the arms from a public servant, Railway Official or public carrier. Where two revolvers, some cartridges and a pistol were recovered from a trunk which was being carried in a Railway compartment : *Held*, that the accused must be presumed to have intended to conceal them from Railway Officials and the offence fell under S. 20, Arms Act. (Vol 18) 1931 Lah 571 (571) : 33 Cri L Jour 110.

[9] Where the arms and ammunitions are tied up and concealed in such a manner that it must be presumed that the intention of the accused was not only to conceal them from the boys of the school hostel but also from any public servant who may happen to come to the hostel, there is no doubt that the intention of the accused is that his act may not be known to any public servant. (Vol 27) 1940 Oudh 337 (340) : 41 Cri L Jour 545.

[10] Arms discovered in consequence of information by accused that he had buried revolver in field — Requirements of *Ss. 19 (f)* and 20 are fulfilled. (Vol 3) 1916 Lah 228 (229) : 17 Cri L Jour 183.

[11] *Held*, that the joint possession of the room by the accused, taken along with the possession of the suitcase and its contents, which must be attributed to the accused alone, clearly proved his intention to conceal the suit-case and its contents from the Police Officers. The accused was guilty under S. 20, Arms Act. (Vol 21) 1934 Cal 705 (706) : 36 Cri L Jour 370.

[12] Approver gave statement disclosing illegal possession of fire-arms. His trial under S. 20 was not legal. (Vol 8) 1921 All 234 (234) : 22 Cri L Jour 699.

[13] Where, on a search made by a Magistrate with a number of Police Officers into the house of the accused person, who, after his license for possession of arms and ammunitions had been cancelled, was suspected of being in possession of them, and who was, preliminarily

21. Whoever, in violation of a condition subject to which a license has been granted, does or omits to do any act shall, when the doing or omitting to do such act is not punishable under section 19 or section 20, be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Section 20 (contd.)

to the search, arrested some arms and ammunitions were found on the premises, and the accused was committed to the Sessions and convicted of offences under Ss. 19 and 20 of the Arms Act, held that the conviction under S. 20 of the Act was not legal. (1900) 27 Cal 692 (697).

[14] The fact that the accused secreted the spear-head next to his skin does not indicate any intention that the possession by the accused of the spear-head might not be known to any public servant. (Vol 16) 1929 Lah 576 (576) : 31 Cri L Jour 79.

[15] Intention specified in S. 20 cannot be inferred from the mere fact of carrying a small arm in pocket. (Vol 14) 1927 Lah 561 (561) : 28 Cri L Jour 671.

[16] Where the weapon which the accused was carrying was originally concealed but the appellant voluntarily took it from its place of concealment in order to threaten a railway servant. *Held*, the intention requisite for an offence under S. 20 had not been established and conviction must be altered to one under S. 19 of the Act. (Vol 10) 1923 Lah 10 (10) : 26 Cri L Jour 166.

[17] Where certain fire-arms had been found from the possession of the accused, who had concealed them under a heap of straw, in order that visitors in his house should not see them ; *Held* that the concealment was not with the intention specified in S. 20, and the accused could, therefore, be convicted only under S. 19 (f) of the Arms Act. (1909) 9 Cri L Jour 259 (260, 261) : 1 Sind L R 18 Cr. (F B).

[18] Where arms were kept by the accused without a licence in a *taikhana* (store-room) and there was no attempt to conceal the *taikhana* itself, it was held that the *taikhana* being a place where arms would naturally be kept, the accused could not be convicted of an offence under S. 20, Arms Act, though he was guilty of an offence under S. 19 (f). (Vol 18) 1931 Sind 9 (11) : 32 Cri L Jour 517 : 25 Sind L R 1.

4. Power of superior Court. — [1] It is open to the Appellate Court to alter the finding from one under S. 20 to one under S. 19 (f). (Vol 18) 1931 Sind 9 (12) : 32 Cri L Jour 517 : 25 Sind L R 1.

[2] Accused convicted under S. 20—First three clauses of S. 19 not applying — It must be presumed that Magistrate held that accused committed an act mentioned in S. 19 (f) — Appellate Court can alter finding from one under S. 20 to one under S. 19 (f). (Vol 18) 1931 Sind 9 (12) : 32 Cri L Jour 517 : 25 Sind L R 1.

[3] In a trial by jury accused charged under S. 19 (f) — Verdict of not guilty — On reference by Sessions Judge, High Court finding him guilty under S. 19 (f) read with S. 20 : *Held*, that the High Court could convict him under S. 19 (f) read with S. 20, though he was charged under S. 19 (f) only. (Vol 20) 1933 All 627 (629, 630) : 35 Cri L Jour 573 : 55 All 681.

5. Procedure.—[1] An offence under S. 20 is not triable by a first class Magistrate. (1904) 2 Low Bur Rul 244 (245).

[2] If the case is made out under S. 20, the Magistrate ought to commit the case to the Sessions Court. (Vol 3) 1916 Cal 477 (477) : 17 Cri L Jour 202.

[3] Where a person is discharged under S. 20 for want of evidence of intention to conceal his possession of arms in contravention of S. 14 or S. 15, proceedings

may be instituted against him under S. 19 (f) after sanction thereto is given under S. 29 of the same Act. (Vol 3) 1916 Low Bur 105 (107) : 17 Cri L Jour 209 : 8 Low Bur Rul 452.

6. Sanction. — [1] No sanction is necessary for prosecution under S. 20. (Vol 11) 1924 Rang 85 (86) : 25 Cri L Jour 203. (Where the applicant was in secret possession of local made guns and cartridges and on sanction having been obtained for prosecution under S. 20, he was convicted both under S. 20 and S. 19 (f), it was held that conviction under S. 20 was legal but the conviction under S. 19 (f) was bad for want of sanction.); (Vol 21) 1934 Cal 705 (705) : 36 Cri L Jour 370; (Vol 29) 1942 All 349 (351) : 43 Cri L Jour 854 : I L R (1942) All 899. (Even in parts of India where such sanction might be necessary for a prosecution under S. 19.); (Vol 3) 1916 Low Bur 105 (107) : 17 Cri L Jour 209 : 8 Low Bur Rul 452 (FB). (Proceedings may be taken under S. 20 for the secret possession of arms in contravention of S. 14 or S. 15 without previous sanction under S. 29.)

[But see (1900) 27 Cal 692 (697).]

[2] As no sanction is required by S. 29 for an offence under S. 20, a sanction given under S. 29 for an offence under S. 20 read with S. 19 (f) should be treated as one given for an offence under S. 19 (f) and hence conviction under S. 19 (f) is not illegal. (Vol 18) 1931 Sind 9 (12) : 32 Cri L Jour 517 : 25 Sind L R 1.

7. Sentence. — [1] Suspicion that accused was about to take part in some criminal offence is no consideration in arriving at appropriate sentence for an offence under S. 20. (Vol 15) 1928 Lah 110 (111) : 29 Cri L Jour 256 : 9 Lah 302.

[2] Sentence of three years' rigorous imprisonment without special grounds is very heavy and ought to be reduced. (Vol 4) 1917 Mad 899 (899) : 17 Cri L Jour 80.

[3] The maximum sentence must not be inflicted in every case merely because the weapon found concealed by the accused is a *chhavi*. (1922) 23 Cri L Jour 339 (339, 340) (Lah).

[4] A man who is found travelling on the railway in possession of six-chambered revolver even if it not be of the most modern type, cannot complain that his sentence is severe when he is given a sentence of four years' rigorous imprisonment, the maximum sentence being one of seven years. (Vol 29) 1942 All 349 (351) : 43 Cri L Jour 854 : I L R (1942) All 899.

[5] Where a person charged under Ss. 19 (f) and 20, Arms Act, pleaded guilty and finding that the possession of arms with him was connected with his political views he was awarded the maximum sentence under the section : *Held* that it was very necessary that the powers of the Court should be employed in putting down these very dangerous crimes of possession and concealment of arms, and that there was nothing calling for interference by the High Court. (Vol 20) 1933 Cal 124 (128) : 34 Cri L Jour 633 : 60 Cal 571.

[6] Where the accused, only 22 years of age though a responsible man, is not shown that he obtained possession of a pistol for an evil purpose, the sentence of seven years' rigorous imprisonment is very severe. He having been sentenced to 18 months' rigorous imprisonment for accidental homicide, the sentence awarded to him under S. 20, Arms Act, was reduced to one month's rigorous imprisonment. (Vol 19) 1932 Lah 365 (366) : 33 Cri L Jour 413.

For knowingly purchasing arms, etc., from unlicensed person.

22. Whoever knowingly purchases any arms, ammunition or military stores from any person not licensed or authorized under the proviso to section 5 to sell the same ; or

For delivering arms, etc., to person not authorized to possess them.

delivers any arms, ammunition or military stores into the possession of any person without previously ascertaining that such person is legally authorized to possess the same,

shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

23. Any person violating any rule made under this Act, and for the violation of which no penalty for breach of rule. is provided by this Act, shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

24. When any person is convicted of an offence punishable under this Act, committed by him in respect of any arms, ammunition or military stores, it shall be in the discretion of the convicting Court or Magistrate further to direct that the whole or any portion of such arms, ammunition or military stores, and any vessel, cart or baggage-animal used to convey the same, and any box, package or bale in which the same may have been concealed, together with the other contents of such box, package or bale, shall be confiscated.

VII.—Miscellaneous.

25. Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose,

or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace,

such Magistrate, having first recorded the grounds of his belief, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, and may seize and detain the same, although covered by a license, in safe custody for such time as he thinks necessary.

The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name or in virtue of his office by the ^a[Central Government].

[a] Substituted by A. O. for "Local Government."

1. SECTION 22. — Note

[1] Section 22 deals with persons without licences dealing with licensed vendors or purchasers, or with persons with licences dealing with unlicensed vendors or purchasers. (Vol 14) 1927 Cal 265 (266) : 28 Cri L Jour 241.

[2] The word "sword" includes sword sticks. Hence selling of a sword stick or the using of it without licence is an offence under S. 22. (Vol 20) 1933 Bom 438 (439) : 35 Cri L Jour 104.

[3] The delivery into possession contemplated by S. 22 is such a delivery as gives the person into whose possession the arm is delivered control over the arm and authority to use it as an arm. Fixing the rifle into a trap and leaving the trap in charge of servant who is not authorised to possess do not amount to delivery of possession. (1909) 10 Cri L Jour 361 (362) : 5 Low Bur Rul 83.

[4] Servant to whom the master having no license delivers his gun and who uses it for shooting commits no offence under S. 22. (1908) 8 Cri L Jour 18 (19) : 4 Nag L R 78.

[5] Where there is a sale of military stores to unauthorised person by manager of licensed vendor of arms, the rule "whatever a servant does in the course of his employment with which he is entrusted and as a part of it, is his master's act," is applicable and the licensee is liable to punishment under S. 22. (1900) 24 Bom 423 (425, 426).

[6] Making over an arm to a person not licensed merely to carry to its owner is no offence. (Vol 15) 1923 All 55 (55) : 29 Cri L Jour 97.

1. SECTION 23. — Note

[1] Holding of arms after expiry of license is not punishable under S. 23 but under S. 19 (f). (Vol 24) 1937 Pesh 30 (31) : 38 Cri L Jour 396.

1. SECTION 24. — Note

[1] Section 24 shows that the order for confiscation is in addition to any sentence which may be passed. Therefore, without the sentence, an order for confiscation cannot be passed. (1905) 1 Weir 654 (654, 655).

[2] All license-holders should be meticulous in taking all precautions for the safe custody of weapons. Absence of such precautions constitutes a danger to the public. In such cases under S. 24, they will be confiscated to Government. (Vol 22) 1935 Pesh 103 (104) : 36 Cri L Jour 1204.

1. SECTION 25. — Note

[1] A Magistrate issuing a warrant to search premises of owner in possession of fire-arms without a license acts as a Court and not merely as a public servant whether he purports to act under the Criminal P. C., or under S. 25 of the Arms Act. (Vol 6) 1919 Mad 620 (622) : 20 Cri L Jour 90 : 42 Mad 96.

[2] Sections 25 and 30 are enacted for the protection of the subject as well as to inspire confidence in the proceedings conducted by the Police Officers. If the

26. The ^a[Central Government] may at any time order or cause to be seized any arms *Seizure and detention by* ammunition or military stores in the possession of any person, not- *Central Government.* withstanding that such person is licensed to possess the same, and may detain the same for such time as it thinks necessary for the public safety.

[a] Substituted by A. O. for "Local Government".

27. The ^a[Central Government] may from time to time, by notification^b published in the *Power to exempt.* ^c[Official Gazette],—

(a) exempt any person by name or in virtue of his office, or any class of persons, or exclude any description of arms or ammunition, or withdraw any part of British India, from the operation of any prohibition or direction contained in this Act; and

(b) cancel any such notification, and again subject the persons or things or the part of British India, comprised therein to the operation of such prohibition or direction.^d

[a] Substituted by A. O. for "Governor-General in Council." [b] For exemptions and withdrawals under S. 27 (v), see rule 3 and Schs. I to IV of the Indian Arms Rules, 1924, General Rules and Orders, Vol. II. For order exempting residents of Pondicherry, being Europeans, from payment of import duty on guns when holding pass-ports from their own authorities, see Notification No. 2257, Gazette of India, 1879, Pt. I p. 782. [c] Substituted by A. O. for "Gazette of India." [d] For notification declaring arms, etc., brought into an Indian port and declared under manifest to be consignments without transhipment to any port on the seaboard of the Persian Gulf, to be liable to the prohibitions and directions contained in S. 6, see No. 902 P., dated 27th April 1904, Gazette of India, 1904, Pt. I, p. 296. As to exemption of small parcels under certain conditions of arms, etc., exported under licence and in transit at an intermediate port, see *ibid.*

28. Every person aware of the commission of any offence punishable under this Act shall, in *Information to be given* the absence of reasonable excuse, the burden of proving which shall lie *regarding offences.* upon such person, give information of the same to the nearest Police-officer or Magistrate, and

every person employed upon any railway or by any public carrier shall, in the absence of reasonable excuse, the burden of proving which shall lie upon such person, give information to the nearest Police officer regarding any box, package or bale in transit which he may have reason to suspect contains arms, ammunition or military stores in respect of which an offence against this Act has been or is being committed.

29. Where an offence punishable under section 19, clause (f), has been committed within *Sanction required to* three months from the date^a on which this Act comes into force in any *certain proceedings under* province, district or place to which section 32, clause (2), of Act XXXI *section 19, clause (f).* of 1860^b applies at such date, or where such an offence has been committed in any part of British India not being such a district, province or place, no proceedings

Section 25 (contd.)

provisions are, therefore, disregarded and no reasonable excuse or justification is offered for not following them, the Court may well look with suspicion upon the entire proceeding and hesitate to convict upon the result of the search. (Vol 22) 1935 Pat 465 (467) : 37 Cri L Jour 100.

[3] The Act refers to cases in which the Magistrate considers that arms, whether under a license or not, are possessed "for an illegal purpose," or under circumstances such as to endanger the public peace. (1882) 8 Cal 473 (476).

[4] The words "having first recorded the ground of his belief" in S. 25 prescribe a preliminary condition, and a Magistrate has no power to make a search under this section without having complied with that preliminary condition. (1912) 13 Cri L Jour 693 (701) (PC). (The majority view in 36 Cal 433 confirmed.)

[5] When a Magistrate issues a search warrant under S. 25, it is necessary that he should record the grounds of his belief that the person against whom the warrant is issued has in his possession arms, ammunition, or military stores for an unlawful purpose. (1898) 15 All 129 (130); (1908) 8 Cal L Jour 75 (78).

[6] Search for arms would be illegal if it was not ordered by a Magistrate in pursuance of S. 25, Arms Act. (1892-96) 1 Upp Bur Rul 1 (1).

[7] Where the offence has been undoubtedly committed by the accused, who was in possession of arms, the

fact that procedure of S. 25 was not followed is no sufficient ground for acquittal. (1892-1896) 1 Upp Bur Rul 2 (2, 3); (1870) 2 N W P H C R 57 (57); (Vol 14) 1927 All 516 (517) : 28 Cri L Jour 652; (Vol 16) 1929 All 68 (69) : 30 Cri L Jour 566; (Vol 22) 1935 Pat 465 (467) : 37 Cri L Jour 100.

[8] A general search for arms would be governed by the Arms Act, S. 25, rather than Criminal P. C.: (1909) 36 Cal 433 (447).

1. SECTION 27 — Note

[1] A publication printed by the Government of India Press in 1923 entitled the "Arms Act" and described *inter alia* as "a brief explanation of the Arms Act" was held not to be a notification within the meaning of S. 27. (Vol 19) 1932 Rang 180 (181) : 34 Cr L J 112.

[2] As to the cases decided with respect to the notifications issued by the Government under this section see (Vol 17) 1930 Bom 153 (154) : 31 Cri L Jour 847; (Vol 15) 1928 Lah 239 (240) : 29 Cri L Jour 425; (1907) 1907 Upp Bur Rul Fourth Quarter, Arms, 13, 15 (at p. 2); (1902) 1902 Pun Re No. 1 Cr, p. 8.

SECTION 29 — SYNOPSIS

1. Non-compliance with section—Effect of.
2. Proceedings.
3. Sanction.

1. Non-compliance with section — Effect of.—

[1] Proceedings commenced for offence under S. 19 (f)

shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the district or, in a presidency-town, of the Commissioner of Police.

[a] 1st October 1878. [b] Arms Act, 1860, (31 [XXXI] of 1860) was repealed by S. 3 of this Act.

PROVINCIAL AMENDMENT.

N.-W.F.P. "Section 29 of the Indian Arms Act, 1878, is hereby repealed."—

N.-W.F.P. ACT I OF 1934, S. 2.

30. Where a search is to be made under the Code of Criminal Procedure^a or the Presidency Magistrates Act, 1877,^b in the course of any proceedings instituted in respect of an offence punishable under section 19, clause (f), such search shall, notwithstanding anything contained in the said Code or Act, be made in the presence of some officer specially appointed by name or in virtue of his office by the [Central Government] in this behalf, and not otherwise.

[a] See now the Code of Criminal Procedure, 1898 (5 [V] of 1898). [b] Substituted by A. O. for "Local Government."

Section 29 (contd.)

without previous sanction of the District Magistrate under S. 29 are null and void. A sanction obtained after the institution of the proceedings would not make the proceedings legal. (Vol 33) 1946 Pat 160 (162) : 24 Pat 641; (1911) 12 Cri L Jour 234 (235); (Vol 28) 1941 Pat 284 (285) : 42 Cri L Jour 341; (1910) 11 Cri L Jour 190 (190). (Neither S. 532 nor S. 537, Criminal P. C., can cure the defect.); (1909) 5 Mad L Tim 162 (162) ; (Vol 3) 1916 Low Bur 105 (107) : 17 Cri L Jour 209 : 8 Low Bur Rul 452 (FB).

[2] The trial of an offence under S. 19 (f) without the District Magistrate's sanction under S. 29, is not merely an error of procedure. The Court has no power to allow proceedings to be instituted without such sanction. No failure of justice is necessary to set aside a conviction made in the proceedings without such sanction. The District Magistrate, in such a case, may, however, order a fresh sanction if he desires to do so. (1892-1896) 1 Upp Bur Rul 2 (2, 3).

[But see (1908) 8 Cri L Jour 65 (68).]

2. Proceedings. — [1] The word "proceedings" in Ss. 29, 30 and 33 means legal proceedings in a Criminal Court. Such proceedings are "instituted" within the meaning of the section only when under S. 190, Criminal P. C., a Magistrate takes cognizance of the offence. The mere presentation of a challan by the Police under S. 173, Criminal P. C., in a Magistrate's Court or the mere presentation of a complaint by a private individual cannot be said to constitute the institution of criminal proceedings. (Vol 31) 1944 Sind 103 (105, 106) : 45 Cri L Jour 510 : 1 L R (1943) Kar 524.

[2] Entering a case in the case-book and making out a charge is not institution of proceedings under S. 29. The proceedings really start when the accused is placed before the Court. (Vol 14) 1927 Cal 721 (722) : 28 Cri L Jour 817.

[3] The word proceeding in S. 29 does not mean that no action can be taken by any officer, police or otherwise, in the matter without a previous sanction of the Commissioner of Police. (Vol 14) 1927 Cal 721 (722) : 28 Cri L Jour 817.

[4] The expression "proceedings" in S. 29 means legal proceedings in Court of competent jurisdiction and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Criminal Procedure Code, or any other law. (Vol 15) 1928 Pat 146 (153) : 29 Cri L Jour 301 : 6 Pat 768.

3. Sanction. — [1] Sanction was required only in the cases of offences committed *within three months* of the coming into force of the Arms Act, where cl. (2) of S. 32 of the Act of 1860 was in force at that time. (Vol 18) 1926 All 143 (144) : 27 Cri L Jour 15; (Vol 16) 1929 All 62 (70) : 30 Cri L Jour 856; (1913) 14 Cri L Jour 688 (688) ; 1913 Pun.Re No. 24 Cr.

[2] Previous sanction of District Magistrate is necessary in Peshawar and also in other four districts of the Frontier Province. (Vol 20) 1933 Pesh 69 (70) : 34 Cri L Jour 670. (But now see the Provincial amendment in N.-W.F.P. made by Act 1 [I] of 1934.)

[3] The provisions of S. 32, cl. (2) of Act 31 [XXXI] of 1860 not being in force in Dera Ghazi Khan, the previous sanction of the District Magistrate is necessary for a prosecution under S. 19 (f), in that District under Part 2 of S. 29. Prosecution without such sanction is illegal. (Vol 20) 1933 Lah 869 (869) : 35 Cri L Jour 109 : 15 Lah 6.

[4] In the following cases sanction of the District Magistrate was held to be necessary for proceedings under S. 19 (f). (1905) 1 Weir 660 (660) ; (1905) 1 Weir 663 (664) ; (1882) 5 Mad 26 (28) ; (Vol 27) 1940 Sind 107 (108) : 41 Cri L Jour 707 : 1 L R (1940) Kar 296. (Where there is a trial under S. 19 (f) by City Magistrate who is also Additional District Magistrate exercising powers of District Magistrate, sanction under S. 29 is still necessary. Once he grants sanction, trial by him is illegal under S. 556, Criminal P. C.); (1896) 9 C. P. L. R. 26 (26) (Cr); (1892-96) 1 Upp Bur Rul 1 (1).

[5] Where proceedings under S. 19 (f) are started without sanction under S. 29 but sanction is obtained subsequently, the proceedings are void. (Vol 33) 1946 Pat 160 (162) : 24 Pat 641.

1. SECTION 30 — Note

[1] The words "in the course of any proceedings instituted" in S. 30 mean "in the course of any legal proceedings commenced in a Court." (Vol 12) 1925 All 434 (434) : 26 Cri L Jour 1112 : 47 All 575. (Powers given under Criminal P. C., S. 165 are curtailed by this section.)

[2] The Act contemplates the presence of some specially empowered officer besides the officer conducting the search. (1882) 8 Cal 473 (476).

[3] Two persons must be present at search, one making the search and the other officer specially appointed. (Vol 12) 1925 All 434 (434, 435) : 26 Cri L Jour 1112 : 47 All 575.

[4] In the United Provinces an officer in charge of a Police Station is empowered to conduct a search. (Vol 16) 1929 All 68 (69) : 30 Cri L Jour 566.

[5] A police-officer, who was specially empowered by the local Government in virtue of his office to make a search, made a search without a warrant from the Magistrate. It was held that the search was not illegal. (Vol 5) 1918 All 113 (115) : 19 Cri L Jour 949.

[6] An officer, who takes action under a particular section must be deemed to have full powers until the contrary is proved. (Vol 16) 1929 All 68 (69) : 30 Cri L Jour 566. (Search made under S. 30.)

[7] Although a search is illegal, a person can be convicted if the evidence against him is conclusive. (Vol 12)

31. Nothing in the Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act or the rules made under it, or from being liable under such other law to any higher punishment or penalty than that provided by this Act: Provided that no person shall be punished twice for the same offence.

32. The ^a[Central Government] may from time to time, by notification in the ^b[Official Gazette], direct a census to be taken of all fire-arms in any local area, and empower any person by name or in virtue of his office to take such census.

On the issue of any such notification, all persons possessing any such arms in such area shall furnish to the person so empowered such information as he may require in reference thereto, and shall produce such arms to him if he so requires.

Any person refusing or neglecting to produce any such arms when so required shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

[a] *Substituted by A. O. for "Local Government."* [b] *Substituted by A. O. for "local official Gazette."*

33. No proceeding other than a suit shall be commenced against any person for anything done in pursuance of this Act, without having given him at least one month's previous notice in writing of the intended proceeding and of the cause thereof, nor after the expiration of three months from the accrual of such cause.

THE FIRST SCHEDULE. — [Enactments repealed.] *Repealed by the Repealing Act 1938 (I of 1938), S. 2 and Schedule.*

THE SECOND SCHEDULE. — [Arms, etc., liable to duty.] *Repealed by the Amending Act, 1891 (XII of 1891).*

THE INDIAN ARMY ACT, 1911.

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1925 All 434 (434) : 26 Cri L Jour 1112 : 47 All 575. (35 All 575 followed — Where proceedings have not started, search under this section is not legal.) ; (Vol 22) 1935 Pat 465 (466) : 37 Cri L Jour 100. (If evidence of possession is unimpeachable prosecution cannot fail but normally the provisions of Ss. 25 and 30 cannot be disregarded.)

1. SECTION 31. — Note

[1] Where a person is found in possession of a stolen revolver without a license there is no legal bar to two trials, one under the Arms Act, and the other under S. 411, I.P.C., and the accused can be punished on both the trials, as an act or omission under S. 411, I. P. C., and that under the Arms Act, S. 19, are not the same. (Vol 20) 1933 All 461 (462) : 34 Cri L Jour 1018.

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STATEMENT OF OBJECTS AND REASONS.

"The law relating to the Indian Army contained in the Indian Articles of War and various other enactments has recently been found to require amendments in the following respects :—

(a) Corporal punishment should only be awardable in time of peace for offence to which the ordinary criminal law assigns the same penalty instead of, as at present, for almost every offence known to the military law. The recent enactment of the Whipping Act, 1909, makes it specially desirable to amend the law in this respect.

(b) The law relating to enrolment and attestation contained in the Indian Articles of War is unsatisfactory and is often misunderstood. It requires amendment and simplification.

(c) The tendency of units and the Indian Army servants outside of India in time of peace and under officers subordinate to the Governor-General in Council was not contemplated when the present Articles of War were framed and the administration and discipline for such units is not very adequately provided for in these Articles.

(d) The recent abolition of the "commands" and the re-organization of the Army and independent Acts have rendered various provisions of the existing law obsolete and have necessitated changes in others.

2. It has long been felt that the Indian Articles of War, in spite of the amendments which have been made in them since they were originally enacted as Act V of 1869, are necessitated to current requirements and need to be entirely recast. These Articles are obscure and often defective, while their arrangement is confusing and practical difficulties in their working are of frequent occurrence. The opportunity has there-

fore been taken to prepare an entirely new Code instead of merely amending the existing Articles on the special points indicated.

3. An additional reason for adopting this course is that it will result in the substitution of one simple and comprehensive for seven in which the law relating to the Indian Army is at present contained, instead of adding the eighth to their number.

4. Various matters which properly belong to rules of procedure and which only find a place in the existing Articles owing to no rules of procedure under Indian Military Law being in existence prior to 1899, have been omitted and will be drafted for new rules to be issued under this Bill when it becomes law. The general principle adopted has been to provide in the Bill for essential matters of procedure only leaving non-essential to be dealt with in rules.

5. Forfeiture and attachment of property at present awardable under Indian Articles of War 24 and 76 have been omitted as being unsuitable penalties for purely Military offences. When Soldiers are tried by Court-martial for civil offences to which these penalties are attached they will continue to be awardable under Clauses 42 and 43 of the Bill. This is all that is necessary in this connection.

6. Certain other changes generally of verbal character and intended to make the law, as at present interpreted, have been made. The arrangement of the Army Act (44 and 45 Vict., c. 58) has, whenever possible, been adhered to as it is believed that this will facilitate reference and be of convenience to officers who have to administer both systems of law.

* * * * *

—Gazette of India, 1910, Part V, page 140.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts XV of 1914; X of 1917; XVIII of 1919; II of 1920; XXXVII of 1920; XXXIII of 1923; VIII of 1930; XXXIII of 1934; VII of 1935; XV of 1937; XIV of 1943; XXI of 1943; VI of 1945; VII of 1945.

—Amended by Ordinances, 18, 31 and 58 of 1942; 5, 30, 31 and 44 of 1944; 37, 42 and 48 of 1945.

—Adapted by A. O.

—Repealed in part by Act XII of 1927.

—Repealed in part and amended by Act XI of 1918.

COGNATE ACTS AND PROVISIONS

1. ARMY (SUSPENSION OF SENTENCES) ACT, XX OF 1920.
2. AUXILIARY FORCE ACT, XLIX OF 1920.
3. CANTONMENTS ACT, II OF 1924.
4. CANTONMENTS (HOUSE-ACCOMMODATION) ACT, VI OF 1923.
5. CIVIL PROCEDURE CODE, 1908, S. 60.
6. CRIMINAL LAW AMENDMENT ACT, XX OF 1938.
7. CRIMINAL PROCEDURE CODE, 1898, SS. 54 (6) AND 549.
8. (ENGLISH) ARMY ACT, 1881, (44 & 45 Vict., c. 58).
9. EUROPEAN DESERTERS ACT, XI OF 1856.
10. GOVERNMENT OF INDIA ACT, 1935, SS. 232, 234 AND 239.

11. INDIAN SOLDIERS (LITIGATION) ACT, IV OF 1925.
12. MANOEUVRES, FIELD FIRING AND ARTILLERY PRACTICE ACT, V OF 1938.
13. MUNICIPAL TAXATION ACT, XI OF 1881.
14. PENAL CODE, 1860, SS. 5, 131 TO 140 AND S. 193 EXPL. 1.
15. PRESS (EMERGENCY POWERS) ACT, XXIII OF 1931. S. 4 (1) (c) AND (i).
16. RESERVE FORCES ACT, IV OF 1888.
17. SUCCESSION ACT, 1925, SS. 65 AND 66.
18. TERRITORIAL FORCE ACT, XLVIII OF 1920.
19. TOLLS (ARMY AND AIR FORCE) ACT, II OF 1901.
20. WORKS OF DEFENCE ACT, VII OF 1903.

ACT NO. VIII of 1911.^a

[16th March 1911.]

*An Act to consolidate and amend the law relating to the Government
of His Majesty's [*]^b Indian Forces.*

WHEREAS it is expedient to consolidate and amend the law relating to the government of the [Indian commissioned officers, Viceroy's commissioned officers], soldiers and other persons in His Majesty's Indian Forces; It is hereby enacted as follows:—

[a] For Report of Select Committee, *see* Gazette of India, 1911, Pt. V, p. 39; and for Proceedings in Council, *see* *ibid*, 1910, Pt. VI, p. 16, dated 13th August, 1910, and *ibid*, 1911, Pt. VI, pp. 34, 46 and 362.

This Act has been declared to be in force in the Sonthal Parganas by notification under the Sonthal Parganas Settlement Regulation (3 [III] of 1872), S. 3; in British Baluchistan by the British Baluchistan Laws Regulations, 1913 (3 [III] of 1913), S. 3; in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Schedule; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Schedule. [b] The word Native was *repealed* by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 26 and Schedule. [c] *Substituted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 2, for "Indian Officers".

CHAPTER I.

PRELIMINARY.

Short title and commencement.

1. (1) This Act may be called the Indian Army Act, 1911.

(2) It shall come into force on such date^a as the [Central Government] may, by notification in the [Official Gazette], direct in this behalf.

[a] 1st January 1912, *see* General Rules and Orders, Vol. IV, p. 120. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

Application of Act.

Persons subject to Act.

2. (1) The following persons shall be subject to this Act, namely:—

(a) [Indian commissioned officers, Viceroy's commissioned officers] and warrant officers:

^b[Provided that a person holding a commission in the Army in India Reserve of Officers shall be so subject only when ordered on any duty or service for which he is liable as a member of such reserve force;]

(b) persons enrolled under this Act;

(c) persons not otherwise subject to military law, who, on active service, in camp, on the march, or at any frontier post specified by the [Central Government] by ^dnotification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, His Majesty's Forces:

[* * * * *

(2) Every person subject to this Act under sub-section (1), clause (a) or (b), shall remain so subject until duly ^f[retired, discharged, cashiered, removed, or dismissed from the service]:

^e[Provided that an officer of the Indian Land Forces retired therefrom and appointed to the Indian Regular Reserve of Officers shall again become so subject when ordered on any duty or service for which he is liable as a member of such reserve force.]

[a] *Substituted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 2, for "Indian Officers". [b] *Inserted* by the Indian Army (Amendment) Act, 1937 (15 [XV] of 1937), S. 2. [c] *Substituted* by A. O. for "Governor-General in Council". [d] For places declared to be frontier posts under Ss. 2 (1) and 22, *see* General Rules and Orders, Vol. IV, p. 120. [e] *Proviso repealed* by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 26 and Schedule. [f] *Substituted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 3 for "discharged or dismissed". [g] *Inserted* by the Indian Army (Amendment) Act, 1937 (15 [XV] of 1937), S. 2.

3. (1) The [Central Government] may, by ^bnotification, direct that any persons or class of *Special provision as to persons subject to this Act under section 2, sub-section (1), clause (c), rank in certain cases.* shall be so subject as [Indian commissioned officers, Viceroy's commissioned officers], warrant officers or non-commissioned officers, and may authorize any officer to give a like direction with respect to any such person and to cancel such direction.

(2) All persons subject to this Act other than officers, warrant officers and non-commissioned officers shall, if they are not persons in respect of whom a notification or direction under sub-section (1) is in force, be deemed to be of a rank inferior to that of a non-commissioned officer.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] For notification declaring the rank of certain civil officers when subject to the Act, *see* General Rules and Orders, Vol. IV, p. 121. [c] *Substituted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 2, for "Indian Officers".

4. Every person subject to this Act under section 2, sub-section (1), clause (c), shall, for the purposes of this Act, be deemed to be under the commanding officer of the corps, department or detachment (if any) to which he is attached, and if he is not attached to any corps, department or detachment, under the command of any officer who may for the time being be named as his commanding officer by the officer commanding the force with which such person may for the time being be serving, or of any other prescribed officer, or, if no such officer is named or prescribed, under the command of the said officer commanding the force :

Provided that an officer commanding a force shall not place a person under the command of an officer of official rank inferior to that of such person if there is present at the place where such person is any officer of higher rank under whose command he can be placed.

Powers to apply Act to certain forces under the Central Government.

5. (1) The ^a[Central Government] may, by notification, apply all or any of the provisions of this Act to any force raised and maintained in India under the authority of the ^a[Central Government].

^b[(1A) On such notification being made, any provisions of this Act so applied shall have effect in respect of persons belonging to any such force as they have effect in respect of persons subject to this Act holding in His Majesty's Indian Forces the same rank as the aforesaid persons hold for the time being in the force to which this Act is so applied, and shall have effect in respect of persons who are employed by, or are in the service of, or are followers of, or accompany any portion of any such force as they have effect in respect of persons subject to this Act under section 2, sub-section (1), clause (c).]

(2) While any of the provisions of this Act apply to any such force, the ^a[Central Government] may, by notification, direct by what authority any jurisdiction, powers or duties incident to the operation of these provisions shall be exercised or performed in respect of that force ^c[and may suspend the operation of any other enactment for the time being applicable to that force].

[a] Substituted by A. O. for "Governor-General in Council". [b] Inserted by the Indian Army Act (Application) Ordinance, 1942 (No. 31 [XXXI] of 1942). [20-6-1942]. [c] These words were added, *ibid*.

Officers to exercise powers in certain cases.

6. ^a [(1) Whenever persons subject to this Act are serving —

(a) out of India under an officer not subject to the authority of the ^b[Central Government], or

(b) in India under an officer commanding any military organization not in this section specifically named, and being, in the opinion of the ^b[Central Government], not less than a brigade,

the ^b[Central Government] may prescribe the officer by whom the powers which, under this Act, may be exercised by officers commanding armies, army corps, divisions and brigades, shall, as regards such persons, be exercised.]

(2) The ^b[Central Government] may confer such powers either absolutely, or subject to such restrictions, reservations, exceptions and conditions as ^c[it] may think fit.

[a] Substituted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 3 for original sub-s. (1). [b] Substituted by A. O. for "Governor-General in Council." [c] Substituted by A. O. for "he."

^a[6A. (1) When an officer, warrant officer or non-commissioned officer of His Majesty's Burma Forces is a member of a body of those forces acting with, or is attached to, any body of His Majesty's Indian Forces under such conditions as may be prescribed, then for the purposes of command and discipline and for the purposes of the provisions of this Act relating to superior officers he shall in relation to that body of His Majesty's Indian Forces be treated and have all such powers as if he were an officer, warrant officer or non-commissioned officer, as the case may be, of His Majesty's Indian Forces.

(2) When an officer, warrant officer, non-commissioned officer or soldier of His Majesty's Indian Forces is a member of a body of those forces acting with, or is attached to, any body of His Majesty's Burma Forces under such conditions as may be prescribed, then for the purposes of command and discipline and for the purposes of the provisions of this Act relating to superior officers the officers, warrant officers and non-commissioned officers of that body of His Majesty's

Burma Forces shall in relation to him be treated and have all such powers as if they were officers, warrant officers or non-commissioned officers of His Majesty's Indian Forces.

(3) In this section "prescribed" means "prescribed by the Central Government and the Governor of Burma," and, for the purposes of this section, the relative rank of officers, warrant officers and non-commissioned officers of His Majesty's Indian Forces and His Majesty's Burma Forces may be determined by regulations made by the Central Government and the Governor of Burma.]

[a] *Inserted by A. O.*

^a[6B. So long as there are in India any of His Majesty's Burma Forces the following provisions of this Act, namely, sections 69, 70, 71, 84, 85, 91A, 103A, 107, 108, 108A, 109, 111A, 114, 118, 119, 120, 122, 123, 125 and 126B, shall have effect in all respects in relation to such Forces and to persons subject to the Burma Army Act and to things done in relation to such Forces and persons under the Burma Army Act as they have effect in relation to His Majesty's Indian Forces and to persons subject to this Act and to things done in relation to such Forces and persons under this Act :

Provided that, in having such effect as aforesaid,—

(a) in the said provisions the word "prescribed" shall be deemed to mean prescribed by rules made under the Burma Army Act, and

(b) in sub-section (1) of section 91A, for the words "Central Government or the Commander-in-Chief in India" the words "Governor of Burma" shall be deemed to be substituted.]

[a] *Inserted by the Indian Army (Third Amendment) Ordinance, 1944 (No. 44 [XLIV] of 1944), S. 2. [30-9-1944].*

Definitions. 7. In this Act, unless there is something repugnant in the subject or context,—

^a[(1) "British officer" means a person holding His Majesty's commission in His Majesty's Land Forces or in the Royal Marines or in the Territorial Army, and includes, in relation to a person subject to this Act when serving under such conditions as may be prescribed, a person holding a commission in His Majesty's Naval Forces or Royal Air Force :]

[a] *Substituted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 5 for original clause (1),*

TEMPORARY AMENDMENT OF SECTION 7 (1).

Until the expiry of a period of six months after the termination of the hostilities in being at the commencement of this Ordinance, the Indian Army Act, 1911, shall have effect as if in cl. (1) of S. 7 thereof after the words "Territorial Army" the words "or in the Auxiliary Force, India or in the Burma Auxiliary Force" were *inserted*. —See the Indian Army (Second Amendment) Ordinance, 1944 (No. 31 [XXXI] of 1944), S. 2. [1-7-1944].

^a[(2) "Indian commissioned officer" means a person commissioned, gazetted or in pay as an officer holding His Majesty's commission in the Indian Land Forces, and includes, in relation to a person subject to this Act when serving under such conditions as may be prescribed, a person holding a commission in the Indian Air Force :

(2A) "Viceroy's commissioned officer" means a person commissioned, gazetted or in pay as a Viceroy's commissioned officer in the Indian Army :]

[a] Clauses (2) and (2A) were *substituted* by S. 5, Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), for original clause (2).

(3) "warrant officer" means a person appointed, gazetted or in pay as ^a[an Indian] warrant officer in His Majesty's Indian Forces :

[a] *Substituted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 2, for "a native."*

(4) "non-commissioned officer" means a person attested under this Act holding ^a[an Indian] non-commissioned rank in His Majesty's Indian Forces, and includes an acting non-commissioned officer :

[a] *Substituted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 2, for "a native."*

^a[(5) "officer" means an officer of any of His Majesty's Military Forces, and includes, in relation to a person subject to this Act when serving under such conditions as may be prescribed, an officer of any of His Majesty's Naval or Air Forces, but does not include a warrant officer, petty officer or non-commissioned officer :]

[a] *Substituted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 5, for original clause (5).*

(6) "commanding officer," when used in any provision of this Act with reference to any separate portion of His Majesty's forces or to any department, means the British officer ^a[or Indian commissioned officer] whose duty it is under the regulations of the army, or, in the absence

of any such regulation, by the custom of the service, to discharge with respect to that portion of the forces or that department the functions of commanding officer in regard to matters of the description referred to in that provision :

[a] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 5.

(7) "superior officer," when used in relation to a person subject to this Act, includes a warrant officer and a non-commissioned officer; and, as regards persons placed under his orders, ^a[an officer, warrant officer, petty officer or non-commissioned officer of any of His Majesty's Naval, Military or Air Forces] :

[a] *Substituted* by the Indian Army (Amendment) Act (33 [XXXIII] of 1934), S. 5 for "a warrant officer or non-commissioned officer subject to the Army Act or the Air Force Act."

^a[(8) "army," "army corps," "division," and "brigade" mean respectively an army, army corps, division or brigade which is under the command of an officer subject to the authority of the ^b[Central Government] or, when on active service, an army, army corps, division or brigade under the command of an officer holding a commission in His Majesty's Land Forces ^c[or His Majesty's Indian Forces] :]

[a] *Substituted* by the Indian Army (Amendment) Act 1918 (11 [XI] of 1918), S. 4, for the original clause.

[b] *Substituted* by A. O. for "Governor General in Council." [c] *Inserted* by the Indian Army (Amendment) Act 1934, (33 [XXXIII] of 1934), Section 5.

(9) "corps" means any separate body of persons subject to this Act or the Army Act which is prescribed as a corps for the purposes of all or any of the provisions of this Act :

(10) "independent brigade" means a brigade which does not form part of a division :

(11) "department" includes any division or branch of a department :

(12) "enemy" includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of a person subject to military law to act :

(13) "active service," as applied to a person subject to this Act, means the time during which such person is attached to, or forms part of, a force which is engaged in operations against an enemy, or is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country :

(14) "military custody" means the arrest or confinement of a person according to the usages of the service ^a[and includes air force custody] :

[a] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 5.

(15) "military reward" includes any gratuity or annuity for long service or good conduct, any good conduct pay, good service pay or pension, and any other military pecuniary reward :

(16) "court-martial" means a court-martial held under this Act :

(17) "criminal court" means a court of ordinary criminal justice in British India, or established elsewhere by the authority of the ^a [Central Government or the Crown Representative] :

[a] *Substituted* by A. O. for "Governor-General in Council."

(18) "civil offence" means an offence which, if committed in British India, would be triable by a criminal court :

(19) "offence" means any act or omission punishable under this Act, and includes a civil offence as hereinbefore defined :

(20) "notification" means a notification published in the ^a [Official Gazette] :

[a] *Substituted* by A. O. for "Gazette of India."

(21) "prescribed" means prescribed by rules made under this Act : and

(22) all words and expressions used herein and defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code.

1. SECTION 7 (13)

[1] For the provisions relating to certain persons to be deemed to be on active service for the purposes of the Army Act, 1911, see the Active Service Ordinance, 1941 (No. 10 [X] of 1941), sections 2 and 3 [6-12-1941]. This Ordinance is applicable to British subjects and servants of the Crown in any part of British India and to all members of and persons

attached to, employed with, or following any military or air force raised in British India wherever they may be. By S. 2 of the Ordinance, such persons including military store-keepers were deemed, so long as the present hostilities continued, to be on active service for the purposes of British and Indian Army Acts and can be tried by the court-martial. (Vol 33) 1946 Lah 103 (109) : ILR (1945) Lah 419 (FB).

CHAPTER II.

ENROLMENT AND ATTESTATION.

Enrolment.

8. Upon the appearance before the prescribed enrolling officer of any person desirous of being enrolled, the enrolling officer shall read and explain to him, or cause to be read and explained to him in his presence, the conditions of the service for which he is to be enrolled; and shall put to him the questions set forth in the prescribed form of enrolment, and shall, after having cautioned him that if he makes a false answer to any such question he will be liable to punishment under this Act, record or cause to be recorded his answer to each such question.

9. If, after complying with the provisions of section 8, the enrolling officer is satisfied that the person desirous of being enrolled fully understands the questions put to him and consents to the conditions of service, and if he perceives no impediment, he shall sign^a[and shall also cause the person to sign] the enrolment paper, and the person shall then be deemed to be enrolled.

[a] Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 5.

^a[10. Every person who has for the space of three months been in the receipt of military pay as an enrolled person and been borne on the rolls of any corps or department shall be deemed to have been duly enrolled, and shall not be entitled to claim his discharge on the ground of any irregularity or illegality in his enrolment or on any other ground whatsoever; ^b[and if any person, in receipt of military pay and borne on the rolls as aforesaid, claims his discharge before the expiry of three months from his enrolment no such irregularity or illegality or other ground shall, until he is discharged] in pursuance of his claim, affect his position as an enrolled person under this Act or invalidate any proceedings, act or thing taken or done prior to his discharge.]

[a] Substituted for the original by the Army and Air Force (Enrolment) Ordinance, 1942 (No. 58 [LVIII] of 1942), S. 2. [26-10-1942]. [b] These words were substituted by the Repealing and Amending Act, 1945 (6 [VI] of 1945), S. 3 and Sch. II. [16-4-1945.]

Attestation.

Persons to be attested. 11. The following persons shall be attested, namely:—

(a) all persons enrolled as combatants;

(b) all other enrolled persons prescribed by the ^a[Central Government].

[a] Substituted by A. O. for "Governor-General in Council."

12. (1) When a person who is to be attested is reported fit for duty, or has completed the prescribed period of probation, an oath or affirmation shall be administered to him in the prescribed form by his commanding officer in front of his corps or such portion thereof or such members of his department as may be present or by any other prescribed person.

(2) The form of oath or affirmation prescribed under this section shall contain a promise that the person to be attested will be faithful to His Majesty, His heirs and successors, and that he will serve in His Majesty's Indian Forces and go wherever he is ordered by land or sea, and that he will obey all commands of any officer set over him, even to the peril of his life.

(3) The fact of an enrolled person having taken the oath or affirmation directed by this section to be taken shall be entered on his enrolment paper, and authenticated by the signature of the officer administering the oath or affirmation.

CHAPTER III.

DISMISSAL AND DISCHARGE.

Dismissal by Central Government and Commander-in-Chief in India.

13. ^a[(1)] The ^b[Central Government] ^c[* * *] may dismiss from the service any person subject to this Act.

SECTION 10—Note 1.

[1] See the following case decided under the English Army Act, 1881, S. 100, where it was held that the subsistence allowance provided to enable a soldier under

arrest to live was not his pay and that the allotment and other payments not paid at his request were the unilateral acts of the military authorities and could not affect his legal position. (Vol 21) 1934 Lah 845 (847): 36 Cri L Jour 737.

^a[(2) The Commander-in-Chief in India may dismiss from the service any person subject to this Act other than an Indian commissioned officer.]

[a] The original S. 13 was re-numbered as sub-section (1) of that section by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 7. [b] Substituted by A. O. for "Governor-General in Council."

[c] Words "or the Commander-in-Chief in India" were repealed by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 7. [d] Inserted by S. 7, *ibid*.

Dismissal by officer commanding army, division, brigade, etc. 14. An officer commanding an army, ^a[army corps], division or brigade, or any prescribed officer, may dismiss from the service any person serving under his command other than an ^b[*] officer.

[a] Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 6. [b] Word "Indian" was repealed by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 8. The words "an Indian" had been substituted for the words "a Native" by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), section 2.

15. [Dismissal of convicts.] Repealed by the Indian Army (Amendment) Act, 1918 (XI of 1918), S. 26 and Schedule.

16. The prescribed authority may, in conformity with any rules prescribed in this behalf, Discharge. discharge from the service any person subject to this Act.

17. Every enrolled person who is dismissed or discharged from the service shall be furnished by his commanding officer with a certificate, in the English language and in the mother tongue of such person (when his mother tongue is not English), setting forth—

(a) the authority dismissing or discharging him;

(b) the cause of his dismissal or discharge;

(c) the full period of his service in the army.

18. (1) Any person enrolled under this Act who is entitled under the conditions of his Discharge, etc., out of enrolment to be discharged, or whose discharge is ordered by competent authority, and who, when he is so entitled or ordered to be discharged, is serving out of India, and requests to be sent to India, shall, before being discharged, be sent to India with all convenient speed.

(2) Any person enrolled under this Act who is dismissed from the service and who, when he is so dismissed, is serving out of India, shall be sent to India with all convenient speed:

^a[Provided that, where any such person is sentenced to dismissal combined with any other punishment, such other punishment, or in the case of a sentence of transportation or imprisonment, a portion of such other punishment, may be inflicted before he is sent to India.]

^b[* * * * *]

[a] Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 7. [b] Sub-section (3) was repealed by S. 26 and Schedule, *ibid*.

CHAPTER IV.

SUMMARY REDUCTION AND PUNISHMENTS OTHERWISE THAN BY ORDER OF COURT-MARTIAL.

19. (1) The Commander-in-Chief in India, an officer commanding an army, ^a[army corps], division or brigade, or any prescribed officer, may reduce to a lower grade or to the ranks ^b[any warrant officer or] any non-commissioned officer under his command:

^b[Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy.]

(2) The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a non-commissioned officer or, if he has no permanent grade above the ranks, to the ranks.

[a] Inserted by S. 6 of the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918). [b] Inserted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 9.

SECTION 19—Note 1.

[1] "We have amended clause 20 (now S. 19) by the addition of a new sub-clause giving power to a Commanding Officer to reduce an acting non-commissioned

officer. This is a power which he exercises at present but of which he would be deprived under the definition of non-commissioned officer which has been adopted in the Bill." — *Select Committee Report*.

20. (1) The Commander-in-Chief in India may, subject to the control of the ^a[Central Government], specify the minor punishments to which persons subject to this Act shall be liable without the intervention of a court-martial, and the officer or officers by whom, and the extent to which, such minor punishments may be awarded.

(2) ^b[Imprisonment in military custody and, in the case of persons subject to this Act on active service, any prescribed field punishment may be specified as minor punishments], provided that—

(a) the term of such imprisonment ^c[or field punishment] shall not exceed twenty-eight days; and

(b) it shall not be awarded to any person of or above the rank of non-commissioned officer, or who, when he committed the offence in respect of which it is awarded, was of or above such rank.

[a] Substituted by A. O. for "Governor-General in Council." [b] Substituted by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 2, for "imprisonment in military custody may be specified as such a minor punishment." [c] Inserted by S. 2, *ibid*.

21. Whenever any weapon or part of a weapon forming part of the equipment of a half squadron, battery, company or other similar unit is lost or stolen, the officer commanding the army, ^a[army corps], division or independent brigade to which such unit belongs may, after obtaining the report of a court of inquiry, impose a collective fine upon the ^b[Viceroy's commissioned officers, warrant officers,] non-commissioned officers and men of such unit, or upon so many of them as, in his judgment, should be held responsible for such loss or theft.

[a] Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 6. [b] Substituted by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 10, for "Indian Officers." The word "Indian" was substituted for "Native" by the Indian Army (Amendment) Act, 1934 (11 [XI] of 1934), S. 2.

22. (1) For any offence, in breach of good order, the commanding officer of any corps or detachment on active service, in camp, on the march, or at any frontier post specified by the ^a[Central Government] by notification in this behalf at which troops are stationed, may punish any ^b[Indian] follower of such corps or detachment who is subject to this Act under section 2, sub-section (1), clause (c) —

(a) if such follower is not a menial servant, with imprisonment for a term which may extend to thirty days, or with fine which may extend to fifty rupees :

(b) if such follower is a menial servant, with imprisonment for a term which may extend to seven days, or, if on active service, with corporal punishment not exceeding twelve strokes of a rattan.

(2) Imprisonment awarded under this section may be carried out in a military guard, or in a jail, as ordered by the said commanding officer; and the officer in charge of any jail shall, on the delivery to him of the person of the offender, with a warrant, under the hand of the said commanding officer, detain the offender according to the exigency of the warrant or until he is discharged by due course of law.

[a] Substituted by A. O. for "Governor-General-in-Council." [b] Substituted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 2, for "Native."

Provost Marshals.

23. For the prompt and instant repression of irregularities and offences committed in the field or on the march, provost-m Marshals may be appointed by the Commander-in-Chief in India or an officer commanding an army, ^a[army corps], division or independent brigade or an officer commanding the forces in the field; and the powers and duties of such provost-m Marshals shall be regulated according to the established custom of war and the rules of the service.

[a] Inserted by the Indian Army (Amendment), Act (11 [XI] of 1918), S. 6.

24. (1) The duties of a provost-marshal so appointed are to take charge of prisoners confined for offences of a general description, to preserve good order and discipline.

SECTION 20 — Note 1.

[1] "We think the opinion expressed in the papers submitted to us that imprisonment in military custody up to 28 days should be a minor punishment is well founded, and we have suggested an amendment of clause 21 (2) (a) (now S. 20) to give effect to this, follow-

ing a recent amendment of the Army Act." — *Select Committee Report*.

SECTION 21 — Note 1.

[1] "In addition to changes of form in clause 22 (now S. 21) we have made it clear that the report of a Court of inquiry must be obtained before a fine can be imposed under this clause." — *Select Committee Report*.

pline, and to prevent breaches of the same by persons belonging or attached to the army. ^a[He may at any time arrest and detain for trial any person subject to this Act who commits an offence and may also carry into effect any punishments to be inflicted in pursuance of the sentence of a court-martial.]

^b[(2) A provost-marshal may punish with any punishment mentioned in section 22, sub-section (1), clause (b), any follower who is subject to this Act under section 2, sub-section (1), clause (c), and is a menial servant and who, on active service and in his view or in the view of any of his assistants, commits any breach of good order and military discipline.]

[a] *Inserted by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 3.* [b] *Substituted by S. 3, *ibid.*, for the original sub-sections (2) and (3).*

CHAPTER V.

OFFENCES.

Offences in respect of Military Service.

Offences punishable with death. **25.** Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) shamefully abandons or delivers up any garrison, fortress, post or guard committed to his charge, or which it is his duty to defend; or
- (b) in presence of an enemy, shamefully casts away his arms or ammunition, or intentionally uses words or any other means to induce any person subject to military law to abstain from acting against the enemy, or to discourage such person from acting against the enemy, or misbehaves in such manner as to show cowardice; or
- (c) directly or indirectly holds correspondence with, or communicates intelligence to, the enemy, or any person in arms against the State or who, coming to the knowledge of any such correspondence or communication, omits to discover it immediately to his commanding or other superior officer; or
- (d) treacherously makes known the watchword to any person not entitled to receive it; or
- (e) directly or indirectly assists or relieves with money, victuals or ammunition, or knowingly harbours or protects, any enemy or person in arms against the State; or
- (f) in time of war, or during any military operation, intentionally occasions a false alarm in action, camp, garrison or quarters, or spreads reports calculated to create alarm or despondency; or
- (g) being a sentry in time of war or alarm, or over any State prisoner, treasure, magazine or dockyard, sleeps upon his post, or quits it without being regularly relieved or without leave; or
- (h) in time of action, leaves his commanding officer or his post or party to go in search of plunder; or
- (i) in time of war, quits his guard, picquet, party or patrol without being regularly relieved or without leave; or
- (j) in time of war or during any military operation, uses criminal force to, or commits an assault on, any person bringing provisions or other necessities to the camp or quarters of any of His Majesty's forces or forces a safeguard, or breaks into any house or any other place for plunder, or plunders, injures or destroys any field, garden or other property of any kind; ^a[or
- (k) on active service commits any offence against the property or person of any inhabitant of, or resident in, the country in which he is serving;]

shall, on conviction by court-martial, be punished with death, or with such less punishment as is in this Act mentioned.

[a] *Inserted by the Indian Army (Amendment) Act, (11 [XI] of 1918), S. 8.*

Offences not punishable with death. **26.** Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) strikes, or forces or attempts to force, any sentry; or

SECTION 25 — Note 1.

[1] "We have amended sub-cl. (b) of clause 26 (now S. 25) following the provisions of the Army Act so as

to make it clear that the offence aimed at in the vague expression 'otherwise misbehaves' is confined to cases of cowardice." — *Select Committee Report.*

- (b) in time of peace, intentionally occasions a false alarm in camp, garrison or cantonment; or
- (c) being a sentry, or on guard, plunders or wilfully destroys or injures any property placed under his charge or under charge of his guard; or
- (d) being a sentry, in time of peace, sleeps upon his post, or quits it without being regularly relieved or without leave;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Mutiny and Insubordination.

Offences punishable with death.

27. Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) begins, excites, causes ^a[or conspires with any other persons to cause,] or joins in any mutiny; or
- (b) being present at any mutiny, does not use his utmost endeavours to suppress the same; or
- (c) knowing or having reason to believe in the existence of any mutiny, or of any intention to mutiny, or of any conspiracy against the State, does not, without delay, give information thereof to his commanding or other superior officer; or
- (d) uses or attempts to use criminal force to, or commits an assault on, his superior officer, whether on or off duty, knowing or having reason to believe him to be such; or
- (e) disobeys the lawful command of his superior officer;

shall, on conviction by court-martial, be punished with death, or with such less punishment as is in this Act mentioned.

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 9.*

Offences not punishable with death.

28. Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) is grossly insubordinate or insolent to his superior officer in the execution of his office; or
- (b) refuses to superintend or assist in the making of any field-work or other military work of any description ordered to be made either in quarters or in the field; or
- (c) impedes a provost-marshal or an assistant provost-marshal, or any officer or non-commissioned officer or other person legally exercising authority under or on behalf of a provost-marshal, or, when called on, refuses to assist, in the execution of his duty, the provost-marshal, assistant provost-marshal, or any such officer, non-commissioned officer or other person;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Desertion, Fraudulent Enrolment and Absence without Leave.

29. Any person subject to this Act who deserts or attempts to desert the service shall, on *Desertion.* conviction by court-martial, be punished with death, or with such less punishment as is in this Act mentioned.

Harbouring deserter, absence without leave, etc.

30. Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) knowingly harbours any deserter, or who, knowing, or having reason to believe, that any other person has deserted, or that any deserter has been harboured by any other person, does not without delay give information thereof to his own or some other superior officer, or use his utmost endeavours to cause such deserter to be apprehended; or
- (b) knowing, or having reason to believe, that a person is a deserter, procures or attempts to procure the enrolment of such person; or
- (c) without having first obtained a regular discharge from the corps or department to which he belongs, enrolls himself in the same or any other corps or department; or

SECTION 27—Note 1.

for an offence under S. 27. It may, however, be taken into consideration while imposing a sentence. (Vol 33)

[1] Plea of good faith will not afford a valid defence. 1946 Lah 103 (107); I L R (1945) Lah 419 (FB).

- (d) absents himself without leave or without sufficient cause overstays leave granted to him ; or
- (e) being on leave of absence and having received information from proper authority that any corps or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay ; or
- (f) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty ; or
- (g) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer quits the parade or line of march ; or
- (h) in time of peace, quits his guard, picquet or patrol without being regularly relieved or without leave ; or
- (i) without proper authority is found two miles or upwards from camp ; or
- (j) without proper authority is absent from his cantonment or lines after tattoo, or from camp after retreat-beating ;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Disgraceful Conduct.

Disgraceful conduct. **31.** Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) dishonestly misappropriates or converts to his own use any money, provisions, forage, arms, clothing, ammunition, tools, instruments, equipments or military stores of any kind, the property of ^a[the Crown], entrusted to him; or
- (b) dishonestly receives or retains any property in respect of which an offence under clause (a) has been committed, knowing or having reason to believe the same to have been dishonestly misappropriated or converted; or
- (c) wilfully destroys or injures any property of ^a[the Crown] entrusted to him; or
- (d) commits theft in respect of any property of ^a[the Crown], or of any military mess, band or institution, or of any person subject to military law, or serving with, or attached to, the army; or
- (e) dishonestly receives or retains any such property as is specified in clause (d) knowing or having reason to believe it to be stolen; or
- (f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person; or
- (g) malingers or feigns or produces disease or infirmity in himself, or intentionally delays his cure or aggravates his disease or infirmity; or
- (h) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person; or
- (i) commits any offence of a cruel, indecent or unnatural kind, or attempts to commit any such offence and does any act towards its commission;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

[a] *Substituted by A. O. for "Government."*

Intoxication.

32. Any person subject to this Act who is in a state of intoxication, whether on duty or not *Intoxication.* on duty, shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Offences in relation to Persons in Custody.

33. Any person subject to this Act who, without proper authority, releases any State prisoner, *Offences punishable with death.* enemy or person taken in arms against the State, placed under his charge, or who negligently suffers any such prisoner, enemy or person to escape, shall, on conviction by court-martial, be punished with death, or with such less punishment as is in this Act mentioned.

Offences not punishable with death.

34. Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) being in command of a guard, picquet or patrol, refuses to receive any prisoner or person duly committed to his charge; or
- (b) without proper authority releases any prisoner or person placed under his charge, or negligently suffers any such prisoner or person to escape; or
- (c) being in military custody, leaves such custody before he is set at liberty by proper authority;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Offences in relation to Property.

Offences in relation to property.

35. Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) commits extortion, or without proper authority exacts from any person carriage, portage or provisions; or
- (b) in time of peace, commits house-breaking for the purpose of plundering, or plunders, destroys or damages any field, garden or other property; or
- (c) designedly or through neglect kills, injures, makes away with, ill-treats or loses his horse or any animal used in the public service; or
- (d) makes away with, or is concerned in making away with, his arms, ammunition, equipments, instruments, tools, clothing or regimental necessaries; or
- (e) loses by neglect anything mentioned in clause (d); or
- (f) wilfully injures anything mentioned in clause (d) or any property belonging to ^a[the Crown], or to any military mess, band or institution, or to any person subject to military law, or serving with, or attached to, the army; or
- (g) sells, pawns, destroys or defaces any medal or decoration granted to him;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

[a] Substituted by A. O. for "Government."

Offences in relation to False Documents and Statements.

False accusations and offences in relation to documents.

36. Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) makes a false accusation against any person subject to military law, knowing such accusation to be false; or
- (b) in making any complaint under section 117 ^a[or section 117A], knowingly makes any false statement affecting the character of any person subject to military law, or knowingly and wilfully suppresses any material fact; or
- (c) obtains or attempts to obtain for himself, or for any other person, any pension, allowance or other advantage or privilege by a statement which is false, and which he either knows or believes to be false or does not believe to be true, or by making or using a false entry in any book or record, or by making any document containing a false statement, or by omitting to make a true entry or document containing a true statement; or
- (d) knowingly furnishes a false return or report of the number or state of any men under his command or charge, or of any money, arms, ammunition, clothing, equipments, stores or other property in his charge, whether belonging to such men or to ^b[the Crown] or to any person in or attached to the army, or who, through design or culpable neglect, omits or refuses to make or send any return or report of the matters aforesaid;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

[a] Inserted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 11. [b] Substituted by A. O. for "Government."

37. Any person having become subject to this Act who is discovered to have made a wilfully false answer to any question set forth in the prescribed form of enrolment which has been put to him by the enrolling officer before whom he appears for

the purpose of being enrolled, shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Offences in relation to Courts-martial.

Offences in relation to courts-martial. **38.** Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) when duly summoned to attend as a witness before a court-martial, intentionally omits to attend, or refuses to be sworn or affirmed or to answer any question, or to produce or deliver up any book, document or other thing which he may have been duly warned and called upon to produce or deliver up; or
- (b) intentionally offers any insult or causes any interruption or disturbance to, or uses any menacing or disrespectful word, sign or gesture, or is insubordinate or violent in the presence of, a court-martial while sitting; or
- (c) having been duly sworn or affirmed before any court-martial or other military court competent to administer an oath or affirmation, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

Miscellaneous Military Offences.

Miscellaneous military offences. **39.** Any person subject to this Act who commits any of the following offences, that is to say,—

- (a) being an officer or warrant officer, behaves in a manner unbecoming his position and character; or
- (b) strikes or otherwise ill-treats any person subject to this Act being his subordinate in rank or position; or
- (c) being in command at any post or on the march, and receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person, or has disturbed any fair or market, or committed any riot or trespass, fails to have due reparation made to the injured person or to report the case to the proper authority; or
- (d) by defiling any place of worship, or otherwise, intentionally insults the religion or wounds the religious feelings of any person; or
- (e) attempts to commit suicide and does any act towards the commission of such offence; or
- (f) being below the rank of warrant officer, when off duty, appears, without proper authority, in or about camp or cantonments, or in or about, or when going to or returning from, any town or bazar, carrying a sword, bludgeon or other offensive weapon; or
- (g) directly or indirectly accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gratification as a motive or reward for procuring the enrolment of any person, or leave of absence, promotion or any other advantage or indulgence for any person in the service; or
- (h) neglects to obey any general or garrison or other orders; or
- (i) is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline;

shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment as is in this Act mentioned.

^a[**39A.** Whoever attempts to commit an offence punishable by this Act or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence may, where no express provision is made by this Act for the punishment of such attempt, be punished with the punishment provided in this Act for such offence.]

[a.] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 10.*

Abetment.

40. Every person subject to this Act who abets any offence punishable under this Act may be punished with the punishment provided in this Act for such offence.

Civil Offences.

41. ^a[(1)] Every person subject to this Act who ^b[either within British India or] at any place beyond British India, ^c[* * *] commits any civil offence shall be deemed to be guilty of an offence against military law, and, if charged therewith under this section, shall, subject to the provisions of this Act, be liable to be tried for the same by court-martial, and on conviction to be punished as follows, that is to say —

- (a) if the offence is one which would be punishable under the law of British India with death or with transportation, he shall be liable to suffer any punishment ^d[other than whipping] assigned for the offence by the law of British India; and
- (b) in other cases he shall be liable to suffer any punishment ^d[other than whipping] assigned for the offence by the law of British India, or such punishment as might be awarded to him in pursuance of this Act in respect of an act prejudicial to good order and military discipline :

^b[Provided that a person subject to this Act who at any place within British India or at any place, other than such frontier posts as may be specified by the ^e[Central Government] by notification in this behalf, ^f[in which the Central Government or the Crown Representative exercises jurisdiction by virtue of the Government of India Act, 1935,^g or of any Order in Council made under the Foreign Jurisdiction Act, 1890,^h] and while not on active service, commits the offence of murder or culpable homicide not amounting to murder in relation to a person not subject to military law or the offence of rape, shall not be deemed to be guilty of an offence against military law and shall not be tried by a court-martial.

(2) The powers of a court-martial to try and to punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also a military offence.]

[a] The original S. 41 was re-numbered as sub-s. (1) of that section by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 12. [b] Inserted by S. 12, *ibid.* [c] Words "or when on active service in British India" were repealed by S. 12, *ibid.* [d] Inserted by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 4. [e] Substituted by A. O. for "Governor-General in Council." [f] Substituted by A. O. for "in which the Governor-General in Council exercises jurisdiction by virtue of the Indian (Foreign Jurisdiction) Order in Council, 1902." [g] 26 Geo. V, c. 2. [h] 53 & 54 Vict., c. 27.

42. [Certain civil offences triable by military law.] *Repealed by the Indian Army (Amendment) Act, 1934 (XXXIII of 1934), S. 13.*

CHAPTER VI.

PUNISHMENTS.

43. Punishments may be inflicted in respect of offences committed by persons subject *Punishments.* to this Act, and convicted by court-martial, according to the scale following, that is to say —

- (a) death;
- (b) transportation for life or for any period not less than seven years;
- (c) imprisonment ^a[either rigorous or simple] for any term not exceeding fourteen years;
- ^b[(cc) in the case of Indian commissioned officers, cashiering;]
- (d) dismissal from the service;

^c[* * * * *]

^d[(f) reduction, in the case of a warrant officer, to a lower grade or class or place in the list of his rank, or to the ranks; or in the case of a non-commissioned officer, to a lower grade or a lower rank or to the ranks :

SECTION 41—Note 1.

[1] Where a subject of an Indian State commits a civil offence outside British India in the capacity of a native officer in the army, the offence is not covered by S. 4, Penal Code, and as such, the person is not triable by the ordinary criminal Courts. For the same reason, Ss. 69 to 71, Indian Army Act, which relate to the adjustment of the jurisdiction of the courts-martial and criminal Courts, would not apply to the case. But

it cannot be contended that S. 41, Indian Army Act, would also be inapplicable for the same reason. The provisions of the Government of India Act, 1833, have been expressly saved by S. 5, Penal Code, and moreover, the Indian Army Act is a special law within the meaning of that section, governing person enlisted in Indian Forces. The provisions of S. 41 would, therefore, fully apply to the person. (Vol 33) 1946 Lah 158 (169) (FB).

Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy;]

(g) in the case of officers, warrant officers and non-commissioned officers, forfeiture ^e[in the prescribed manner of seniority of rank and service for the purpose of promotion;]

^f[(gg) in the case of officers, ^g[warrant officers and non-commissioned officers,] reprimand or severe reprimand;]

(h) forfeitures and stoppages as follows, namely :—

(i) forfeiture of service for the purpose of ^h[*] increased pay, pension or any other prescribed purpose;

i[* * * * *]

(iii) forfeiture, in the case of a person sentenced to ^g[cashiering or] dismissal from the service ⁱ[* * *], of all arrears of pay and allowances and other public money due to him at the time of such ^g[cashiering or] dismissal;

(iv) stoppages of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good;

^k[(v) on active service forfeiture of pay and allowances for a period not exceeding three months.]

[a] *Substituted* by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 11 (1), for “(with or without solitary confinement).” [b] Clause (cc) was *inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 14. [c] Clause (e) was *repealed* by S. 14, *ibid.* [d] *Substituted* by S. 14, *ibid.*, for the original clause. [e] *Substituted* by S. 14, *ibid.*, for “of seniority of rank.” [f] Clause (gg) was *inserted* by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 11 (3). [g] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 14. [h] Word “promotion” was *repealed* by S. 14, *ibid.* [i] Sub-clause (ii) was *repealed* by S. 14, *ibid.* [j] Words “or whole sentence involves such dismissal” were *repealed* by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 26 and Schedule. [k] *Inserted* by S. 11 (4), *ibid.*

44. Where in respect of any offence under this Act there is specified a particular punishment

Lower punishments. or such less punishment as is in this Act mentioned, there may be awarded in respect of that offence instead of such particular punishment (but subject to the other provisions of this Act as to punishments and regard being had to the nature and degree of the offence) any one punishment lower in the above scale than the particular punishment.

^a45. Where any person, subject to this Act and under the rank of warrant officer, on active *Field punishment.* service is guilty of any offence, it shall be lawful for a court-martial to award for that offence any such punishment, other than flogging, as may be prescribed as a field punishment. Field punishment shall be of the character of personal restraint or of hard labour but shall not be of a nature to cause injury to life or limb.]

[a] *Substituted* by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 5, for the original S. 45.

Position of field punishment in scale.

46. ^a[Field punishment] shall, for the purpose of commutation, be deemed to stand in the scale of punishments next below dismissal.

[a] *Substituted* by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 6 for “corporal punishment.”

47. A sentence of a court-martial may award, in addition to or without any one other punishment, ^a[the punishment specified in clause (cc) or clause (d) and any one or more of the punishments specified in clauses (f), (g), (gg) and (h) of section 43].

Combination of punishments.

[a] *Substituted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 15, for “any one or more of the punishments specified in clauses (d), (f), (gg) and (h) of section 43.”

Cashiering of Indian commissioned officer on conviction.

^a47A. Whenever an Indian commissioned officer is sentenced to transportation or imprisonment, the court shall by its sentence sentence such officer to be cashiered.]

[a] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 16.

48. Whenever any person is sentenced to rigorous imprisonment, the court may, by its *Solitary confinement.* sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say,—

(a) a time not exceeding one month if the term of imprisonment does not exceed six months;

(b) a time not exceeding two months if the term of imprisonment exceeds six months and does not exceed one year ;

(c) a time not exceeding three months if the term of imprisonment exceeds one year.

49. ^a[A warrant officer or a non-commissioned officer] sentenced by court-martial to transportation, imprisonment, ^b[field punishment] or dismissal from the service, shall be deemed to be reduced to the ranks.

[a] *Substituted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 17, for "A non-commissioned officer."* [b] *Substituted by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 6, for "corporal punishment."*

^a[**49A.** When ^b[any enrolled person] on active service has been sentenced by court-martial to dismissal or to transportation or imprisonment, whether combined with dismissal or not, the prescribed officer may direct that such person may be retained to serve in the ranks, and where such person has been sentenced to transportation or imprisonment, such service shall be reckoned as part of his term of transportation or imprisonment.]

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 13.* [b] *Substituted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 18, for "any person."*

CHAPTER VII.

PENAL DEDUCTIONS.

Deductions from pay and allowances. **50.** ^a[(1) The following penal deductions may be made from the pay and allowances of an Indian commissioned officer, that is to say,—

(a) all pay and allowances for every day of absence without leave, unless a satisfactory explanation has been given through his Commanding Officer and has been approved by the ^b[Central Government] ;

(b) any sum required to make good such compensation for any expenses, loss, damage or destruction occasioned by the commission of any offence as may be determined by the court-martial by whom he is convicted of such offence ^c[or by an officer exercising authority under section 20] ;

(c) any sum required to make good the pay of any person subject to this Act which he has unlawfully retained or unlawfully refused to pay ;

(d) any sum required to make good any loss, damage or destruction of public or regimental property which after due investigation appears to the ^b[Central Government] to have been occasioned by any wrongful act or negligence on the part of the Indian commissioned officer ;

(e) any sum ordered by a court-martial to be stopped under section 43.]

^d[(2)] The following penal deductions may be made from the pay and allowances of a person subject to this Act ^e[other than an Indian commissioned officer], that is to say,—

(a) all pay and allowances for every day of absence either on desertion or without leave, or as a prisoner of war, and for every day of imprisonment awarded by a criminal court, a court-martial, or an officer exercising authority under section 20 ^f[or of field punishment awarded by a court-martial or such officer] ;

(b) all pay and allowances for every day whilst he is in custody on a charge for an offence of which he is afterwards convicted by a criminal court or court-martial, or on a charge

SECTION 50—Note 1.

[1] Section 2 of the Penal Deductions Ordinance, 1943 (No. 43 [XLIII] of 1943), runs as follows :—“(1) In addition to and without derogation from the provisions of sub-s. (2) of S. 50 of the Indian Army Act, 1911, penal deductions may be made from the pay and allowances of a person subject to the Indian Army Act, 1911, other than an Indian commissioned officer for recovery of any sum required to pay a fine imposed on him by the Head of a training establishment as defined in clause (j) of S. 2 of the National Service (Technical Personnel) Ordinance, 1940 (No. 2 [II] of 1940), in which he is for the time being undergoing training, in respect of an act or omission for

which the Head of the establishment could, if he were the employer in an industrial establishment to which the Payment of Wages Act, 1936 (4 [IV] of 1936), applies, in accordance with the provisions of that Act, impose a fine of similar amount on a person employed in such industrial establishment.

[2] The provisions of Ss. 51 and 52 of the Indian Army Act, 1911, shall apply to any deduction made under this Ordinance as they apply to deductions authorised under the said Act, and the proviso to sub-s. (2) of S. 50 of the said Act shall have effect as if a deduction made under this Ordinance were a deduction made under any of the clauses (e) to (g), both inclusive, of the said sub-section.”

of absence without leave for which he is afterwards awarded imprisonment ¹[or field punishment] by an officer exercising authority under section 20 ;

(c) all pay and allowances for every day on which he is in hospital on account of sickness certified by the ²[*] medical officer attending on him ³[*] to have been caused by an offence under this Act committed by him ;

¹[(cc) for every day on which he is in hospital on account of sickness certified by the medical officer attending on him to have been caused by his own misconduct or imprudence, such sum as may be specified by order of the Commander-in-Chief in India] ;

¹[(d) all pay and allowances ordered by a court-martial under section 43, or by an officer exercising authority under section 20, to be forfeited] ;

¹[(dd) all pay and allowances for every day between his being recovered from the enemy and his dismissal from the service in consequence of his conduct when being taken by, or whilst in the hands of, the enemy] ;

(e) any sum ordered by a court-martial to be stopped under section 43 ;

(f) any sum required to make good such compensation for any expenses caused by him, or for any loss of or damage or destruction done by him to any arms, ammunition, equipment, clothing, instruments, regimental necessaries or military decoration, or to any buildings or property, as may be awarded by his commanding officer ;

(g) any sum required to pay a fine awarded by a criminal court, a court-martial exercising jurisdiction under section 41 ⁴[*] or an officer exercising authority under section 20 or section 21 :

Provided that the total deductions from the pay and allowances of a person subject to this Act ¹[other than an Indian commissioned officer] made under clauses (e) to (g), both inclusive, shall not (except in the case of a person sentenced to dismissal ²[*] * * *]) exceed in any one month one-half of his pay and allowances for that month.

Explanation.—For the purposes of clauses (a) and (b)—

(i) absence or custody for six consecutive hours or upwards, whether wholly in one day or partly in one day and partly in another, may be reckoned as absence or custody for a day ;

(ii) absence or custody for twelve consecutive hours or upwards may be reckoned as absence or custody for the whole of each day during any portion of which the person was absent or in custody ; and

(iii) any absence or custody for less than a day may be reckoned as absence or custody for a day if such absence or custody prevented the absentee from fulfilling any military duty which was thereby thrown upon some other person.

[a] *Inserted by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 19.* [b] *Substituted by A. O. for "Governor-General in Council."* [c] *Added by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 2. (13-8-1943).* [d] *The original S. 50 was re-numbered as sub-section (2) of that section by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 19.* [e] *Inserted by S. 19, *ibid.** [f] *Inserted by the Indian Army (Amendment) Act, 1920 (37 [XXXVII] of 1920), S. 7.* [g] *The word "proper" was repealed by the Indian Army (Amendment) Act, 1918, (11 [XI] of 1918), S. 26 and Sch.* [h] *Words "at the hospital" were repealed by S. 26 and Sch., *ibid.** [i] *Inserted by S. 14, *ibid.** [j] *Substituted by the Indian Army (Amendment) Act, 1935 (7 [VII] of 1935), S. 2 for the original clause.* [jj] *Clause (dd) was inserted by the Indian Army (Amendment) Ordinance, 1945 (No. 37 [XXXVII] of 1945), S. 2. [29-9-1945].* [k] *Words and figures "or S. 42" were repealed by S. 2, *ibid.** [l] *Inserted by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 19.* [m] *Words "or whose sentence involves dismissal" were repealed by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 26 and Sch.*

51. Any sum authorized by this Act to be deducted from the pay and allowances of any

Deduction from public money other than pay. person may, without prejudice to any other mode of recovering the same, be deducted from any public money due to him other than a pension.

^a**[51A.]** Where the conduct of any person subject to this Act when being taken by, or whilst in the hands of, the enemy, is to be inquired into under this Act or any other law, the Commander-in-Chief in India or any officer authorised by him in this behalf may order that the whole or any part of the pay and allowances of such person shall be withheld pending the result of such inquiry.]

Power to withhold pay and allowances pending inquiry into conduct as prisoner of war.

[a] *Inserted by the Indian Army (Amendment) Ordinance, 1945 (No. 37 [XXXVII] of 1945), S. 3. [29-9-1945].*

52. Any deduction from pay and allowances authorized by this Act may be remitted in such manner ^a[and to such extent] and by such authority as may from time to time be prescribed.

[a] *Inserted* by the Indian Army (Amendment) Act, 1917, (10 [X] of 1917), S. 2.

^a**[52A.]** (1) In the case of all persons subject to this Act, being prisoners of war, whose pay and allowances have been forfeited under section 50, but in respect of whom a remission has been made under section 52, it shall be lawful, notwithstanding any provision in any enactment or any rule of law to the contrary, for proper provision to be made by the prescribed authorities out of such pay and allowances for any dependants of such persons, and any such remission shall in that case be deemed to apply only to the balance thereafter remaining of such pay and allowances.

(2) Any payments hitherto made to dependants by way of deductions from pay and allowances which, if this section had been in force, could have been validly made are hereby validated.]

^b[(3) For the purposes of this section, a person shall be deemed to continue to be a prisoner of war until the conclusion of any inquiry into his conduct such as is referred to in section 51A, and if he is dismissed from the service in consequence of such conduct, until the date of such dismissal.]

[a] *Inserted* by the Indian Army (Amendment) Act, 1917 (10 [X] of 1917), S. 3. [b] *Added* by the Indian Army (Amendment) Ordinance, 1945 (No. 37 [XXXVII] of 1945), S. 4. [29-9-1945].

^a**[52B.]** (1) In the case of all persons subject to this Act, it shall be lawful, notwithstanding any provision in this Act or in any other enactment or any rule of law to the contrary, for proper provision to be made by the prescribed authorities for any dependent of any such person who is a prisoner of war or missing, out of his pay and allowances.

(2) Any payments made before the commencement of the Army (Provision for Dependents) Ordinance, 1944 (XXX of 1944) to dependents which, if this section had been in force, could have been validly made are hereby validated.]

^b[(3) For the purposes of this section, a person shall be deemed to continue to be a prisoner of war until the conclusion of any inquiry into his conduct such as is referred to in section 51A, and if he is dismissed from the service in consequence of such conduct, until the date of such dismissal.]

[a] *Inserted* by the Army (Provision for Dependents) Ordinance, 1944 (No. 30 [XXX] of 1944), S. 3. [1-7-1944].

[b] *Added* by the Indian Army (Amendment) Ordinance, 1945 (No. 37 [XXXVII] of 1945), S. 5. [29-9-1945].

CHAPTER VIII.

COURTS-MARTIAL.

Constitution and Dissolution of Courts-martial.

Courts-martial and the kinds thereof. **53.** For the purposes of this Act there shall be four kinds of courts-martial, that is to say —

- (1) general courts-martial;
- (2) district courts-martial;
- (3) summary general courts-martial; and
- (4) summary courts-martial.

Power to convene general courts-martial. **54.** A general court-martial may be convened by the Commander-in-Chief in India, or by any officer empowered in this behalf by warrant of the Commander-in-Chief in India.

Power to convene district courts-martial. **55.** A district court-martial may be convened by any officer having power to convene a general court-martial, or by any officer empowered in this behalf by warrant of any such officer.

Contents of warrant issued under section 54 or section 55. **56.** A warrant issued under section 54 or section 55 may contain such restrictions, reservations or conditions as the officer issuing it may think fit.

^a[57. A general court-martial shall consist of not less than five British officers or Indian commissioned officers, each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of Captain.]

Composition of general courts-martial. [a] Substituted by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 20 for the original section.

Composition of district courts-martial. 58. A district court-martial shall consist of not less than three ^a[British officers or Indian commissioned officers].

[a] Substituted by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 21, for "officers."

59. [Convening order to state if larger number of officers is not available.] *Repealed by the Indian Army (Amendment) Act, 1934 (XXXIII of 1934), S. 22.*

Composition of general, summary general or district court-martial. ^a[60. A general, summary general or district court-martial may be composed of either British officers or Indian commissioned officers or of both British officers and Indian commissioned officers.]

[a] Substituted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 23, for the original section.

61. [Claim to trial by British officers.] *Repealed by the Indian Army (Amendment) Act, 1934 (XXXIII of 1934), S. 24.*

Convening of summary general courts-martial. 62. The following authorities shall have power to convene a summary general court-martial, namely —

(a) an officer empowered in this behalf by an order of the ^a[Central Government] or of the Commander-in-Chief in India;

(b) on active service, the officer commanding the forces in the field, or any officer empowered by him in this behalf;

(c) an officer commanding any detached portion of His Majesty's troops upon active service, when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence should be tried by an ordinary general court-martial.

[a] Substituted by A. O. for "Governor-General in Council."

Composition of summary general courts-martial. 63. A summary general court-martial shall consist of not less than three ^a[British officers or Indian commissioned officers].

[a] Substituted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934) S. 25, for "officers."

Summary courts-martial. 64. (1) A summary court-martial may be held —

(a) by the commanding officer of any corps or department of His Majesty's Indian Forces, or of any detachment of those forces;

(b) by the commanding officer of any British corps or detachment to which details subject to this Act are attached.

(2) At every summary court-martial the officer holding the trial shall alone constitute the court, but the proceedings shall be attended throughout by two other officers who shall not, as such, be sworn or affirmed.

65. (1) If a court-martial after the commencement of a trial is reduced below the smallest number of officers of which it is by this Act required to consist, it shall be dissolved.

^a[* * * * *]

(2) If, on account of the illness of the accused before the finding, it is impossible to continue the trial, a court-martial shall be dissolved.

(3) Where a court-martial is dissolved under this section, the accused may be tried again.

[a] Proviso was repealed by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 26.

SECTION 62 — Note 1.

[1] Under S. 62, the Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial to try a person whether the latter be on active service or not. On active service, others may convene a Court-martial who cannot do it in peace time. The section does not mean that the Central Government or Commander-in-Chief lose their right to

empower an officer to convene a Court-martial when the troops are on active service. The Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial at all times whereas the officer commanding forces in the field can only empower an officer to convene such a Court on active service. (Vol 33) 1946 Lah 103 (110); I L R (1945) Lah 419 (F B).

Jurisdiction of Courts-martial.

66. When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been summarily dealt with for an offence under section 20 or section 22, he shall not be liable to be tried again for the same offence by a court-martial or dealt with summarily in respect of it under either of the said sections.

^a[**67.** No trial by court-martial of any person subject to this Act for any offence (other than mutiny, desertion or fraudulent enrolment) shall be commenced after the 7th day of December 1941 while the person in question was a prisoner of war or was present in enemy territory or,] an offence of mutiny, desertion or fraudulent enrolment) shall be commenced after the ^b[expiration of a period of three years (in the computation of which period any time spent by the person in question after the aforesaid date as a prisoner of war or in enemy territory or in evading arrest shall be excluded)] from the date of such offence, and no such trial for an offence of desertion (other than desertion on active service) or of fraudulent enrolment shall be commenced if the person in question ^d[(not being an Indian commissioned officer)] has, subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of His Majesty's regular forces.

Explanation.—For the purposes of this section, 'mutiny' means any of the offences specified in clauses (a), (b) and (c) of section 27 ^e[and 'enemy territory' means any area at the time of the presence therein of the person in question under the sovereignty of or administered by or in the occupation of a State at that time at war with His Majesty].]

[a] Substituted by the Indian Army (Amendment) Act, 1920, (37 [XXXVII] of 1920), S. 8, for the section which had been substituted by the Repealing and Amending Act, 1919, (18 [XVIII] of 1919), S. 2 and Sch. I, for the original section. [b] These words were added by the Indian Army and Indian Air Force (Amendment) Ordinance, 1945 (No. 42 [XLII] of 1945), S. 2. [This amendment shall be deemed to have been made with effect from 7-12-1941.] [c] Substituted for "expiration of three years," *ibid* [do]. [d] Inserted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 27. [e] Added by Ordinance (No. 42 [XLII] of 1945), S. 2. [7-12-1941.]

Place of trial. **68.** Any person subject to this Act who commits any offence against it may be tried and punished for such offence in any place whatever.

Adjustment of the jurisdiction of Courts-martial and Criminal Courts.

69. When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the prescribed military authority to decide before which court the proceedings shall be instituted, and, if that authority decides that they shall be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

70. (1) When a criminal court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any alleged offence, it may, by written notice, require the prescribed military authority at its option either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the ^a[Central Government].

(2) In every such case the said authority shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the court before which the

SECTION 69—Note 1.

[1] In cases where an ordinary criminal Court and a Court-martial have each jurisdiction in respect of an offence, it cannot be said that the Court-martial has no jurisdiction on the ground that first information report in respect thereof was lodged by persons other than the prescribed military authority and cognizance was taken by a Magistrate before the decision of the prescribed military authority as to the Court before which the proceedings should be instituted. (Vol 33) 1946 Lah 103 (111, 112) : I L R. (1945) Lah 419 (FB).

[2] Where a Magistrate has taken cognizance of offences which were equally triable by the Court-martial under S. 69, the case can be withdrawn from the former and tried by the latter Court. (Vol 33) 1946 Lah 103 (111) : I L R. (1945) Lah 419 (FB).

[3] Subject of an Indian State committing civil

offence outside India as a native officer. Case is not triable by ordinary criminal Court; hence such a case is outside the scope of Ss. 69 to 71 of the Army Act. Offence can be tried under S. 41 of the Army Act that being the special law within the meaning of S. 5 of the Penal Code. (Vol 33) 1946 Lah 158 (169) (F B).

SECTION 70—Note 1.

[1] Offence of desertion is not triable by the criminal Courts. Hence, where a military servant commits criminal breach of trust and absconds military Court has concurrent jurisdiction as regards criminal breach of trust but exclusive jurisdiction as to desertion. Mere fact that accused was arrested by Police, put up before a Magistrate and that case proceeded to some length does not make S. 70 applicable to an offence of desertion. (Vol 15) 1928 All 672 (672, 673) : 29 Cr L Jour 803.

proceedings are to be instituted for the determination of the ^a[Central Government], whose order upon such reference shall be final.

[a] *Substituted by A. O. for "Governor-General in Council."*

71. (1) Notwithstanding anything contained in section 26 of the General Clauses Act, 1897, *Trial by court-martial* or in section 403 of the Code of Criminal Procedure, 1898, a person *no bar to subsequent trial* convicted or acquitted by a court-martial may be afterwards tried by a criminal court for the same offence or on the same facts.

(2) If a person sentenced by a court-martial in pursuance of this Act to punishment for an offence is afterwards tried by a criminal court for the same offence or on the same facts, that court shall, in awarding punishment, have regard to the military punishment he may already have undergone.

Powers of Courts-martial.

72. A general or summary general court-martial shall have power to try any person subject to this Act for any offence made punishable therein and to pass any sentence authorized by this Act.
Powers of general and summary general courts-martial.

73. A district court-martial shall have power to try any person subject to this Act other than an officer for any offence made punishable therein, and to pass any sentence authorized by this Act other than a sentence of death, or transportation, or imprisonment for a term exceeding two years :
Powers of district court-martial.

^a[Provided that a district court-martial shall not award to a warrant officer any punishment other than ^b[the punishments specified in clauses (g), (gg) and (h) of section 43 or], either in addition to or in substitution for any such punishment, the punishment specified in clause (d) or the punishment specified in clause (f) of that section.]

[a] *Inserted by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 28.* [b] *Substituted by the Indian Army (Amendment) Act, 1935 (7 [VII] of 1935), S. 3, for "the punishment specified in cl. (h) of section 43 or."*

Offences triable by summary court-martial. **74.** A summary court-martial may try any offence punishable under any of the provisions of this Act :

Provided that when there is no grave reason for immediate action, and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial ^a[or on active service a summary general court-martial] for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any of the following offences, namely —

(a) any offence punishable under sections 25, 27, clauses (a), (b) or (c), 33 ^b[or 41], or

(b) any offence against the officer holding the court.

[a] *Inserted by the Indian Army (Amendment) Act, 1918, (11 [XI] of 1918), S. 15.* [b] *Substituted by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 29, for "41 or 42."*

Persons triable by summary court-martial. **75.** A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer or warrant officer.

76. (1) A summary court-martial ^a[* * * *] may pass any sentence which can be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding one year.
Sentences awardable by summary court-martial.

^b[* * * * *]

[a] Words "held by the commanding officer of a corps or department" were *repealed* by the Indian Army (Amendment) Act, 1917 (10 [X] of 1917), S. 4. [b] Sub-section (2) of S. 76 was *repealed* by S. 4, *ibid*.

Procedure at Trials by Court-martial.

77. At every general, district or summary general court-martial the senior member shall sit *President.* as president.

SECTION 72—Note 1.

[1] Under S. 491, Criminal P. C., High Court cannot interfere with findings of Court-martial even if it had made a mistake of law. Courts-martial are the sole Judges of both law and fact, unless the Court-martial convicted an accused person without hearing any

evidence at all. (Vol 33) 1946 Lah 103 (110, 111) : I L R²(1945) Lah 419 (F B).

[2] The High Court has no jurisdiction to sit in judgment on the findings of any Court-martial where a person has been tried under the Army Act. (Vol 32) 1945 Oudh 217 (218) : 46 Cri L Jour 746; 20 Luck 335.

78. Every general court-martial shall, and every district^a [or summary general] court-martial Judge Advocate. may, be attended by a judge advocate, who shall be either an officer belonging to the department of the Judge Advocate General in India, or, if no such officer is available, a person appointed by the convening officer.

[a] Inserted by the Indian Army (Amendment) Ordinance, 1942 (18 [XVIII] of 1942), S. 2 [5-5-1942].

79. [Superintending officer.] *Repealed by the Indian Army (Amendment) Act, 1934, (XXXIII of 1934), S. 30.*

80. (1) At all trials by general, district or summary general courts-martial, as soon as the Challenges. court is assembled, the names of the president and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.

(2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer, decide on the objection.

(3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner by another officer, subject to the same right of the accused to object.

(4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial.

81. (1) Every decision of a court-martial shall be passed by an absolute majority of Voting of members. votes; and where there is an equality of votes, as to either finding or sentence, the decision shall be in favour of the accused.

(2) In matters other than a challenge or the finding or sentence, the president shall have a casting vote.

82. An oath or affirmation in the prescribed form shall be administered to every member Oaths of president of every court-martial and to the judge advocate^a [* * *] and members. before the commencement of the trial.

[a] Words "or superintending officer" were repealed by the Indian Army (Amendment) Act, 1934, (33 [XXXIII] of 1934), S. 31.

83. Every person giving evidence at a court-martial shall be examined on oath or affirmation. Oaths of witnesses. tion, and shall be duly sworn or affirmed in the prescribed form.

84. (1) The convening officer, the president of the court, the judge advocate, or the commanding officer of the accused person may, by summons under his hand, require the attendance^a [* * *] at a time and place to be mentioned in the summons, of any person either to give evidence or to produce any document or other thing. Summoning witnesses and production of documents.

(2) In the case of a witness amenable to military authority, the summons shall be sent to the officer commanding the corps, department or detachment to which he belongs, and such officer shall serve it upon him accordingly.

(3) In the case of any other witness, the summons shall be sent to the Magistrate within whose jurisdiction he may be or reside, and such Magistrate shall give effect to the summons as if the witness were required in the court of such Magistrate.

(4) When a witness is required to produce any particular document or other thing in his possession or power, the summons shall describe it with convenient certainty.

(5) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to any letter, postcard, telegram or other document in the custody of the postal or telegraph authorities.

(6) If any document in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any court-martial, such Magistrate or Court may require the postal or telegraph authorities, as the case may be, to deliver such document to such person as such Magistrate or Court may direct.

(7) If any such document is, in the opinion of any other Magistrate or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal

or telegraph authorities, as the case may be, to cause search to be made for and to detain such document pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

[a] Words "before the court" were *repealed* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 32.

85. (1) Whenever, in the course of a trial by court-martial, it appears to the court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, in the circumstances of the case, would be unreasonable, such court may address the Judge Advocate General in order that a commission to take the evidence of such witness may be issued.

(2) The Judge Advocate General may then, if he thinks necessary, issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

^a[(3) When the witness resides in any Indian State or tribal area in which there is an officer representing the Central Government or the Crown Representative, the commission may be issued to that officer.]

(4) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is or shall summon the witness before him and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under the Code of Criminal Procedure, 1898.

(5) Where the commission is issued to such officer as is mentioned in sub-section (3), he may delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

(6) When the witness resides out of India, the commission may be issued to any British consular officer, British Magistrate or other British official competent to administer an oath or affirmation in the place where such witness resides.

(7) The prosecutor and the accused person in any case in which a commission is issued may respectively forward any interrogatories in writing which the court may think relevant to the issue, and the Magistrate or officer to whom the commission is issued shall examine the witness upon such interrogatories.

(8) The prosecutor and the accused person may appear before such Magistrate or officer by pleader or, except in the case of an accused person in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

(9) After any commission issued under this section has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Judge Advocate General.

(10) On receipt of a commission and deposition returned under sub-section (9), the Judge Advocate General shall forward the same to the court at whose instance the commission was issued or, if such court has been dissolved, to any other court convened for the trial of the accused person; and the commission, the return thereto and the deposition shall be open to the inspection of the prosecutor and the accused person, and may, subject to all just exceptions, be read in evidence in the case by either the prosecutor or the accused, and shall form part of the proceedings of the court.

(11) In every case in which a commission is issued under this section the trial may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

Explanation. — In this section, the expression "Judge Advocate General" means the Judge Advocate General in India, and includes a Deputy Judge Advocate General.

[a] *Substituted* by A. O. for the original sub-section.

Conviction of one offence permissible on charge of another. **86. (1)** A person charged before a court-martial with desertion may be found guilty of attempting to desert or of being absent without leave.

^a[(2) A person charged before a court-martial with attempting to desert may be found guilty * * *] of being absent without leave.

(3) A person charged before a court-martial with any of the following offences specified in section 31, that is to say, theft, dishonest misappropriation or conversion to his own use of property entrusted to him, or dishonestly receiving or retaining property in respect of which any of the aforesaid offences has been committed knowing or having reason to believe it to have been stolen or dishonestly misappropriated or converted, may be found guilty of any other of these offences with which he might have been charged.

(4) A person charged before a court-martial with an offence punishable under section 41 b[* *] may be found guilty of any other offence of which he might have been found guilty if the provisions of the Code of Criminal Procedure, 1898, were applicable.

(5) A person charged before a court-martial with any other offence under this Act may, on failure of proof of an offence having been committed in circumstances involving a more severe punishment, be found guilty of the same offence as having been committed in circumstances involving a less severe punishment.

°(6) A person charged before a court-martial with any offence under this Act may be found guilty of having attempted to commit or of abetment of that offence although the attempt or abetment is not separately charged.]

[a] The words "of desertion or" were omitted by the Indian Army and Indian Air Force (Amendment) Act, 1948 (21 [XXI] of 1948), S. 3. [b] The words and figures "or section 42" were repealed by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 83. [c] Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 16.

87. No sentence of death shall be passed by any court-martial without the concurrence of Majority requisite to two-thirds at the least of the members of the court.
sentence of death.

Evidence before Courts-martial.

General rule as to evidence.

88. The Indian Evidence Act, 1872, shall, subject to the provisions of this Act, apply to all proceedings before a court-martial.

89. A court-martial may take judicial notice of any matter within the general military knowledge of the members.
Judicial notice.

90. In any proceeding under this Act, any application, certificate, warrant, reply or other document purporting to be signed by an officer in the ^a[service of the Crown] shall, on production, be presumed to have been duly signed by the person and in the character by whom and in which it purports to have been signed, until the contrary is shown.
Presumption as to signatures.

[a] Substituted by A. O. for "civil or military service of the Government."

91. Any enrolment paper purporting to be signed by an enrolling officer shall, in proceedings under this Act, be evidence of the person enrolled having given the answers to questions which he is therein represented as having given. ^a[The enrolment of such person may be proved by the production of a copy of his enrolment paper purporting to be certified to be a true copy by the officer having the custody of the enrolment paper.]
Enrolment paper.

[a] Substituted by the Indian Army (Amendment) Act, 1918, (11 [XI] of 1918), S. 17, for "and of the enrolment of such person."

^a[91A. (1) A letter, return or other document respecting the service of any person in, or the dismissal or discharge of any person from, any portion of His Majesty's Forces, or respecting the circumstance of any person not having served in, or belonged to, any portion of His Majesty's Forces, if purporting to be signed by or on behalf of the ^b[Central Government] or the Commander-in-Chief in India or by any prescribed officer, shall be evidence of the facts stated in such letter, return or other document.
Presumption as to certain documents.

(2) An Army List or Gazette purporting to be published by authority shall be evidence of the status and rank of the officers or warrant officers therein mentioned, and of any appointment held by such officers or warrant officers and of the corps, battalion or arm or branch of the service to which such officers or warrant officers belong.

(3) Where a record is made in any regimental book, in pursuance of this Act or of any rules made thereunder or otherwise in pursuance of military duty, and purports to be signed by the commanding officer or by the officer whose duty it is to make such record, such record shall be evidence of the facts thereby stated.

(4) A copy of any record in any regimental book purporting to be certified to be a true copy by the officer having the custody of such book shall be evidence of such record.

(5) Where any person subject to this Act is being tried on a charge of desertion or of absence without leave, and such person has surrendered himself into the custody of, or has been apprehended by, a provost-marshal, assistant provost-marshal or other officer, or any portion of His Majesty's Forces, a certificate purporting to be signed by such provost-marshal, assistant provost-marshal or other officer, or by the commanding officer of that portion of His Majesty's Forces and stating the fact, date and place of such surrender or apprehension, shall be evidence of the matters so stated.

(6) When any person subject to this Act is being tried on a charge of desertion or of absence without leave, and such person has surrendered himself into the custody of, or has been apprehended by, a police-officer not below the rank of an officer in charge of a police-station, a certificate purporting to be signed by such police-officer and stating the fact, date and place of such surrender or apprehension, shall be evidence of the matters so stated.]

“(7) Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report may be used as evidence in any proceeding under this Act.]

[a] Section 91A was inserted by the Indian Army (Amendment) Act, 1918, (11 [XI] of 1918), S. 18.

[b] Substituted by A. O. for “Governor-General in Council.” [c] Sub-section (7) was inserted by the Indian Army (Amendment) Act, 1923 (33 [XXXIII] of 1923), S. 3.

92. (1) If at any trial for desertion, absence without leave, overstaying leave or not rejoining when warned for service, the person tried states in his defence any sufficient or reasonable excuse for his unauthorized absence, and refers in support thereof to any officer in the ^a[service of the Crown] or if it appears that any such officer is likely to prove or disprove the said statement in the defence, the court shall address such officer and adjourn until his reply is received.

(2) The written reply of any officer so referred to shall, if signed by him, be received in evidence and have the same effect as if made on oath before the court.

(3) If the court is dissolved before the receipt of such reply, or if the court omits to comply with the provisions of this section, the convening officer may, at his discretion, annul the proceedings and order a fresh trial by the same or another court-martial.

[a] Substituted by A. O. for “civil or military service of Government.”

93. (1) When any person subject to this Act has been convicted by a court-martial of any offence, such court-martial may inquire into, and receive and record evidence of, any previous convictions of such person, either by a court-martial or by a criminal court, and may further inquire into and record the general character of such person, and such other matters as may be prescribed.

(2) Evidence received under this section may be either oral, or in the shape of entries in, or certified extracts from, court-martial books or other official records; and it shall not be necessary ^a[* * *] to give notice before trial to the person tried that evidence as to his previous convictions or character will be received.

(3) At a summary court-martial the officer holding the trial may, if he thinks fit, record any previous convictions against the offender, his general character, and such other matters as may be prescribed, as of his own knowledge, instead of requiring them to be proved under the foregoing provisions of this section.

[a] The words “to prove the signature to such certified extracts, nor shall it be necessary” were repealed by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 26 and Schedule.

Confirmation and Revision of Findings and Sentences.

Finding and sentence invalid without confirmation.

94. No finding or sentence of a general or district court-martial shall be valid except so far as it may be confirmed as provided by this Act.

Power to confirm finding and sentence of general court-martial.

95. The findings and sentences of general courts-martial may be confirmed by the Commander-in-Chief in India, or by any officer empowered in this behalf by warrant of the Commander-in-Chief in India.

Power to confirm finding and sentence of district court-martial.

96. The findings and sentences of district courts-martial may be confirmed by any officer having power to convene a general court-martial, or by any officer empowered in this behalf by warrant of any such officer.

Contents of warrant issued under section 95 or section 96.

97. A warrant issued under section 95 or section 96 may contain such restrictions, reservations or conditions as the officer issuing it may think fit.

98. (1) The finding and sentence of a summary general court-martial shall require to be confirmed by the convening officer ^a[or if the convening officer so directs, by an authority superior to the convening officer] —

(a) in the case of the trial of an officer,

(b) in the case of an acquittal or a sentence of death or transportation or imprisonment for a term exceeding two years, and

(c) in any other case if so ordered by the ^b[convening] officer.

(2) Save as provided in sub-section (1), a sentence passed by a summary general court-martial shall not require to be confirmed, but may be carried out forthwith.

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 19 (1).* [b] *Substituted by S. 19 (2), ibid, for "said."*

99. Subject to such restrictions as may be contained in any warrant issued under section 95 or section 96, a confirming officer may, when confirming the sentence of a court-martial, mitigate or remit the punishment thereby awarded, or commute that punishment for any less punishment or punishments to which the offender might have been sentenced by the court-martial ^a[or if that punishment is death or transportation for life, then for any less punishment or punishments mentioned in this Act] :

Provided that a sentence of transportation shall not be commuted for a sentence of imprisonment for a term exceeding the term of transportation awarded by the court.

[a] *Inserted by the Indian Army (Second Amendment) Ordinance, 1945 (48 [XLVIII] of 1945), S. 2 [24-12-1945].*

^a**99A.** When any person subject to this Act is tried and sentenced by court-martial while on board ship, the finding and sentence so far as not confirmed and executed on board ship may be confirmed and executed in like manner as if such person had been tried at the port of disembarkation.]

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 20.*

100. (1) Any finding or sentence of a court-martial which requires confirmation may be once revised by order of the confirming officer ; and on such revision, the court, if so directed by him, may take additional evidence.

(2) The court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.

(3) In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the court shall proceed with the revision, provided that, if a general court-martial, it still consists of five officers, or if a district court-martial, of three officers.

101. The finding and sentence of a summary court-martial shall not require to be confirmed, but may be carried out forthwith :

Provided that, if the officer holding the trial is of less than five years' service, he shall not, except on active service, carry into effect any sentence until it has received the approval of an officer commanding not less than a corps.

102. The proceedings of every summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer; and such officer, or the Commander-in-Chief in India, or the officer commanding the army, ^a[or army corps,] in which the trial was held, may, for reasons based on the merits of the case, but not on any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed.

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 6.*

SECTION 99—Note 1.

[1] As to the suspension of sentences awarded to a person subject to the Army Act, see Ss. 3 and 8 of the Army (Suspension of Sentences) Act, 1920.

SECTION 101—Note 1.

[1] As to suspension of sentences, see Ss. 3 and 8 of the Army (Suspension of Sentences) Act, 1920.

SECTION 102—Note 1.

[1] "We accept the opinion expressed in the papers submitted to us that an officer to whom the proceedings of a summary Court-martial are transmitted should have the power to reduce the sentence of such a Court, and we have suggested an amendment to clause 103 (now S. 102) to give effect to this." — *Select Committee Report.*

^a[103. (1) Where a finding of guilty by a court-martial, which has been confirmed, or which does not require confirmation, is found for any reason to be invalid or cannot be supported by the evidence, the authority which would have had power under section 112 to commute the punishment awarded by the sentence, if the finding had been valid, may substitute a new finding, if the new finding could have been validly made by the court-martial on the charge and if it appears that the court-martial must have been satisfied of the facts establishing the offence specified or involved in the new finding, and may pass a sentence for the said offence.

(2) Where a sentence passed by a court-martial which has been confirmed, or which does not require confirmation, not being a sentence passed in pursuance of a new finding substituted under sub-section (1), is found for any reason to be invalid, the authority which would have had power under section 112 to commute the punishment awarded by the sentence if it had been valid may pass a valid sentence.

(3) The punishment awarded by a sentence passed under sub-section (1) or sub-section (2) shall not be higher in the scale of punishments than, or in excess of the punishment awarded by, the sentence for which a new sentence is substituted under this section.]

^b[(4) Any finding substituted, or any sentence passed, under this section shall for the purposes of this Act and the rules made thereunder have effect as if it were a finding or sentence, as the case may be, of a court-martial.]

[a] Substituted by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 4, for S. 103. [13-8-43]. [b] Sub-section (4) was added by the Indian Army (Second Amendment) Ordinance, 1944 (31 [XXXI] of 1944), S. 3. [1-7-1944].

^a[103A. (1) Whenever, in the course of a trial by court-martial, it appears to the court that *Provision in the case of* the person charged is of unsound mind and consequently incapable of *accused being lunatic.* making his defence, or that such person committed the act alleged but was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law, the court shall record a finding accordingly, and the President of the Court or the officer holding the trial, as the case may be, shall forthwith report the case to the confirming officer, or, in the case of a court-martial whose finding does not require confirmation, to the prescribed officer.

(2) A confirming officer to whom a case is reported under sub-section (1) may, if he does not confirm the finding, take steps to have the accused person tried by the same or another court-martial for the offence with which he was originally charged.

(3) A prescribed officer to whom a case is reported under sub-section (1) and a confirming officer confirming a finding in any case so reported to him shall order the accused person to be kept in custody in the prescribed manner, and shall report the case for the orders of the ^b[Central Government].

(4) On receipt of a report under sub-section (3), the ^b[Central Government] may order the accused person to be detained in a lunatic asylum or other suitable place of safe custody.

(5) Where an accused person, having been found by reason of unsoundness of mind to be incapable of making his defence, is in custody or under detention, the prescribed officer may—

(a) if such person is in custody under sub-section (3), on the report of a medical officer that he is capable of making his defence, or

(b) if such person is detained under sub-section (4), on a certificate such as is referred to in section 473 of the Code of Criminal Procedure, 1898,

take steps to have such person tried by the same or another court-martial for the offence with which he was originally charged or, provided that the offence is a civil offence, by a Criminal Court.

^c[(5A) Where any person is in custody under sub-section (3) or under detention under sub-section (4),—

(a) if such person is in custody under sub-section (3), on the report of a medical officer, or

(b) if such person is detained under sub-section (4), on a certificate from any of the authorities empowered to grant a certificate under section 473 of the Code of Criminal Procedure, 1898, that, in the judgment of such officer or authority, such person may be released without danger of his doing injury to himself or to any other person, the ^b[Central Government] may thereupon order such person to be released, or to be

detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum.

(5B) Where any relative or friend of any person who is in custody under sub-section (3) or under detention under sub-section (4) desires that he shall be delivered to his care and custody, the ^b[Central Government] may, upon the application of such relative or friend and on his giving security to the satisfaction of the ^b[Central Government] that the person delivered shall —

(a) be properly taken care of and prevented from doing injury to himself or to any other person, and

(b) be produced for the inspection of such officer, and at such times and places, as the ^b[Central Government] may direct,

order such person to be delivered to such relative or friend.]

(6) A copy of every order made by the prescribed officer under sub-section (5) shall forthwith be sent to the ^b[Central Government].]

[a] Section 103A was inserted by the Indian Army (Amendment) Act, 1923 (33 [XXXIII] of 1923), S. 4.

[b] Substituted by A. O. for "Governor-General in Council." [c] Inserted by the Indian Army (Amendment) Act, 1935 (7 [VII] of 1935), S. 4.

CHAPTER IX.

EXECUTION OF SENTENCES.

104. In awarding a sentence of death a court-martial shall, in its discretion, direct that the *Form of sentence of death.* offender shall suffer death by being hanged by the neck until he be dead, or shall suffer death by being shot to death.

105. [Imprisonment to be in military custody.] *Repealed by the Indian Army (Amendment) Act, 1934 (XXXIII of 1934), S. 34.*

106. Whenever any person is sentenced under this Act to transportation or imprisonment, *Commencement of sentence of transportation or imprisonment.* the term of his sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the president or, in the case of a summary court-martial, by the court.

^a**[107. (1)]** Whenever any sentence of transportation is passed under this Act or whenever *Execution of sentence of transportation or imprisonment.* any sentence so passed is commuted to transportation, the commanding officer of the person under sentence or such other officer as may be prescribed shall forward a warrant in the prescribed form to the officer in charge of the civil prison in which such person is to be confined and shall forward him to such prison with the warrant.

(2) Whenever any sentence of imprisonment is passed under this Act or whenever any sentence so passed is commuted to imprisonment, the confirming officer, or in the case of a sentence which does not require confirmation, the Court or in either case such officer as may be prescribed may direct either that the sentence shall be carried out by confinement in a civil prison or by confinement in a military prison, and the commanding officer of the person under sentence or such other officer, as may be prescribed, shall forward a warrant in the prescribed form to the officer in charge of the prison in which the person under sentence is to be confined and shall forward him to such prison with the warrant:

Provided that in the case of a sentence of imprisonment for a period not exceeding three months, in lieu of a direction that the sentence shall be carried out by confinement in a civil or a military prison, a direction may be made that the sentence shall be carried out by confinement in military custody:

Provided further that on active service a sentence of imprisonment may be carried out by confinement in such place as the officer commanding the forces in the field may from time to time appoint.]

[a] Substituted by the Indian Army and Air Force (Military Prisons and Detention Barracks) Act, 1943 (14 [XIV] of 1943), S. 2, for S. 107. [7-4-1943.]

108. Whenever, in the opinion of an officer commanding an army, ^a[army corps], division or independent brigade, any sentence or portion of a sentence of *Execution of sentence of imprisonment in special cases.* imprisonment cannot, for special reasons, conveniently be carried out in accordance with the provisions of ^b[* * * *] section 107, such

officer may direct that such sentence or portion of sentence shall be carried out by confinement in any civil prison or other fit place.

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 6. [b] Words and figures "Section 105 or" were repealed by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 36.*

^a[108A. In every case in which a sentence of transportation is passed under this Act, the *Offenders sentenced to transportation how dealt with until transported.* offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be deemed to have been undergoing his sentence of transportation during the term of his imprisonment.]

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 22.*

^a[109. Whenever an order is duly made under this Act setting aside or varying any sentence, *Communication of certain orders to prison officers.* order or warrant under which any person is confined in a civil or military prison, a warrant in accordance with such order shall be forwarded by the prescribed officer to the officer in charge of the prison in which such person is confined.]

[a] *Section 109 was substituted for original section 109 by the Indian Army and Air Force (Military Prisons and Detention Barracks) Act, 1943 (14 [XIV] of 1943), S. 3. [7-4-1943.]*

110. In executing a sentence of solitary confinement such confinement shall in no case exceed *Limit of solitary confinement.* fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and, when the imprisonment awarded exceeds three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

111. [Instrument of corporal punishment.] *Repealed by the Indian Army (Amendment) Act, 1920 (XXVII of 1920), S. 10.*

^a[111A. When a sentence of fine is imposed by a court-martial under section 41 ^b[* * *], *Execution of sentence of fine.* whether the trial was held within British India or not, a copy of such sentence, signed and certified by the president of the court or the officer holding the trial, as the case may be, may be sent to any Magistrate in British India, and such Magistrate shall thereupon cause the fine to be recovered in accordance with the provisions of the Code of Criminal Procedure, 1898, for the levy of fines as if it was a sentence of fine imposed by such Magistrate.]

[a] *Inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 23. [b] Words and figures "or Section 42" were repealed by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 37.*

Establishment and regulation of military prisons. ^a[111B. (1) The Central Government may set apart any building or part of a building or any place under its control as a military prison for the confinement of persons sentenced to imprisonment under this Act ^b[or under the Burma Army Act.]

(2) The Central Government may make rules providing —

- (a) for the Government, management and regulation of such military prisons;
- (b) for the appointment and removal and powers of inspectors, visitors, governors and officers thereof;
- (c) for the labour of prisoners undergoing confinement therein, and for enabling persons to earn, by special industry and good conduct, a remission of a portion of their sentence; and
- (d) for the safe custody of prisoners and the maintenance of discipline among them and the punishment, by personal correction, restraint or otherwise, of offences committed by prisoners:

Provided that such rules shall not authorise corporal punishment to be inflicted for any offence nor render the imprisonment more severe than it is under the law for the time being in force relating to civil prisons in British India.

(3) Rules made under this section may provide for the application to military prisons of any of the provisions of the Prisons Act, 1894, relating to the duties of officers of prisons and the punishment of persons not prisoners.]

[a] *Inserted by the Indian Army and Air Force (Military Prisons and Detention Barracks) Act, 1943 (14 [XIV] of 1943), S. 4. [7-4-43.] [b] These words were added by the Indian Army (Amendment) Ordinance, 1944 (5 [V] of 1944), S. 2. [31-1-1944.]*

CHAPTER X.

- PARDONS AND REMISSIONS.

^a[112. (1) When any person subject to this Act has been convicted by a court-martial of any offence, the ^b[Central Government] or the Commander-in-Chief in India or, in the case of a sentence which he could have confirmed or which did not require confirmation, the officer commanding the army, army corps, division or independent brigade in which such person at the time of his conviction was serving, or the prescribed officer, may,

(a) either without conditions or upon any conditions which the person sentenced accepts, pardon the person or remit the whole or any part of the punishment awarded;

(b) mitigate the punishment awarded, or commute such punishment for any less punishment or punishments mentioned in this Act :

Provided that a sentence of transportation shall not be commuted for a sentence of imprisonment for a term exceeding the term of transportation awarded by the court.

(2) If any condition on which a person has been pardoned or a punishment has been remitted is, in the opinion of the authority which granted the pardon or remitted the punishment, not fulfilled, such authority may cancel the pardon or remission, and thereupon the sentence of the court shall be carried into effect as if such pardon had not been granted or such punishment had not been remitted :

Provided that, in the case of a person sentenced to transportation or imprisonment, such person shall undergo only the unexpired portion of his sentence.

(3) When under the provisions of section 49 ^c[a warrant officer or] a non-commissioned officer is deemed to be reduced to the ranks, such reduction shall, for the purposes of this section, be treated as a punishment awarded by sentence of a court-martial.]

[a] *Substituted* by the Indian Army (Amendment) Act 1918 (11 [XI] of 1918), S. 24, for the original section.

[b] *Substituted* by A. O. for "Governor-General in Council." [c] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 30.

CHAPTER XI.

RULES.

Power to make rules. 113. (1) The ^a[Central Government] may make ^brules for the purpose of carrying into effect the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for —

(a) the ^c[removal, retirement or discharge] from the service of persons subject to this Act;

(b) the amount and incidence of fines to be imposed under section 21;

^d[(bb) the specification of the punishments which may be awarded as field punishments under sections 20 and 45;]

(c) the assembly and procedure of courts of inquiry, and the administration of oaths or affirmations by such courts;

(d) the convening and constituting of courts-martial;

(e) the adjournment, dissolution and sittings of courts-martial;

(f) the procedure to be observed in trials by courts-martial;

(g) the confirmation and revision of the findings and sentences of courts-martial;

(h) the carrying into effect sentences of courts-martial;

(i) the forms of orders to be made under the provisions of this Act relating to courts-martial, transportation or imprisonment; ^e[*]

^f[(ii) the constitution of authorities to decide for what persons, to what amounts and in what manner, provision should be made for dependants under section 52A, and the due carrying out of such decisions;] ^g[and]

(j) any matter in this Act directed to be prescribed.

(3) All rules made under this Act shall be published in the ^h[Official Gazette], and, on such publication, shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For rules under the Act, see General Rules and Orders Vol. IV, p. 127. [c] *Substituted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 39, for "discharge." [d] *Inserted* by the Indian Army (Amendment) Act 1920 (37 [XXXVII] of 1920), S. 9. [e] Word "and" was *repealed* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Schedule I. [f] *Inserted* by the Indian Army (Amendment) Act, 1917 (10 [X] of 1917), S. 6. [g] *Inserted* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Schedule I. [h] *Substituted* by A. O. for "Gazette of India."

CHAPTER XII.

PROPERTY OF DECEASED PERSONS, DESERTERS AND LUNATICS.

Property of deceased persons and deserters. ^a[114. The following rules are enacted respecting the disposal of the property of every person subject to this Act who dies or deserts:—

(1) The commanding officer of the corps, detachment or department to which the deceased person or deserter belonged shall secure all the moveable property belonging to the deceased or deserter that is in camp or quarters, and cause an inventory thereof to be made, and draw any pay and allowances due to such person.

(2) In the case of a deceased person who has left in a Government savings bank (including any post office savings bank, however named) a deposit not exceeding one thousand rupees, the commanding officer may, if he thinks fit, require the secretary or other proper officer of the bank to pay the deposit to him forthwith, notwithstanding anything in any departmental rules, and after the payment thereof in accordance with such requisition, no person shall have any right in respect of the deposit except as hereinafter provided.

(3) In the case of a deceased person whose representative is on the spot and has given security for the payment of the regimental or other debts in camp or quarters (if any) of the deceased, the commanding officer shall deliver over any property received under clauses (1) and (2) to that representative.

(4) In the case of a deceased person whose estate is not dealt with under clause (3), and in the case of any deserter, the commanding officer shall cause the moveable property to be sold by public auction, and shall pay the regimental and other debts in camp or quarters (if any), and, in the case of a deceased person, the expenses of his funeral ceremonies, from the proceeds of the sale and from any pay and allowances drawn under clause (1) and from the amount of the deposit (if any) received under clause (2).

(5) The surplus, if any, shall, in the case of a deceased person, be paid to his representative (if any), or in the event of no claim to such surplus being established within twelve months after the death, then the same shall be remitted to the prescribed person.

(6) In the case of a deserter, the surplus (if any) shall be forthwith remitted to the prescribed person and shall, on the expiry of three years from the date of his desertion, be forfeited to His Majesty, unless the deserter shall in the meantime have surrendered or been apprehended.

^b(7) Where the deceased person or deserter is an Indian commissioned officer on active service, the references in the foregoing rules to the commanding officer shall be construed as references to the Standing Committee of Adjustment, if any, appointed in this behalf in the manner prescribed; and the power conferred by rule (2) to require payment of a deposit left in a Government savings bank shall be read as a power to require the payment from any deposit left in any bank, notwithstanding anything in the rules of the bank, of a sum, not exceeding two thousand rupees, equal to the nearest multiple of one hundred rupees above the amount estimated by the Standing Committee of Adjustment as necessary to meet the regimental and other debts in camp or quarters of the deceased.

(8) The decision of the commanding officer or the Standing Committee of Adjustment, as the case may be, as to what are the regimental and other debts in camp or quarters of a deceased person and as to the amount payable therefor shall, subject to the result of any appeal as against an order to the principal Court of original civil jurisdiction in the locality, be final.]

Explanation ^c[1. — A person shall be deemed to be a deserter within the meaning of this section who has, without authority, been absent from duty for a period of sixty days and has not subsequently surrendered or been apprehended.]

^c[*Explanation 2.* —The expression 'regimental and other debts in camp or quarters' includes for the purposes of this section money due as —

military debts, namely, sums due in respect of, or of any advance in respect of —

(a) quarters,

(b) mess, band, and other regimental accounts,

(c) military clothing, appointments and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death.]

[a] *Substituted* by the Indian Army (Amendment) Act, 1914 (15 [XV] of 1914), S. 2, for the original section.

[b] These rules were *added* after rule (6) by the Indian Army (Amendment) Act, 1945 (7 [VII] of 1945), S. 2. [16-4-1945.] [c] The original *Explanation* was numbered as *Explanation 1* and this *Explanation* was *added* by S. 2, *ibid.*

115. Property deliverable and money payable to the representative of a deceased person under *Disposal of certain property without production of probate, etc.* section 114 may, if the total value or amount thereof does not exceed one thousand rupees, and if the prescribed person thinks fit, be delivered or paid to any person appearing to him to be entitled to receive it or to administer the estate of the deceased, without requiring the production of any probate, letters of administration, certificate or other such conclusive evidence of title; and such delivery or payment shall be a full discharge to those ordering or making the same and to ^a[the Crown] from all further liability in respect of the property or money; but nothing in this section shall affect the rights of any executor or administrator or other representative, or of any creditor, of a deceased person against any person to whom such delivery or payment has been made.

[a] *Substituted* by A. O. for "the Secretary of State for India in Council."

116. The provisions of ^a[sections 114 and 115] shall, so far as they can be made applicable, *Application of section 114 to lunatics.* apply in the case of a person subject to this Act becoming insane, ^b[or, who, being on active service, is officially reported missing :

Provided that, in the case of a person so reported missing, no action shall be taken under sub-sections (2) to (5), inclusive, ^c[of section 114], until one year has elapsed from the date of such report.]

[a] *Substituted* for "Section 114" by the Indian Army and Indian Air Force (Amendment) Act, 1943 (21 [XXI] of 1943), S. 5. [13-8-43.] [b] *Inserted* by the Indian Army (Amendment) Act, 1920 (2 [II] of 1920), S. 2.

[c] *Substituted* for "of the said section" by the Indian Army and Indian Air Force (Amendment) Act, 1943, (21 [XXI] of 1943), S. 5.

CHAPTER XIII.

MISCELLANEOUS.

Military Privileges.

117. (1) Any person subject to this Act ^a[other than an Indian commissioned officer] who *Complaints against officers.* deems himself wronged by any superior or other officer, may, if not attached to a troop or company, complain to the officer under whose command or orders he is serving; and may, if attached to a troop or company, complain to the officer commanding the same.

(2) When the officer complained against is the officer to whom any complaint should, under sub-section (1), be preferred, the aggrieved person may complain to such officer's next superior officer.

(3) Every officer receiving any such complaint shall examine into it, and, when necessary, refer it to superior authority :

^a[Provided that a decision by an authority competent to dispose of the matter complained of shall be final.]

(4) Every such complaint shall be preferred through such channels as may be from time to time specified by proper authority.

[a] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 40.

^a[**117A.** Any Indian commissioned officer who deems himself wronged by his Commanding *Complaints by Indian commissioned officers.* Officer or any superior officer and who on due application made to his Commanding Officer does not receive the redress to which he considers himself entitled, may complain to the ^b[Central Government].]

[a] *Inserted* by the Indian Army (Amendment) Act, 1934 (33 [XXXIII] of 1934), S. 41. [b] *Substituted* by A. O. for "Governor-General in Council."

118. (1) No president or member of a court-martial, no judge advocate ^{a[* * *]}, no party to any proceeding before a court-martial, or his legal practitioner or agent, *Privileges of persons attending courts-martial.* and no witness acting in obedience to a summons to attend a court-martial, shall, while proceeding to, attending on, or returning from a court-martial, be liable to arrest under civil or revenue process.

(2) If any such person is arrested under any such process, he may be discharged by order of the court-martial.

[a] Words "or superintending officer" were repealed by the Indian Army (Amendment) Act, 1934 (33 XXXIII) of 1934, S. 42.

119. (1) No person subject to this Act shall, so long as he belongs to His Majesty's Indian Forces, be liable to be arrested for debt under any process issued by, or by the authority of, any civil or revenue court or revenue officer. *Exemption from arrest for debt.*

(2) The judge of any such court may examine into any complaint made by such person or his superior officer of the arrest of such person contrary to the provisions of this section, and may, by warrant under his hand, discharge the person, and award reasonable costs to the complainant, who may recover those costs in like manner as he might have recovered costs awarded to him by a decree against the person obtaining the process.

(3) For the recovery of such costs no fee shall be payable to the court by the complainant.

120. Neither the arms, clothes, equipment, accoutrements or necessities of any person subject to this Act, nor any animal used by him for the discharge of his duty, shall *Property exempted from attachment.* be seized, nor shall the pay and allowances of any such person or any part thereof be attached, by direction of any civil or revenue court or any revenue-officer, in satisfaction of any decree or order enforceable against him.

Application of the last two foregoing sections to reservists. **121.** Every person belonging to the Indian Reserve Forces shall, when called out for or engaged upon or returning from training or service, be entitled to all the privileges accorded by sections 119 and 120 to a person subject to this Act.

122. (1) On the presentation to any court by or on behalf of any person subject to this Act of a certificate, from the proper military authority, of leave of absence having been granted to or applied for by him for the purpose of prosecuting or defending any suit or other proceeding in such court, the court shall, *Priority of hearing by courts of cases in which Indian officers and soldiers are concerned.* on the application of such person, arrange, so far as may be possible, for the hearing and final disposal of such suit or other proceeding within the period of the leave so granted or applied for.

(2) The certificate from the proper military authority shall state the first and last day of the leave or intended leave, and set forth a description of the case with respect to which the leave was granted or applied for.

(3) No fee shall be payable to the court in respect of the presentation of any such certificate, or in respect of any application by or on behalf of any such person for priority for the hearing of his case.

(4) Where the Court is unable to arrange for the hearing and final disposal of the suit or other proceeding within the period of such leave or intended leave as aforesaid, it shall record its reasons for having been unable to do so, and shall cause a copy thereof to be furnished to such person on his application without any payment whatever by him in respect either of the application for such copy or of the copy itself.

SECTION 120 — Note 1.

[1] Person enrolled under the Act is protected in respect of pays and allowances. Regimental order to treat them as civilians does not take away the protection. (Vol 17) 1930 Lah 105 (105).

[2] Portion of pay set aside towards security is pay withheld and not liable to attachment although ordered to be refunded. (Vol 17) 1930 Lah 105 (105).

[3] Accountant of Army employed at any Frontier Pass, would be exempted from attachment of salary so long as he is so employed. (Vol 20) 1933 All 153 (153).

[4] An Army Assistant Surgeon is warrant officer,

and his pay is not attachable even if he is recruited in India. (Vol 13) 1926 All 122 (124) : 48 All 73.

[5] The pay of a first class warrant officer cannot be attached in a civil Court decree even to the extent contained in S. 60 (1) (i), Civil P. C. (Vol 20) 1933 Bom 185 (186).

[6] As to whether the salary of army officers and pay of persons to whom the Indian Army Act, 1911, applies can be attached under the decree of a civil Court, see the A. I. R. Commentaries on the Civil Procedure Code, 4th (1944) Edn., Section 60, Notes 17 and 18.

(5) If in any case a question arises as to the proper military authority qualified to grant such certificate as aforesaid, such question shall be at once referred by the court to an officer commanding a corps, whose decision shall be final.

Deserters and Military Offenders.

123. (1) Whenever any person subject to this Act deserts, the commanding officer of the *Capture of deserters.* corps, department or detachment to which he belongs shall give written information of the desertion to such civil authorities as, in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a Magistrate, and shall deliver the deserter, when apprehended, to military custody.

(2) Any police-officer may arrest without warrant any person reasonably believed to be subject to this Act and to be travelling without authority, and shall bring him without delay before the nearest Magistrate, to be dealt with according to law.

Arrest by military authorities. **124.** (1) Any person subject to this Act who is charged with an offence may be taken into military custody.

(2) Any such person may be ordered into military custody by any superior officer.

(3) The charge against every person taken into military custody shall, without unnecessary delay, be investigated by the proper military authority, and as soon as may be, either proceedings shall be taken for punishing the offence, or such person shall be discharged from custody.

125. Whenever any person subject to this Act, who is accused of any offence under this Act, *Arrest by civil authorities.* is within the jurisdiction of any Magistrate or police-officer, such Magistrate or officer shall aid in the apprehension and delivery to military custody of such person upon receipt of a written application to that effect signed by his commanding officer.

126. (1) When any person subject to this Act has been absent without due authority from *Inquiry on absence of person subject to Act.* his duty for a period of sixty days, a court of inquiry shall, as soon as practicable, be assembled and, upon oath or affirmation administered in the prescribed manner, shall inquire respecting the absence of the person, and the deficiency, if any, of property of ^a[the Crown] entrusted to his care, or of his arms, ammunition, equipments, instruments, clothing or necessities; and, if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any; and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.

(2) If the person declared absent does not afterwards surrender, or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter.

b [* * * * *

[a] Substituted by A. O. for "the Government." [b] Sub-section (3) was repealed by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 26 and Schedule.

Disposal of Property.

^a[**126A.** When any property regarding which any offence appears to have been committed, *Order for custody and disposal of property pending trial in certain cases.* or which appears to have been used for the commission of any offence, is produced before a court-martial during a trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the trial, and if the property is subject to speedy or natural decay may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.]

[a] Section 126A was inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 25.

^a[**126B.** (1) After the conclusion of a trial before any court-martial, the court or the officer *Order for disposal of property regarding which offence committed.* confirming the finding or sentence of such court-martial or any authority superior to such officer, or, in the case of a court-martial whose finding or sentence does not require confirmation, the officer commanding the army,

SECTION 123—Note 1.

[1] As a deserter can be arrested under S. 123 (1), without any warrant, the production of a warrant cannot be insisted upon. Moreover, S. 54 (1), Criminal P. C., empowers any Police Officer to arrest without

any warrant and without any order from a Magistrate any person reasonably suspected of being a deserter from His Majesty's forces and hence no question of the production of a warrant or an order can arise. (Vol 30) 1943 Mad 280 (281) : 44 Cri L Jour 465 : I L R (1943) Mad 827.

army corps, division or brigade within which the trial was held, may make such order as it or he thinks fit for the disposal by destruction, confiscation, delivery to any person claiming to be entitled to possession thereof, or otherwise, of any property or document produced before the court or in its custody, or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

(2) Where any order has been made under sub-section (1) in respect of property regarding which an offence appears to have been committed, a copy of such order signed and certified by the authority making the same may, whether the trial was held within British India or not, be sent to a Magistrate in any presidency-town or district in which such property for the time being is, and such Magistrate shall thereupon cause the order to be carried into effect as if it was an order passed by such Magistrate under the provisions of the Code of Criminal Procedure, 1898.

Explanation.—In this section the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange whether immediately or otherwise.]

[a] Section 126B was inserted by the Indian Army (Amendment) Act, 1918 (11 [XI] of 1918), S. 25.

Repeal.

127. [Repeal.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

THE SCHEDULE.—[Repeal of Enactments.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

THE INDIAN ARMY (SUSPENSION OF SENTENCES) ACT, 1920.

(Repealed in part by Act XII of 1927.)

ACT No. XX OF 1920.^a

[23rd March 1920.]

An Act to consolidate and amend the law relating to the suspension of sentences passed by courts-martial under the Indian Army Act, 1911.

WHEREAS it is expedient to consolidate and amend the law relating to the suspension of sentences of imprisonment or transportation passed by courts-martial on persons subject to the Indian Army Act, 1911; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1920 Pt. V, p. 124 ; and for proceedings in Council, see *ibid*, 1920 Pt. VI, pp. 843 and 955.

Short title and construction.

1. This Act may be called the Indian Army (Suspension of Sentences) Act, 1920, and shall be construed as one with the principal Act.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) “committed” means committed to prison or to confinement in military custody ;
- (b) “competent military authority” means a superior military authority, or any general or other officer not below the rank of field officer duly authorised by a superior military authority ;
- (c) “imprisonment” includes confinement in military custody ;
- (d) “principal Act” means the Indian Army Act, 1911 ;
- (e) “sentence” means a sentence of transportation or imprisonment, whether originally passed on a person subject to the principal Act, or passed by way of reduction or commutation ; and “sentenced” has the corresponding meaning ; and
- (f) “superior military authority” means the Commander-in-Chief in India or any officer empowered under the principal Act to convene general courts-martial or summary general courts-martial.

3. (1) Where a person subject to the principal Act is sentenced, the confirming officer when *Suspension of sentences.* confirming the sentence, or; in the case of a sentence which does not require confirmation, the officer holding the trial or the President of the court-martial when

passing sentence may, notwithstanding anything in the principal Act, direct that such person be not committed until the orders of a superior military authority have been obtained.

(2) A superior military authority may, in the case of any such offender so sentenced,—

(a) direct that, until his orders have been obtained, such offender shall not be committed; and

(b) suspend the sentence whether or not the offender has already been committed.

(3) Where, in accordance with any order passed under sub-section (2), a sentence is suspended, the offender shall, whether he has been committed or not, forthwith be released.

Calculation of periods of sentence under suspension.

4. Any period during which a sentence is under suspension shall be reckoned as part of the term of such sentence.

Power to set aside suspension or order remission.

5. A superior military authority may, at any time whilst a sentence is suspended under this Act, order—

(a) that the offender be committed to undergo the unexpired portion of the sentence, or

(b) that the sentence be remitted.

6. Where a sentence has been suspended under this Act, the case may at any time, and shall at intervals of not more than four months, be reconsidered by a competent military authority, and if, on any such reconsideration, it appears to such authority that the conduct of the offender since his conviction has been such as to justify a remission of the sentence, he shall, if he is not also a superior military authority, refer the case to a superior military authority.

Procedure on further sentence of offender whose sentence is suspended.

7. Where an offender, while a sentence on him is suspended under this Act, is sentenced for any other offence, then—

(a) if the further sentence is also suspended under this Act, the two sentences shall run concurrently;

(b) if the further sentence is for a period of three months or more and is not suspended under this Act, the offender shall also be committed on the unexpired portion of the previous sentence, but both sentences shall run concurrently; and

(c) if the further sentence is for a period of three months or less and is not suspended under this Act, the offender shall be committed on that sentence only, and the previous sentence shall (subject to any order which may be passed under section 5 or section 6) continue to be suspended.

8. The powers conferred by this Act shall be in addition to, and not in derogation of, any powers as to the mitigation, remission or commutation of sentences conferred by the principal Act, and a superior military authority shall, as regards persons subject to that Act, be an authority having power to mitigate, remit or commute sentences under section 112 of that Act.

9. Where in addition to any other sentence the punishment of dismissal has been awarded by a court-martial, and such other sentence is suspended under this Act, then, notwithstanding anything contained in the principal Act or in any rules made thereunder, such dismissal shall not take effect until so ordered by a superior military authority:

Provided that, if a sentence is remitted under this Act, the punishment of dismissal shall also be remitted.

10. [Repeal of Act IV of 1917.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

ARYA MARRIAGE VALIDATING ACT, 1937.

STATEMENT OF OBJECTS AND REASONS.

"As the Arya Samajists who form quite an appreciable number of the Indian population conscientiously believe that the present caste system is not in accordance with their scriptures, the Vedas and the sacred Shastras and as according to the law as administered at present marriages between parties belonging by birth to different castes or sub-castes are considered invalid and

there is a fear of the issue of such marriages being declared illegitimate and as quite a large number of such marriages have taken place and more would have taken place had there been no such obstacle, it is necessary to have a law which would give relief to the Arya Samajists. Hence the above law is proposed."

—Gazette of India, 1935, Part V, page 132.

REPORT OF THE SELECT COMMITTEE.

The following Report of the Select Committee on the Bill to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists was presented to the Legislative Assembly on the 1st September 1936 :

We have revised the extent clause of the Bill so as to accord retrospective effect which it was sought to secure by clause 1 (2) of the Bill as introduced has been secured in the re-draft of clause 3 of the Bill as introduced, now appearing as clause 2.

We have omitted the definition of Arya Samajist. We were impressed by the difficulty of finding a satisfactory definition, and we consider that the proposal in sub-clause (b) of clause 2 that a declaration subsequent to marriage should suffice to establish that the maker of the declaration was an Arya Samajist, was fraught with danger. We are of opinion that the purposes of the Bill will be adequately served if the question of the religious status of the parties to a marriage remains a question of fact to be determined by the circumstances of each case.

We have recast clause 3 (now numbered clause 2) in a clearer and more comprehensive form.

We recognize that some provision must be made to govern succession in respect of the marriages dealt with by the Bill, but we found that considerable diversity of opinion existed as to what that provision should be. We decided by a majority that the most suitable solution of the problem is to provide as we have done in clause 3 that questions of succession shall be determined according to the Indian Succession Act, 1925.

The 5th August,
1936.

N. N. SIRCAR.
*M. C. RAJAH.
*G. S. GUPTA.
*N. B. KHARE.
*BHAGVAN DAS.
G. H. SPENCE.
G. V. DESHMUKH.
SANT SINGH.
M. S. ANEY.

MINUTES OF DISSENT.

The Bill is intended to meet the needs of the Arya Samajists. Clause 4, relating to succession, should therefore be so framed as to meet the sentiments of that community. It is known as a fact that the whole body of Arya Samajists are opposed to the Indian Succession Act being applied to them instead of the sacred Shastras which they believe in. The application of the Indian Succession Act to the property of the parties for whose benefit the Bill is intended denies to them, as Arya Samajists, what the Arya Samaj as a body has needed and been asking for all this time. If the Indian Succession Act were to apply in such cases, the present Bill would indeed not be needed at all; for the already existing Special Marriage Act, commonly known as the Civil Marriage Act, would cover all such cases.

It should not be forgotten that the Arya Samaj believes in the Vedas and the sacred Shastras and also in Varna-Ashrama Dharma. Their difference with the orthodox Hindus is that they do not believe in Varna by Janma or birth alone, i. e., in the current caste system exclusively by birth. Instead, they believe in Varna by Karma, i. e., vocation or occupation, as clearly expounded by Swami Dayanand, the founder of the Arya Samaj. To ask them to take to the Succession Act, in cases where the Shastras can apply, is to ask them to forsake their faith.

We, therefore, would press that a provision to the following effect, which preserves the applicability of the Shastras in ordinary cases, and also provides for the

application of the Indian Succession Act in certain exceptional cases, be substituted in place of clause 4 as amended by the majority. "For purposes of Succession, the Hindu Personal Law of the husband, where he was a Hindu before the marriage, and the Indian Succession Act in other cases, shall govern the case."

An amendment to the above effect was moved by Dr. Bhagvan Das at the meeting of the Select Committee.

Dated the 4th
August, 1936.

BHAGVAN DAS.
N. B. KHARE.
G. S. GUPTA.
M. C. RAJAH.

I am not clear if it is good to omit the definition of Arya Samajist. The definition given in the Bill is good for all practical purposes and may be allowed to remain.

As regards the changes in clause 4, I agree to the amendment of Dr. Bhagvan Das only as a matter of compromise. I would however insist that clause 4 should remain as introduced, viz., as follows :

"4. For purposes of Succession all inter-marriages referred to in section 3 of this Act shall be deemed to be marriages between persons of the same caste of (Dwijas) the twice-born Hindus."

This is in conformity with the feelings of the Arya Samajists for whom this Bill is meant. The Arya Samajists as a body support this provision.

The 4th August,
1936.

G. S. GUPTA.

—Gazette of India, 1936, Part V, page 306.

ACT NO. XIX OF 1937.

[As amended by Act XXXII of 1940.]

[14th April 1937.]

An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists.

WHEREAS it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Arya Marriage Validation Act, 1937.

(2) It extends to the whole of British India [* * * *] and applies also to all subjects

* Subject to a minute or minutes of dissent.

of His Majesty, within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

[a] The words "including British Baluchistan and the Sonthal Parganas" were omitted by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Schedule II.

2. Notwithstanding any provision of Hindu Law, usage or custom to the contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

THE AUXILIARY FORCE ACT, 1920.

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STATEMENT OF OBJECTS AND REASONS.

"The replacement of the Indian Volunteer Force, which had been in existence for nearly 60 years, by the Indian Defence Force, was a war measure necessitated by the exigencies of the situation. Compulsory service was adopted to meet the needs of an Imperial emergency. Reversion to voluntary enrolment is now considered desirable, but it is essential to maintain and develop in the reconstituted Volunteer Force, the improvements in organization and in the standard of training effected under war conditions.

The necessity for a substantial amendment of the Indian Volunteers Act, 1869, had long been apparent. Under that enactment no definite obligations were imposed on enrolled men in the matter of training, and the standard of efficiency varied widely in different units. It is now proposed to secure the requisite amendment in the force by the substitution of a new measure, in which the liabilities of those enrolled in the matter of training and service are clearly defined.

The main principle underlying these provisions is that the European and domiciled community, being employed for the most part in the public services or in

commercial and industrial occupations of importance, cannot be regarded as available for any but purely local service, and further that military training must be restricted as far as possible to the earlier years of service in the force. Moreover conditions differ greatly in different localities and for this reason it has been found desirable to adjust requirements in the matter of training to the local conditions obtaining. The adjustment will be effected through the agency of Advisory Committee for every military area, power of varying the training in individual cases being entrusted to these bodies.

The liability to local service only is subject to the provision that, in circumstances of emergency to be notified formally by Government, any part of the force may be required to serve beyond the limits of the military area to which it belongs, but in no case out of India.

No term of service is specified, as was the case under the Indian Volunteers Act, 1869. Any enrolled person desirous of discharge during the first six years of his service will be required to satisfy the Local Advisory Committee as to the validity of his reasons for desiring to leave the Force; but after completing six years of

service he may be discharged at any time on application being made to the Commanding Officer and no reference to higher authority will be required.

The scale of training laid down in the Bill is based on the principle already indicated. On attaining the age of 31, a member of the force is entitled to be passed into the First Class of the Reserve and thereupon to undergo training on a reduced scale. On attaining the age of 40, he will be included in the Second Class of the Reserve, and will then be required to complete the annual musketry course only. It is permissible, however, for any person in the Reserve to undertake, from year to year, the liabilities imposed on persons belonging to a higher class.

Members of the Force will be subject to the provi-

sions of the Army Act when called out and when embodied, or when attached to or training with any part of the Regular Forces, this rule being the same as that applied to the Territorial Force in England. Military discipline on other occasions will be enforced with under the summary powers of the Commanding Officer, or, in the case of more serious offences and in any case, should the person charged so elect, by means of the ordinary Criminal Courts. In no case can a Commanding Officer order any form of imprisonment as a summary or minor punishment and no military offence (as specified in clause 24 of the Bill) is punishable with imprisonment by a Magistrate unless it constitutes an offence so punishable under the ordinary law."

—Gazette of India, 1920, part V page 154.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts XXXI of 1923; X of 1928, VI of 1931; X of 1933.
—Amended by Ordinance No. XXVII of 1942.

—Adapted by A. O.

—Repealed in part by Acts XII of 1927; VIII of 1930; I of 1938.

COGNATE ACTS AND PROVISIONS.

See UNDER THE INDIAN ARMY ACT, 1911.

ACT XLIX of 1920^a

[22nd September 1920.]

An Act to constitute an auxiliary force for service in India.

WHEREAS it is expedient to constitute an auxiliary force for service in India; It is hereby enacted as follows:—

[a] For Report of Select Committee, see Gazette of India, 1920, Part V, page 255; and for proceedings in Council, see *ibid*, 1920, Part VI, pages 1042 and 1282.

Short title, extent and commencement.

1. (1) This Act may be called the Auxiliary Force Act, 1920.

(2) It extends^a to the whole of British India, including British Baluchistan and the Sonthal Parganas, and applies also to European British subjects ^b[in any Indian State or tribal area.]

(3) It shall come into force on the first day of October, 1920.

[a] This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation 1936 (4 [IV] of 1936), S. 3 and Schedule; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Schedule. [b] Substituted by A. O. for "within the territories of any Prince or Chief in India."

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

"Advisory Committee" means an Advisory Committee constituted under section 28 for the prescribed military area, or part of a prescribed military area, within which a person subject to this Act for the time being resides or is serving, as the case may be;

^a["competent military authority" means the authority prescribed as competent to perform or exercise all or any of the duties imposed or powers conferred on the competent military authority by this Act;]

"enrolled person" means a person enrolled in the prescribed manner under this Act;

"enrolling officer" means an officer authorised to enroll persons under this Act;

"prescribed" means prescribed by rules made under this Act, and "prescribe" has a corresponding meaning;

ⁱ"regulation" means a regulation made under section 31; and

"training year" means a period of twelve months beginning on the first day of April and ending on the thirty-first day of March.

[a] Substituted by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 2, for the original definition.

Constitution of an auxiliary force.
"Force, India.

3. There shall be raised and maintained in the manner hereinafter provided an auxiliary force for service in India to be designated the Auxiliary

Classes who may be enrolled.

4. Every person who—

(a) is a European British subject as defined in the Code of Criminal Procedure, 1898, or

^a[*

*,

*

*

*

*

*

]

^a[(b)] is a British subject of European descent in the male line,

^a[*]

^a[* * * * *]

shall, subject to the provisions of this Act, be eligible for enrolment thereunder.

[a] The original clauses (b) and (d) and the word "or" at the end of clause (c) were *repealed* and clause (c) was *relettered* as clause (b), by the Auxiliary Force (Amendment) Act, 1928 (10 [X] of 1928), S. 2.

5. (1) Any male eligible for enrolment under this Act who has attained the age of sixteen *Enrolment.* years and is not a member of His Majesty's regular naval, military or air forces ^a[* * *] may apply to be enrolled in the Auxiliary Force, India, and if he satisfies the prescribed conditions, may be enrolled therein in the prescribed manner, and shall thereupon become subject to the provisions of this Act.

(2) ^b[Subject to the prescribed conditions,] an applicant for enrolment may apply to be enrolled for service in any particular branch, or in any particular corps or unit ^c[* * *]

[a] The words "or of his Majesty's Royal Indian Marine" were *repealed* by A. O. [b] *Inserted* by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 3. [c] The words "located in the prescribed military area within which he for the time being resides," were *repealed* by S. 3, *ibid*.

Liability to undergo military training. 6. Every enrolled person shall be liable to undergo military training as provided by or under this Act until discharged from the Auxiliary Force, India, as hereinafter provided.

Liability to perform military service. 7. Every enrolled person liable to undergo military training under section 6 shall, on and from ^a[* * *] the date on which he attains the age of ^b[seventeen] years or, if he has already attained the age of ^b[seventeen] years on and from any later date on which he is enrolled, be liable to perform military service under this Act.

^c[A person enrolled before the commencement of the Auxiliary Force (Amendment) Ordinance, 1942, shall be liable to perform military service as provided in this section notwithstanding that at the time of his enrolment his liability thereto was to begin only upon the first day of April next following the date on which he attained the age of eighteen years.]

[a] The words "the first day of April next following" were *deleted* by the Auxiliary Force (Amendment) Ordinance, 1942 (No. 27 [XXVII] of 1942), S. 2. [30-5-1942]. [b] *Substituted* for the word "eighteen," *ibid*. [c] This sentence was *added*, *ibid*.

8. (1) Every enrolled person shall, without unnecessary delay, be appointed by, or under the *Appointment to corps or unit.* orders of, the competent military authority to a corps or unit of the Auxiliary Force, India, and on receipt of an order so appointing him shall report himself for the purpose of joining such corps or unit at such time and place as may be specified in the order.

(2) Any person who has been enrolled for service in any particular branch, corps or unit shall be appointed to a corps or unit of that branch or to that corps or unit, as the case may be.

9. Every enrolled person liable to perform military service under this Act who on becoming *Preliminary training.* so liable ^a[is included in the Active Class] shall, within the training year in which he becomes so liable, undergo ^b[preliminary training of such amount as may be ordered by the competent military authority subject to the limits specified in Schedule I] :

Provided that, if such preliminary training cannot be completed within that training year, it may be completed at the discretion of the ^c[Officer Commanding the corps or unit to which such enrolled person belongs] in the training year next following :

^d[Provided further that any person may be exempted either wholly or in part by the Officer Commanding his corps or unit from the necessity of undergoing preliminary training required by this section, and shall, on the publication in the orders of the corps or unit of such exemption, be deemed to the extent of such exemption to have completed such preliminary training.]

[a] *Substituted* by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 4 for "has not attained the age of thirty-one years". [b] *Substituted* by *ibid*, for "the preliminary training specified in Schedule".

[c] *Substituted*, *ibid* for "competent military authority". [d] *Substituted*, *ibid* for original second proviso.

10. [Periodical training of persons entitled to rank as officers.] *Repealed by the Auxiliary Force (Amendment) Act, 1933 (X of 1933), S. 5.*

11. Every enrolled person liable to perform military service under this Act ^a[* * *] shall be included ^b[by the Officer Commanding the corps or unit to which he is appointed] in one or other of the following classes, namely :—

(a) the Active Class ; ^c[or]

^d[(b) the Reserve Class ;]

and shall undergo ^e[periodical training of such amount as may be ordered by the competent military authority subject to the limits specified in Schedule I] for the Class in which he is for the time being included.

[a] The words and brackets "(other than a person to whom the provisions of S. 10 apply)" were *repealed* by the Auxiliary Force (Amendment) Act, 1933-10 [X] of 1933) S. 6. [b] *Substituted* by S. 6, *ibid* for "as hereinafter provided". [c] *Inserted* by S. 6, *ibid*. [d] *Substituted* by S. 6, *ibid*, for the original clauses (b) and (c). [e] *Substituted* by S. 6, *ibid* for "the periodical training specified in Schedule I."

12. (1) Every commissioned officer of the Auxiliary Force, India, shall be included in the *Classification*. Active Class until he relinquishes his commission.

(2) Enrolled persons liable to perform military service under this Act not being commissioned officers of the Auxiliary Force, India, ^a[* * *] shall be classified as follows, namely :—

(a) every such person who is required by section 9 to undergo preliminary training ^b[or who being so required] has completed or is deemed to have completed the same shall be included in the Active Class ^c[until he is transferred to the Reserve Class by order of the Officer Commanding the corps or unit] ;

^d[(b) every such person who is transferred from the Active Class under the provisions of clause (a) or who on enrolment is assigned to the Reserve Class by order of the Officer Commanding the corps or unit shall be included in the Reserve Class.]

(3) Any enrolled person who ceases ^e[* * *] to be a commissioned officer of the Auxiliary Force, India, shall thereupon be included in the Class in which he would have been included under this section, if the provisions of ^f[* * *] sub-section (1) ^g[* * *] had not applied to him, and shall undergo periodical training accordingly.

(4) Any person who is under this section included in ^h[the Reserve Class] may apply to the competent military authority to be included ⁱ[in the Active Class], and shall, ^j[if the competent military authority grants the application,] thereupon be deemed to be included in that Class.

k[* * * * *]

[a] The words "or entitled to rank as officers of His Majesty's Forces" were *repealed* by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 7. [b] *Substituted* by S. 7, *ibid*, for "and". [c] *Substituted* by S. 7, *ibid*, for "until the end of the training year in which he attains the age of thirty-one years". [d] *Substituted* by S. 7, *ibid*, for the original clauses (b) and (c). [e] The words "to be entitled to rank as an officer of His Majesty's Forces or" were *repealed* by S. 7, *ibid*. [f] The words and figures "Section 10 or" were *repealed* by S. 7, *ibid*. [g] The words "as the case may be" were *repealed* by S. 7, *ibid*. [h] *Substituted* by S. 7, *ibid*, for "either Class of the Reserve". [i] *Substituted* by S. 7, *ibid* for "for any training year in any other Class for which more periodical training is specified in Schedule I". [j] *Inserted* by S. 7, *ibid*. [k] Sub-section (5) was *repealed* by S. 7, *ibid*.

Variations of training. 13. (1) The competent military authority may, by order in writing, —

^a[(a) on the recommendation of the Advisory Committee, direct that any enrolled person included in the Active Class shall, for the purposes of periodical training, be included for any stated period in the Reserve Class, or]

(b) on his own motion or on the recommendation of the Advisory Committee, reduce the specified amount of training either in individual cases or in the case of any unit or part thereof for any stated period.

(2) The competent military authority shall grant ^b[in respect of each individual or unit or part thereof] whose training is reduced under clause (b) of sub-section (1) a certificate setting forth the amount of training to be undergone during the said period.

[a] *Substituted* by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 8 for the original clause.

[b] *Substituted* by S. 8, *ibid*, for "to each person".

14. Every enrolled person shall, if and when required by the ^a[Officer Commanding the Medical exa- corps or unit to which he belongs], present himself for such medical examination mination. as may be necessary to determine the extent, if any, to which he is fit to undergo military training or to perform military service, before a medical officer appointed or approved

in that behalf by the competent military authority, and for the purposes of such medical examination shall comply with the directions of such medical officer.

[a] Substituted by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 9, for "competent military authority."

15. (1) Every person appointed to a corps or unit under section 8 shall remain in that corps or unit until transferred to another corps or unit by, or under the orders of, the competent military authority, but no person shall be transferred from the Infantry branch to another branch or from one unit to another unit located in the same prescribed military area except at his own request.

(2) Any person so transferred from the Infantry branch to another branch may be required to undergo such further preliminary training, not exceeding eight days, as may be ordered by the competent military authority, and thereafter shall undergo the periodical training ^a[to which he is liable in] the branch to which he is transferred :

Provided that any periodical training already undergone by such person in the training year in which he is transferred shall be deemed to have been undergone in such other branch.

Explanation.—For the purposes of this section and of Schedule I, a day shall be deemed to consist of four hours of actual military drill or instruction, and may be made up of fractions of a day not more than four in number.

[a] Substituted by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 10 for "specified in Schedule I for."

16. (1) Any enrolled person who leaves his place of residence in India for the time being and thereby leaves the area commanded by one competent military authority for residence. that commanded by another shall, if he does not intend to return to the area which he leaves, notify the competent military authority commanding that area of his change of residence.

(2) If such person having intended to return does not return within three months, he shall notify the competent military authority as aforesaid immediately on the expiry of that period.

(3) The competent military authority on being notified of a change of residence under sub-section (1) or sub-section (2) may, subject to the provisions of section 15, transfer such person from the corps or unit in which he is serving to another corps or unit.

17. (1) Any enrolled person who has attained the age of forty-five years or has completed *Discharge.* four years' service from the date of his enrolment shall, on application made by him in the prescribed manner, be entitled to receive his discharge from the Auxiliary Force, India.

(2) An enrolled person who is not entitled to his discharge under sub-section (1) ^a[shall] be discharged by the competent military authority on a recommendation of the Advisory Committee in this behalf.

^b[(3) Any enrolled person may be discharged by such authority, and subject to such conditions, as may be prescribed.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no enrolled person, who is for the time being engaged in military service under the provisions of this Act, shall be entitled to receive his discharge before the termination of such service.]

[a] Substituted by the Auxiliary Force (Amendment) Act, 1928 (10 [X] of 1928), S. 3 for "may".

[b] Inserted by S. 3, *ibid.*

Calling out and embodiment. **18.** No person liable to perform military service under this Act shall be required to perform such service except —

(a) when called out with any portion of the Auxiliary Force, India, by an order of the senior military officer present either to act in support of the civil power or to provide guards which, in the opinion of such officer, are essential; or

(b) when any portion of the Auxiliary Force, India, to which he belongs has been embodied to support or supplement His Majesty's regular forces in the event of an emergency by a notification directing such embodiment issued by the ^a[Central Government and published in the Official Gazette]; or

(c) when attached at his own request to any regular forces; ^b[or

(d) when required by an order of the senior military officer present to perform for short periods not exceeding three days in duration at any one time military service which in the opinion of such officer is essential.]

[a] Substituted by A. O. for "Governor-General in Council" or any Local Government empowered by the Governor-General in Council in that behalf and published in the Gazette of India or the local official Gazette, as the case may be. [b] The word "or" at the end of clause (c) and clause (d) were added by the Auxiliary Force (Amendment) Ordinance, 1942 (27 [XXVII] of 1942), S. 3. [30-5-1942.]

19. No person called out under clause (a), or embodied under clause (b), ^a[or required to perform military service under clause (d),] of section 18 shall be required to perform military service beyond the limits of the prescribed military area in which the corps or unit to which he has been appointed or is for the time being attached is located, save when it is, in the opinion of the senior military officer present, necessary to proceed beyond those limits in the course of the military operations upon which the corps or unit or any portion thereof is for the time being engaged.

[a] Inserted by the Auxiliary Force (Amendment) Ordinance, 1942 (27 [XXVII] of 1942), S. 4. [30-5-1942.]

20. Any portion of the Auxiliary Force, India, which, having been called out or embodied under section 18, is performing military service, shall be replaced by regular troops or otherwise as soon as circumstances permit, and shall not be required to perform such service after such replacement has been effected to the satisfaction of the senior military officer present or after the cancellation of the order or notification under clause (a) or (b), as the case may be, of section 18.

^a[**20A.** (1) If, as a consequence of his being required to perform military service under this Act, either when called out under clause (a) or embodied under clause (b) of section 18, or when attached to any regular forces under clause (c) of that section otherwise than for a course of instruction, the employment of any person is terminated, it shall be the duty of the employer by whom such person was employed at the time he was so required to perform military service to reinstate him in his employment on the termination of such military service under conditions not less favourable to him than those which would have applied to him had his employment not been interrupted by his performance of military service.

(2) If an employer refuses to reinstate any such person as required by sub-section (1) or denies his liability to reinstate such person, or if for any reason the reinstatement of such person is represented by the employer to be impracticable, either party may refer the matter to the tribunal constituted under section 9 of the National Service (European British Subjects) Act, 1940, for the hearing of matters referred to it under the proviso to section 8 of that Act, and that tribunal shall after consideration pass an order either, exempting the employer from the provisions of this section or requiring him to re-employ such person on such terms as it thinks suitable, or requiring him to pay to such person a sum in compensation for failure to re-employ him not exceeding an amount equal to six months' remuneration at the rate at which his last remuneration was payable to him by the employer; and if any employer fails to obey the order of the tribunal, he shall be punishable with a fine which may extend to one thousand rupees, and the Court by which an employer is convicted under this section may order him (if he has not already been so required by the tribunal) to pay the person whom he has failed to re-employ a sum not exceeding an amount equal to six months' remuneration at the rate at which his last remuneration was payable to him by the employer, and any amount so required by the tribunal to be paid or so ordered by the Court to be paid shall be recoverable as if it were a fine imposed by such Court:

Provided that in any proceedings under this section it shall be a defence for an employer to prove that the person formerly employed by him did not apply to the employer for reinstatement within a period of two months from the termination of the military service he was required to perform under this Act.

(3) The duty imposed by sub-section (1) upon an employer to reinstate in his employment a person such as is described in that sub-section shall attach to an employer who before such person is actually required to perform military service under this Act terminates his employment in circumstances such as to indicate an intention to evade the duty imposed by that sub-section; and when a person's employment is terminated at any time after he has been required in any of the manners specified in sub-section (1) to perform military service under this Act, it shall be presumed until the contrary is proved that the termination of his employment took place as a consequence of his having been so required to perform military service.]

[a] Section 20A was inserted by the Auxiliary Force (Amendment) Ordinance, 1942 (27 [XXVII] of 1942), S. 5 [30-5-1942.]

21. ^a[(1)] Every commissioned officer of the Auxiliary Force, India, when doing duty as a commissioned officer, and every non-commissioned officer and man of the said Force —

(a) when attached to or otherwise acting as part of or with any regular forces, and

(b) when called out ^b[or required to perform military service] by an order, or embodied by a notification, under section 18,

shall be subject to the provisions of the Army Act and any orders or regulations made thereunder, and the said Act, orders and regulations shall apply to every such person in the circumstances aforesaid as if the same were enacted in this Act, and as if such person held the same rank in His Majesty's Army as he holds for the time being in the said Force, ^c[subject, in the case of an officer, to the terms of his commission and the orders of His Majesty, and, in the case of a non-commissioned officer or man, to the orders of the Governor-General].

^d(2) Where an offence punishable under the Army Act has been committed by any person whilst subject to that Act under the provisions of sub-section (1), such person may be taken into and kept in military custody and tried and punished for such offence, although he has ceased to be so subject as aforesaid, in like manner as he might have been taken into and kept in military custody, tried or punished if he had continued to be so subject :

Provided that no such person shall be kept in military custody after he has ceased to belong to the Auxiliary Force, India, unless he has been taken into or kept in military custody, on account of the offence before the date on which he ceased so to belong, nor shall he be kept in military custody or be tried or punished for the offence after the expiry of two months from that date, unless his trial had already commenced before such expiry.]

[a] The original S. 21 was *re-numbered* as sub-s. (1) of that section by the Indian Territorial and Auxiliary Forces (Amendment) Act, 1923 (31 [XXXI] of 1923), S. 3. [b] *Inserted* by the Auxiliary Force (Amendment) Ordinance, 1942 (27 [XXVII] of 1942), S. 6 [30-5-1942.] [c] *Inserted* by the Auxiliary Force (Amendment) Act, 1928 (10 [X] of 1928), S. 4. [d] *Inserted* by the Indian Territorial and Auxiliary Forces (Amendment) Act, 1923 (31 [XXXI] of 1923), S. 3.

22. If any person liable to perform military service under this Act fails to comply with an order or notification under section 18 calling him out ^a[or requiring him to perform military service] or embodying him for military service, any District Magistrate or Chief Presidency Magistrate may, on the application of the competent military authority or of an officer empowered by such authority in writing in that behalf, cause such person to be arrested and brought before him, and, if the Magistrate is satisfied that such person has been duly required to perform military service, the Magistrate may, without prejudice to any penalty which such person may have incurred, make over such person in custody to the military authorities.

[a] *Inserted* by the Auxiliary Force (Amendment) Ordinance, 1942 (27 [XXVII] of 1942), S. 7 [30-5-1942.]

Penalties for breach of sections 8, 14 and 16.

23. An enrolled person who refuses or without lawful excuse (the burden of proving which shall lie upon such person) neglects —

- (a) to comply with any order under section 8 ; or
- (b) to attend for medical examination, or to comply with the directions of the medical officer, as required by section 14 ; or
- (c) to notify any change of residence as required by section 16 ;

shall be punishable with fine which may extend to fifty rupees.

24. An enrolled person commits an offence if he, in circumstances when he is not subject to military law, does any of the following acts, namely :—

- (1) when on parade or undergoing military training or wearing His Majesty's uniform —
 - (a) strikes, or uses or offers violence to or uses threatening or insubordinate language to, or behaves with contempt to, his superior officer ; or
 - (b) disobeys any standing order of, or lawful command given by, his superior officer ; or
 - (c) neglects to obey a general or garrison order made specially applicable to the Auxiliary Force, India, by the competent military authority ; or
 - (d) is in a state of intoxication ; or
 - (e) being a non-commissioned officer strikes or ill-treats any person subject to military law or to this Act, or to the Indian Territorial Force Act, 1920, who is his subordinate in rank or position ;

(2) without sufficient cause fails to appear at the place of parade at the time fixed or to attend at any place in his capacity as a member of the Auxiliary Force, India, when duly required so to attend, or when on parade without sufficient cause quits the ranks ;

(3) without sufficient cause fails to perform any part of the training which by or under this Act he is required to perform ;

(4) strikes, or uses or offers violence to, any person whether subject to military law or not in whose military custody he is placed, and whether such person is or is not his superior officer ;

(5) resists an escort whose duty it is to arrest him or detain him in military custody ;

(6) being under arrest or detention or otherwise in lawful military custody escapes or attempts to escape ;

(7) when in charge of any property belonging to ^a[the Crown] or to a corps or unit of the Auxiliary Force, India, makes away with, or is concerned in making away with, any such property ;

(8) wilfully injures, or by culpable neglect loses or causes injury to, any such property as is mentioned in clause (7) ;

(9) wilfully ill-treats a horse or other animal used in the public service ;

(10) knowingly furnishes a false return or report of the number or state of men under his command or charge, or of any money, arms or ammunition, clothing, equipment, stores or other property in his charge ;

(11) through design or culpable neglect omits to make or send any return of any matter mentioned in clause (10) which it is his duty to make or send ;

(12) when it is his official duty to make a declaration respecting any matter, makes a declaration respecting such matter which he either knows or believes to be false or does not believe to be true ;

(13) knowingly makes against any person subject to military law or to this Act or to the Indian Territorial Force Act, 1920, an accusation which he either knows or believes to be false or does not believe to be true ;

(14) falsely personates any other person at any parade or on any occasion when such other person is required by or under this Act to do any act or attend at any place, or abets any such act of personation.

[a] Substituted by A. O. for "Government".

25. (1) Any person committing any of the offences specified in sub-clauses (b), (c) and (d), *Punishment for offences* of clause (1) or in clauses (2), (3) (8), (11) and (14) of section 24 under section 24, shall be punishable with fine which may extend to two hundred rupees.

(2) Any person committing any other offence specified in section 24 shall be punishable with imprisonment which may extend to two months, or with fine which may extend to two hundred rupees, or with both.

26. The competent military authority may in his discretion dismiss any enrolled person *Dismissal.* from the Auxiliary Force, India.

27. The ^a[Central Government] may prescribe summary and minor punishments for offences *Summary and minor punishments.* under section 24 or for contravention of any rule or regulation made under this Act to which enrolled persons shall be liable without the intervention of a Criminal Court, and the officer or officers by whom and the circumstances in which and the extent to which such summary and minor punishments may be inflicted, and the manner in which any such punishment may be enforced :

Provided that no punishment involving any kind of imprisonment shall be imposed as a summary or minor punishment :

Provided further that no summary punishment shall be inflicted in any case in which the accused claims to be tried by a Criminal Court.

[a] Substituted by A. O. for "Governor-General in Council."

^a [27A. Where any non-commissioned officer or man of the Auxiliary Force is required, by *Presumption as to certain documents.* or in pursuance of any rule, regulation or order made under this Act, to attend at any place, a certificate purporting to be signed by the prescribed officer stating that the person so required to attend failed to do so in accordance with such requirement, shall, without proof of the signature or appointment of such officer, be evidence of the matters stated therein.]

[a] Inserted by the Auxiliary Force (Amendment) Act, 1928 (10 [X] of 1928), S. 5.

28. (1) The ^a[Central Government] shall constitute for each prescribed military area one or more Advisory Committees. more Advisory Committees each consisting of three or more members, of whom one shall be the competent military authority ^b[* * *] and the others shall be persons eligible for enrolment in the Auxiliary Force, India, within the meaning of section 4, who shall be appointed annually by, or under the orders of, the ^a[Central Government].

(2) Any Advisory Committee constituted for a prescribed military area or a part thereof, as the case may be, which includes a Presidency town or any other place to which the ^c[Central Government] may, by order in writing, declare this sub-section to apply, ^d shall consist of not less than five members, of whom not more than two shall be persons in the ^e[service of the Crown].

(3) The ^c[Central Government] shall prescribe the duties, powers and procedure of Advisory Committees and, in particular, the matters in respect of which the competent military authority shall be bound to give effect to a recommendation of an Advisory Committee unless the ^a[Central Government] otherwise directs.

[a] *Substituted* by A. O. for "Local Government." [b] The words "or a military officer appointed by him in this behalf" were *repealed* by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 11.

[c] *Substituted* by A. O. for "Governor-General in Council." [d] For notification applying the provisions of this sub-section to the town of Karachi, see General Rules and Orders Vol. IV, p. 599. [e] *Substituted* by A. O. for "service of Government".

Constitution and disbandment of units.

29. The ^a[Central Government] may constitute^b any corps or unit and may disband any corps or unit constituted under this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For notifications under this section, see General Rules and Orders, Vol. IV, pp. 599 to 607.

Power to make rules.

30. (1) The ^a[Central Government] may make rules^b to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers such rules may—

(a) provide for the appointment of enrolling officers;

^c[(aa) prescribe the authority which shall be the competent military authority for any purpose under this Act;]

(b) prescribe military areas for the purposes of this Act;

(c) prescribe the manner in which and the conditions subject to which European British subjects ^d[* * *] may offer themselves for enrolment under this Act ^e[and the conditions governing applications to be enrolled in a particular branch, corps or unit];

(d) define the manner in which and the conditions under which persons or any class of persons liable to military service under this Act may be excused from ^e[such service];

(e) prescribe the military training to be undergone by persons liable to military training under section 6 but not to military service under section 7;

(f) prescribe the ^e[conditions governing the grant of, and the] rates of pay for, and provide for the grant of allowances to, ^f[enrolled persons];

(g) prescribe for any military area which is a railway area or for any area beyond the limits of British India the ^g[authority] which shall be deemed ^h[*] to be ⁱ[* * *] the District Magistrate for all or any of the purposes of this Act; and

(h) provide for any other matter which under this Act is to be or may be prescribed.

(3) Any rule made under this section may provide that a contravention thereof shall be punishable with fine which may extend to fifty rupees.

(4) The power to make rules conferred by this section shall, except on the first occasion of the exercise thereof, be subject to the condition of previous publication.

(5) All rules made under this section shall be published in the ^j[Official Gazette], and on such publication shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For the Auxiliary Force Rules, 1920, see General Rules and Orders, Vol. IV, p. 607. [c] *Inserted* by the Auxiliary Force (Amendment) Act, 1933, (10 [X] of 1933), S. 12. [d] Words "and other persons who are not British subjects" were *repealed* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 3 and Sch. II. [e] *Inserted* by the Auxiliary Force (Amendment) Act, 1933 (10 [X] of 1933), S. 12. [ee] *Substituted* for the words "being called out or embodied" by the Auxiliary Force (Amendment) Ordinance, 1942 (27 [XXVII] of 1942), S. 8. [30-5-1942.] [f] *Substituted* by the Auxiliary Force (Amendment) Act, 1931 (6 [VI] of 1931), S. 2 for "persons liable to perform military service under this Act." [g] *Substituted* by A. O. for "authorities." [h] Word "respectively" was *repealed* by A. O. [i] Words "the Local Government and" were *repealed* by A. O. [j] *Substituted* by A. O. for "Gazette of India."

31. The Commander-in-Chief of His Majesty's Forces in India may make regulations *Power to make regulations.* consistent with this Act and the rules made thereunder providing generally for details connected with the organisation and personnel of the Auxiliary Force, India, and for the duties, equipment, military training, allowances and leave of enrolled persons.

Certain persons subject to this Act to be deemed part of His Majesty's Army for certain purposes. **32.** For the purposes of sections 128, 130 and 131 of the Code of Criminal Procedure, 1898, all officers, non-commissioned officers and men liable to perform military service under this Act who have been appointed to a corps or unit shall be deemed to be officers, non-commissioned officers and soldiers, respectively, of His Majesty's Army.

33. Save as otherwise provided by section 27, no offence under this Act shall be tried save by *Trial of offences.* a Court not inferior to that of a Presidency Magistrate or a Magistrate of the first class.

34. No enrolled person shall be liable to pay any municipal or other tax in respect of a horse, *Exemption from local taxation.* bicycle, motor-bicycle, motor car or other means of conveyance which he is authorised by a general or special order of the competent military authority to maintain in his capacity as a member of the Auxiliary Force, India.

35. [Amendment of section 1, Act XI of 1878.] *Repealed by the Repealing Act, 1938 (I of 1938), S. 2, and Schedule.*

36. [Repeals.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

SCHEDULE I.

(See sections 9, 11, 12 and 15.)

TRAINING.

1. Preliminary—		
(a) for infantry	.	32 days, and the annual musketry course as laid down in regulations.
(b) for other branches.	.	40 days, and the annual musketry or gun course as laid down in regulations.
2. Periodical—		
(1) Active class—		
(a) for infantry	.	16 days, in each training year, and the annual musketry course as laid down in regulations.
(b) for other branches.	.	20 days, in each training year, and the annual musketry or gun course as laid down in regulations.
*[* *]		
b[(2)]	c[Reserve Class]—	
(a) for infantry.	.	} The annual musketry course as laid down d[* *] in regulations.
(b) for other branches.	.	

NOTE.—(Of. section 15.) A day consists of four hours of actual military drill or instruction and may be made up of fractions of a day not more than four in number.

[a] Sub-item (2) was *repealed* by the Auxiliary Force (Amendment) Act, 1933, (10 [X] of 1933), S. 13. [b] The original sub-item (3) was *renumbered* as sub-item (2) by S. 13, *ibid.* [c] *Substituted* by S. 13, *ibid.*, for "Second (B) Class Reserve." [d] Words "for this clause" were *repealed* by S. 13, *ibid.*

SCHEDULE II.—[Enactments repealed.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

THE BANGALORE MARRIAGES VALIDATING ACT, 1936.^a

ACT NO. XVI of 1936.

[27th October 1936.]

An Act to validate certain marriages solemnized in the Civil and Military Station of Bangalore.

WHEREAS Mr. Walter James McDonald Redwood, a Missionary of the Plymouth Brethren, was, in the year 1929, granted by the Resident in Mysore a licence, under the Indian Christian

Marriage Act, 1872, as applied to the Civil and Military Station of Bangalore, to solemnize marriages within the territories included in the Civil and Military Station of Bangalore between persons one of whom was a Native Christian subject of Mysore, and neither of whom was a Christian subject of His Majesty ;

AND WHEREAS the said Walter James McDonald Redwood has, in the belief that he was authorised so to do, solemnized certain marriages in the Civil and Military Station of Bangalore between certain Christian subjects of His Majesty ;

AND WHEREAS the parties to the said marriages all believed that the said Walter James McDonald Redwood was duly authorised to solemnize the same, and that such marriages were valid in law;

AND WHEREAS the said parties being Christian subjects of His Majesty, the said Walter James McDonald Redwood had not the requisite authority under the licence held by him to solemnize the said marriages;

AND WHEREAS it is expedient that the said marriages, having been solemnized in good faith, should be validated;

It is hereby enacted as follows :—

[a] For Statements of Objects and Reasons, *see* Gazette of India, 1936, Part V, page 314.

Short title. 1. This Act may be called the BANGALORE MARRIAGES VALIDATING ACT, 1936.

2. All marriages between Christian subjects of His Majesty which have already been solemnized in the Civil and Military Station of Bangalore by Mr. Walter James McDonald Redwood, a Missionary of the Plymouth Brethren, shall be, and shall be deemed to have been with effect from the date of solemnization of each respectively, as good and valid in law as if such marriages had been solemnized under a licence authorizing solemnization of marriages between Christian subjects of His Majesty in the Civil and Military Station of Bangalore.

3. Certificates of marriages which are declared by section 2 to be good and valid in law, and register-books and certified copies of true and duly authenticated extracts thereof, deposited in compliance with the provisions of the Indian Christian Marriage Act, 1872, in so far as the register-books and extracts relate to such marriages as aforesaid, shall be received as evidence of such marriages as if such marriages had been duly solemnized under Part I of the said Act.

BANKERS' BOOKS EVIDENCE ACT, 1891.

STATEMENT OF OBJECTS AND REASONS.

"The object of this Bill is to apply to British India the provisions of the English Bankers' Books Evidence Act, 1879, under which copies of entries in bankers' books are made receivable in evidence under certain conditions."

—Gazette of India, 1891, Part V, page 24.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts I of 1893; XII of 1900.

—Repealed in part by Act X of 1914.

—Adapted by A. O.

COGNATE ACTS AND PROVISIONS.

See under EVIDENCE ACT, 1872.

ACT NO. XVIII of 1891^a.

[1st October 1891.]

An Act to amend the Law of Evidence with respect to Bankers' Books.

WHEREAS it is expedient to amend the Law of evidence with respect to Bankers' Books; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, *see* Gazette of India, 1891, Pt. V, p. 24; for Report of the Select Committee, *see* *ibid.*, p. 189, and for Proceedings in Council, *see* *ibid.*, Pt. VI, pp. 15, 25, 117, 135 and 140. The Act has been declared to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 [II] of 1913), and in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 [III] of 1872).

Title and extent. 1. (1) This Act may be called the Bankers' Books Evidence Act, 1891.

(2) It extends to the whole of British India; [* * *]^a

[* * * * *]^a

[a] The word "and" at the end of sub-section (2), and sub-section (3) were repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914).

Definitions. 2. In this Act, unless there is something repugnant in the subject or context, —

^a[(1) 'company' means a company registered under any of the enactments relating to companies for the time being in force in any part of His Majesty's dominions or incorporated by an Act of Parliament or by an Indian law or by Royal Charter or by Letters Patent :]

(2) "bank" and "banker" mean —

(a) any company carrying on the business of bankers,

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

^b[(c) any post office saving bank or money order office :]

(3) "bankers' books" include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank :

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration:

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken :

(6) "Judge" means a Judge of a High Court :

(7) "trial" means any hearing before the Court at which evidence is taken : and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

[a] *Substituted* by A. O. for previous definition which had been *substituted* for original definition by the Bankers' Books Evidence Act, 1900 (12 [XII] of 1900).

[b] Clause (c) was *added* by S. 2 of the Bankers' Books Evidence Act, 1893 (1 [I] of 1893).

3. The ^a[Provincial Government] may, from time to time, by notification in the Official *Power to extend* Gazette, extend the provisions of the Act to the books of any partnership or *provisions of Act.* individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely, a cash-book, a day-book or journal, and a ledger, and may in like manner rescind any such notification.

[a] *Substituted* by A. O. for "Local Government."

SECTION 2 — Note 1.

[1] "We have omitted from clause (a) of sub-s. (2) the reference to a Government Savings Bank. We consider the accounts of such banks, as well as those of the Money Order Department of the Post Office and of Government treasuries, to be "public documents" within the meaning of S. 74 of the Evidence Act and covered therefore by S. 65 of that Act." [But now see clause (c) of sub-s. (2) which is added by the Bankers' Books Evidence Act, 1893.]

"We have added a clause (b) to sub-s. (2) so as to include under the term "bank" or "banker" any partnership (not coming under the definition of "company") or individual to whom the Local Government may under S. 3 extend the provisions of the Act.

We have also added definitions of the terms "trial" and "certified copy" so as to make the provisions of the Bill compact and readily intelligible." — *Select Committee Report.*

[2] SECTION 2 (4). — Proceedings before a Police officer are not legal proceedings. (Vol 24) 1937 Lah 160 (162) : 38 Cr L Jour 435 : 17 Lah 593.

[3] SECTION 2 (5). — Under the definition of S. 2 "Court" includes a Magistrate trying the case. (1938) 1 L B (1938) Bom 31 (39).

[4] SECTION 2 (8). — It is only the principal account-

tant or the manager of the bank that alone can certify the document. Hence a copy signed by a sub-accountant who had authority to sign for the manager is not a certified copy within the meaning of S. 2 (8). (Vol 28) 1941 Rang 344 (346).

[5] Where a certificate read: "We certify that this is a true extract from the books of the bank." It was held that this was not a certificate which is prescribed as requisite in S. 2 (8). (Vol 28) 1941 Rang 344 (346).

[6] Compare the definition of "certified copy" given in S. 2 (8) with the meaning of that term in S. 76 of the Evidence Act, 1872, and see also the case in (1903) 31 Cal 284 (293, 294).

SECTION 3 — Note 1.

[1] "This section is new. It has been brought to our notice that there are in India several large private banks to whom the privileges contemplated by this Bill may safely and fairly be extended. As, however, it is not desirable to extend the privileges to all private banks, we have given power to the Local Government to decide each case on its merits. We consider, however, that these privileges should not be extended to any partnership or individual carrying on the business of bankers which does not keep at least the three account books specified in the section which are absolutely essential to a proper system of accounts." — *Select Committee Report.*

4. Subject to the provisions of this Act, a certified copy of any entry in a banker's book *Mode of proof of entries in bankers' books.* shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be *Case in which officer of bank not compellable to produce books.* compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

6. (1) On the application of any party to a legal proceeding the Court or a Judge may *Inspection of books by order of Court or Judge.* order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

SECTION 4 — Note 1.

[1] "We consider that no copy of any entry should be receivable in evidence in any legal proceeding unless it is a "certified copy" as defined in the revised Bill. That definition, read with section 4 of the Bill, seems to us to meet all the requirements of the case. Certified copies of entries in the accounts of privileged banks will now be on the same footing as certified copies of public documents."—*Select Committee Report.*

[2] Unless a bank comes within the definition of the word "company" as defined in S. 2 (1), copies of entries in the books of such a bank cannot be admitted under S. 4. (1900) 4 Cal W N 433 (438) (F B).

[See also (1895) 18 All 92 (94, 95).]

SECTION 5 — Note 1.

[1] "We consider that it is inadvisable in the public interests to restrict the power conferred by this section to a Judge of a High Court. Such a restriction might, and probably would, involve in many cases unnecessary expense and delay. We have, therefore, extended the power to the Court before which the legal proceeding in question is held or taken (section 2 (5))."—*Select Committee Report.*

[2] There is no conflict between the provisions of S. 94, Criminal P. C., and the Bankers' Books Evidence Act. There is nothing in the latter Act which prevents an order being made under S. 94, Criminal P. C., in a proper case. (1938) ILR (1938) Bom 31 (39).

[3] In the case of bankers' books an order under S. 94, Criminal P. C., should be very cautiously made and carefully drafted. A routine order to comply *ex parte* is generally undesirable and in any case the prosecutor should be required to state before the issue of the order not only what books he requires to be produced but why their production is necessary with specific reference to the allegations in the complaint. (1938) ILR (1938) Bom 31 (40).

[4] A Magistrate making an order under S. 94, Criminal P. C., for production of documents does not thereby commit himself to the proposition that inspection

of all the documents production of which is ordered must necessarily follow. Usually inspection should only be given of particular documents shown to be relevant. The party producing the documents is not precluded from objecting to their inspection. (Vol 25) 1938 Bom 33 (35) : 39 Cri L Jour 207 : ILR (1938) Bom 119 (SB).

[5] The bank cannot be compelled to produce its books without an order of the Court "for special cause." But there is no reason why an order made under S. 94, Criminal P. C., should not be regarded as a sufficient order for the purpose of S. 5 of this Act. (1938) I L R (1938) Bom 31 (39).

[6] Section 5 does not prevent the Police from inspection of the books of the Bank even without the order of a Court. (Vol 24) 1937 Lah 160 (161) : 33 Cri L Jour 435 : 17 Lah 593.

SECTION 6 — Note 1.

[1] "We have enlarged sub-s. (1) so as to allow the Court or a Judge to permit the bank to prepare and produce certified copies of all relevant entries as an alternative to allowing parties to inspect and take copies for themselves. It is probable that in many cases it may, in the interest of the bank or its clients, be highly undesirable to allow an inspection of the bank's books. We have amended sub-s. (2) so as to require that in ordinary cases due notice of any order under S. 5 or under S. 6, sub-s. (1), shall be given to the bank; and we have added a sub-s. (3) allowing the bank to show cause against any such order."—*Select Committee Report.*

[2] Ordinarily no party to a suit is entitled to obtain an order under S. 6, as against the other party without notice. (Vol 19) 1932 Bom 428 (429).

[3] Where a party desires an order, under S. 6, on his own behalf the Court ought to grant it *ex parte* : but where he applies against the other party the Court ought not to make the order without notice to the other party. Where, however, the Court is not satisfied that the application is not for the purpose of obtaining inspection beyond what is allowed under the ordinary

7. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself :

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

THE INDIAN BAR COUNCILS ACT, 1926.

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THE SCHEDULE.

STATEMENT OF OBJECTS AND REASONS.

"The recommendations of the Indian Bar Committee in regard to the constitutions of Bar Councils and their functions were as follows :—

(i) An all-India Bar or Council is impracticable.

Section 6 (*contd.*)

procedure, the Court ought to refuse the application. (1903) 5 Bom L R 865 (867).

[4] Provisions of the Criminal Procedure Code do not affect the law contained in the Bankers' Books Evidence Act, the latter being a special law within the meaning of S. 1 (2), Criminal P. C. Therefore, though an order directing inspection of books of a bank is made under S. 94, Criminal P. C., it should be deemed to be one made under S. 6, Bankers' Books Evidence Act. And, therefore, as S. 6, Bankers' Books Evidence Act, gives a statutory right to object to any such order, an order of the Court made without hearing the bank is not binding upon it. (Vol 25) 1938 Bom 33 (35, 36) : 39 Cri L Jour 207 : ILR (1938) Bom 119 (SB).

[5] The Court should not allow inspection of banker's books under the Bankers' Books Act unless a *prima facie* case is made out for thinking that there is some matter on which the books of the bank are bound to be relevant. (Vol 25) 1938 Bom 33 (37) : 39 Cri L Jour 207 : ILR (1938) Bom 119 (SB). (Court should not give fishing or roving commission for inspection.)

Statutory Bar Councils should, however, be established at Calcutta, Madras, Bombay, Allahabad, Patna and Rangoon, but provision should be made permitting the constitutions of Councils at Lahore,

[6] Where the lower Court passed an order under S. 6 against a bank to furnish copies of the entire account of A from its books and it appeared that the accounts which were kept in several different books were very voluminous and extended over a period exceeding thirty years, the High Court observed that the order did not appear to be a wise or necessary one and that the proper course would probably have been to have allowed the inspection of the bank-books of the whole account, and then to have permitted copies of all entries which it was considered necessary to have after inspection. (1900) 1900 Pun L R 237 (238).

[7] Where the order passed by the lower Court under this section is not an illegal one or one which that Court had power to pass, the High Court will not interfere in revision even if it appears that the lower Court has not exercised a wise discretion. (1900) 1900 Pun LR 237 (238).

SECTION 7 — Note 1.

[1] "We have altered this section so as to make it clear that costs awarded to a bank, as well as costs awarded against it, may be enforced as if the banks were a party."—*Select Committee Report.*

Nagpur, Karachi and Lucknow later on. (Paragraphs 48 and 55.)

(ii) The Council should consist of 15 members four of whom should be nominated by the High Court, including, where possible, the Advocate-General or the Government Advocate and the Government Pleader. The remaining eleven, of whom six should be advocates of at least 10 years' standing, should be elected by advocates of the High Court, provided that in Calcutta and Bombay the High Courts should determine how many of the eleven should be advocates entitled to practise on the original side. The nominated members should ordinarily be advocates, but it should be left to the High Courts to nominate judges past and present. (Paragraphs 57 and 58.)

(iii) The first Council should hold office for 3 years the term of office of subsequent Councils being determined by rules to be framed by the Councils themselves (Paragraph 57.)

(iv) A Bar Council should have power to make rules subject to the approval of the High Court in respect of the following matters : (a) the qualifications, admission, and certificates of proper persons to be advocates of the High Court ; (b) the powers and duties of advocates ; (c) the conduct of any examination which may be prescribed by it and the fees to be paid for appearing at the same ; (d) legal education, including the delivery of lectures to students and the fees chargeable therefor ; (e) matters relating to the discipline and professional conduct of advocates ; (f) procedure and practice in case falling within the disciplinary jurisdiction of the Council ; (g) the method of holding elections of members of the Council and all matters incidental thereto ; (h) meetings of the Council, the quorum necessary for the transaction of business, the elections of a President or other officer and the appointment of committees for special purposes ; (i) the period for which a Council after the first Council, should hold office and the filling of vacancies occurring between elections ; (j) the terms on which advocates of another High Court may be permitted to appear occasionally in the High Court to which the Council is attached ; and (k) any other matter prescribed by the High Court. (Paragraph 59.)

(v) The rules regulating the election of the first Council and the filling of vacancies before rules are made by the Council should be made by the High Court, and it should be provided that no rules shall be made affecting the special provisions suggested for the original side of the Calcutta and Bombay High Courts so long as those provisions remain in force. (Paragraph 59.)

(vi) A Bar Council should have power either of its own motion or on complaint or on a reference by the High Court to enquire into all matters of the kind referred to in sections 12 and 13 of the Legal Practitioners Act, 1879, breaches of rules and other improper conduct in which an advocate of the Court is concerned, and make a request to the High Court with a recommendation as to the action, if any, to be taken by the Court.

A Bar Council should also be entitled to be heard in any matter relating to the admission of an advocate or in support of any report made by it to the Court. (Paragraph 60.)

(vii) The existing disciplinary jurisdiction of the High Court should be maintained, but the Court should be bound before taking disciplinary action against an advocate, except in regard to contempt of Court and the like, to refer the case to the Bar Council for inquiry, and report. On receipt of a report from the Bar Council the Court should be empowered itself to make or require the Council to make further inquiry. At the request of a Bar Council or on its own motion a High

Court should be authorised to order an inquiry to be held by a local Court. (Paragraph 61.)

(viii) Provision should be made for procuring with the sanction of the Court the attendance of witnesses, and production of documents required by the Council for an inquiry, and witnesses should receive the same protection as when they give evidence before a Court. (Paragraph 61.)

The paragraphs referred to are paragraphs in the report.

The Government of India consulted Local Governments and High Courts upon these recommendations. In certain respects it appeared necessary to amplify them and in some respects to modify them in the light of the views urged by the authorities consulted. It is intended that these recommendations with the amplifications and modifications should be given effect to by or under the Bill.

[2] The Bill is intended also to carry out as far as possible the following miscellaneous recommendations of the committee : (a) The ideal to be kept in view should be the disappearance of different grades of legal practitioners so that ultimately there may be a single grade entitled to appear in all Courts. At present the largest degree of unification possible should be effected. (Paragraphs 11 and 17); (b) In all High Courts a single grade of practitioners entitled to plead should be enrolled, to be called advocates (not barristers), the grade of High Court vakils or Pleaders being abolished, and when special conditions are maintained for admission to plead on the original side the only distinction should be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled. (Paragraph 19); (c) Advocates of one High Court should be entitled to practise in another High Court subject to conditions to be imposed by the Bar Council of the latter Court or by the Courts where there is no Bar Council. (Paragraph 20); (d) Where there is compulsory dual agency system at present it should be allowed to continue. (Paragraph 26); (e) The High Courts should retain their power to fix the amount payable by a party in respect of the fees of an adversary's legal practitioner. (Paragraph 61); (f) Partnerships between legal practitioners should be permitted wherever all classes of legal practitioners are entitled to act as well as to appear and plead. (Paragraph 69); (g) The High Courts, where this is not now permitted, should consider the advisability of allowing Indian barristers applying for enrolment as advocates to read with an approved Indian practitioner instead of reading in chambers in England, at least when it is shown that the individual cannot obtain entry in suitable chambers in England. (Paragraph 68).

[3] Incidentally it is intended that the provisions of the Bill and the rules which may be made under it shall, in regard to advocates entitled as of right to practise in the High Courts, replace the relevant provisions of the Legal Practitioners Act, the Bombay Pleaders Act and the Letters Patent of the various High Courts of Judicature as well as the rules made under these provisions. In regard to certain matters for which provision has not been made in the Bill it has, however, been necessary to retain the residuary powers of the High Courts of Judicature under these Letters Patent.

In accordance with the recommendation of the Committee in para. 56 of their report the enrolment and control of legal practitioners other than Advocates is left to the High Courts under the Legal Practitioners Act and the Bombay Pleaders Act as amended by the Bill.

[4] The principal modifications of the Committee's recommendations which are contained in the Bill are

as follows : (a) The constitution of the Bar Councils differs slightly from the recommendations in that the Advocate-General must be a member and the number of members to be elected is ten instead of eleven; (b) the rules regarding all elections of the Councils instead of only the election of the first Councils are to be made by the High Courts, the powers of the Councils in this respect being restricted to the making of bye-laws in regard to matters not provided for by the rules made by the High Courts. For the making of these bye-laws, however, the approval of the High Court will not be required; (c) power is given to the Councils, with the sanction of the High Court, to prescribe fees to be payable to the Courts in respect of admission and enrolment and of the issue of certificates; and (d) the powers of the Councils to hold inquiries into complaints of unprofessional conduct are restricted to cases referred to the Council by the High Court and the inquiries are

to be held by a Tribunal consisting of members of the Council appointed for the purposes of the inquiries by the Chief Justice or Chief Judge of the High Court. The High Court is, however, required to refer all complaints of unprofessional conduct which it does not dismiss either to the Bar Council or to a subordinate Court for inquiry. Instead of requiring the sanction of the Court for compelling the attendance of witnesses in each case a Tribunal is given power to enforce such attendance. A Tribunal is also given power to administer oaths to witnesses, and the prosecution of the witnesses who give evidence, which was recommended by the Committee, is secured by applying the provisions of section 132 of the Indian Evidence Act to proceedings before a Tribunal. On the other hand, rules governing the procedure of a Tribunal are to be prescribed by the Councils with the approval of the High Courts."

—Gazette of India, 1926, Part V, page 5.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act XIII of 1937.

—Amended in Central Provinces and Berar by C. P. & Berar Act, XXIV of 1939.

—Adapted by A. O.

COGNATE ACTS AND PROVISIONS.

- | | |
|---|--|
| 1. CIVIL PROCEDURE CODE, 1908, S. 135, O. 3 Br. 1, 4 and 5. | 7. LEGAL PRACTITIONERS ACT, XVIII of 1879. |
| 2. CONTRACT ACT, 1872, S. 171. | 8. LEGAL PRACTITIONERS (FEES) ACT, XXI of 1926. |
| 3. CRIMINAL PROCEDURE CODE, 1898, Ss. 4 (r), 320, 340, 419 and 421. | 9. LEGAL PRACTITIONERS (WOMEN) ACT, XXIII of 1923. |
| 4. EVIDENCE ACT, 1872, Ss. 126, 127, 128 and 146 to 150. | 10. LIMITATION ACT, 1908, Art. 84. |
| 5. LEGAL PRACTITIONERS ACT, I of 1846. | 11. TRANSFER OF PROPERTY ACT, 1882, S. 136. |
| 6. LEGAL PRACTITIONERS ACT, XX of 1853. | 12. TRUSTS ACT, 1882, S. 88. |

ACT NO. XXXVIII of 1926.

[9th September 1926.]

An Act to provide for the constitution of Bar Councils in British India and for other purposes.

WHEREAS it is expedient to provide for the constitution and incorporation of Bar Councils for certain Courts in British India, to confer powers and impose duties on such Bar Councils, and to consolidate and amend the law relating to legal practitioners entitled to practise in such Courts; It is hereby enacted as follows:—

Preliminary.

Short title, extent, application and commencement.

1. (1) This Act may be called the INDIAN BAR COUNCILS ACT, 1926.

(2) It extends to the whole of British India, and shall apply to the High Courts of Judicature at Fort William in Bengal, and at Madras, Bombay, Allahabad, ^a[and Patna] and to such other High Courts within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, as the ^b[Provincial Government] may, by notification^c in the ^d[Official Gazette], declare to be High Courts to which this Act applies.

(3) This section and sections 2, 17, 18 and 19 shall come into force at once; and the ^b[Provincial Government] may, by notification^e in the ^d[Official Gazette], direct that the other provisions of this Act, or any provision thereof specified in the notification, shall come into force in respect of any High Court to which this Act applies on such date as ^f[it] may by the notification appoint.

[a] *Substituted by A. O. for "Patna and Rangoon".* [b] *Substituted by A. O. for "Governor-General in Council".* [c] For notification declaring the Chief Court of Oudh to be a High Court to which this Act applies, see Gazette of India, 1928, Pt. I, page 325. [d] *Substituted by A. O. for "Gazette of India".* [e] The rest of the Act came into force in respect of—[i] The Calcutta High Court, Ss. 3 to 7 from 1st March 1928 (see Gazette of India, 1928, Pt. I, page 325) and Ss. 8 to 16 from 1st July 1928 (see *ibid.*, page 382); [ii] the Madras High Court from 16th July 1928 (see *ibid.*, page 382); [iii] the Bombay High Court from 1st January 1929 (see *ibid.*, page 714); [iv] the Allahabad High Court from 1st June 1928 (see *ibid.*, p. 400); [v] the Patna High Court from 1st January 1929 (see *ibid.*, page 703); [vi] the Oudh Chief Court from 1st March 1928 (see *ibid.*, page 325); [vii] the Nagpur High Court from 1st January 1937 (see C. P. Gazette, 1936, Pt. I, pages 831, 832). [f] *Substituted by A. O. for "he."*

Interpretation. ^a[2. (1)] In this Act, unless there is anything repugnant in the subject or context,—

- (a) "advocate" means an advocate entered in the roll of advocates of a High Court under the provisions of this Act;
- (b) "Advocate-General" includes, where there is no Advocate-General, the Government Advocate and, where there is no Advocate-General or Government Advocate, such officer as the ^b[Provincial Government] may declare to be the Advocate-General for the purposes of this Act;
- (c) "High Court" means a High Court to which this Act applies; and
- (d) "prescribed" means prescribed by rules made under this Act.

^c[(2) In this Act "the Provincial Government" means, in relation to any High Court, the Provincial Government of the Province in which the High Court has its principal seat.]

[a] Section 2 may be deemed to have been *re-numbered* as sub-section (1) of S. 2 by A. O. which has *added* a new sub-section (2) to that section. [b] *Substituted* by A. O. for "Local Government." [c] *Inserted* by A. O.

Constitution for Bar Councils.

Constitution and incorporation of Bar Councils.

3. (1) For every High Court a Bar Council shall be constituted in the manner hereinafter provided.

(2) Every Bar Council so constituted shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property, both moveable and immoveable, and to contract, and shall by the name of the Bar Council of the High Court for which it has been constituted sue and be sued.

Composition of Bar Councils.

4. (1) Every Bar Council shall consist of fifteen members, of whom —

- (a) one shall be the Advocate-General;
- (b) four shall be persons nominated by the High Court, of whom not more than two may be Judges of that Court; and
- (c) ten shall be elected by the advocates of the High Court from amongst their number.

(2) Of the elected members of every Bar Council not less than five shall be persons who have for not less than ten years been entitled as of right to practise in the High Court for which the Bar Council has been constituted.

(3) Of the elected members of the Bar Councils to be constituted for the High Courts of Judicature at Fort William in Bengal and at Bombay such proportion as the High Court may direct in each case shall be persons who have, for such minimum period as the High Court may determine, been entitled to practise in the High Court in the exercise of its original jurisdiction, and such number as may be fixed by the High Court out of the said proportion shall be barristers of England or Ireland or members of the Faculty of Advocates in Scotland.

(4) There shall be a Chairman and Vice-Chairman of each Bar Council elected by the Council in such manner as may be prescribed:

Provided that the Advocates-General of Bengal, Madras and Bombay shall be Chairmen *ex officio*, respectively, of the Bar Councils constituted for the High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay.

5. (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 4, the *Special provisions regarding constitution of first Bar Councils.* elected members of the first Bar Council constituted under this Act for any High Court shall be elected by and from amongst the advocates, vakils and pleaders who are on the date of the election entitled as of right to practise in the High Court.

(2) The terms of office of the nominated and elected members of any such first Bar Council shall be three years from the date of the first meeting of the Council.

Section 4 — Note 1.

[1] Sections 4, 5, 6, 7 and 8 should be read together. (Vol 23) 1936 Sind 75 (77) (SB).

Section 5 — Note 1.

[1] Section 5 (2) does not prevent rules being framed

whereby certain members elected to the first Bar Council may continue in office thereafter so that a certain continuity may be maintained between the first Council and its successor. (Vol 23) 1936 Sind 75 (76) (SB).

Power to make rules regarding constitution and procedure of Bar Councils.

6. (1) Rules, consistent with this Act, may be made to provide for the following matters, namely :—

- (a) the manner in which elections of members of the Bar Council shall be held; the method of determining, in accordance with the provisions of sub-sections (2) and (3) of section 4, the candidates who shall be declared to have been elected; the manner in which the result of elections shall be published; and the manner in which and the authority by which doubts and disputes as to the validity of an election shall be finally decided;
- (b) the terms of office of nominated and elected members of the Council;
- (c) the filling of casual vacancies in the Council;
- (d) the convening of meetings of the Council, and the quorum necessary for the transaction of business thereat;
- (e) the manner of election and the respective terms of office of the Chairman, in cases where the Chairman is to be elected, and of the Vice-Chairman; and
- (f) any matter incidental or ancillary to any of the foregoing matters.

(2) The first rules under this section shall be made by the High Court, but the Bar Council may thereafter, with the previous sanction of the High Court, add to, amend or rescind any rules so made.

(3) No election of a member or members to the Council shall be called in question on the ground that due notice thereof has not been given to any person entitled to vote thereat, if notice of the date fixed for the election has, not less than thirty days before that date, been published in the ^a[Official Gazette] of the Province, or of each Province, as the case may be, in which the High Court exercises jurisdiction.

(4) Rules made under clause (b) of sub-section (1) may provide for the retirement of members from office by rotation and for the manner in which the order of such retirement shall be determined.

[a] Substituted by A. O. for "local official Gazette."

Power of Bar Councils to make bye-laws.

7. The Bar Council may make bye-laws consistent with this Act and any rules made thereunder to provide for any of the following matters, namely :

- (a) the appointment of such ministerial officers and servants as the Bar Council may deem necessary, and the pay and allowances and other conditions of service of such officers and servants; and
- (b) the appointment and constitution of Committees of the Council, the procedure of such Committees, and the determination of the powers or duties of the Council which may be delegated to such Committees.

Admission and enrolment of advocates.

Enrolment of advocates.

8. (1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act :

Provided that nothing in this sub-section shall apply to any attorney of the High Court.

(2) The High Court shall prepare and maintain a roll of advocates of the High Court in which shall be entered the names of —

- (a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section comes into force in respect thereof; and
- (b) all other persons who have been admitted to be advocates of the High Court under this Act :

Section 6 — Note 1.

[1] The powers conferred by this section and rules made thereunder relate to the first Bar Council as well as to its successors. (Vol 23) 1936 Sind 75 (76) (S B).

[2] Statutory body must follow law strictly to which it owes its existence and rules framed thereunder. (Vol 22) 1935 All 295 (299) (S T).

[3] When the Bar Council approved of certain rules and subsequently the High Court sanctioned them but the Bar Council did not again pass those rules it was held that though the omission to strictly follow the

provisions of S. 6 (2) was regrettable, it did not amount to an illegality. (Vol 22) 1935 All 295 (297).

[4] A Court will set aside an election only if it is not an election in substance conducted under existing election law. (Vol 22) 1935 All 295 (298).

Section 8 — Note 1.

[1] See also Legal Practitioners Act, 1879, Ss. 4 and 41.

[2] See S. 38 of the Legal Practitioners Act, 1879, by which it is now, *inter alia*, provided that except as provided by S. 36 (power to frame and publish lists of

Provided that such persons shall have paid in respect of enrolment the stamp-duty, if any, chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a), and in other cases such amount as may be prescribed.

^a[(3) Entries in the roll shall be made in the order of seniority, and such seniority shall be determined as follows namely :—

- (a) all such persons as are referred to in clause (a) of sub-section (2) shall be entered first in the order in which they were respectively entitled to seniority *inter se* immediately before the date on which this section comes into force in respect of the High Court; and
- (b) the seniority of any other person admitted to be an advocate of the High Court under this Act after that date shall be determined by the date of his admission or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier :

Provided that, for the purposes of clause (b), the seniority of a person who before his admission to be an advocate was entitled as of right to practise in another High Court shall be determined by the date on which he became so entitled.

(4) The respective rights of pre-audience of advocates of the High Court shall be determined by seniority :

Provided that the Advocate-General shall have pre-audience over all other advocates, and King's Counsel shall have pre-audience over all advocates except the Advocate-General.]

^b[(5) The High Court shall issue a certificate of enrolment to every person enrolled under this section.

^b[(6) The High Court shall send to the Bar Council a copy of the roll as prepared under this section, and shall thereafter communicate to the Bar Council all alterations in, and additions to, the roll as soon as the same have been made.

^b[(7) The Bar Council shall enter in the copy of the roll all alterations and additions so communicated to it.

[a] Sub-sections (3) and (4) were inserted by the Indian Bar Councils (Amendment) Act, 1927 (13 [XIII] of 1927), S. 2. [b] Sub-sections (3), (4) and (5) were re-numbered as sub-sections (5), (6) and (7) respectively by S. 2, *ibid*.

9. (1) The Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court :

Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion.

Section 8 (contd.)

touts), nothing in that Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926.

[3] Weight should be attached to recommendations of Bar Council regarding enrolment of legal practitioners. (Vol 17) 1930 All 22 (22).

[4] In the absence of any reciprocal arrangement between the two High Courts, an advocate of the Rangoon High Court cannot claim admission to the Madras High Court under R. 1 (u) of the Madras High Court Rules. Having, however, obtained the law degree of the Rangoon University at a time when that University was a University established by law in British India, the petitioner could claim admission under R. 1 (i). (Vol 29) 1942 Mad 455 (456); ILR (1942) Mad 663 (SB).

[5] An agent with a power-of-attorney to appear and conduct judicial proceedings but not so authorized by the High Court has no right of audience on behalf of the principal either on the appellate or the original side nor is he entitled to notice. Such an agent is not under the disciplinary control of any Court. If he carries on business as a solicitor or attorney he becomes liable. Even a single instance may amount to carrying on business or practice. (Vol 24) 1937 Mad 937 (937-940) : I L R (1938) Mad 12.

[6] The expression "Advocate-General" in sub-section (4) includes the *Acting* Advocate-General. (Vol 19) 1932 Bom 71 (73) (F B).

Section 9 — Note 1.

[1] A legal practitioner's conduct may prevent his enrolment as advocate though it may not be such as to deserve suspension or removal or exclusion from subordinate Courts. (Vol 17) 1930 Oudh 121 (123) : 5 Luck 615.

[2] Admission as an advocate may be refused on the objection of the Bar Council if it acts honestly and without prejudice. However, the Bar Council must be convinced that the member of profession does not deserve to be enrolled as advocate before refusing admission. (Vol 17) 1930 Oudh 121 (123) : 5 Luck 615.

[3] Under the Bar Council Rules (Allahabad), R. 1, Benares State Chief Court is neither a High Court nor a Court subordinate to the High Court. Hence, a pleader practising in that Court is not entitled to be enrolled as an advocate of the High Court. (Vol 17) 1930 All 91 (91).

[4] High Court referred to in the Bar Council Rules (Allahabad), R. 1, is a chartered High Court. (Vol 17) 1930 All 91 (91).

[5] The clause "practised in one or more of the Court subordinate to the Allahabad High Court" as

(2) In particular and without prejudice to the generality of the foregoing power, such rules shall provide for the following matters, namely:—

- (a) the qualifications to be possessed by persons applying for admission as advocates;
- (b) the form and manner in which applications shall be made to the High Court for admission;
- (c) the giving of notice by the High Court to the Bar Council of all such applications;
- (d) the hearing by the High Court of any objection preferred on behalf of the Bar Council to the admission of any applicant; and
- (e) the charging of fees payable to the Bar Council in respect of enrolment.

(5) Rules made under this section shall provide that no woman shall be disqualified for admission to be an advocate by reason only of her sex.

(4) Nothing in this section or in any other provision of this Act shall be deemed to limit or in any way affect the powers of the High Courts of Judicature at Fort William in Bengal and at Bombay to prescribe the qualifications to be possessed by persons applying to practise in those High Courts respectively in the exercise of their original jurisdiction or the powers of those High Courts to grant or refuse, as they think fit, any such application ^a[or to prescribe the conditions under which such persons shall be entitled to practise or plead].

[a] Inserted by the Indian Bar Councils (Amendment) Act, 1927 (13 [XIII] of 1927), S. 3.

Misconduct.

10. (1) The High Court may, in the manner hereinafter provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

(2) Upon receipt of a complaint made to it by any Court or by the Bar Council or by any other person that any such advocate has been guilty of misconduct, the High Court shall, if it does not summarily reject the complaint, refer the case for inquiry either to the Bar Council or, after consultation with the Bar Council, to the Court of a District Judge (hereinafter referred to as a District Court) and may of its own motion so refer any case in which it has otherwise reason to believe that any such advocate has been so guilty.

PROVINCIAL AMENDMENT.

C. P. and Berar.—(i) In sub-section (1) for the words “whom it finds guilty of professional or other misconduct” substitute the words “who is found guilty of professional misconduct or is convicted of any criminal offence implying a defect of character which unfits him to be such advocate.”

(ii) In sub-section (2) — (a) for the word “misconduct” substitute the words “professional misconduct or has been convicted of any criminal offence implying a defect of character which unfits him to be an advocate.” (b) at the end of this sub-section after the words “so guilty” add the words “or convicted.”

— C. P. AND BERAR ACT, XXIV of 1939. [8-9-1939].

Section 9 (contd.)

used in the rules framed under S. 9 means “practised in one of the Courts in this province.” (Vol 17) 1930 All 887 (888).

[6] Therefore, the Courts in Ajmer are not Courts subordinate to the Allahabad High Court and a practitioner in Ajmer cannot be enrolled. (Vol 17) 1930 All 887 (888).

[7] Expression “Advocate of not less than ten years’ standing in Oudh” in R. 285, Oudh Chief Court Civil Rules, Chap. VII, should be interpreted to mean an advocate of the Chief Court who is of not less than ten years’ standing as an advocate in Oudh. (Vol 23) 1936 Oudh 115 (118) : 11 Luck 583.

[8] An application for admission as advocate is required to be accompanied by a diploma or a certificate or other proof that the applicant has taken the degree and not merely certificate from the District Court. (Vol 22) 1935 Sind 196 (196).

[9] Under the Rules by Karachi Bar Council an application for enrolment as an advocate will be dismissed in absence of receipt for payment of fees. (Vol 22) 1935 Sind 180 (182).

[10] Advocates on the appellate side of the Bombay High Court were held not to fall under the definition of the term “pleader” in S. 4 (1) (r), Criminal P. C., quoad

the High Court Sessions inasmuch as they are not pleaders authorized by law to practise in that Court. Hence, they cannot practise in the High Court Sessions. (Vol 21) 1934 Bom 70 (71) : 58 Bom 456 (FB).

[11] See also Legal Practitioners Act, 1879, S. 6.

SECTION 10 — SYNOPSIS.

1. Conviction.
2. Discretion of Court.
3. Disciplinary action.
4. Duty towards clients.
5. Misconduct — Evidence and proof.
6. Misconduct — General.
7. Misconduct — Instances.
8. Nature of proceedings.
9. Reference to Bar Council.

1. Conviction. — [1] Conviction for criminal offence is evidence of misconduct. (Vol 22) 1935 P C 168 (168) : 62 I A 235 : 59 Bom 676 (PC); (Vol 23) 1936 Cal 158 (160) : 37 Cri L Jour 534 : 63 Cal 867 (SB); (Vol 33) 1946 Mad 247 (248) (FB).

[2] The mere fact that the person has been convicted of criminal offence does not make it imperative on Court to strike him off the roll. The Court may take

Section 10 (*contd.*)

into consideration the fact that the conviction rested not on direct but on merely circumstantial evidence. (Vol 18) 1931 Oudh 161 (165) : 32 Cri L Jour 625.

2. Discretion of Court. — [1] There is no justification for restricting the natural meaning of the words 'professional or other misconduct' in S. 10 (1). The Court has jurisdiction to take action in all cases of misconduct. The law leaves it to the discretion of the Court to take action only in suitable cases. (Vol 22) 1985 Bom 1 (3) : 59 Bom 57 (F B).

[2] The words 'professional or other misconduct' in S. 10 (1) should be read in their plain and natural meaning. The Legislature intended to confer on the Court jurisdiction to take action in all cases of misconduct, whether in a professional or other capacity. The word "may" in sub-s. (1) leaves a discretion to Court to take action in suitable cases only. With regard to the exercise of the Court's discretion there is no hard and fast rule, but the discretion must be exercised judicially. (Vol 23) 1936 Cal 158 (159, 160) : 37 Cri L Jour 534 : 63 Cal 867 (S B).

[3] Exercise of discretion in matter of disciplinary action is not such matter as can be considered by Privy Council. (Vol 22) 1935 P C 168 (169) : 62 I A 235 : 59 Bom 676 (P C).

3. Disciplinary action. — [1] As a general rule the only step which can be taken against an Advocate who abuses his privilege is disciplinary action by Court. (Vol 19) 1932 Bom 199 (201).

[2] Disciplinary jurisdiction of Court should not be employed either to aid or to supplement ordinary criminal law of the land. (Vol 23) 1936 Cal 158 (160) : 37 Cri L Jour 534 : 63 Cal 867.

[3] Though it is proper that all Judicial Officers should keep a vigilant eye on the conduct of the legal practitioners, it should, at the same time, be borne in mind that permanent and undeserved harm may be caused to the reputation of the legal practitioner if ill-considered proceedings are taken against him. (Vol 18) 1931 All 580 (581) : 33 Cri L Jour 260.

[4] All criminal offences do not call for disciplinary measures. Conviction for sedition does not necessarily involve removal or suspension of advocate. Court should consider facts on which conviction is based. (Vol 23) 1936 Cal 158 (160, 161) : 37 Cri L Jour 534 : 63 Cal 867.

[5] No power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court. (Vol 17) 1930 All 225 (234) : 52 All 619.

[6] Advocate convicted for criminal breach of trust in respect of large amount and for attempt to cheat and dishonestly inducing another to part with security should be removed from roll. (Vol 22) 1935 Rang 458 (459, 460) : 37 Cri L Jour 200.

[7] Pleader defaming police officer by alleging that he had taken money from accused and referred case as undetectable. Pleader's action does not involve such a degree of moral turpitude as to warrant the Court in imposing the severe penalty of suspension from practice — Reprimand is sufficient. (Vol 33) 1946 Mad 247 (248) (F B).

4. Duty towards clients. — [1] An Advocate consulted by one party is perfectly free to appear for other party, unless first party has conveyed to him any confidential information which could be used against that party. (*See R. 3 framed by the Bar Council of the Allahabad High Court.*) The onus of proving that confidential information was conveyed lies heavily upon the party. (Vol 27) 1940 All 233 (235) : ILR (1940) All 262.

[2] In order to prevent counsel appearing for the other party, he must have a definite retainer, with a fee paid, or he must have confidential instructions from one of the parties. (Vol 21) 1934 Oudh 58 (59) (F B).

[3] Where an advocate was guilty of two plain cases of fraud against his client but the amounts involved were not large the High Court suspended the advocate from practice for a period of two years. (Vol 18) 1931 Bom 557 (560).

[4] An advocate engaged to file a suit entrusted the plaint to his unregistered clerk who failed to file it and retained the unused court-fee stamp. The dispute between the parties was compromised and the suit was agreed to be withdrawn. The failure of the advocate to return to the client the refund for the unused stamp and other money and to account was held to be a gross misconduct. (Vol 25) 1938 Rang 423 (425) : 40 Cri L Jour 58 (S B).

[5] The name of an advocate guilty of even temporary misappropriation of his client's money will be removed from roll of advocates. (1937) 1937 M W N 1322 (1324) (F B).

5. Misconduct — Evidence and proof. — [1] Where proceedings are taken before the High Court for taking disciplinary action against the advocate who is convicted for a criminal offence it is not incumbent on the Advocate-General to adduce evidence of the grounds on which the conviction is based. It is for the Court to see whether the conviction for offence committed renders advocate unfit for exercise of his profession. And it is for the impugned advocate to adduce considerations which might induce High Court to refrain from taking disciplinary action. (Vol 22) 1935 P C 168 (169) : 62 I. A. 235 : 59 Bom 676 (P C).

[2] Charges of professional misconduct must be clearly proved; error of judgment or indiscretion is no misconduct. (Vol 21) 1934 Oudh 58 (59) (F B).

[3] In a proceeding under S. 12 started against advocate convicted of perjury, the High Court has no jurisdiction to reconsider entire bulk of evidence on which conviction is based. It can however look into nature of offence to consider propriety of order or measure of disciplinary sentence. (Vol 18) 1931 Oudh 161 (162, 163) : 32 Cri L Jour 625 (F B).

6. Misconduct — General. — [1] The jurisdiction under the Bar Councils Act is one which ought to be circumspectly exercised. A distinction should be drawn between misconduct of a purely professional character and misconduct which also lies within the ambit of the criminal law. In the former case, a special tribunal under the Bar Councils Act is a proper one to deal with purely professional misconduct. But it cannot usurp the functions of a Criminal or Civil Court merely because the person complained against is an advocate and the complaint being a matter connected with his professional practice. A charge of misappropriation is a matter which should be dealt with under S. 10, only after the complainant has taken steps in the ordinary Courts. Should a charge be materialised then it will be possible for him to approach the High Court again under the Bar Councils Act. (Vol 28) 1941 All 280 (280, 281) : 42 Cn L Jour 623 : I L R (1941) All 592 (SB).

[2] There are two tests for considering whether an advocate should be struck off the roll of advocates on the ground of misconduct. The misconduct must be such as to show that he is unworthy of remaining in the profession or he must appear to be unfit to perform the duties of an advocate. The two tests are to be read disjunctively and are applicable to both suspension and reprimand of advocates. (Vol 23) 1936 Cal 158 (160) : 37 Cri L Jour 534 : 63 Cal 867; (Vol 21) 1934 Rang 33 (34) : 12 Rang 110.

11. (1) Where any case is referred for inquiry to the Bar Council under section 10, the case *Tribunal of Bar Council*, shall be inquired into by a Committee of the Bar Council (hereinafter referred to as the Tribunal).

(2) The Tribunal shall consist of not less than three and not more than five members of the Bar Council appointed for the purpose of the inquiry by the Chief Justice or Chief Judge of the High Court, and one of the members so appointed shall be appointed to be the President of the Tribunal.

Section 10 (contd.)

[3] 'Misconduct' is a sufficiently wide expression; it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is "likely to tamper or embarrass the administration of justice by High Court or any of the Courts subordinate thereto" may be considered to be misconduct calling for disciplinary action. (Vol 28) 1941 Bom 228 (230); 42 Cri L Jour 723; I L R (1941) Bom 548.

[4] An advocate or pleader is punishable in his professional capacity for misconduct other than professional misconduct. The intention of the Legislature in this respect is clear from S. 10, sub-s. (1) of the Bar Councils Act. (Vol 20) 1933 All 224 (225) : 55 All 148.

[5] Court can take disciplinary action though such misconduct may not be committed in professional capacity. (Vol 22) 1935 P C 168 (168) : 62 I A 235 : 59 Bom 676 (PC).

[6] See also Legal Practitioners Act, 1879, Sections 12 and 13.

7. Misconduct — Instances. — [1] Communal remark by counsel can be complained against for taking action against him. (Vol 23) 1936 Sind 49 (50) : 37 Cri L Jour 783.

[2] Perjury is an offence the gravity of which cannot be minimised. But it has many degrees of gravity and there may be several factors, extenuating the gravity of the offence. (Vol 18) 1931 Oudh 161 (166) : 32 Cri L Jour 625.

[3] Where an advocate makes false allegations against Judicial Officers in a personal capacity, he should not be dealt with under the Bar Councils Act. An advocate was charged with having verified an application falsely and endeavoured to deceive the Court. He was not acting for a client in this matter but in his personal capacity in his own litigation. It was held that suspension of the advocate for three calendar months would be sufficient punishment. (Vol 19) 1932 All 492 (494) : 54 All 912 (SB).

[4] The purchase of a speculative interest in a contemplated litigation by the advocate, *benami* in the name of his mother, and producing false evidence in support of it, amounts to misconduct which renders him unfit to be a member of the legal profession. (Vol 30) 1943 Oudh 159 (163) : 44 Cri L Jour 197.

[5] Conduct of an advocate agreeing to take his remuneration out of the proceeds of suit only if suit is successful amounts to professional misconduct. (Vol 26) 1939 Mad 772 (774) : 41 Cri L Jour 83 : I L R (1940) Mad 17.

[6] The carrying on of a trade or business is ordinarily inconsistent with the practice of the profession of an advocate. Hence the conduct of an advocate carrying on a trade or business as a partner of a firm amounts to professional misconduct. (Vol 23) 1936 Oudh 18 (19, 20) : 11 Luck 477. (Advocate undertaking to suspend practice — Requirements of case can be met by mere expression of disapproval.)

[7] Advocate convicted for submitting false return of income and setting false defence must be struck off the rolls of the High Court. (Vol 21) 1934 Rang 33 (34) : 12 Rang 110.

[8] Advocate stooping to bribe Judge to get judgment in client's favour is guilty of gross professional misconduct. (Vol 22) 1935 Rang 178 (180) : 36 Cri L Jour 961 : 13 Rang 518.

[9] Letter by advocate addressed to clerk in Magistrate's office asking that application filed by him should be dealt with urgently is improper. (Vol 28) 1941 Mad 230 (231) : 42 Cri L Jour 602 : ILR (1941) Mad 354 (SB). (Advocate apologising — Only censure for his conduct was thought enough.)

[10] As to whether the conduct of an advocate amounts to misconduct when he commits an irregularity in accepting a vakalatnama in that he fails to comply with the rules framed by the High Court, see the case in. (Vol 24) 1937 Pat 433 (434) : 16 Pat 438 : 38 Cri L Jour 926 (SB).

8. Nature of proceedings. — [1] Proceedings under S. 10 of the Act, respecting misconduct of advocate are judicial, and orders for costs can be passed. (Vol 21) 1934 All 898 (901) : 56 All 702.

[2] Case of misconduct against advocate under Bar Councils Act must proceed on an inquiry. (Vol 18) 1931 Oudh 161 (165) : 32 Cri L Jour 625.

[3] When an advocate is accused of a grave criminal offence, to deal with him under the Bar Councils Act for misconduct before his prosecution is altogether improper. (Vol 19) 1932 Mad 131 (133) : 32 Cri L Jour 1065 : 54 Mad 857.

[4] Under the Bar Councils Act, the Court, when a complaint is made, can only dismiss it summarily or refer it to a Tribunal of the Bar Council to inquire into; and the Court should not dismiss a petition summarily unless the allegations do not make out any case. (Vol 19) 1932 Bom 199 (201).

[5] Where an advocate is convicted for an offence the proceedings for striking off his name from roll are not in the nature of second trial but Court has to see whether he should continue to be member of profession. (Vol 22) 1935 Rang 458 (459) : 37 Cri L Jour 200.

9. Reference to Bar Council. — [1] Where a complaint has been referred to the Bar Council to be enquired into by a tribunal, it is incumbent upon the tribunal to come to some finding or other and it cannot abandon the proceeding merely for want of prosecution. (Vol 17) 1930 Cal 574 (575) : 57 Cal 724.

[2] *Per Buckland J.* — Bar Council is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members. When a charge is made against an advocate it should either be cleared or brought home to him. (Vol 17) 1930 Cal 574 (575) : 57 Cal 724.

Section 11 — Note

[1] When a case is referred to the Bar Council under this section for enquiry into the conduct of an advocate it is the duty of the Council to enquire into the matter and to record a finding on the materials produced before it irrespective of any finding on the point recorded by a Civil Court. The finding of the Civil Court is not conclusive in the enquiry before the Bar Council. (Vol 22) 1935 All 1023 (1031, 1032) : 37 Cri L Jour 217 (SB).

12. (1) The High Court shall make rules to prescribe the procedure to be followed by *Procedure in inquiries*. Tribunals and by District Courts, respectively, in the conduct of inquiries referred under section 10.

(2) The finding of a Tribunal on an inquiry referred to the Bar Council under section 10 shall be forwarded to the High Court through the Bar Council, and the finding of a District Court on such an inquiry shall be forwarded direct to the High Court which shall cause a copy thereof to be sent to the Bar Council.

(3) On receipt of the finding, the High Court shall fix a date for the hearing of the case and shall cause notice of the day so fixed to be given to the advocate concerned and to the Bar Council and to the Advocate-General, and shall afford the advocate concerned and the Bar Council and the Advocate-General an opportunity of being heard before orders are passed in the case.

(4) The High Court may thereafter either pass such final orders in the case as it thinks fit or refer it back for further inquiry to the Tribunal through the Bar Council or to the District Court, as the case may be, and, upon receipt of the finding after such further inquiry, deal with the case in the manner provided in sub-section (3) and pass final orders thereon.

(5) In passing final orders the High Court may pass such order as regards the payment of the costs of the inquiry and of the hearing in the High Court as it thinks fit.

(6) The High Court may, of its own motion or on application made to it in this behalf, review any order passed under sub-section (4) or sub-section (5) and maintain, vary or rescind the same, as it thinks fit.

(7) When any advocate is reprimanded or suspended under this Act, a record of the punishment shall be entered against his name in the roll of advocates of the High Court, and when an advocate is removed from practice his name shall forthwith be struck off the roll; and the certificate of any advocate so suspended or removed shall be recalled.

SECTION 12 — SYNOPSIS

1. Section 12 (1).

2. Section 12 (3).

3. Section 12 (4).

4. Section 12 (5).

5. Section 12 (6).

1. Section 12 (1).— [1] Where a special jurisdiction is conferred upon District Judge, he cannot delegate it to his assistants not so empowered. (Vol 24) 1937 Sind 98 (98) : 38 Cri L Jour 664.

[2] Under R. 1 of the Madras Rules it is obligatory upon the tribunal or Court to which a case is referred for inquiry under S. 10 (2) of the Act to frame a formal charge. Failure to frame a charge vitiates the whole of the proceedings. (Vol 31) 1944 Mad 247 (248): I L R (1944) Mad 397 : 46 Cri L Jour 311 (F B).

[3] The direction in R. 7 of the Madras High Court Rules, that all the members of the tribunal shall sign their findings is mandatory. If a member of the tribunal dies before the report has been drawn up and signed, its report cannot be considered. Another tribunal must be constituted to proceed. (Vol 29) 1942 Mad 267 (268): I L R (1942) Mad 428 (S B).

2. Section 12 (3). — [1] A Bench of three Judges is competent to hear an enquiry into the conduct of an advocate under S. 10, Letters Patent. (Vol 19) 1932 Mad 131 (137) : 32 Cri L Jour 1085 : 54 Mad 857.

[2] Under S. 12 the correct procedure is for the Advocate-General to open by submitting the report of the Tribunal to the Court, then the advocate concerned is entitled to be heard and then the Advocate-General will have a right to reply. The original petitioner is not entitled to be noticed and heard. (Vol 18) 1931 Bom 557 (558).

3. Section 12 (4). — [1] The question whether an advocate has violated the recognised canons of professional etiquette primarily concerns the Bar Council; hence the High Court usually accepts the findings of the Bar Tribunal on questions of fact unless the find-

ings are perverse. (Vol 27) 1940 All 1 (3) : I L R (1940) All 60 : 41 Cri L Jour 211 (F B); (Vol 22) 1935 All 503 (503) (S B).

[2] Where the Tribunal constituted under Act has made a careful investigation, the High Court will not interfere. (Vol 18) 1931 Cal 680 (681) (S B).

[3] High Court is not bound by finding of the Bar Council. (Vol 22) 1935 All 425 (429) (S B).

[4] Where the members of a Tribunal of the Bar Council differ in their opinions, the High Court is entitled to consider the reports and findings both of the majority and the minority of the Tribunal. (Vol 19) 1932 Mad 131 (136) : 54 Mad 857 : 32 Cri L Jour 1085.

[5] High Court is not in any way fettered by report of the Tribunal of Bar Council and may go into the facts for itself and disagree with those findings. Though the greatest weight has to be attached to the findings in such report its value is lessened if it is not unanimous or is ambiguous. It is not necessary to send it back to the Tribunal if the Court has no doubt as to the order that it should pass in the case. (Vol 20) 1933 Rang 10 (12, 13).

[6] In proceeding against legal practitioner High Court can consider case on evidence and arrive at different conclusion to that of Bar Tribunal. (1930) 1930 M W N 216 (220).

[7] Finding of Tribunal not clear as to question of moral delinquency — Case should be sent back to Tribunal. (Vol 22) 1935 Cal 484 (487, 488) : 62 Cal 158 : 36 Cri L Jour 1130 (S B).

[8] Where the Tribunal had not in terms dealt with the charges of professional misconduct and gross misconduct but disposed of those charges by saying that there had been no misappropriation and also that there was gross negligence on the part of the advocate. *Held* that it was difficult under the circumstances to take any action under S. 10 (1). (Vol 22) 1935 Cal 484 (486 487) : 62 Cal 158 : 36 Cri L Jour 1130 (S B).

[9] The contention that the finding of the Bar Council Tribunal can be reversed by a Bench of the

13. (1) For the purposes of any such inquiry as aforesaid, a Tribunal or a District Court *Powers of the Tribunal* shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

- (a) enforcing the attendance of any person and examining him upon oath,
- (b) compelling the production of documents, and
- (c) issuing commissions for the examination of witnesses:

Provided that the Tribunal shall not have power to require the attendance of the presiding officer of any Court save with the previous sanction of the High Court or, in the case of an officer of a Criminal or Revenue Court, of the ^a[Provincial Government].

(2) Every such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code; and a Tribunal shall be deemed to be a Civil Court for the purposes of sections 480, 482 and 485 of the Code of Criminal Procedure, 1898.

(3) For the purpose of enforcing the attendance of any person and examining him upon oath or of compelling the production of documents or of issuing commissions—

- (a) the local limits of the jurisdiction of a Tribunal shall be those of the jurisdiction of the High Court by which the Tribunal has been constituted; and
- (b) a Tribunal may send to any Civil Court having jurisdiction in the place where the Tribunal is sitting any summons or other process for the attendance of a witness or the production of a document required by the Tribunal, or any commission which it desires to issue, and the Civil Court shall serve such process or issue such commission, as the case may be, and may enforce any such process as if it were a process for attendance or production before itself.

(4) Proceedings before a Tribunal or a District Court in any such inquiry shall be deemed to be civil proceedings for the purposes of section 132 of the Indian Evidence Act, 1872, and the provisions of that section shall apply accordingly.

[a] Substituted by A. O. for "Local Government".

Miscellaneous.

Right of advocates to practise.

14. (1) An advocate shall be entitled as of right to practise—

- (a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an advocate, and
- (b) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force in any other Court in British India and before any other Tribunal or person legally authorised to take evidence, and
- (c) before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.

Section 12 (contd.)

High Court only when all the Judges constituting the Bench are unanimous and that if a single Judge dissents the finding cannot be set aside was repelled and it was held that the opinion of the majority of the Judges hearing the case prevailed under Clause 27 of the Letters Patent. (Vol 22) 1935 All 1037 (1039) : 37 Cri L Jour 139 : 58 All 406.

[10] High Court in a proceeding under S. 12, Bar Councils Act, may hear the complainant. (Vol 18) 1931 Cal 680 (681) (S B).

[11] The original petitioner is not entitled to be served with notice or to be heard. (Vol 18) 1931 Bom 557 (558).

[12] See also Legal Practitioners Act, 1879, S. 14.

4. Section 12 (5).—[1] High Court is empowered to assess costs of an enquiry. (Vol 18) 1931 Cal 680 (681) (SB).

[2] Held that the advocate was entitled to costs, both in the enquiry and in the application before the High Court and fees of the short-hand writer and the interpreter in the enquiry before the Bar Council. (Vol 25) 1938 Cal 766 (767) (SB).

5. Section 12 (6).—[1] The power of review conferred upon High Courts under sub-s. (6) of S. 12 cannot

be extended to an order passed under S. 41 of the Legal Practitioners Act. (Vol 21) 1934 Oudh 140 (141) : 35 Cri L Jour 678 (FB).

Section 14 — Note 1.

[1] Ex-Judge of High Court entered in the roll of advocates has a right to appear in Courts of the Province. (Vol 18) 1931 P C 22 (23) : 10 Pat 375 : 58 I A 38 (P C).

[2] Advocates of Madras under the Act can act and plead in High Court insolvency jurisdiction. (Vol 15) 1928 Mad 1182 (1186) : 52 Mad 92.

[3] For allowing the appearance of advocates of other High Courts, Chief Justice is to use judicial discretion. The right of an advocate of any particular Bar to appear in other High Courts does not exist as a matter of right. The Chief Justice will see whether good reasons have been shown in any particular case. The following may be considered : (1) that the advocate has from the very beginning made a complete study of the case; or (2) that the litigant has his normal residence and carries on his normal business in another province and lawyer of that other province is familiar with his business; (3) a third circumstance may be the great magnitude of a case, the fact that it raises some extremely new and important questions of principle and of the jurisdiction. But the high position of the accused

(2) Where rules have been made by any High Court within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, or in the case of a High Court for which a Bar Council has been constituted under this Act, by such Bar Council under section 15, regulating the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court, such advocates shall not be entitled to practise therein otherwise than subject to such conditions.

(3) Nothing in this section shall be deemed to limit or in any way affect the power of the High Court of Judicature at Fort William in Bengal or of the High Court of Judicature at Bombay to make rules determining the persons who shall be entitled respectively to plead and to act in the High Court in the exercise of its original jurisdiction.

15. A Bar Council may, with the previous sanction of the High Court for which it is constituted, make rules consistent with this Act to provide for and regulate any of the following matters, namely:—

General power of Bar Councils to make rules.

- (a) the rights and duties of the advocates of the High Court and their discipline and professional conduct;
- (b) the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court;
- (c) the giving of facilities for legal education and training and the holding and conduct of examinations by the Bar Council;
- (d) the charging of fees payable to the Bar Council in respect of the enjoyment of educational facilities provided, or of the right to appear at examinations held, by the Bar Council;
- (e) the investment and management of the funds of the Bar Council; and
- (f) any other matter in respect of which the High Court may require rules to be made under this section.

16. The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto.

Power to fix fees payable as costs.

17. No suit or other legal proceeding shall lie against a Bar Council or any Committee, Tribunal or member of a Bar Council for any act in good faith done or intended to be done in pursuance of the provisions of this Act or of any rule made thereunder.

Indemnity against legal proceedings.

18. All rules made under this Act shall be published in the "[Official Gazette] of the Province, or of each Province, as the case may be, in which the High Court, by which or with whose sanction the rules are made, exercises jurisdiction.

Publication of rules.

[a] Substituted by A. O. for "local official Gazette."

Section 14 (contd.)

or that it is contempt of Court case is no good reason for granting permission. (Vol 24) 1937 Pat 122 (122, 123, 124) : 38 Cri L Jour 392.

[4] An advocate enrolled by any High Court has a right to practise in the Subordinate Courts of the Madras Presidency provided there is no law which prohibits him from doing so. Section 4 of the Legal Practitioners Act does not apply in such cases. There is no bar to an advocate of the Bombay High Court practising in the Subordinate Courts of Madras. (Vol 52) 1945 Mad 144 (144) : 1 L R (1945) Mad 464.

[5] An advocate's right of audience depends on the right given by S. 14. This right 'save as otherwise provided by any other law for the time being in force' includes the right of audience before any tribunal or person legally authorised to take evidence. But the advocate's right of audience is necessarily inseparable from his client's right to appear by advocate before a particular tribunal. If the client is expressly denied the privilege of being heard by counsel, the Bar Councils Act will not save him from the disability. (Vol 24) 1937 Mad 735 (741) : 11 L R (1938) Mad 127.

[6] See also Legal Practitioners Act, 1879, Sections 4 and 8.

Section 15 — Note

[1] Whether the particular dealings made by an advo-

cate constitute money-lending business depends on facts of each case. Investment of savings by an advocate do not necessarily constitute engagement in money-lending business but investments by way of loan and made as a matter of course for gain amount to engagement in money-lending business. (Vol 27) 1940 All 1 (2) : 41 Cri L Jour 211 : 11 L R (1940) All 60 (FB).

Section 16 — Note 1.

[1] See also Legal Practitioners Act, 1879, Section 27.

Section 18 — Note 1.

[1] One of the grounds on which a statutory rule or a bye-law may be treated as *ultra vires* is that it has not been made, sanctioned and published in the manner prescribed by the statute. Section 18, Bar Councils Act, provides that all rules made under this Act shall be published in the official Gazette of the province in which the High Court exercises jurisdiction. But it does not make the publication a condition precedent to their coming into force. Where the Bar Council had approved of the rules before they received the sanction of the High Court but the Bar Council did not pass those rules after the sanction : *Held*, that the omission strictly to follow the provisions of the law as laid down in S. 6 (2) did not amount to an illegality, but only an irregularity. (Vol 22) 1935 All 295 (297) (ST).

19. (1) When sections 8 to 16 come into force in respect of any High Court, any enactment mentioned in the first column of the Schedule which is in force in any Province in which the High Court exercises jurisdiction shall, for the purpose of its application to that Province, be amended to the extent and in the manner specified in the second column of the Schedule.

(2) When sections 8 to 16 come into force in respect of any High Court of Judicature established by Letters Patent, this Act shall have effect in respect of such Court notwithstanding anything contained in such Letters Patent, and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder, be deemed to have been repealed.

(3) When sections 8 to 16 come into force in respect of the High Court of Judicature at Bombay, the Bombay Pleaders' Act, 1920, except section 7 thereof, shall cease to apply to or in respect of any person enrolled as an advocate of the High Court under this Act, and nothing in that Act shall be deemed to authorise the admission or enrolment of any person as a vakil or pleader of the High Court.

(4) When this Act has come into force in respect of any High Court, any provision of any other enactment or any order, scheme, rule, form or bye-law made thereunder, which was before that date applicable to advocates, vakils or pleaders entitled to practise in such High Court, shall, unless such a construction is repugnant to the context or to any provision made by or under this Act, be construed as applying to advocates of the High Court enrolled under this Act.

THE SCHEDULE.

(See section 19.)

Amendment of Enactments.

Enactments amended.	Extent and manner of amendments.
The Legal Practitioners Act, 1879.	(1) In section 4, after the words "with the permission of the Court" the words and figures "or, in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force, subject to rules made under that Act" shall be inserted. (2) In section 6, clauses (a) and (b), after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted. (3) To section 38 the following words and figures shall be added, namely : — "and, except as provided by section 36, nothing in this Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926."
The Indian Stamp Act, 1899.	(4) In section 41, sub-section (1), after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted. In Article 30 of the First Schedule after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Madras Stamp (Amendment) Act, 1922.	In Article 25 of Schedule 1A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Bengal Stamp (Amendment) Act, 1922.	In Article 30 of Schedule 1A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Indian Stamp (Punjab Amendment) Act, 1922.	In Article 30 of Schedule 1A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.
The Assam Stamp (Amendment) Act, 1922.	In Article 30 of Schedule 1A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.

Section 19 — Note 1.

[1] Notice issued by High Court after the Act comes into force is *ultra vires* and a nullity — Procedure in S. 10 must be followed. (Vol 15) 1928 All 439 (439) : 29 Cri L Jour 998 : 51 All 76 (FB).

[2] Section 38 of the Legal Practitioners Act, 1879, runs as follows : "Except as provided by Ss. 4, 5, 7, 16,

25, 27, 32 and 36, nothing in this Act applies to advocates, vakils and attorneys admitted and enrolled by any High Court under the Letters Patent by which such Court is constituted, or to mukhtars practising in such Court or to advocates enrolled under S. 41 of this Act and, except as provided by S. 36, nothing in this Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926."

BERAR LAWS ACT, 1941

STATEMENT OF OBJECTS AND REASONS.

"Though the provisions of many Central Acts are applicable to Berar, this result does not flow from the British Indian Act itself being *proprio vigore* operative in Berar but is achieved by the application to Berar by order made under the Indian (Foreign Jurisdiction) Order in Council, 1902, of each such Act, often with certain modifications of the form in which the Act is in force in British India. Certain administrative inconveniences result from this. The Act as in force in British India is distinct from the Act as in force in Berar, the former being an enactment applying *proprio vigore* to British India but not to Berar, the latter consisting of the provisions of the British Indian Act made applicable to Berar by order under the Foreign Jurisdiction Order but not applicable to British India. Notifications and statutory Rules issued under identical provisions, operative both in British India and in Berar, have accordingly to be issued separately for British India and for Berar, and a similar dual process must attend any subsequent amendment of such notifications and rules. The repeal in British India of an Act made applicable to Berar does not automatically make the Act inoperative in Berar.

2. Since the commencement of Part III of the Government of India Act, 1935, on the 1st April, 1937, Berar and the Central Provinces have been deemed to be one Governor's Province, and an Act passed after that date and expressed to extend to the whole of British India does extend *proprio vigore* to Berar.

3. The primary object of the present Bill is to assimilate the position of Central Acts passed before the 1st day of April, 1937, to that of those passed after that date and automatically in force in Berar, that is to say, by means of one comprehensive enactment to extend to and make operative *proprio vigore* in Berar Central Acts passed before the commencement of Part III of the Government of India Act, 1935, while simultaneously nullifying the orders under the Foreign Jurisdiction Order in Council by virtue of which those Acts are operative in Berar. It is possible, now that the legislative competence of the Central Legislature is confined to matters enumerated in List I and List III of the

Seventh Schedule to the Government of India Act, 1935, to achieve the result aimed at only in part by legislation in the Central legislature. So far as the Central Legislature is incompetent to achieve the result completely, because the subject-matter of the Act to be extended is included in List II, it is anticipated that this Central legislation will be supplemented by Provincial legislation, and that the Central Act and the Provincial Act will come into operation simultaneously, each thus completing what the other left incomplete. Accordingly the Acts to be extended to Berar are grouped in two separate Schedules, Schedules I and II, according as their subject-matter is relatable solely to List I and List III or only partly to those Lists and partly to List II.

4. In addition to Central Acts the provisions of which are already applicable to Berar by virtue of orders under the Foreign Jurisdiction Order in Council, Schedules I and II also contain a few Acts which it seems advisable to take the opportunity afforded by the Bill to extend to Berar.

5. One Act, the Indian Cotton Cess Act, 1923, which was made operative *proprio vigore* in Berar by the Government of India (Adaptation of Indian Laws) Order, 1937, is also still operative by virtue of an order under the Foreign Jurisdiction Order in Council. This Act has received special treatment in clause 3 of the present Bill.

6. Two Acts, the Code of Civil Procedure, 1908, and the Indian Limitation Act, 1908, require small modifications when operative in Berar owing to the fact that a special law, the Berar Small Cause Courts Law, 1905, takes the place of the Provincial Small Cause Courts Act, 1887, in Berar. These modifications have been effected in the Third Schedule to the Bill. The Fourth Schedule contains a list of Acts in regard to which doubts might arise whether they are or are not still operative in Berar. They were at one time applied to Berar, and on the repeal or expiry of the Acts in British India no overt action was taken to cancel the notifications by which their provisions were applied to Berar." — Gazette of India, 1940, Part V page 247.

ACT NO. IV of 1941.^a

[17th March 1941.]

An Act to extend certain Acts to Berar.

WHEREAS by orders made under the Indian (Foreign Jurisdiction) Order in Council, 1902, the provisions of certain Acts in force in British India have from time to time been applied to, and are now, by virtue of such application, in force, in Berar;

AND WHEREAS it is expedient that those and certain other Acts should be extended to, and be, by virtue of such extension, in force, in Berar;

It is hereby enacted as follows:—

[a] For Report of Select Committee, see Gazette of India, 1941, Pt. V, p. 50.

Short title and commencement.

1. (1) This act may be called the BERAR LAWS ACT, 1941.

(2) It shall come into force on such ^adate as the Central Government may, by notification in the Official Gazette, appoint.

[a] The 1st August 1941, see Gazette of India, 1941, Pt. I, p. 966.

2. (1) The Acts specified in the First Schedule and so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws are hereby extended to, and shall be in force in, Berar; and in any enactment so extended any reference by whatever form of words to subjects of His Majesty shall be deemed to include a reference to Berari subjects of His Exalted

Highness the Nizam of Hyderabad, and notwithstanding anything contained in clause (7) of section 3 of the General Clauses Act, 1897, any reference to British India shall be construed as a reference to British India and Berar.

(2) The Acts specified in the Third Schedule shall be amended in the manner set forth in the second column of that Schedule.

3. The application, if any, to Berar, made by order under the Indian (Foreign Jurisdiction) Cesser of application of Order in Council, 1902, of the Acts specified in the First Schedule, of so certain Acts to Berar. much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws, and of the Indian Cotton Cess Act, 1923 (XIV of 1923), shall cease to have effect :

Provided that all appointments, delegations, notifications, orders, bye-laws, rules and regulations, which have been made or issued under, or in pursuance of, any provision of any of the said Acts as applied to Berar by order under the said Order in Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar.

4. For the removal of doubt it is hereby declared that the Acts specified in the Fourth Schedule have ceased to have effect and are repealed in Berar.

THE FIRST SCHEDULE.

[See sections 2 (1) and 3.]

(Acts Extended to Berar.)

Year	Number.	Short title.	Year	Number.	Short Title.
1850	XIX	The Apprentices Act, 1850.	1890	VIII	The Guardians and Wards Act, 1890.
1850	XXI	The Caste Disabilities Removal Act, 1850.	1890	XI	The Prevention of Cruelty to Animals Act, 1890.
1855	XIII	The Indian Fatal Accidents Act, 1855.	1891	XVIII	The Bankers' Books Evidence Act, 1891.
1856	XI	The European Deserters Act, 1856.	1898	V	The Code of Criminal Procedure, 1898.
1856	XV	The Hindu Widows' Re-marriage Act, 1856.	1901	II	The Indian Tolls (Army) Act, 1901.
1860	XLV	The Indian Penal Code 1860.	1903	VII	The Indian Works of Defence Act, 1903.
1864	III	The Foreigners Act, 1864.	1903	XV	The Indian Extradition Act, 1903.
1865	III	The Carriers Act, 1865.	1904	VII	The Ancient Monuments Preservation Act, 1904.
1866	XXI	The Native Converts' Marriage Dissolution Act, 1866.	1905	IV	The Indian Railway Board Act, 1905.
1867	XXV	The Press and Registration of Books Act, 1867.	1906	III	The Indian Coinage Act, 1906.
1869	IV	The Indian Divorce Act, 1869.	1908	V	The Code of Civil Procedure, 1908.
1872	I	The Indian Evidence Act, 1872.	1908	VI	The Explosive Substances Act, 1908.
1872	III	The Special Marriage Act, 1872.	1908	IX	The Indian Limitation Act, 1908.
1872	IX	The Indian Contract Act, 1872.	1908	XIV	The Indian Criminal Law Amendment Act, 1908.
1872	XV	The Indian Christian Marriage Act, 1872.	1908	XVI	The Indian Registration Act, 1908.
1873	V	The Government Savings Banks Act, 1873.	1909	IV	The Whipping Act, 1909.
1873	X	The Indian Oaths Act, 1873.	1910	IX	The Indian Electricity Act, 1910.
1874	IX	The European Vagrancy Act, 1874.	1911	II	The Indian Patents and Designs Act, 1911.
1875	IX	The Indian Majority Act, 1875.	1911	VIII	The Indian Army Act, 1911.
1875	XVIII	The Indian Law Reports Act, 1875.	1912	IV	The Indian Lunacy Act, 1912.
1876	IX	The Native Coinage Act, 1876.	1913	II	The Official Trustees Act, 1913.
1877	I	The Specific Relief Act, 1877.	1913	III	The Administrator-General's Act, 1913.
1878	VIII	The Sea Customs Act, 1878.	1914	III	The Indian Copyright Act, 1914.
1878	XI	The Indian Arms Act, 1878.	1916	VII	The Indian Medical Degrees Act, 1916.
1879	XVIII	The Legal Practitioners Act, 1879.	1917	II	The Motor Spirit (Duties) Act, 1917.
1881	XXVI	The Negotiable Instruments Act, 1881.	1917	XVIII	The Post Office Cash Certificates Act, 1917.
1882	II	The Indian Trusts Act, 1882.	1918	XXII	The Bronze Coin (Legal Tender) Act, 1918.
1882	XII	The Indian Salt Act, 1882.	1919	XII	The Poisons Act, 1919.
1884	IV	The Indian Explosives Act, 1884.			
1888	III	The Police Act, 1888.			
1889	IV	The Indian Merchandise Marks Act, 1889.			

Year	Number.	Short Title.	Year	Number.	Short Title.
1920	V	The Provincial Insolvency Act, 1920.	1931	XXIII	The Indian Press (Emergency Powers) Act, 1931.
1920	XIV	The Charitable and Religious Trusts Act, 1920.	1932	IX	The Indian Partnership Act, 1932.
1920	XV	The Indian Red Cross Society Act, 1920.	1932	XI	The Public Suits Validation Act, 1932.
1920	XLVII	The Imperial Bank of India Act, 1920.	1932	XII	The Foreign Relations Act, 1932.
1920	XLVIII	The Indian Territorial Force Act, 1920.	1932	XIII	The Sugar Industry (Protection) Act, 1932.
1920	XLIX	The Auxiliary Force Act, 1920.	1932	XXIII	The Criminal Law Amendment Act, 1932.
1921	XVIII	The Maintenance Orders Enforcement Act, 1921.	1933	II	The Children (Pledging of Labour) Act, 1933.
1922	XI	The Indian Income-tax Act, 1922.	1933	VII	The Indian Finance Act, 1933.
1922	XII	The Indian Finance Act, 1922.	1933	XVII	The Indian Wireless Telegraphy Act, 1933.
1922	[a]	The Indian States (Protection against Disaffection) Act, 1922.	1933	XXVII	The Indian Medical Council Act, 1933.
1923	IV	The Indian Mines Act, 1923.	1934	II	The Reserve Bank of India Act, 1934.
1923	V	The Indian Boilers Act, 1923.	1934	VIII	The Khaddar (Name Protection) Act, 1934.
1923	VIII	The Workmen's Compensation Act, 1923.	1934	IX	The Indian Finance Act, 1934.
1923	XXIII	The Legal Practitioners (Women) Act, 1923.	1934	XI	The Indian States (Protection) Act, 1934.
1924	VI	The Criminal Tribes Act, 1924.	1934	XIV	The Sugar (Excise Duty) Act, 1934.
1925	XXXIX	The Indian Succession Act, 1925.	1934	XVI	The Matches (Excise Duty) Act, 1934.
1926	XI	The Promissory Notes (Stamp) Act, 1926.	1934	XX	The Indian Carriage by Air Act, 1934.
1926	XVI	The Indian Trade Unions Act, 1926.	1934	XXII	The Indian Aircraft Act, 1934.
1926	XXI	The Legal Practitioners (Fees) Act, 1926.	1934	XXIII	The Mechanical Lighters (Excise Duty) Act, 1934.
1926	XXXVIII	The Indian Bar Councils Act, 1926.	1934	XXV	The Factories Act, 1934.
1929	VII	The Trade Disputes Act, 1929.	1934	XXXI	The Iron and Steel Duties Act, 1934.
1929	XIX	The Child Marriage Restraint Act, 1929.	1934	XXXII	The Indian Tariff Act, 1934.
1930	II	The Dangerous Drugs Act, 1930.	1935	[a]	The Indian Finance Act, 1935.
1930	III	The Indian Sale of Goods Act, 1930.	1936	[a]	The Indian Finance Act, 1936.
1930	XVIII	The Silver (Excise Duty) Act, 1930.	1936	III	The Parsi Marriage and Divorce Act, 1936.
1930	XIX	The Indian Companies (Amendment) Act, 1930.	1936	IV	The Payment of Wages Act, 1936.
1930	XXIV	The Indian Lac Cess Act, 1930.	1936	XIV	The Geneva Convention Implementing Act, 1936.
1931	[a]	The Indian Finance Act, 1931.	1937	I	The Agricultural Produce (Grading and Marking) Act, 1937.
1931	[a]	The Indian Finance (Supplementary and Extending) Act, 1931.	1937	VI	The Arbitration (Protocol and Convention) Act, 1937.
1931	XVI	The Provisional Collection of Taxes Act, 1931.	1937	[a]	The Indian Finance Act, 1937.

[a] These Acts are made by the Governor-General under S. 67B of the Government of India Act. No number was given to these Acts.

THE SECOND SCHEDULE.

[See sections 2 (1) and 3.]

Acts partially extended to Berar.

Year	Number.	Short Title.	Year	Number.	Short Title.
1843	V	The Indian Slavery Act, 1843.	1886	VI	The Births, Deaths and Marriages Registration Act, 1886.
1850	XII	The Public Accountants' Default Act, 1850.	1886	XI	The Indian Tramways Act, 1886.
1850	XXXVII	The Public Servants (Inquiries) Act, 1850.	1890	I	The Revenue Recovery Act, 1890.
1855	XXIV	The Penal Servitude Act, 1855.	1890	VI	The Charitable Endowments Act, 1890.
1870	VII	The Court-fees Act, 1870.	1890	IX	The Indian Railways Act, 1890.
1871	XXIII	The Pensions Act, 1871.	1895	XV	The Crown Grants Act, 1895.
1881	XI	The Municipal Taxation Act, 1881.	1897	III	The Epidemic Diseases Act, 1897.
1882	IV	The Transfer of Property Act, 1882.	1897	X	The General Clauses Act, 1897.
1885	XIII	The Indian Telegraph Act, 1885.	1897	XIV	The Indian Short Titles Act, 1897.

Year	Number.	Short Title.	Year	Number.	Short Title.
1898	VI	The Indian Post Office Act, 1898.	1924	XIII	The Indian (Specified Instruments) Stamp Act, 1924.
1899	II	The Indian Stamp Act, 1899.	1925	IV	The Indian Soldiers (Litigation) Act, 1925.
1899	IV	The Government Buildings Act, 1899.	1925	XII	The Cotton Ginning and Pressing Factories Act, 1925.
1913	VII	The Indian Companies Act, 1913.	1925	XIX	The Provident Funds Act, 1925.
1914	IX	The Local Authorities Loans Act, 1914.	1927	XVI	The Indian Forest Act, 1927.
1916	XV	The Hindu Disposition of Property Act, 1916.	1928	XII	The Hindu Inheritance (Removal of Disabilities) Act, 1928.
1917	V	The Destruction of Records Act, 1917.	1929	II	The Hindu Law of Inheritance (Amendment) Act, 1929.
1918	II	The Cinematograph Act, 1918.	1930	XXX	The Hindu Gains of Learning Act, 1930.
1920	X	The Indian Securities Act, 1920.	1936	V	The Decrees and Orders Validating Act, 1936.
1920	XXXIX	The Indian Elections Offences and Inquiries Act, 1920.			
1923	III	The Cotton Transport Act, 1923.			
1923	XIX	The Indian Official Secrets Act, 1923.			

THE THIRD SCHEDULE.

[See section 2 (2).]

Acts Amended.

Name of Act.	Amendments.
The Code of Civil Procedure, 1908 (Act V of 1908).	In section 7 and in rule 1 of Order I in the First Schedule,— (a) after the figures "1887" the words and figures "or under the Berar Small Cause Courts Law, 1905" shall be inserted, and (b) for the words "under that Act" the words "under the said Act or Law" shall be substituted.
The Indian Limitation Act, 1908 (IX of 1908).	In Article 161 of the First Schedule, the word "Provincial" in both places where it occurs, shall be omitted, and after the words "Small Causes", where they occur for the first time, the brackets and words "(other than a Presidency Small Cause Court)" shall be inserted.

THE FOURTH SCHEDULE.

(See section 4.)

Acts which have ceased to have effect and are repealed in Berar.

Year	Number.	Short Title.	Year	Number.	Short Title.
1841	XIX	The Succession (Property Protection) Act, 1841.	1912	VI	The Indian Life Assurance Companies Act, 1912.
1847	XX	The Indian Copyright Act, 1847.	1914	VIII	The Indian Motor Vehicles Act, 1914.
1860	IX	The Employers and Workmen (Disputes) Act, 1860.	1919	X	The Excess Profits Duty Act, 1919.
1865	X	The Indian Succession Act, 1865.	1923	X	The Indian Paper Currency Act, 1923.
1865	XXI	The Parsi Intestate Succession Act, 1865.	1926	XIX	The Indian Finance Act, 1926.
1881	V	The Probate and Administration Act, 1881.	1927	V	The Indian Finance Act, 1927.
1881	VI	The District Delegates Act, 1881.	1928	XX	The Indian Insurance Companies Act, 1928.
1889	VII	The Succession Certificate Act, 1889.	1929	X	The Indian Census Act, 1929.
1911	XII	The Indian Factories Act, 1911.	1933	XIII	The Safeguarding of Industries Act, 1933.
1912	V	The Provident Insurance Societies Act, 1912.	1935	[a]	The Criminal Law Amendment Act, 1935.
			1936	I	The Italian Loans and Credits Prohibition Act, 1936.

[a] This Act is made by the Governor-General under S. 67B of the Government of India Act. No number was given to this Act.

^aTHE INDIAN BILLS OF LADING ACT, 1856.

COGNATE ACTS AND PROVISIONS.

1. BILLS OF LADING ACT, 1855 (18 & 19 Vict., c. 111).
2. CARRIAGE OF GOODS BY SEA ACT, XXVI OF 1925, S. 4.
3. SALE OF GOODS ACT, III OF 1930, SECTIONS 2 (4), 18 TO 25, AND 50 TO 52.

ACT IX of 1856.^b

[11th April 1856.]

An Act to amend the Law relating to Bills of Lading.

WHEREAS by the custom of merchants a bill of lading of goods being transferable by Preamble. endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper, or owner, and it is expedient that such rights should pass with the property; And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid; it is enacted as follows:—

[a] This title has been given by the Indian Short Titles Act, 1897 (14 [XIV] of 1897). [b] This Act is based on the Bills of Lading Act, 1855 (18 and 19 Vict. c. 111). Act IX of 1856 has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act (15 [XV] of 1874), Section 3.

It has been declared by notification under S. 3 (a) of the Scheduled Districts Act (14 [XIV] of 1874), to be in force in the following Scheduled Districts:—

Sindh	...	...	See <i>Gazette of India</i>	...	1880, Pt. I., p. 672.
West Jalpaiguri	...	...	Ditto	...	1881, Pt. I., p. 74.
The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see <i>Calcutta Gazette</i> , 1899, Pt. I, p. 44) and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singhbhum					
The District of Sylhat	...	...	Ditto	...	1881, Pt. I., p. 504.
The District of Sylhat	...	...	Ditto	...	1879, Pt. I., p. 681.
The rest of Assam (except the North Lushai Hills)	...	...	Ditto	...	1897, Pt. I., p. 299.

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading

Rights under bills of lading to whom the property in the goods therein mentioned shall pass, upon to vest in consignee or or by reason of such consignment or endorsement, shall have transferred endorsee. to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*,^a or

Not to affect right of stoppage in transitu or claims for freight. any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

[a] As to stoppage in transit, see the Indian Contract Act, 1872 (9 [IX] of 1872), Ss. 99-106 (now see Sale of Goods Act, 1930 (3 [III] of 1930), Ss. 50-52).

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration,

Bill of lading in hands of consignee, &c., conclusive evidence of the shipment as against master, &c. representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board:

Provided that the master or other person so signing may exonerate himself in respect of such

Proviso. misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims.

Sections 1 to 3 — Notes

[1] The object of the Act is to provide for cases where the goods have not been shipped at all. Its application is limited to endorsee to whom property in the goods shall pass by reason of such endorsement. (1909) 3 Sind L R 203 (206).

[2] A bill of lading is intended to provide for the rights and liabilities of the parties in reference to the contract to carry; it is not concerned with liabilities to contribution in general average. (Vol 12) 1925 Sind 76 (79): 21 Sind L R 29.

[3] A bill of lading is a document of title signed by

THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886.

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CHAPTER III.

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CHAPTER IV.

AMENDMENT OF MARRIAGE ACTS.

- 29-31. [*Repealed.*]

Sections 1 to 3 (*contd.*)

the shipowner or by the master or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. The bill of lading is symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer, being symbolical, delivery of the goods themselves has, by mercantile usage, the same effect as an actual delivery in the circumstances. (Vol 26) 1939 Sind 225 (229): I L R (1939) Kar 439.

[4] If the consignee claims the goods under a bill of lading, he is bound by the terms. (Vol 15) 1928 Bom 5 (6): 52 Bom 37.

[5] Where a bill of lading purporting to be for fifty tons of coal contained a printed clause 'weight, contents and value unknown' and similar words were also written above the signature of the master, it was held that under S. 3 the bill of lading in the above form was not, in the hands of a consignee for value, conclusive evidence against the master of the shipment of fifty tons. (1872) 9 Bom H C R 321 (331, 332).

[6] Section 3 of Bills of Lading Act is limited to the master or the person signing bills. (Vol 12) 1925 Sind 221 (222): 18 Sind L R 106.

[7] Bills of lading are *prima facie* evidence of articles being given to shipping company unless stated otherwise. (Vol 12) 1925 Sind 221 (222): 18 Sind L R 106.

[8] It is essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title is the receipt on board the ship of the goods which the bills of lading cover and which it is so declared in the bill itself. (Vol 26) 1939 Sind 225 (229): I L R (1939) Kar 439.

[9] On a transfer of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise according to the intention of the parties, to the transferee provided that the transferor was competent to dispose of the goods. (Vol 26) 1939 Sind 225 (229): I L R (1939) Kar 439.

[10] Carrier by sea can limit his liability by a bill of lading. (Vol 5) 1918 Sind 50 (51): 11 Sind L R 106.

[11] On the question as to the burden of proof where a bill of lading contains the usual exemption clause, *see* (Vol 11) 1924 Mad 773 (774): 47 Mad 610.

CHAPTER V.

SPECIAL PROVISIONS AS TO CERTAIN
EXISTING REGISTERS.

SECTIONS.

32. Permission to persons having custody of certain records to send them within one year to Registrar General.
33. Appointment of Commissioners to examine registers.
34. Duties of Commissioners.

SECTIONS.

35. Searches of lists prepared by Commissioners and grant of certified copies of entries.
- 35A. Constitution of additional Commissions for purposes of this Chapter.

CHAPTER VI.

RULES.

36. Rules.
37. [*Repealed.*]

STATEMENT OF OBJECTS AND REASONS.

"It is proposed by this Bill (i) to establish a system of voluntary registration of births and deaths for the benefit of such classes of the community as would be likely to avail themselves of such registration, (ii) to establish general registry offices for keeping registers of the births and deaths so registered, and of marriages registered under Act III of 1872 or the Indian Christian Marriage Act, 1872 (XV of 1872) and (iii) to provide machinery for giving evidential value to certain existing registers of births, baptisms, deaths, burials and marriages, which have been kept under no law.

2. The subject of the registration of births and deaths among Europeans in India has been long under the consideration of the Government, whose attention has, moreover, been frequently directed to it by memorials from various Christian religious bodies urging very strongly the need for legislation.

3. The Indian Statute-Book contains at present no general law for the registration of births and deaths. There are indeed, enactments which provide for the registration of births and deaths within certain specified areas, principally municipalities and cantonments, but, in the first place these enactments are strictly local in their nature, leaving the greater portion of the country unprovided for, and, in the next place, their provisions, being directed primarily to statistical purposes, are not of such a nature as to make the registers of births and deaths kept under them of value for purposes of evidence.

4. As to the numerous registers of baptisms and burials which are kept by ministers of religion in all parts of the country, it is doubtful how far they can be relied on for giving accurately the requisite particulars as to births and deaths, and most of them would, moreover, be inadmissible in evidence.

5. This being the state of the law, and considering the importance of the subject generally, and the memorials above referred to, and having regard to the fact that references are frequently made to the Secretary of State for India and to the Government of India for proof of age or of deaths in connection with questions involving large individual interests, such as rights to property, the Government of India is of opinion that it is expedient to enact a permissive law under which full facilities for registering births and deaths should be given to persons valuing unimpeachable evidence of these events.

6. As to the second object of the Bill, it is obvious that no system of registration of births and deaths can be complete or of practical value unless it provides for the establishment, at certain centres, of general offices where the information registered at the various local offices shall be collected and so arranged as to be readily available for public reference.

7. In this connection, the attention of the Government of India has been directed to the unsatisfactory nature of the system of registration of marriages under the Indian Christian Marriage Act, 1872, and Act III of 1872.

Documentary evidence of all marriages under the former Act is, by the provisions of the Act or the orders thereunder, sent to the Secretary of the Local Government who is also empowered to grant certified copies which are receivable in evidence. It would seem, therefore, at first sight, that nothing further was required. But as a matter of fact, not only are no arrangements made for maintaining an index to the marriages the records of which are retained in the local Secretariat, but the greater portion of the marriage records which are received in the local Secretariat have, under section 81 of the Act and the orders in force, to be sent on in original to the Government of India in the Home Department for transmission to the Secretary of State, so that the greater number of the marriage records which reach the local Secretariat do not remain there for purposes of reference and such as do remain are, owing to the absence of an index, practically valueless.

As to Act III of 1872, this Act makes no provision for the marriages solemnized under it being reported to any central authority. The marriage certificate books for which it provides are retained by the Registrar who is not even required to index them. Their value as records of marriage to which they refer is accordingly much diminished.

8. The Government of India have, therefore, availed themselves of the opportunity of the proposed legislation for the registration of births and deaths to remove these defects in the marriage registration law, by providing for general registry offices for keeping registers, not only of the births and deaths which may be registered under the present law, but also of marriages which may be registered under Act III of 1872 or the Indian Christian Marriage Act, 1872."

* * * *

—Gazette of India, 1885, Part V, page 12.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

- Amended by Acts XVI of 1890; XXIV of 1934.
- Amended by Bombay Act XVII of 1945.
- Adapted by A. O.

- Repealed in part and amended by Acts IX of 1911; XXXVIII of 1920.
- Repealed in part by Acts II of 1891; XII of 1891; I of 1938.

COGNATE ACTS AND PROVISIONS.

1. CANTONMENTS ACT, II OF 1924, S. 282 (1).
2. FEMALE INFANTICIDE PREVENTION ACT, VIII OF 1870, SS. 2 AND 3.
3. FOREIGN MARRIAGE ACT, 1892 (55 & 56 Vict., c. 23), SS. 9 TO 11, 17, 18, 24.
4. INDIAN CHRISTIAN MARRIAGE ACT, XV OF 1872, PART IV.
5. MERCHANT SHIPPING ACT, 1894 (57 & 58 Vict., c. 60), SS. 254 AND 339.
6. MERCHANT SHIPPING ACT, XXI OF 1923, S. 121 (vi) TO (viii).
7. PARSİ MARRIAGE AND DIVORCE ACT, III OF 1936, SS. 6 TO 9.
8. PENAL CODE, 1860, S. 466.
9. REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES (ARMY) ACT, 1879 (42 & 43 Vict., c. 8).
10. SPECIAL MARRIAGE ACT, III OF 1872, SS. 13 AND 13A.

ACT NO. VI of 1886.^a

[8th March 1886.]

An Act to provide for the voluntary Registration of certain Births and Deaths, for the establishment of General Registry Offices for keeping Registers of certain Births, Deaths and Marriages, and for certain other purposes.

WHEREAS it is expedient to provide for the voluntary registration of births and deaths among certain classes of persons, for the more effectual registration of those births and deaths and of the marriages registered under Act III of 1872,^b or the Indian Christian Marriage Act, 1872, and of certain marriages registered under the Parsi Marriage and Divorce Act, 1865, and for the establishment of general registry offices for keeping registers of those births, deaths and marriages;

AND WHEREAS it is also expedient to provide for the authentication and custody of certain existing registers made otherwise than in the performance of a duty specially enjoined by the law of the country in which the registers were kept, and to declare that copies of the entries in those registers shall be admissible in evidence;

It is hereby enacted as follows :—

[a] For Report of the Select Committee, see Gazette of India, 1886, Pt. IV, p. 103; and for proceedings in Council, see *ibid*, 1885, Supplement, pp. 14 and 87, and *ibid*, 1886, p. 290. [b] Special Marriage Act, 3 [III] of 1872.

CHAPTER I.

PRELIMINARY.

Short title and commencement. 1. (1) This Act may be called the BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886; and

(2) It shall come into force on such day^a as the ^b[Central Government], by notification in the ^c[Official Gazette], directs.

d[*] * * * *

[a] The 1st October 1888, see Gazette of India, 1888, Pt. I, p. 336. [b] Substituted by A. O. for "Governor General in Council". [c] Substituted by A. O. for "Gazette of India". [d] Sub-section (3) was repealed by the Amending Act, 1891 (12 [XII] of 1891).

2. This Act extends to the whole of British India^a and applies also ^b[to British subjects in *Local extent.* Indian States]

[a] It has been declared in force in the Sonthal Parganas by S. 3 of the Sonthal Parganas Settlement Regulation (3 [III] of 1872), in British Baluchistan by the British Baluchistan Laws Regulation (2 [II] of 1913), S. 3 and Schedule, and in the Chittagong Hill Tracts by Notification under S. 4 (2) (a) of the Chittagong Hill Tracts Regulation (1 [I] of 1900), see Notification No. 13083-E. A., dated 13th August 1927, Calcutta Gazette, Pt. I, p. 1728. [b] Substituted by A. O. for "within the dominions of Princes and States in India in alliance with Her Majesty, to British subjects in those dominions".

Definitions. 3. In this Act, unless there is something repugnant in the subject or context,—

"sign" includes mark, when the person making the mark is unable to write his name :

"prescribed" means prescribed by a rule made ^a[* * * * *] under this Act: and

"Registrar of Births and Deaths" means a Registrar of Births and Deaths appointed under this Act.

[a] The words "by the Governor-General in Council" were repealed by A. O.

4. Nothing in this Act, or in any rule made under this Act, shall affect any law heretofore *Saving of local laws.* or hereafter passed providing for the registration of births and deaths within particular local areas.

Powers exercisable from time to time. 5. All powers conferred by this Act may be exercised from time to time as occasion requires.

CHAPTER II.

GENERAL REGISTRY OFFICES OF BIRTHS, DEATHS AND MARRIAGES.

Establishment of general registry offices and appointment of Registrars General.

6. (1) Each ^a[Provincial Government]—

(a) shall establish^b a general registry office for keeping such certified copies of registers of births and deaths registered under this Act, or marriages registered under Act III of 1872 (to provide a form of marriage in certain cases) or the Indian Christian Marriage Act, 1872, or, beyond the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Bombay, under the Parsi Marriage and Divorce Act, 1865,^c as may be sent to it under this Act, or under any of the three last-mentioned Acts, as amended by this Act; and

(b) may appoint^d to the charge of that office an officer, to be called the Registrar General of Births, Deaths and Marriages, for the territories under its administration.

* * *

[a] Substituted by A. O. for "Local Government." [b] For General Registry Offices established for different provinces, see local Rules and Orders for; Delhi, see Gazette of India, 1912, Pt. I, page 1105. [c] See now the Parsi Marriage and Divorce Act, 1936 (3 [III] of 1936). [d] For Registrars General appointed for different provinces, see local Rules and Orders. [e] Sub-section (2) was repealed by A. O.

7. Each Registrar General of Births, Deaths and Marriages shall cause indexes of all the certified copies of registers sent to his office under this Act, or under Act III of 1872, the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865^a as amended by this Act, to be made and kept in his office in the prescribed form.

[a] See now the Parsi Marriage and Divorce Act, 1936 (3 [III] of 1936.)

8. Subject to the payment of the prescribed fees, the indexes so made shall be at all reasonable times open to inspection by any person applying to inspect them, and copies of entries in the certified copies of the registers to which the indexes relate shall be given to all persons applying for them.

9. A copy of an entry given under the last foregoing section shall be certified by the Registrar General of Births, Deaths and Marriages, or by an officer authorized^a in this behalf by the ^b[Provincial Government], and shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates.

[a] For such authorizations, see local Rules and Orders. [b] Substituted by A. O. for "Local Government".

10. Each Registrar General of Births, Deaths and Marriages shall exercise a general superintendence over the Registrars of Births and Deaths in the territories for which he is appointed.

CHAPTER III.

REGISTRATION OF BIRTHS AND DEATHS.

A.—Application of this Chapter.

Persons whose births and deaths are registrable. 11. (1) The persons whose births and deaths shall, in the first instance, be registrable under this Chapter are the following, namely:—

(a) in British India, the members of every race, sect or tribe to which the Indian Succession Act, 1865,^a applies, and in respect of which an order under section 332 of that Act is not for the time being in force, and all persons professing the Christian religion;

(b) in ^b[Indian States], British subjects being members of a like race, sect or tribe or professing the Christian religion.

(2) But the ^c[Provincial Government], by notification in the Official Gazette, may ^d* * * extend the operation of this Chapter to any other class of persons either generally or in any local area.

[a] See now the Indian Succession Act, 1925 (39 [XXXIX] of 1925), S. 3. [b] Substituted by A. O. for "the dominions of Princes and States in India in alliance with Her Majesty". [c] Substituted by A. O. for "Local Government". [d] The words "with the previous approval of the Governor-General of India in Council" were omitted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

B.—Registration Establishment.

^a12. The ^b[Provincial Government] may appoint, either by name or by virtue of their office, so many persons as it thinks necessary to be Registrars of Births and Deaths for such local areas within the territories under its administration as it may define and, if it sees fit, for any class of persons within any part of those territories.

[a] As to Registrars appointed under this section, see different local Rules and Orders, and General Rules and Orders, Vol. II, P. 559. [b] *Substituted* by A. O. for "Local Government".

13. The ^a[Central Government] may, by notification in the ^b[Official Gazette], appoint, either by name or by virtue of their office, so many persons as ^c[it] thinks necessary to be ^dRegistrars of Births and Deaths for such local areas within ^e[any Indian State] as ^f[it] may define and, if ^g[it] sees fit, for any class of persons within any part of ^h[those States].

§[* * * * *]

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India." [c] *Substituted* by A. O. for "he". [d] For Registrars of Births and Deaths appointed under this section for—(1) Indian States in the Bombay Presidency, see British Enactments in force in Indian States; (2) States of Pudukottai, Banganapalle, and Sandur, see Gazette of India, 1889, Pt. I, p. 52; (3) State of Mysore, see Gazette of India, 1889, Pt. I, p. 54, and *ibid*, 1893, Pt. I, p. 381; (4) Hyderabad State, see Gazette of India, 1889 and 1890, Pt. I, pp. 621 and 468, respectively; (5) Rampur and Tehri States, see Gazette of India, 1891, p. 424; (6) Kashmir and Jammu, see British Enactments in force in Indian States; (7) Central Provinces Feudatory States, see British Enactments in force in Indian States, and Gazette of India, 1895, Pt. I, p. 404; (8) States in the Central India Agency, see British Enactments in force in Indian States; (9) The territory of the Raja of Nahan (Sirmur), see Gazette of India, 1899, Pt. I, p. 277; (10) Certain States in Rajputana, see Gazette of India, 1912, Pt. I, p. 1051; (11) Baluchistan Agency Territories, see Gazette of India, 1903, Pt. I, p. 916; (12) State of Cambay, see Gazette of India, 1917, Pt. I, p. 1073. [e] *Substituted* by A. O. for "the dominions of any Prince or State in India in alliance with Her Majesty". [f] *Substituted* by A. O. for "those dominions". [g] The proviso added by S. 2 and Sch. I of the Devolution Act, 1920 (38 [XXXVIII] of 1920), was repealed by A. O.

Registrar to be deemed a public servant. 14. Every Registrar of Births and Deaths shall be deemed to be a public servant within the meaning of the Indian Penal Code.

15. [Power to remove Registrars.] *Repealed by the A. O.*

Office and attendance of Registrar. 16. (1) Every Registrar of Births and Deaths shall have an office in the local area, or within the part of the territories or dominions, for which he is appointed.

(2) Every Registrar of Births and Deaths to whom the ^a[Provincial Government] may direct this sub-section to apply shall attend at his office for the purpose of registering births and deaths on such days and at such hours as the Registrar General of Births, Deaths and Marriages may direct, and shall cause to be placed in some conspicuous place on or near the outer door of his office his name, with the addition of Registrar of Births and Deaths for the local area or class for which he is appointed, and the days and hours of his attendance.

[a] *Substituted* by A. O. for "Local Government".

17. (1) When any Registrar of Births and Deaths to whom the ^a[Provincial Government] may direct this section to apply^b, not being a Registrar of Births and Deaths for a local area ^c[in the town of Calcutta or Madras or in the city of Bombay], is absent, or when his office is temporarily vacant, any person whom the Registrar General of Births, Deaths and Marriages appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's office is situate, or such other officer as the ^a[Provincial Government] appoints in this behalf, shall be the Registrar of Births and Deaths during such absence or until the ^a[Provincial Government] fills the vacancy.

(2) When any such Registrar of Births and Deaths for a local area ^c[in the town of Calcutta or Madras or in the city of Bombay] is absent, or when his office is temporarily vacant, any person whom the Registrar General of Births, Deaths and Marriages appoints in this behalf shall be the Registrar of Births and Deaths during such absence or until the ^a[Provincial Government] fills the vacancy.

Sections 12 and 13 — Note

"By Sections 12 and 13, we have proposed to enable Local Government in British India, and the Governor-General in Council in States in India in alliance with Her Majesty, to appoint Registrars of Births and Deaths

for classes of persons as well as for local areas. It will thus be practicable to appoint ministers of religion to be Registrars of Births and Deaths for their own congregations only without imposing on them duties for which they might have neither leisure nor inclination." — *Select Committee Report.*

(3) The Registrar General of Births, Deaths and Marriages shall report to the ^a[Provincial Government] all appointments made by him under this section.

[a] *Substituted* by A. O. for "local Government". [b] The section has been declared by the Government of Madras to apply to all Registrars appointed by that Government under S. 12, *see* Madras Rules and Orders,

[c] These words were *substituted* for "in the town of Calcutta, Madras or Bombay" by the Greater Bombay Laws and the Bombay High Court (Declaration of Limits) Act, 1945 (17 [XVII] of 1945), S. 9 and Sch. E. "City of Bombay" means the area within the local limits of the ordinary original civil jurisdiction of the High Court of Bombay immediately before the commencement of Bombay Act 17 [XVII] of 1945.—*See ibid*, S. 2 (1).

18. The ^a[Provincial Government] shall supply every Registrar of Births and Deaths with a sufficient number of register books of births and of register books of deaths, and shall make suitable provision for the preservation of the records connected with the registration of births and deaths.

[a] *Substituted* by A. O. for "Local Government".

C.—Mode of Registration.

19. Every Registrar of Births and Deaths, on receipt of notice of a birth or death within the local area or among the class for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorized by this Act to give the notice, forthwith make an entry of the birth or death in the proper register book :

Provided that —

- (a) if he has reason to believe the notice to be in any respect false, he may refuse to register the birth or death until he receives an order from the Judge of the District Court directing him to make the entry and prescribing the manner in which the entry is to be made ; and
- (b) he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child.

Persons authorised to give notice of birth.

20. Any of the following persons may give notice of a birth, namely :

- (a) the father or mother of the child ;
- (b) any person present at the birth ;
- (c) any person occupying, at the time of the birth, any part of the house wherein the child was born and having knowledge of the child having been born in the house ;
- (d) any medical practitioner in attendance after the birth and having personal knowledge of the birth having occurred ;
- (e) any person having charge of the child.

Persons authorized to give notice of death.

21. Any of the following persons may give notice of a death, namely : —

- (a) any relative of the deceased having knowledge of any of the particulars required to be registered concerning the death ;
- (b) any person present at the death ;
- (c) any person occupying, at the time of the death, any part of the house wherein the death occurred and having knowledge of the deceased having died in the house ;
- (d) any person in attendance during the last illness of the deceased ;
- (e) any person who has seen the body of the deceased after death.

Entry of birth or death to be signed by person giving notice.

22. (1) When an entry of a birth or death has been made by the Registrar of Births and Deaths under section 19, the person giving notice of the birth or death must sign the entry in the register in

the presence of the Registrar :

^a[Provided that it shall not be necessary for the person giving notice to attend before the Registrar or to sign the entry in the register if he has given such notice in writing and has furnished to the satisfaction of the Registrar such evidence of his identity as may be required by any rules made by the ^b[Provincial Government] in this behalf.]

(2) Until the entry has been so signed ^a[for the conditions specified in the proviso to sub-section (1) have been complied with,] the birth or death shall not be deemed to be registered under this Act.

(3) When the birth of an illegitimate child is registered, and the mother and the person acknowledging himself to be the father of the child jointly request that that person may be registered as the father, the mother and that person must both sign the entry in the register in the presence of the Registrar.

[a] *Inserted* by the Births, Deaths and Marriages Registration (Amendment) Act, 1911 (9 [IX] of 1911), S. 2.
[b] *Substituted* by A. O. for "Local Government".

Grant of certificate of registration of birth or death. **23.** The Registrar of Births and Deaths shall, on application made at the time of registering any birth or death by the person giving notice of the birth or death, and on payment by him of the prescribed fee, give to the applicant a certificate in the prescribed form, signed by the Registrar, of having registered the birth or death.

24. (1) Every Registrar of Births and Deaths in British India shall send to the Registrar General of Births, Deaths and Marriages for the territories within which the local area or class for which he is appointed is situate or resides, at the prescribed intervals, a true copy certified by him, in the prescribed form, of all the entries of births and deaths in the register book kept by him since the last of those intervals :

Duty of Registrars as to sending certified copies of entries in register books to Registrar General. Provided that in the case of Registrars of Births and Deaths who are clergymen of the Churches of England, Rome and Scotland, the Registrar may, if so directed by his ecclesiastical superior, send the certified copies in the first instance to that superior, who shall send them to the proper Registrar General of Births, Deaths and Marriages.

In this sub-section "Church of England" and "Church of Scotland" mean the Church of England and the Church of Scotland as by law established respectively ; and "Church of Rome" means the Church which regards the Pope of Rome as its spiritual head.

(2) The provisions of sub-section (1) shall apply to every Registrar of Births and Deaths in ^a[any Indian State] with this modification that the certified copies referred to in that sub-section shall be sent to such one of the Registrars General of Births, Deaths and Marriages as the ^b[Central Government], by notification^c in the ^d[Official Gazette], appoints in this behalf.

e[* * * * *

[a] *Substituted* by A. O. for "the dominions of any Prince or State in India, in alliance with her Majesty".
[b] *Substituted* by A. O. for "Governor-General in Council". [c] For an instance of such notification, see Gazette of India, 1923, Pt. I, p. 204. [d] *Substituted* by A. O. for "Gazette of India". [e] The proviso added by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, was *repealed* by A. O.

25. (1) Every Registrar of Births and Deaths shall, on payment of the prescribed fees, at all *Searches and copies of entries in register books.* reasonable times, allow searches to be made in the register books kept by him, and give a copy of any entry in the same.

(2) Every copy of an entry in a register book given under this section shall be certified by the Registrar of Births and Deaths and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.

26. Notwithstanding anything in section 19, the ^a[Provincial Government] may make rules^b *Exceptional provision for registration of certain births and deaths.* authorizing Registrars of Births and Deaths, on conditions and in circumstances to be specified in the rules, to register births and deaths occurring outside the local areas or classes for which they are appointed.

[a] *Substituted* by A. O. for the words "Local Government", which had been *substituted* for the words "Governor-General in Council" by the Births, Deaths and Marriages Registration (Amendment) Act, 1911 (9 [IX] of 1911), S. 3. [b] For rules made under S. 26 conjointly with Ss. 28 and 36, see General Rules and Orders Vol. II, page 562, and different local Rules and Orders. All rules made by the "Governor-General in Council" under this Act before 1911 shall be deemed to have been made by the Provincial Government, see the Births, Deaths and Marriages Registration (Amendment) Act, 1911 (9 [IX] of 1911), S. 6.

Section 23 — Note 1.

It has been observed in the following case that in a divorce case a certificate granted under S. 23 of this Act has been made evidence by the Act of the fact of marriage. (Vol 21) 1934 Pat 475 (477) : ILR 13 Pat 129 [Note:—The reference to S. 23 does not seem to be correct. Now see S. 80, Christian Marriage Act, 1872.]

Section 26 — Note 1.

Events occurring in the course of journeys, or in places for which Registrars of Births and Deaths have not been appointed may, by the rules framed under this section be, made registrable. See *Select Committee Report*.

D.—Penalty for False Information.

27. If any person wilfully makes, or causes to be made for the purpose of being inserted in any register of births or deaths, any false statement in connection with any notice of a birth or death under this Act, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

E. — Correction of Errors.

28. (1) If it is proved to the satisfaction of a Registrar of Births and Deaths that any entry in a birth or death in any register kept by him under this Act is erroneous in form or substance, he may, subject to such rules^a as may be made by the ^b[Provincial Government] with respect to the conditions and circumstances on and in which errors may be corrected, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction.

(2) If a certified copy of the entry has already been sent to the Registrar General of Births, Deaths and Marriages, the Registrar of Births and Deaths shall make and send a separate certified copy of the original erroneous entry and of the marginal correction therein made.

[a] For rules made under S. 26 conjointly with Ss. 28 and 36, see foot-note to S. 26 *supra*. [b] Substituted by A. O. for "Local Government" which had been substituted for "Governor-General in Council" by the Births, Deaths and Marriages Registration (Amendment) Act, 1911, (9 [IX] of 1911), S. 8.

CHAPTER IV. [Amendment of Marriage Acts. Sections 29 to 31.] *[Repealed by the Repealing Act, 1938 (I of 1938), S. 2 and Schedule.]*

CHAPTER V.

SPECIAL PROVISIONS AS TO CERTAIN EXISTING REGISTERS.

32. If any person in British India, or in ^a[any Indian State], has for the time being the custody of any register or record of birth, baptism, naming, dedication, death or burial of any persons of the classes referred to in section 11, subsection (1), or of any register or record of marriage of any persons of the classes to which Act III of 1872 or the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, applies, and if such register or record has been made otherwise than in performance of a duty specially enjoined by the law of the country in which the register or record was kept, he may, ^b[at any time before the first day of April 1891] send the register or record to the office of the Registrar General of Births, Deaths and Marriages for the territories within which he resides, or, if he resides within ^c[any Indian State], to such one of the Registrars General as aforesaid as the ^d[Central Government], by notification^e in the ^f[Official Gazette], directs in this behalf:

^g[Provided that such register or record shall, in the case of ^h[any Indian State] which ⁱ[is] within the political charge of a ^j[Provincial Government], be sent to the Registrar General of Births, Deaths and Marriages for the territories under the administration of that ^j[Provincial Government].]

[a] Substituted by A. O. for "the dominions of any Prince or State in India in alliance with Her Majesty."

[b] Substituted for "within one year from the date on which this Act comes into force" by the Births, Deaths and Marriages Registration Act (1886) Amendment Act, 1890 (16 [XVI] of 1890), S. 1. [c] Substituted by A. O. for "the dominions of any such Prince or State as aforesaid." [d] Substituted by A. O. for "Governor-General in Council". [e] For an instance of such notification, see Gazette of India, 1899, Pt. I, p. 424.

[f] Substituted by A. O. for "Gazette of India". [g] Inserted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [h] Substituted by A. O. for "any such dominions." [i] Substituted by A. O. for "are". [j] Substituted by A. O. for "Local Government".

33. ^a[(1) Any ^b[Provincial Government] in the case of registers or records sent under section 32 to the Registrar General for the territories under its administration, and the ^c[Central Government], in the case of registers or records so sent to any other Registrar General appointed by ^d[it] under the said section, may appoint so many persons as it ^e[* * *] thinks fit to be Commissioners for examining such registers or records.]

(2) The Commissioners so appointed shall hold office for such period as the ^f[authority appointing them], by the order of appointment, or any subsequent order, directs.

[a] *Substituted* by the Devolution Act, 1920, (38 [XXXVIII] of 1920), S. 2 and Sch. I, for the original sub-section (1). [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "Governor-General in Council". [d] *Substituted* by A. O. for "him". [e] The words "or he, as the case may be" were *repealed* by A. O. [f] *Substituted* for "Governor-General in Council" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

34. (1) The Commissioners appointed under the last foregoing section shall enquire into the *Duties of Commissioners.* state, custody and authenticity of every such register or record as may be sent to the Registrar General of Births, Deaths and Marriages under section 32;

and shall deliver to the Registrar General a descriptive list or descriptive lists of all such registers or records, or portions of registers or records, as they find to be accurate and faithful.

(2) The list or lists shall contain the prescribed particulars and refer to the registers or records, or to the portions of the registers or records, in the prescribed manner.

(3) The Commissioners shall also certify^a in writing, upon some part of every separate book or volume containing any such register or record, or portion of a register or record, as is referred to in any list or lists made by the Commissioners, that it is one of the registers or records, or portions of registers or records, referred to in the said list or lists.

[a] The certificates in writing required by S. 34 (3) shall be signed by not less than two Commissioners.—No. 306 dated 4-3-1892, Gazette of India, 1892, Pt. I, page 123.

35. (1) Subject to the payment of the prescribed fees,^a the descriptive list or lists of registers or records, or portions of registers or records, delivered by the *Searches of list prepared by Commissioners and grant of certified copies of entries.* Commissioners to the Registrar General of Births, Deaths and Marriages shall be, at all reasonable times, open to inspection by any person applying to inspect it or them, and copies of entries in those registers or records shall be given to all persons applying for them.

(2) A copy of an entry given under this section shall be certified by the Registrar General of Births, Deaths and Marriages, or by an officer or person^b authorized in this behalf by the ^c[Provincial Government] and shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death, burial or marriage to which the entry relates.

[a] For fees payable under this section, see Notification No. 296 dated 26-10-1894 published in Gazette of India, 1894, Pt. I, page 580. [b] For such authorizations, see different local Rules and Orders. [c] *Substituted* by A. O. for "Local Government."

35A. (1) The ^b[Central Government] or the ^c[Provincial Government]^d [may by notification in the Official Gazette] appoint more Commissions^e than one for the purposes of section 33, each such Commission consisting of so many and such members, and having its functions restricted to the disposal, under this Act and the rules thereunder, of such registers and records sent under section 32 to the Registrar General, as may be specified in the notification.

(2) If more Commissions than one are appointed in exercise of the power conferred by sub-section (1), then references in this Act to the Commissioners shall be construed as references to the members constituting a Commission so appointed.]

[a] Section 35-A was *added* by the Births, Deaths and Marriages Registration Act (1886) Amendment Act, 1890 (16 [XVI] of 1890), S. 2, which was *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 3 and Sch. II. The present sub-section (1) was *substituted* for the original sub-section by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, and sub-section (2), which is the same as the original sub-section (2), was *inserted* by the Repealing and Amending Act, 1934 (24 [XXIV] of 1934), S. 2 and Sch. I.

[b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Local Government". [d] *Substituted* by A. O. for "if he or it thinks fit, may by notification in the Gazette of India or the local official Gazette, as the case may be". [e] For Commissioners appointed under this section, see General Rules and Orders, Vol II, page 571.

CHAPTER VI.

RULES.

36. (1) The Provincial Government, for each Province, and the Central Government, for *Rules.* British subjects in Indian States, may make rules to carry out the purposes of this Act].

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) fix the fees payable under this Act;

- (b) prescribe the forms required for the purposes of this Act;
 - (c) prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice;
 - (d) prescribe the evidence of identity to be furnished to a Registrar of Births and Deaths by persons giving notice of a birth or death in cases where personal attendance before such Registrar is dispensed with;
 - (e) prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them;
 - (f) prescribe the conditions and circumstances on and in which Registrars of Births and Deaths may correct entries of births and deaths in registers kept by them;
 - (g) prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate; and
 - (h) prescribe the custody in which those registers or records are to be kept.
- (3) Every power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication.
- (4) All rules made under this Act shall be published in the "[Official Gazette]", and on such publication shall have effect as if enacted in this Act.]
- [a] *Substituted* by the Births, Deaths and Marriages Registration (Amendment) Act, 1911 (9 [IX] of 1911), S. 4, for the original section. [b] *Substituted* by A. O. for the original sub-section. [c] *Substituted* by A. O. for "Local Official Gazette."

37. [Procedure for making and publication of rules.] *Repealed by the Births, Deaths and Marriages Registration Amendment Act, 1911 (IX of 1911), S. 5.*

THE INDIAN BOILERS ACT, 1923.

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STATEMENT OF OBJECTS AND REASONS.

"Under the Devolution Rules the regulation of boilers is a provincial subject, subject to legislation by the Indian Legislature. There are at present seven Provincial Boiler Acts; some of them were framed many years ago and are out of date, and all of them are inconsistent with each other. The result is that different rules are enforced in different provinces, and the anomalous position has been reached that a boiler which is allowed to work up to a certain pressure in one province can only be worked to a much lower pressure when transferred to another province. Further in the interest of safety a boiler requires regular inspection in whatever province it may be situated, and it is wrong that in certain provinces no boiler law should be in force at all. The object therefore of the present legislation is :— (a) to secure uniformity throughout India in all technical matters connected with boiler regulations, e. g., standards of construction, maximum pressure, and (b) to insist on the registration and regular inspection of all boilers throughout India.

This object can only be attained by an all-India Act, with uniform regulations throughout the country; under the Devolution Rules, as explained above, it is the function of the Central Government to promulgate such an Act.

2. The subject being a highly technical one a Committee of three persons including two boiler experts was appointed to examine the existing provincial laws and to put forward proposals for an all-India Act, based on the provisions of these laws brought up to date and co-ordinated. The report of this Committee has been published and the views of Local Governments obtained upon it.

The Bill which is now presented to the Assembly is the result of their recommendations as modified after consideration of the views of Local Governments.

3. The only important respect in which the Bill diverges from certain of the existing Acts is with regard to certificated boiler attendants. It is only in a few provinces that boiler attendants are required to possess certificates of competency. The Industrial Commission recommended that this requirement was unnecessary, a recommendation which the Boiler Laws Committee endorsed, and in which Local Governments, including those now insisting on certificates, have unanimously agreed."

* * * * *

—Gazette of India, 1922, Part V, page 249.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Amended by Acts IX of 1929; XI of 1937; V of 1942; XVII of 1943.

— Adapted by A. O.

— Repealed in part by Acts XII of 1927; XXXIV of 1939.

COGNATE ACTS AND PROVISIONS.

SEE UNDER THE FACTORIES ACT, 1934.

ACT NO. V of 1923.^a

[23rd February 1923.]

An Act to consolidate and amend the law relating to steam-boilers.

Whereas it is expedient to consolidate and amend the law relating to steam-boilers; it is hereby enacted as follows :—

[a] For Report of Joint Committee, see Gazette of India, 1923, Pt. V, p. 15.

Short title, extent and commencement.

1. (1). This Act may be called the INDIAN BOILERS ACT, 1923.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date^a as the ^b[Central Government,] may, by notification in the ^c[Official Gazette], appoint.

[a] This Act came into force on 1st January 1924, see General Rules and Orders, Vol. V, p. 134. [b] *Substituted* by A. O. for "Governor-General in Council." [c] *Substituted* by A. O. for "Gazette of India".

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context, —

(a) "accident" means an explosion of a boiler or steam-pipe or any damage to a boiler or steam-pipe which is calculated to weaken the strength thereof so as to render it liable to explode;

^a[(aa) "Board" means the Central Boilers Board constituted under section 27A;]

[a] *Inserted* by the Indian Boilers (Amendment) Act, 1937 (11 [XI] of 1937), S. 3.

(b) "boiler" means any closed vessel exceeding five gallons in capacity which is used expressly for generating steam under pressure ^a[* * *] and includes any mounting or other fitting attached to such vessel, which is wholly or partly under pressure when steam is shut off;

[a] Words "for use outside such vessel" were *repealed* by the Indian Boilers (Amendment) Act, 1929 (9 [IX] of 1929), S. 2.

Section 2 (b)—Note 1.

[1] The word "expressly" does not denote that the steam generated under pressure must be *used* as steam *under pressure*. The ultimate use is immaterial. The

fact that the steam was used for cleaning vessels will not take a vessel generating steam under pressure out of the category of boilers. (Vol 26) 1939 All 697 (697) : ILR (1939) All 883 : 41 Cri L Jour 26.

(c) "Chief-Inspector" and "Inspector" mean, respectively, a person appointed to be a Chief Inspector and an Inspector under this Act ;

^a[(cc) "feed pipe" means any pipe or connected fitting wholly or partly under pressure through which feed-water passes directly to a boiler;]

[a] Clause (cc) was inserted by the Indian Boilers (Amendment) Act, 1943 (17 [XVII] 1943), S. 2, [13-8-1943].

(d) "owner" includes any person using a boiler as agent of the owner thereof and any person using a boiler which he has hired or obtained on loan from the owner thereof;

(e) "prescribed" means prescribed by regulations or rules made under this Act ;

(f) "steam-pipe" means any main pipe exceeding three inches in internal diameter through which steam passes directly from a boiler to a prime-mover or other first user, and includes any connected fitting of a steam-pipe; and

(g) "structural alteration, addition or renewal" shall not be deemed to include any renewal or replacement of a petty nature when the part or fitting used for replacement is not inferior in strength, efficiency or otherwise to the replaced part or fitting.

^a[2A. Every reference in this Act (except where the word 'steam-pipe' is used in clause (f) of *Application of Act* section 2), to a steam-pipe or steam-pipes shall be deemed to include also a reference to a feed-pipe or feed-pipes respectively.]

[a] Inserted by the Indian Boilers (Amendment) Act, 1943 (17 [XVII] of 1943), S. 3, [13-8-43].

Limitation of applica- 3. (1) Nothing in this Act shall apply in the case of any boiler or
tion. steam-pipe—

(a) in any steamship as defined in section 3 of the ^aIndian Steamships Act, 1884, or in any steam-vessel as defined in section 2 of the Indian steam-vessels Act, 1917 ; or

(b) belonging to or under the control of His Majesty's Navy or ^b[the Royal Indian Navy] ; ^c[or

(c) appertaining to a sterilizer or disinfector of a type such as is commonly used in hospitals, if the boiler does not exceed twenty gallons in capacity;]

(2) The ^d[Safety Controlling Authority] may, by notification in the ^e[Official Gazette], declare that the provisions of this Act shall not apply in the case of boilers or steam-pipes, or of any specified class of boilers or steam-pipes, belonging to or under the control of any railways^f administered ^g[by the Federal Railway Authority or by any Provincial Government] or by any railway company as defined in clause (5) of section 3 of the Indian Railways Act, 1890.

^h[In this sub-section, "Safety Controlling Authority" has the same meaning as in the Indian Railways Act, 1890.]

[a] See now the Indian Merchant Shipping Act, 1923, (21³[XXI] of 1923), S. 2. [b] Substituted by A. O. for "the Royal Indian Marine Service."² [c] Word "or" at the end of clause (b) was added and clause (c) was inserted by the Indian Boilers (Amendment) Act, 1942 (5 [V] of 1942), S. 2. [2-3-42.] [d] Substituted by A. O. for "Governor-General in Council." [e] Substituted by A. O. for "Gazette of India." [f] For list of railways, notified under this section, see General Rules and Orders, Vol V, p. 134. [g] Substituted by A. O. for "by the Government". [h] Inserted by A. O.

4. The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], exclude^c any Power to limit extent. specified area from the operation of all or any specified provisions of this Act.

[a] Substituted by A. O. for "Governor-General in Council." [b] Substituted by A. O. for "Gazette of India." [c] The Andaman and Nicobar islands have been excluded from the operation of the provisions of this Act, see General Rules and Orders, Vol V, p. 135.

5. (1) The ^a[Provincial Government] may appoint such persons as it thinks fit to be Appointment of Chief Inspectors for the Province for the purposes of this Act, and may define Inspectors and Inspectors. the local limits within which each Inspector shall exercise the powers and perform the duties conferred and imposed on Inspectors by or under this Act.

Section 2 (d) — Note 1.

[1] The definition of "owner" is inclusive. It extends the dictionary meaning of word by including persons mentioned therein and does not restrict the meaning to only such persons. (Vol 24) 1937 Pat 500 (500) : 16 Pat 495 : 38 Cri L Jour 1054.

Section 3 — Note 1.

[1] "The boilers used on ordinary steam-ships are already subject to a law which ensures proper inspection, and boilers used on His Majesty's ships are always in the charge of competent engineers. It is, therefore,

unnecessary to bring these classes of boilers within the scope of the Act. Similarly, as regards sub-clause (2), the boilers, used on the large, well organized railways are in charge of competent engineers and it would be a work of supererogation for the provincial boiler inspection staff to inspect such boilers : hence power is taken to exempt such railways. On the other hand, in the case of tramways and the smaller railway lines it may be desirable to provide for inspection by the provincial staff. Exemptions made under this clause will be specific in each case."—*Statement of Objects and Reasons.*

(2) The ^a[Provincial Government] shall likewise appoint a person to be Chief Inspector for the Province, who may, in addition to the powers and duties conferred or imposed on the Chief Inspector by or under this Act, exercise any power or perform any duty so conferred or imposed on Inspectors.

(3) Every Chief Inspector and every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code.

[a] Substituted by A. O. for "Local Government."

Prohibition of use of unregistered or uncertificated boiler.

6. Save as otherwise expressly provided in this Act, no owner of a boiler shall use the boiler or permit it to be used —

- (a) unless it has been registered in accordance with the provisions of this Act ;
- (b) in the case of any boiler which has been transferred from one Province to another, until the transfer has been reported in the prescribed manner ;
- (c) unless a certificate or provisional order authorising the use of the boiler is for the time being in force under this Act ;
- (d) at a pressure higher than the maximum pressure recorded in such certificate or provisional order ;
- (e) where the ^a[Provincial Government] has made rules requiring that boilers shall be in charge of persons holding certificates of competency, unless the boiler is in charge of a person holding the certificate required by such rules :

Provided that any boiler registered, or any boiler certified or licensed, under any Act hereby repealed shall be deemed to have been registered or certified, as the case may be, under this Act :

b[*] * * * * *

[a] Substituted by A. O. for "Local Government." [b] Second proviso was repealed by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 3 and Sch. II.

7. (1) The owner of any boiler which is not registered under the provisions of this Act may *Registration.* apply to the Inspector to have the boiler registered. Every such application shall be accompanied by the prescribed fee.

(2) On receipt of an application under sub-section (1), the Inspector shall fix a date, within thirty days or such shorter period as may be prescribed from the date of the receipt, for the examination of the boiler and shall give the owner thereof not less than ten days' notice of the date so fixed.

(3) On the said date the Inspector shall proceed to measure and examine the boiler and to determine in the prescribed manner the maximum pressure, if any, at which such boiler may be used, and shall report the result of the examination to the Chief Inspector in the prescribed form.

(4) The Chief Inspector, on receipt of the report, may —

- (a) register the boiler and assign a register number thereto either forthwith or after satisfying himself that any structural alteration, addition or renewal which he may deem necessary has been made in or to the boiler or any steam-pipe attached thereto, or
- (b) refuse to register the boiler :

Provided that where the Chief Inspector refuses to register a boiler, he shall forthwith communicate his refusal to the owner of the boiler together with the reasons therefor.

(5) The Chief Inspector shall, on registering the boiler, order the issue to the owner of a certificate in the prescribed form authorising the use of the boiler for a period not exceeding twelve months at a pressure not exceeding such maximum pressure as he thinks fit and as is in accordance with the regulations made under this Act.

(6) The Inspector shall forthwith convey to the owner of the boiler the orders of the Chief Inspector and shall in accordance therewith issue to the owner any certificate of which the issue has been ordered, and, where the boiler has been registered, the owner shall within the prescribed period cause the register number to be permanently marked thereon in the prescribed manner.

Section 7 — Note 1.

[1] "The intention is that all boilers which come within the definition shall be registered and that the scale of registration fees shall be uniform for the whole of India, though the fee payable will of course vary according to the size of the boiler. It is desirable that, on receipt of an application for registration, the Inspector should be bound by law to examine the boiler within

a reasonable period: otherwise, the owner might be put to considerable loss and inconvenience in having to wait for a long time before bringing the boiler into use. It is essential too that the Inspector should give the owner ten days' notice of the date of his inspection as in the case of multitubular boilers, it takes ten days to make the boiler ready for inspection." — *Statement of Objects and Reasons.*

Renewal of certificate.

8. (1) A certificate authorising the use of a boiler shall cease to be in force —

- (a) on the expiry of the period for which it was granted; or
- (b) when any accident occurs to the boiler; or
- (c) when the boiler is moved, the boiler not being a vertical boiler the heating surface of which is less than two hundred square feet, or a portable or vehicular boiler; or
- (d) when any structural alteration, addition or renewal is made in or to the boiler; or
- (e) if the Chief Inspector in any particular case so directs, when any structural alteration, addition, or renewal is made in or to any steam-pipe, attached to the boiler; or
- (f) on the communication to the owner of the boiler of an order of the Chief Inspector or Inspector prohibiting its use on the ground that it or any steam-pipe attached thereto is in a dangerous condition.

(2) Where an order is made under clause f) of sub-section (1), the grounds on which the order is made shall be communicated to the owner with the order

(3) When a certificate ceases to be in force, the owner of the boiler may apply to the Inspector for a renewal thereof for such period not exceeding twelve months as he may specify in the application.

(4) An application under sub-section (3), shall be accompanied by the prescribed fee and, on receipt thereof, the Inspector shall fix a date, within thirty days or such shorter period as may be prescribed from the date of the receipt, for the examination of the boiler and shall give the owner thereof not less than ten day's notice of the date so fixed.

Provided that, where the certificate has ceased to be in force owing to the making of any structural alteration, addition or renewal, the Chief Inspector may dispense with the payment of any fee.

(5) On the said date the Inspector shall examine the boiler in the prescribed manner, and if he is satisfied that the boiler and the steam-pipe or steam-pipes attached thereto are in good condition shall issue a renewed certificate authorising the use of the boiler for such period not exceeding twelve months and at a pressure not exceeding such maximum pressure as he thinks fit and as is in accordance with the regulations made under this Act:

Provided that if the Inspector —

(a) proposes to issue any certificate —

- (i) having validity for a less period than the period entered in the application, or
- (ii) increasing or reducing the maximum pressure at which the boiler may be used, or

(b) proposes to order any structural alteration, addition or renewal to be made in or to the boiler or any steam-pipe attached thereto, or

(c) is of opinion that the boiler is not fit for use, the Inspector shall, within forty-eight hours of making the examination, inform the owner of the boiler in writing of his opinion and the reasons therefor, and shall forthwith report the case for orders to the Chief Inspector.

(6) The Chief Inspector, on receipt of a report under sub-section (5), may, subject to the provisions of this Act and of the regulations made hereunder, order the renewal of the certificate in such terms and on such conditions, if any, as he thinks fit, or may refuse to renew it:

Provided that where the Chief Inspector refuses to renew a certificate, he shall forthwith communicate his refusal to the owner of the boiler, together with the reasons therefor.

(7) Nothing in this section shall be deemed to prevent an owner of a boiler from applying for a renewed certificate therefor at any time during the currency of a certificate.

9. Where the Inspector reports the case of any boiler to the Chief Inspector under sub-section (3) of section 7, or sub-section (5) of section 8, he may, if the boiler is not a boiler the use of which has been prohibited under clause (f) of sub-section (1) of section 8, grant to the owner thereof a provisional order in writing permitting the boiler to be used at a pressure not exceeding such maximum pressure as he thinks fit and as is in accordance with the

Section 9—Note 1.

[1] "The object of the provisional order is to allow the owner to work the boiler in certain cases before the final orders of the Chief Inspector have been received.

This provision should obviate any inconvenience which might be experienced by the owner if the Chief Inspector was on tour and the reference to him or the receipt of his orders was delayed."—*Statement of Objects and Reasons.*

regulations made under this Act pending the receipt of the orders of the Chief Inspector. Such provisional order shall cease to be in force—

- (a) on the expiry of six months from the date on which it is granted, or,
- (b) on receipt of the orders of the Chief Inspector, or
- (c) in any of the cases referred to in clauses (b), (c), (d), (e) and (f) of sub-section (1) of section 8,

and on so ceasing to be in force shall be surrendered to the Inspector.

10. (1) Notwithstanding anything hereinbefore contained, when the period of a certificate relating to a boiler has expired, the owner shall, provided that he has applied before the expiry of that period for a renewal of the certificate, be entitled to use the boiler at the maximum pressure entered in the former certificate pending the issue of orders on the application.

(2) Nothing in sub-section (1) shall be deemed to authorise the use of a boiler in any of the cases referred to in clauses (b), (c), (d), (e) and (f) of sub-section (1) of section 8 occurring after the expiry of the period of the certificate.

Revocation of certificate or provisional order. **11.** The Chief Inspector may at any time withdraw or revoke any certificate or provisional order on the report of an Inspector or otherwise —

- (a) if there is reason to believe that the certificate or provisional order has been fraudulently obtained or has been granted erroneously or without sufficient examination; or
- (b) if the boiler in respect of which it has been granted has sustained injury or has ceased to be in good condition; or
- (c) where the ^a[Provincial Government] has made rules requiring that boilers shall be in charge of persons holding certificates of competency, if the boiler is in charge of a person not holding the certificate required by such rules; or
- (d) where no such rules have been made, if the boiler is in charge of a person who is not, having regard to the condition of the boiler, in the opinion of the Chief Inspector competent to have charge thereof:

Provided that where the Chief Inspector withdraws or revokes a certificate or provisional order on the ground specified in clause (d), he shall communicate to the owner of the boiler his reasons in writing for the withdrawal or revocation, and the order shall not take effect until the expiry of thirty days from the receipt of such communication.

[a] *Substituted by A. O. for "Local Government."*

12. No structural alteration, addition or renewal shall be made in or to any boiler registered under this Act unless such alteration, addition or renewal has been sanctioned in writing by the Chief Inspector.

13. Before the owner of any boiler registered under this Act makes any structural alteration, addition or renewal in or to any steam-pipe attached to the boiler, he shall transmit to the Chief Inspector a report in writing of his intention, and shall send therewith such particulars of the proposed alteration, addition or renewal as may be prescribed.

Duty of owner at examination. **14. (1)** On any date fixed under this Act for the examination of a boiler, the owner thereof shall be bound —

- (a) to afford to the Inspector all reasonable facilities for the examination and all such information as may reasonably be required of him;
- (b) to have the boiler properly prepared and ready for examination in the prescribed manner; and
- (c) in the case of an application for the registration of a boiler, to provide such drawings, specification, certificates and other particulars as may be prescribed.

(2) If the owner fails, without reasonable cause, to comply with the provisions of sub-section (1), the Inspector shall refuse to make the examination and shall report the case to the Chief Inspector who shall, unless sufficient cause to the contrary is shown, require the owner to file a fresh application under section 7 or section 8, as the case may be, and may forbid him to use the boiler notwithstanding anything contained in section 10.

Section 12 — Note

[1] "The making of a structural alteration may seriously impair the strength of a boiler; it is necessary,

therefore, that, when an owner intends to make such an alteration, the Chief Inspector should have knowledge of it."—*Statement of Objects and Reasons.*

15. The owner of any boiler who holds a certificate or provisional order relating thereto shall, *Production of certificates, etc.* at all reasonable times during the period for which the certificate or order is in force, be bound to produce the same when called upon to do so by a District Magistrate, Commissioner of Police or Magistrate of the first class having jurisdiction in the area in which the boiler is for the time being, or by the Chief Inspector or by an Inspector or by any Inspector appointed under the Indian Factories Act, 1911^a, or by any person specially authorised in writing by a District Magistrate or Commissioner of Police.

[a] See now the Indian Factories Act, 1934 (25 [XXV] of 1934).

16. If any person becomes the owner of a boiler during the period for which a certificate or provisional order relating thereto is in force, the preceding owner shall be bound *Transfer of certificates, etc.* to make over to him the certificate or provisional order.

17. An Inspector may, for the purpose of inspecting or examining a boiler or any steam-pipe *Powers of entry.* attached thereto or of seeing that any provision of this Act or of any regulation or rule made hereunder has been or is being observed, at all reasonable times enter any place or building within the limits of the area for which he has been appointed in which he has reason to believe that a boiler is in use.

18. (1) If any accident occurs to a boiler or steam-pipe, the owner or person in charge thereof *Report of accidents.* shall, within twenty-four hours of the accident, report the same in writing to the Inspector. Every such report shall contain a true description of the nature of the accident and of the injury, if any, caused thereby to the boiler or to the steam-pipe or to any person, and shall be in sufficient detail to enable the Inspector to judge of the gravity of the accident.

(2) Every person shall be bound to answer truly to the best of his knowledge and ability every question put to him in writing by the Inspector as to the cause, nature or extent of the accident.

Appeals to Chief Inspector.

19. Any person considering himself aggrieved by —

- (a) an order made or purporting to be made by an Inspector in the exercise of any power conferred by or under this Act, or
- (b) a refusal of an Inspector to make any order or to issue any certificate which he is required or enabled by or under this Act to make or issue,

may, within thirty days from the date on which such order or refusal is communicated to him, appeal against the order or refusal to the Chief Inspector.

Appeals to appellate authority.

20. Any person considering himself aggrieved by an original or appellate order of the Chief Inspector—

- (a) refusing to register a boiler or to grant or renew a certificate in respect of a boiler; or
- (b) refusing to grant a certificate having validity for the full period applied for; or
- (c) refusing to grant a certificate authorising the use of a boiler at the maximum pressure desired; or
- (d) withdrawing or revoking a certificate or provisional order; or
- (e) reducing the amount or pressure specified in any certificate or the period for which such certificate has been granted; or
- (f) ordering any structural alteration, addition or renewal to be made in or to a boiler or steam-pipe or refusing sanction to the making of any structural alteration, addition or renewal in or to a boiler,

may, within thirty days of the communication to him of such order, lodge with the Chief Inspector an appeal to an appellate authority to be constituted by the ^a[Provincial Government] under this Act.

[a] Substituted by A. O. for "Local Government."

21. An order of an appellate authority under section 20 and, save as otherwise provided in *Finality of orders.* sections 19 and 20, an order of the Chief Inspector or of an Inspector shall be final and shall not be called in question in any Court.

Minor penalties.

22. Any owner of a boiler who refuses or without reasonable excuse neglects—

- (i) to surrender a provisional order as required by section 9, or
- (ii) to produce a certificate or provisional order when duly called upon to do so under section 15, or
- (iii) to make over to the new owner of a boiler a certificate or provisional order as required by section 16,

shall be punishable with fine which may extend to one hundred rupees.

23. Any owner of a boiler who, in any case in which a certificate or provisional order is required for the use of the boiler under this Act, uses the boiler either without any such certificate or order being in force or at a higher pressure than that allowed thereby, shall be punishable with fine which may extend to five hundred rupees, and, in the case of a continuing offence, with an additional fine which may extend to one hundred rupees for each day after the first day in regard to which he is convicted of having persisted in the offence.

Other penalties. **24.** Any person who —

- (a) uses or permits to be used a boiler of which he is the owner and which has been transferred from one Province to another without such transfer having been reported as required by section 6, or
 - (b) being the owner of a boiler fails to cause the registered number allotted to the boiler under this Act to be marked on the boiler as required by sub-section (6) of section 7, or
 - (c) makes any structural alteration, addition or renewal in or to a boiler without first obtaining the sanction of the Chief Inspector when so required by section 12, or to a steam-pipe without first informing the Chief Inspector, when so required by section 13, or
 - (d) fails to report an accident to a boiler or steam-pipe when so required by section 18, or
 - (e) tampers with a safety valve of a boiler so as to render it inoperative at the maximum pressure at which the use of the boiler is authorised under this Act,
- shall be punishable with fine which may extend to five hundred rupees.

25. (1) Whoever removes, alters, defaces, renders invisible or otherwise tampers with the register number marked on a boiler in accordance with the provisions of this Act or any Act repealed hereby, shall be punishable with fine which may extend to five hundred rupees.

(2) Whoever fraudulently marks upon a boiler a register number which has not been allotted to it under this Act or any Act repealed hereby, shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

26. No prosecution for an offence made punishable by or under this Act shall be instituted except within six months from the date of the commission of the offence, and no such prosecution shall be instituted without the previous sanction of the Chief Inspector.

27. No offence made punishable by or under this Act shall be tried by a Court inferior to that of a Presidency Magistrate or a Magistrate of the first class.

^a[27A. (1)] A Board to be called the Central Boilers Board shall be constituted to exercise the powers conferred by section 28.

(2) The Board shall consist of fourteen members, namely :—

- (a) a chairman to be nominated by the ^b[Central Government];
- (b) one member to be nominated by each of the ^c[Provincial Governments] of Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces ^d[and Berar], Assam, the North-West Frontier Province, Sind and Orissa;
- (c) one member, holding office for a period of three years, to be nominated alternately by the ^e[Provincial Government] of Delhi and the ^f[Provincial Government] of Ajmer-Merwara; and
- (d) one member to be nominated by the Chief Commissioner of Railways.

(3) Any vacancy occurring in the Board, otherwise than by the expiry of the term of office of the member referred to in clause (c) of sub-section (2), shall be filled as soon as may be by a nomination made by the authority by whom the member vacating office was nominated.

(4) The Board shall have full power to regulate by bye-laws or otherwise its own procedure and the conduct of all business to be transacted by the Board.

(5) The powers of the Board may be exercised notwithstanding any vacancy in the Board.]

[a] Section 27A was inserted by the Indian Boilers (Amendment) Act, 1937 (11 [XI] of 1937), S 4. [b] Substituted by A. O. for "Governor-General in Council." [c] Substituted by A. O. for "Local Governments" [d] Inserted by A. O. [e] Substituted by A. O. for "Local Government."

Section 23—Note

[1] The word "owner" in S. 23 has been used in the dictionary meaning and also includes persons mentioned in S. 2 (d). It is not restricted to persons who actually

use the boiler. An absentee owner of a boiler which is being used for his purpose comes within the purview of this section (Vol 24) 1937 Pat 500 (501) : 16 Pat 495 : 38 Cri L Jour 1054.

28. The ^a[Board] may, by notification in the Gazette of India, make regulations^b consistent with this Act for all or any of the following purposes, namely :—

- (a) for laying down the standard conditions in respect of material, design and construction which shall be required for the purpose of enabling the registration and certification of a boiler under this Act;
- ^c[(aa) for prescribing the circumstances in which, the extent to which, and the conditions subject to which, variation from the standard conditions laid down under clause (a) may be permitted;]
- (b) for prescribing the method of determining the maximum pressure at which a boiler may be used;
- (c) for regulating the registration of boilers, prescribing the fees payable therefor, the drawings, specifications, certificates and particulars to be produced by the owner, the method of preparing a boiler for examination, the form of the Inspector's report thereon, the method of marking the register number, and the period within which such number is to be marked on the boiler;
- (d) for regulating the inspection and examination of boilers and steam-pipes, and prescribing forms of certificates therefor;
- (e) for ensuring the safety of persons working inside a boiler ; and
- (f) for providing for any other matter which is not, in the opinion of the ^a[Board], a matter of merely local or provincial importance.

[a] Substituted by the Indian Boilers (Amendment) Act, 1937 (11 [XI] of 1937), S. 5, for "Governor-General in Council". [b] For the Indian Boiler Regulations, 1924, see General Rules and Orders, Vol. V, page 136. These Regulations, which were made by the Governor-General in Council shall be deemed to have been made by the Board : see the Rules and Regulations Continuance Act, 1937 (24 [XXIV] of 1937), S. 2, which runs as follows : — "2. Rules made before the 31st day of March 1937, under S. 37 of the Indian Electricity Act, 1910, and regulations made before the 28th day of March 1937, under S. 28 of the Indian Boilers Act, 1923, by the Governor-General in Council shall, on and from the said dates respectively, be deemed to have been made under the said section of the said Acts by the authority substituted for the Governor-General in Council by the Indian Electricity (Amendment) Act, 1937, and the Indian Boilers (Amendment) Act, 1937, respectively, and shall continue to be in force until suspended by rules, or regulations made under the said sections of the said Acts by the Central Electricity Board or the Central Boilers Board, as the case may be." [c] Inserted by the Indian Boilers (Amendment) Act, 1937 (11 [XI] of 1937), S. 5.

29. The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], make rules^c consistent with this Act and the regulations made thereunder for all or any of the following purposes, namely :—

- (a) for prescribing the qualifications and duties of the Chief Inspector and of Inspectors, ^d[* * *] for prescribing or constituting authorities to which they shall respectively be subordinate, and the limits of the administrative control to be exercised by such authorities ;
- (b) for regulating the transfer of boilers ;
- (c) for providing for the registration and certification of boilers in accordance with the regulations made under this Act ;
- (d) for requiring boilers to be in charge of persons holding certificates of competency, and for prescribing the conditions on which such certificates may be granted ;
- (e) for prescribing the times within which Inspectors shall be required to examine boilers under section 7 or section 8 ;
- (f) for prescribing the fees payable for the issue of renewed certificates and the method of determining the amount of such fees in each case ;
- (g) for regulating inquiries into accidents ;
- (h) for constituting the appellate authority referred to in section 20, and for determining its powers and procedure ;
- (i) for determining the mode of disposal of fees, costs and penalties levied under this Act and
- (j) generally to provide for any matter which is, in the opinion of the ^a[Provincial Government], a matter of merely local importance in the Province.

^e[* * * * *]

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for "Local Official Gazette". [c] For such rules for Coorg, see Notification No. 37, dated 31st March 1925, in the Coorg District Gazette, 1925, Pt. I, p. 26. [d] Words "for regulating their salary, allowances and conditions of service" were repealed by A. O. [e] Proviso was repealed by A. O.

30. Any regulation or rule made under section 28 or section 29 may provide that a *Penalty for breach of rules.* convention thereof shall be punishable with fine which may extend to one hundred rupees.

31. (1) The power to make regulations and rules conferred by sections 28 and 29 shall be *Publication of regulations and rules.* subject to the condition of the regulations and rules being made after previous publication.

(2) Regulations and rules so made shall be published in the Gazette of India and the local Official Gazette, respectively, and on such publication, shall have effect as if enacted in this Act.

32. All fees, costs and penalties levied under this Act shall be recoverable as arrears of *Recovery of fees, etc.* land-revenue.

33. Save as otherwise expressly provided, this Act shall apply to boilers and steam-pipes *Applicability to the Crown.* belonging to the Crown.

34. ^a[(1) The ^b[Provincial Government] may, by notification in the ^c[Official Gazette], *Exemptions.* exempt from the operation of this Act, subject to such conditions and restrictions as it thinks fit, any boilers or classes or types of boilers used exclusively for the heating of buildings or the supply of hot water.]

^a[(2)] In case of any emergency, the ^b[Provincial Government] may, by general or special *Power to suspend in case of emergency.* order in writing, exempt any boiler or steam-pipe from the operation of all or any of the provisions of this Act.

[a] The original section 34 was re-numbered as sub-section (2) and sub-section (1) was inserted by the Indian Boilers (Amendment) Act, 1929 (9 [IX] of 1929), S. 3. [b] Substituted by A. O. for "Local Government". [c] Substituted by A. O. for "Local Official Gazette".

35. [Repeal of enactments.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

THE SCHEDULE. — [Enactments Repealed.] *Repealed by the Repealing Act, 1927 (XII of 1927) S. 2 and Schedule.*

THE BRITISH LAW ASCERTAINMENT ACT, 1859.

(22 & 23 Vict., c. 63.)

(13th August 1859.)

An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof.

[As modified up to 31-12-1934.]

[Preamble and enacting words: *Repealed by 55 & 56 Vict., c. 19.*]

1. If in any action depending in any Court within her Majesty's dominions it shall be the *Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a Court in any other part thereof.* opinion of such Court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions, on any point on which the law of such other part of Her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing;

and upon such case being approved of by such Court or a Judge thereof they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the superior Courts thereof, whose

Section 1 — Note

[1] *Ex-Rajah of Coorg* expiring in England — Suit instituted for administration of his estate — Question of Hindu law as administered in India arising in suit — Under statute 22 & 23 Vict., c. 63 question was referred for opinion to the Supreme Court at Calcutta. *LOGIN v. THE PRINCES OF COORG*, (1862) 30 Beav. 632 (633): 54 E. R. 1035 (1036).

[2] Question whether parties had homologated under the will of testator — Question of homologation being one purely of Scotch law — Under provision of statute 22 & 23 Vict., c. 63 case was directed to be sent to a Scotch Court to determine the law applicable to the question as administered in Scotland. *LORD v. COLVIN*, (1860) 29 L. J. Ch. 297 (298).

opinion is desired upon the law administered by them as applicable to the facts set forth in such case and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act;

and it shall be competent to any of the parties to the action to present a petition to the Court whose opinion is to be obtained; praying such last-mentioned Court to hear parties or their counsel and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel;

and the Court to which such petition shall be presented, shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court;

and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

2. Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

3. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the Court in which the action may be depending, who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified;

and the said Court shall thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a jury;

or the said last-mentioned Court shall, if it thinks fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, as the Court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the jury.

4. In the event of an appeal to Her Majesty in Council or to the House of Lords in any such action, it shall be competent to bring under the review of Her Majesty in Council or of the House of Lords the opinion pronounced as afore-said by any Court whose judgments are reviewable by Her Majesty in Council or by the House of Lords;

and Her Majesty in Council or that House may respectively adopt or reject such opinion of any Court whose judgments are respectively reviewable by them, as the same shall appear to them as to be well founded or not in law.

5. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical;

and the words "Superior Courts" shall include,

in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate;

in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its divisions;

in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls and the Judge of the Admiralty Court;

and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein.

THE BRONZE COIN (LEGAL TENDER) ACT, 1918.

STATEMENT OF OBJECTS AND REASONS.

"It is of importance to enable the Indian Mints to increase the rate of output of rupees from the large supply which the Government of India are at present obtaining. One method of effecting this is to arrange for the coinage elsewhere of the bronze coinage which is

at present carried out by the Calcutta Mint. An arrangement has accordingly been entered into with His Exalted Highness the Nizam of Hyderabad for the coinage, for the present, at the Hyderabad Mint of bronze pice or quarter-anna pieces. In order to make the pice so coined

legal tender within British India, legislation is required, since under S. 14 of the Indian Coinage Act, 1906 (III of 1906), read with S. 8 thereof, only piece coined at Mints established under the Indian Coinage Act are legal tender within British India. It is accordingly proposed by the present Bill that where the bronze coinage specified in the Indian Coinage Act are coined outside British India at the request of the Governor-General in Council, and the Governor-General in Council is satis-

fied that such coins are in accordance with the requirements of the Act and of any notification for the time being in force thereunder, he may by notification in the Gazette of India, direct the issue of any such coins, and these shall thereafter be legal tender in the same manner as if they had been coined under the provisions of the Indian Coinage Act."

— Gazette of India, 1918, Part V, page 82.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Adapted by A. O.

COGNATE ACTS AND PROVISIONS.

1. INDIAN COINAGE ACT, III OF 1906.
2. PENAL CODE, 1860, SS. 230 TO 254.

ACT NO. XXII of 1918.^a

[26th September 1918.]

An Act to provide that certain bronze coins coined outside British India shall be legal tender in British India.

WHEREAS it is expedient to provide that certain bronze coins coined outside British India shall be legal tender in British India; It is hereby enacted as follows:—

[a] For Proceedings in Council, see Gazette of India, 1918, Pt. VI, pages 1001 and 1140.

Short title. 1. This Act may be called the BRONZE COIN (LEGAL TENDER) ACT, 1918.

2. (1) Where bronze coins of any of the denominations specified in section 8 of the Indian Coinage Act, 1906, are coined outside British India at the request of the ^a[Central Government], and the ^a[Central Government] is satisfied that such coins are in accordance with the requirements of section 9 and of any notification for the time being in force under section 10 of the said Act, ^b[it] may, by notification in the ^c[Official Gazette], direct the issue of any such coins, and thereafter any such coins shall be legal tender in payment or on account in the same way and to the same extent as if they were coins referred to in section 14 of the said Act, and the provisions of the said Act shall apply accordingly.

Power to declare certain bronze coins coined outside British India to be legal tender.

(2) Every coin which is declared to be legal tender by sub-section (1) shall be deemed to be Queen's coin within the meaning of section 230 of the Indian Penal Code.

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "he".

[c] Substituted by A. O. for "Gazette of India".

THE CALCUTTA HIGH COURT (JURISDICTIONAL LIMITS) ACT, 1919.

ACT NO. XV of 1919.^a

[17th September 1919.]

An Act to declare and prescribe the limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal.

WHEREAS clause 11 of the Letters Patent for the High Court of Judicature at Fort William in Bengal, dated the 28th December, 1865, provides that the said High Court shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by competent legislative authority for India;

AND WHEREAS it is expedient so to declare and prescribe the local limits of the ordinary original civil jurisdiction of the said High Court;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the CALCUTTA HIGH COURT (JURISDICTIONAL LIMITS) ACT, 1919.

Limits of ordinary original civil jurisdiction.

2. The ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal shall be exercised within the limits set out in the Schedule:

Provided that nothing in this Act shall effect any suit or other legal proceeding pending in any Court at the date of the commencement of this Act.

[a] For Statement of Objects and Reasons, see Gazette of India, 1919, Pt. V, p. 74; and for Proceedings in Council, see *ibid*, Pt. VI, pp. 876 and 1101.

THE SCHEDULE

(See section 2.)

1. The limits within which the ordinary original civil jurisdiction of the High Court shall be exercised are as follows :—

North. — A line commencing on the western side of the river Hooghly at a point where the straight line joining reference pillar No. I (in a compound on the river side of the Ghusrri Cotton Mill, Howrah) and reference pillar No. II (near the south-western end of Chitpure Toll Bridge) meets the western water-line of the river Hooghly, and thence along the said line to the point where it meets the eastern water-line of the river Hooghly near the south bank of the opening of Circular Canal; thence along the water-line of the south bank of Circular Canal passing under the Chitpur Toll Bridge, the Chitpur or Baghbazar Bridge to boundary pillar A on the eastern side of the southern pile of Barrackpore Bridge.

East. — A line commencing from the said boundary pillar A following the eastern edge of the steps of the bridge to a point near the south-eastern corner of the immediate approach to the bridge marked by reference pillar III, which is on the boundary; thence by a straight line to boundary pillar B on the south-eastern corner of the junction of Cornwallis Street and Galif Street (now marked with a Public Works Department stone); thence along the eastern side and the eastern side of the eastern pavement of Cornwallis Street in a series of regular links joining points marked by posts 1-3 to boundary pillar C at the north corner of the junction of Shambazar street with Cornwallis Street, thence by a straight line to boundary pillar D on the solid south corner of the said junction; thence in an approximately straight line along the solid eastern side of Upper Circular Road marked by posts 4-9; thence eastward following the corner round to boundary pillar E on the north corner of the junction of the unnamed road (which runs into Jadu Nath Mitra Lane) with Upper Circular Road; and thence by a straight line to boundary pillar F at the solid south corner of the junction of Jadu Nath Mitra Lane with Upper Circular Road; thence by posts 10-13 to boundary pillar G on the solid south corner of the junction of Ultadingi Road with Upper Circular Road; thence along the solid south side of Ultadingi Road in a series of continuous and approximately straight lines joining points marked by posts 14-16 to boundary pillar H at the solid western corner of the junction of Ultadingi Road and Gauribere Lane; thence by the solid western side of Gauribere Lane marked by posts 17-21; thence by a straight line crossing the road diagonally to boundary pillar I on the solid south-eastern corner of the junction of Gauribere Lane and Ultadingi Junction Lane; thence along the solid eastern side of Ultadingi Junction Lane marked by posts 22-24 to boundary pillar J on the solid eastern corner of the junction of Ultadingi Junction Lane with Halsibagan Road; thence by a straight line to post 25 at the solid western corner of the said junction; thence along the solid north side of Halsibagan Road marked by post 26 to boundary pillar K on the north side of Halsibagan Road directly opposite the solid eastern side of Upper Circular Road south of it; thence by a straight line to post 27 at the solid south corner of the junction of Halsibagan Road with Upper Circular Road; thence by the solid eastern side of Upper Circular Road marked by posts 28-34 to post 35; thence turning east to boundary pillar L on the north side of Maniktola Road; thence by a straight line to post 36 at the south corner of the junction of Maniktola Road with Upper Circular Road at the north-western corner of the garden of Kali Pada Barik; thence along the eastern side of the lane on the eastern side of the raised platform road and marked by posts 37-49 to boundary pillar M at the solid north corner of the junction of Gas Street and Upper Circular Road; thence by a straight line to boundary pillar N at the solid south corner of the said junction; thence keeping again to the eastern side of the lane on the eastern side of the raised platform road along a line marked by posts 50-61 excluding the recently made Ladies' Park to boundary pillar O near the north pillar of the north entrance to North Station Sealdah; thence by a straight line to boundary pillar P at the south corner of that entrance; thence by the comparatively straight lines from pillar to pillar connecting boundary pillars P, Q, R, S, and T adjacent to the pillars forming the corners of the various approaches to Sealdah Station; thence along the solid eastern side of Lower Circular Road marked by posts 62-64 to pillar 65; thence turning west to boundary pillar U at the north-western corner of the out-patients' department of the Campbell Hospital; thence by a straight line marked by posts 66-68 to boundary pillar V on the corner of the platform to the right of the north entrance to the Calcutta Corporation Central Stores; thence by post 69 turning east to post 70; thence by posts 71-76, boundary pillars W and X at the solid corners of the junction of Beniapukur Lane with Lower Circular Road, by posts 81-86 to boundary pillars A1 and B1, at the solid corners of the junction of Nonapukur or Bijli Road and Lower Circular Road, posts 87, 88 to boundary pillar C1, near the south-western corner of the Circular Road burial ground; thence by a straight line to boundary pillar D1, on the other side of the tramway lines; thence post 89 eastward to post 90; thence to boundary pillars E1, and F1, at the solid corners of the junction of Karaya Bazar Road and Lower Circular Road, posts 91, 92 to boundary pillar G1, opposite to Theatre Road, posts 93, 94 to boundary pillar H1, a few feet south of the point directly opposite the junction of Auckland Place and Lower Circular Road, and following the curve of the road by posts 95 and 96 to reference pillar IV (which is on the boundary) on the eastern side of the junction of Beck Bagan Lane with Lower Circular Road.

South. — A line commencing from the said reference pillar IV in a straight line to boundary pillar I1, on the western corner of the junction of Beck Bagan Lane with Lower Circular Road; thence along the solid south side of Lower Circular Road to boundary pillar J1, and K1, at the solid corners of the junction of Ballyganj Circular Road and Lower Circular Road; thence by the solid south side of Lower Circular Road marked by posts 97, 98, boundary pillars L1, M1, at the solid corners of the junction of Lansdowne Road with Lower Circular

Road, post 99 southward to post 100 westward to post 101, northward to post 102 and westward to post 103, boundary pillars N1, and O1, at the solid corners of the junction of Woodburn Road with Lower Circular Road, posts 104, 105, boundary pillars P1, and Q1, at the solid corners of the junction of Lee Road with Lower Circular Road; thence by the straight line links but broken boundary line formed by posts 106-113, to boundary pillar R1, on the south-eastern corner of the junction of Chowringhee with Lower Circular Road; thence by an oblique straight line to boundary pillar S1, on the south-western corner of the said junction (near a stone marked F. W. B.-26); thence by a line representing the present limits of the holdings on the south of Circular Road and marked by posts 114-116, boundary pillars T1, and U1, at the solid corners of the junction of Haris Chandra Mukharji Road and Lower Circular Road, posts 117-121; thence to boundary pillar V1, near the north corner of the junction of Bhowanipore Road and Lower Circular Road; thence following the curve of the corner and the eastern side of Bhowanipore Road and the surplus lands attached thereto by a series of straight line links joining points marked by posts 122-124, boundary pillars W1, and X1, at the junction of Shambhunath Pandit Street and Bhowanipore Road, posts 125-128 turning eastward to boundary pillar Y1, on the north side of Sankaripara Road, posts 129-130 to boundary pillars Z1, and A2 across the entrance of Ketrapati Road into Bhowanipore Road; thence by posts 131, 132 to boundary pillar B2 on the north-eastern side of Alipore Bridge; thence along a straight line joining the said boundary pillar B2 with subsidiary reference pillar VII on the south-eastern side of the said bridge to a point where that straight line meets the water-line of Tolly's Nala; thence along the water-line of Tolly's Nala to the north-eastern corner of the District Magistrate's compound, near which is boundary pillar C2; thence along the irregular northern boundary of the Magistrate's compound marked by posts 133-141 to boundary pillar D2, at the south corner of the entrance to the Civil Surgeon's house from Thackeray Road; thence southward along the western boundary of the Magistrates compound by posts 142-145 and along the southern boundary of that compound marked by posts 147, 148 to boundary pillar E2 on the bank of Tolly's Nala; thence continuing the straight line from post 148 to boundary pillar E2 till it meets the water-line of Tolly's Nala; thence along the water-line of Tolly's Nala to a point in a direct line with the north side of the masonry drain running outside the Jail Garden near which is boundary pillar F2; thence along the north side of the said drain in a straight line across Motee Zeel to post 149 against the boundary of the compound of the Magistrate's Court; thence northward along that boundary to post 150 and westward to post 151 and northward again along the boundary of the Army Clothing Agency to post 152; thence westward on the south side of the lane to boundary pillar G2 at the north-western corner of the Police Hospital Compound; thence along the wall of the Alipore Central Jail facing Belvedere Road and marked by pillars 153-157 to the north-western corner of the junction of Belvedere Road and Jail Lane following the corner eastward to post 158 and continuing along the south side of Jail Lane to post 159; thence by a straight line to boundary pillar H2 at the acute corner of the junction of Reformatory Street with Jail Lane; thence to boundary pillar I2 on the north-western side of Alipore Bridge; thence to boundary pillar J2 on the north-eastern side of the said bridge; thence by the solid south-western and western side of Bhowanipore Road marked by posts 160-167; thence following the western corner of the junction of Bhowanipore Road, and Lower Circular Road to boundary pillar K2; thence along the solid south side of Lower Circular Road following the Sweep of the railings and marked by posts 168-172 to boundary pillar L2 on Lower Circular Road and east of its junction with Belvedere Road; thence following the natural bends of the corner marked by posts 173 and 174 to boundary pillar M2 on the eastern side of Belvedere Road; thence along the eastern side of Belvedere Road now indicated by wooden railings and marked by post 175 to boundary pillar N2 on the north-eastern side of Zeerut Bridge; thence along the railings of the footpath on the eastern side of the bridge to boundary pillar O2 near its south-eastern end; thence along a bent line following the shape of the bridge and marked by posts 176, 177 to post 178 on the eastern side of the south extremity of the immediate approach to the bridge; thence by a straight line to boundary pillar P2 on the western side of the said extremity; thence turning north along the railings of the footpath on the western side of the bridge till it meets the water-line underneath the bridge, thence along the water-line of the south or Alipore bank of Tolly's Nala trending northwards under Hastings Bridge, to a point where a straight line joining reference pillar V (near the south-western end of Hastings Bridge), to reference pillar VI (on the Howrah side of the river in a line with the northern wall of the Bengal-Nagpur Railway Goods Yard) meets the water-line of the south bank of the bend of the Hooghly River, near the western side of the opening of Tolly's Nala; thence continuing the said straight line till that said straight line meets the water-line of the Howrah side of the river Hooghly.

West. — A line commencing from the point last defined along the water-line of the Howrah side of the River Hooghly to the western extremity of the northern boundary.

2. (a) When the expression "water-line" is used in this Schedule all *pucca ghats* and other objects permanently attached to the bank and in contact with the water shall be deemed to appertain to the area to which the land on that bank appertains and the water in contact with such objects shall be deemed to appertain to the other side of the boundary. In the places in the Schedule where the boundary is thus described the boundary line shall be the moving edge of the water wherever it may be at any time. In the case of bridges, however, the supporting pile in contact with the bank only shall be deemed to be permanently attached to the bank and the boundary line across the bridge to be immediately above the water-line so described.

(b) The expression "solid side" or "solid corner" means the line or spot marked out by solid objects, such as a *pucca* wall or the face of a house, the wayside lands and pavements thus being all included in the adjacent road, street or lane.

THE CANTONMENTS ACT, 1924.

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STATEMENT OF OBJECTS AND REASONS.

"A committee which was appointed by the Government of India in January 1921 to consider what changes were necessary in order to introduce into the administration of cantonments the spirit of the reformed scheme of government, recommended a complete revision and amalgamation of the Cantonments Act (Act XV of 1910) and the Cantonment Code, 1912, in order to bring into conformity with ordinary municipal law the system under which military cantonments are administered.

The recommendations of the committee have now been examined by the Government of India and the conclusions arrived at are embodied in the Bill.

The main features of the Bill are as follows :—

(a) It is proposed to take power to municipalize the Government of those cantonments which contain a substantial civil population having no essential connection with or dependence upon the military administration. In other cantonments where these circumstances do not fully exist the administration of cantonment

affairs will be vested in the hands of the commanding officer of the cantonment, who, for the purpose of the Act, will be constituted a corporation sole. The general effect will be that the Government authority will cease to be the purely executive agency at present. In the larger cantonments the existing cantonment committee will be replaced by a cantonment Board which will be municipal in character and an essentially local self-government body.

(b) The reformed cantonment authorities will have a separate legal person, will be capable of suing and being sued in their own name and of making contracts. They will also be empowered to make bye-laws to govern local matters of administration which require different treatment in different cantonments.

(c) The cantonment fund under the reformed system will be a local fund vested in the cantonment authority.

(d) In the reformed cantonments where a Board is constituted a proportion of the cantonment Board will be elected representatives of the civil inhabitants of the cantonment. An official majority will, however, be maintained.

(e) The cantonment Magistrate, as such, will be eliminated. In his place an "executive officer" will be appointed. He will be paid by Government. He will perform, amongst other things, the duties of Secretary of the Board and he will have no judicial powers or functions.

(f) The Local Governments will exercise certain larger powers of superintendence and control over cantonment affairs than they do at present.

(g) The military authorities will retain certain special powers in matters affecting the health, welfare and discipline of troops."

— Gazette of India, 1923, Part V, page 220.

SELECT COMMITTEE REPORT.

"3. The non-official members of the Select Committee desire to express the following opinion on two questions of administration connected with the policy which the Bill seeks to introduce. They hold very strongly that the ultimate control of cantonment administration under the reformed system should be exercised by the Government of India in the Army Department, and not by any executive military authority. They also hold that the executive officer, though he may be a military officer subordinate to the Army

Department, should, like the Cantonment Magistrate of the present, be an officer in civil employ. It is recognized that it would be inappropriate to embody in the Bill provisions on these two points; but they desire it to be recorded that, in agreeing to the Bill as amended, they hope that the further administrative arrangements to be made will conform to the views here expressed."

— Gazette of India, 1923, Part V, page 270..

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts VII of 1925; XXXV of 1926; X of 1927; XXVI of 1927; VIII of 1930; VII of 1931; XVII of 1932; XXIV of 1934; XII of 1935; XXIV of 1936; XXXIV of 1939; XXXI of 1940; XXXII of 1940; XV of 1942; VIII of 1944.

— Adapted by A. O.

— Repealed in part by Act XII of 1927.

COGNATE ACTS AND PROVISIONS.

1. CANTONMENTS (HOUSE-ACCOMMODATION) ACT, VI OF 1923.

ACT NO. II OF 1924.

[16th February 1924.]

An Act to consolidate and amend the law relating to the administration of cantonments.

WHEREAS it is expedient to consolidate and amend the law relating to the administration of cantonments; It is hereby enacted as follows:

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement. 1. (1) This Act may be called the CANTONMENTS ACT, 1924..

(2) It extends to the whole of British India, including British Baluchistan.

(3) The ^a[Central Government] may, by notification in the ^b[Official Gazette], direct that this Act, or any provisions thereof which ^c[it] may specify, shall come into force on such date^d as ^c[it] may appoint in this behalf.

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India".

[c] Substituted by A. O. for "he". [d] 1st May, 1924; see General Rules and Orders Vol. V, p. 466.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(i) "Assistant Health Officer" means the medical officer appointed by the ^a[Officer Commanding-in-Chief, the Command.] to be the Assistant Health Officer for a cantonment;

[a] Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2 for "Officer Commanding the District".

Section 1 — Note 1

[1] The first general Cantonments Act, a consolidating and amending measure, was passed in 1889 and repealed a large number of existing Acts and Regulations. The Act of 1889 was followed by another consolidating

and amending Act in 1910, namely, the Cantonments Act, 15 [XV] of 1910 and later by a very elaborate Code of 1924. This supersedes all previous legislation and is, though it has not itself escaped amendment, the principal Act relating to the subject. (Vol 26) 1939 FC 58 (60): I L R (1939) Kar F C 98; 1939 F C R 124 (F C).

- (ii) "Board" means a Cantonment Board constituted under this Act;
- (iii) "brigade area" means one of the brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes for all or any of the purposes of this Act any area which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be a brigade area for such purpose or purposes ;

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

- ^a[(iv) "building" means a house, outhouse, stable, latrine, shed, hut or other roofed structure whether of masonry, brick, wood, mud, metal or other material, and any part thereof, and includes a well and a wall (other than a boundary wall not exceeding eight feet in height and not abutting on a street) but does not include a tent or other portable and temporary shelter;]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2 for the original clause.

^a[* * * * *]

[a] Clause (v) was *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

- (vi) "casual election" means an election held to fill a casual vacancy;
- (vii) "casual vacancy" means a vacancy occurring otherwise than by efflux of time in the office of an elected member of a Board;
- (viii) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be a Command for all or any of the purposes of this Act;

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

^a[* * * * *]

[a] Clause (ix) was *repealed* by the Repealing and Amending Act, 1935 (12 [XII] of 1935), S. 2 and Sch. I.

- (x) "dairy" includes any farm, cattle-shed, milk-store, milk-shop or other place from which milk is supplied or in which milk is kept for purposes of sale or is manufactured for sale into butter, ghee, cheese or curds, and, in relation to a dairyman who does not occupy any premises for the sale of milk, includes any place in which he keeps the vessels used by him for the storage or sale of milk;
- (xi) "dairyman" includes the keeper of a cow, buffalo, goat, ass or other animal, the milk of which is offered or is intended to be offered for sale for human consumption, and any purveyor of milk and any occupier of a dairy;
- ^a[(xia) "entitled consumer" means a person in a cantonment who is paid from the Defence Services Estimates and is authorised by general or special order of the ^b[Central Government] to receive a supply of water for domestic purposes from the Military Engineer Services or the Public Works Department on such terms and conditions as may be specified in the order;]

[a] Clause (xia) was *inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2. [b] *Substituted* by A. O. for "Governor-General in Council".

- (xii) "Executive Engineer" means the Public Works officer of that grade, or the ^a[Officer of the Military Engineer Services] of the corresponding grade, having charge of the military works in a cantonment ^b[or where more than one such officer has charge of the military works in a cantonment such one of those officers as the Officer Commanding the Station may designate in this behalf], and includes the officer of whatever grade in immediate executive engineering charge of a cantonment;

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 2 for "Military Works Officer". [b] These words were *inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

- (xiii) "Executive Officer" means the person appointed under this Act to be the Executive Officer of a cantonment;
- (xiv) "Health Officer" means the senior executive medical officer in military employ on duty in a cantonment;

^a[* * * * *]

[a] Clause (xv) was *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

- (xvi) "hut" means any building, no material portion of which above the plinth level is constructed of masonry or of squared timber framing or of iron framing ;
- (xvii) "infectious or contagious disease" means cholera, leprosy, enteric fever, small-pox, tuberculosis, diphtheria, plague, influenza, venereal disease, and any other epidemic, endemic or infectious disease which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be an infectious or contagious disease for the purposes of this Act ;

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "Local Official Gazette".

- (xviii) "inhabitant", in relation to a cantonment, or local area, means any person ordinarily residing or carrying on business or owning or occupying immoveable property therein, and in case of a dispute means any person declared by the District Magistrate to be an inhabitant ;

- (xix) "intoxicating drug" means opium, ganja, bhang, charas and any preparation or admixture thereof, and includes any other intoxicating substance, or liquid which the ^a[Central Government] ^b* * * ^c] may by notification in the ^d[Official Gazette], declare to be an intoxicating drug for the purposes of this Act ;

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council" were *repealed* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 2.

[c] *Substituted* by A. O. for "Local Official Gazette".

- (xx) "market" includes any place where persons assemble for the purpose of selling meat, fish, fruit, vegetable, live-stock or any other article of food ;

- ^a[(xxa) "Military Estates Officer" means the officer appointed by the ^b[Central Government] to perform the duties of the Military Estates Officer under rules made under clauses (a) and (b) of sub-section (2) of section 280 ;]

[a] Clause (xxa) was *inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

[b] *Substituted* by A. O. for "Governor-General in Council".

- (xxi) "Military officer" means—

- (a) a person who, being an officer within the meaning of the Army Act^a or the Indian Army Act, 1911, or the Air Force Act,^b [or the Indian Air Force Act, 1932,] is commissioned and in pay as an officer doing military or air force duty with His Majesty's military or air forces, or is an officer doing such duty in any arm, branch or part of those forces ; or

[a] 44 & 45 Vict., c. 58. [b] *Inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

- (b) a person doing military or air force duty as a warrant officer with either of those forces or with any arm, branch, or part thereof, whether he is or is not an officer within the meaning of the Army Act^a or the Indian Army Act, 1911, or the Air Force Act^b, or the Indian Air Force Act, 1932 ;]

[a] 44 & 45 Vict., c. 58. [b] *Inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

- (xxii) "nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is or may be dangerous to life or injurious to health or property ;

- (xxiii) "occupier" includes an owner in occupation of, or otherwise using his own land or building ;

- (xxiv) "Officer Commanding the District" means the Officer Commanding any one of the districts into which India is for military purposes for the time being divided, or any brigade area which does not form part of any such district, or any area which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be such a district for all or any of the purposes of this Act ;

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

- ^a[(xxiva) "Officer Commanding the station" means the military officer for the time being in command of the forces in a cantonment, or, if that officer is the Officer Commanding the District or Officer Commanding-in-Chief, the Command, the military officer who would be in command of those forces in the absence of the Officer Commanding the District and Officer Commanding-in-Chief, the Command ;]

[a] Clause (xxiva) was *inserted* by the Repealing and Amending Act, 1935 (12 [XII] of 1935), S. 2 and Sch. I.

Section 2 — Notes

1. Section 2 (xvii). — [1] "In sub-clause (xvii) of this clause we have included venereal disease among the

catalogue of infectious or contagious diseases and have made the definition comprehensive instead of merely illustrative as it was before."—*Select Committee Report.*

(xxv) "ordinary election" means an election held to fill a vacancy in the office of an elected member of a Board arising by efflux of time ;

(xxvi) "owner" includes any person who is receiving or is entitled to receive the rent of any building or land whether on his own account or on behalf of himself and others or an agent or trustee, or who would so receive the rent or be entitled to receive it if the building or land were let to a tenant ;

(xxvii) "party wall" means a wall forming part of a building and used or constructed to be used for the support or separation of adjoining buildings belonging to different owners, or constructed or adapted to be occupied by different persons ;

(xxviii) "private market" means a market which is not maintained by a ^a[Board] and which is licensed by a ^a[Board] under the provisions of this Act ;

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority".

(xxix) "private slaughter-house" means a slaughter-house which is not maintained by a ^a[Board] and which is licensed by a ^a[Board] under the provisions of this Act ;

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority".

(xxx) "public market" means a market maintained by a ^a[Board] ;

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority".

(xxxi) "public place" means any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not ;

(xxxii) "public slaughter-house" means a slaughter-house maintained by a ^a[Board] ;

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority".

^a[(xxxiii) a person is deemed to reside in a cantonment if he maintains therein a house or a portion of a house which is at all times available for occupation by himself or his family even though he may himself reside elsewhere, provided that he has not abandoned all intention of again occupying such house either by himself or his family:]

[a] Clause (xxxiii) was *inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

(xxxiii) "shed" means a slight or temporary structure for shade or shelter ;

(xxxiv) "slaughter-house" means any place ordinarily used for the slaughter of animals for the purpose of selling the flesh thereof for human consumption ;

(xxxv) "soldier" means a person who is a soldier or airman within the meaning of the Army Act^a or the Air Force Act, or is subject to the Indian Army Act, 1911, and who is not a military officer ;

[a] 44 & 45 Vict., c. 58.

(xxxvi) "spirituous liquor" means any fermented liquor, any wine, or any alcoholic liquid obtained by distillation or the sap of any kind of palm tree, and includes any other liquid containing alcohol which the ^a[Central Government], ^b[* * *] may, by notification in the ^c[Official Gazette], declare to be a spirituous liquor for the purposes of this Act ;

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council" were *repealed* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 2.

[c] *Substituted* by A. O. for "local official Gazette".

(xxxvii) "street" includes any way, road, lane, square, court, alley ^a[or passage] in a cantonment, whether a thoroughfare or not and whether built upon or not, over which the public have a right-of-way and also the road-way or foot-way over any bridge or causeway ;

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2 for "passage or open space".

(xxxviii) "vehicle" means a wheeled conveyance of any description which is capable of being used on a street, and includes a motor-car, motor lorry, motor omnibus, cart, locomotive, tram-car, hand-cart, truck, motor-cycle, bicycle, tricycle and rickshaw ^a[* * *] ;

[a] The word "and" was *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

(xxxix) "water-works" includes all lakes, tanks, streams, cisterns, springs, pumps, wells, reservoirs, aqueducts, water-trucks, sluices, mains, pipes, culverts, hydrants, stand-pipes, and conduits, and all machinery, lands, buildings, bridges and things, used for, or intended for the purpose of, supplying water to a cantonment; ^a[and

(xl) "year" means the year commencing on the first day of April.]

[a] The word "and" and clause (xl) were inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 2.

CHAPTER II.

DEFINITION AND DELIMITATION OF CANTONMENTS.

3. (1) The ^a[Central Government], ^b[* * *] may, by notification in the ^c[Official Gazette], declare any place or places in which any part of His Majesty's regular forces or regular air force is quartered or which, being in the vicinity of any such place or places, is or are required for the service of such forces to be a cantonment for the purposes of this Act and of all other enactments for the time being in force, and ^d[* * * *] may, by a like notification, declare that any cantonment shall cease to be a cantonment.

(2) The ^a[Central Government], ^d[* * * *] may, by a like notification, define the limits of any cantonment for the aforesaid purposes.

^e[(3) When any place is declared a cantonment for the first time, the ^f[Central Government] may, until a Board is constituted in accordance with the provisions of this Act, by order make any provision which appears necessary to ^g[it] either for the administration of the Cantonment or for the constitution of the Board.]

^h[(4) The Central Government may, by notification in the Official Gazette, direct that in any place declared a cantonment under sub-section (1) the provisions of any enactment relating to local self-government other than this Act shall have effect only to such extent or subject to such modifications, or that any authority constituted under any such enactment shall exercise authority only to such extent, as may be specified in the notification.]

[a] Substituted by A. O. for "Local Government". [b] Words "with the previous sanction of the Governor-General in Council" were repealed by A. O. [c] Substituted by A. O. for "Local Official Gazette". [d] Words "with the like sanction" were repealed by A. O. [e] Inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 3. [f] Substituted by A. O. for "Governor-General in Council". [g] Substituted by A. O. for "him". [h] Sub-section (4) was added by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 2. [17-3-1944.]

4. (1) The ^a[Central Government] ^b[* * *] may, by notification in the ^c[Official Gazette], declare its intention to include within a cantonment any local area situated in the ^d[*] vicinity thereof or to exclude from a cantonment any local area comprised therein.

(2) Any inhabitant of a cantonment or local area in respect of which a notification has been published under sub-section (1) may, within six weeks from the date of the notification, submit in writing to the ^a[Central Government] through the Officer Commanding-in-Chief, the Command, an objection to the notification, and the ^a[Central Government] shall take such objection into consideration.

(3) On the expiry of six weeks from the date of the notification, the ^a[Central Government] may ^b[* * *] after considering the objections, if any, which have been submitted under sub-section (2), by notification in the ^c[Official Gazette], include the local area in respect of which the

Section 3 — Note 1.

[1] Much of the land comprised in the cantonments in different parts of India was originally acquired by Government for military purposes. Private individuals were allowed to erect houses upon various plots. Thus, the Government recognised, subject to certain restrictions, rights of private ownership in the buildings, while at the same time retaining in themselves the property in soil. (Vol 18) 1931 P C I (1, 2): 57 Ind App 339: 59 Cal 858 (PC).

[2] The Secretary of State is absolute owner of all cantonment land, unless it can be proved that he parted with it. A person occupying land in cantonments not specifically transferred to him by the Secretary of State

can only hold it as a licensee from him. (Vol 9) 1922 All 57 (58, 59).

[3] Ownership of cantonment land vests in Secretary of State subsequent to establishment of cantonment. (Vol 17) 1930 All 587 (589).

[4] A cantonment Board, as representing the Secretary of State, is to be regarded as the owner of all the sites in the cantonment. It is entitled to eject its licensee on payment of compensation. (Vol 20) 1933 Pesh 56 (57).

[5] As to the result that follows from the transfer of property situate in cantonment area, see (Vol 11) 1924 All 415: 46 All 427.

[6] See also section 108.

notification was published under sub-section (1), or any part thereof, in the cantonment or, as the case may be, exclude such area or any part thereof from the cantonment.

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council" were *repealed* by A. O. [c] *Substituted* by A. O. for "Local Official Gazette". [d] The word "immediate" was *repealed* by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 2.

5. When, by a notification under section 4, any local area is included in a cantonment, such area shall thereupon become subject to this Act and to all other enactments for the time being in force throughout the cantonment and to all notifications, rules, regulations, bye-laws, orders and directions issued or made thereunder.

6. (1) When, by a notification under section 3, any cantonment ceases to be a cantonment and the local area comprised therein is immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the ^a[Board] shall vest in such local authority, and the liabilities of the ^a[Board] shall be transferred to such local authority.

(2) When, in like manner, any cantonment ceases to be a cantonment and the local area comprised therein is not immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the ^a[Board] shall vest in His Majesty, and the liabilities of the ^a[Board] shall be transferred to the ^b[Central Government].

[a] *Substituted* by S. 69 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), for "Cantonment Authority". [b] *Substituted* by A. O. for "Secretary of State in Council".

7. (1) When, by a notification under section 4, any local area forming part of a cantonment ceases to be under the control of a particular ^a[Board] and is immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the ^a[Board] and such portion of the liabilities of the ^a[Board] as the ^b[Central Government] may, by general or special order, direct, shall be transferred to that other local authority.

(2) When, in like manner, any local area forming part of a cantonment ceases to be under the control of a particular ^a[Board] and is not immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the ^a[Board] shall vest in His Majesty, and such portion of the liabilities of the ^a[Board] shall be transferred to the ^c[Central Government], as the ^b[Central Government] may, by general or special order, direct.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Secretary of State in Council".

8. Any cantonment fund or portion of a cantonment fund or other property of a ^a[Board] vesting in His Majesty under the provisions of section 6 or section 7 shall be applied in the first place to satisfy any liabilities of the ^a[Board] transferred under such provisions to the ^b[Central Government], and in the second place for the benefit of the inhabitants of the local area which has ceased to be a cantonment or, as the case may be, part of a cantonment.

[a] *Substituted* by S. 69 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), for "Cantonment Authority".

[b] *Substituted* by A. O. for "Secretary of State in Council".

9. The ^a[Central Government] may, ^b[* * *] by notification in the ^c[Official Gazette], exclude from the operation of any part of this Act the whole or any part of a cantonment, or direct that any provision of this Act shall, in the case of any cantonment —

^d(a) situated within the limits of a Presidency-town; or

(b) in which the Board is superseded under section 54,

apply with such modifications as may be so specified.

[a] *Substituted* by A. O. for "Local Government". [b] Words "with the previous sanction of the Governor-General in Council" were *repealed* by A. O. [c] *Substituted* by A. O. for "Local Official Gazette". [d] *Substituted* by S. 4 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), for "specified in the notification in which there is no Board."

Section 5 — Note 1.

[1] Mere declaration of lands to be within Cantonment area does not vest their ownership in Government. Acquisition by Government for the purpose must be proved. (Vol 14) 1927 Cal 786 (787).

Section 9 — Note 1.

[1] "We have here provided a power to exclude from the operation of any particular provision of the Act not only any specified part of a cantonment, but, where necessary, the whole of a cantonment."—*Select Committee Report*.

CHAPTER III.

^a[CANTONMENT BOARDS.]

Cantonment Board and Executive Officer.

^b10. For every cantonment there shall be a Cantonment Board and an Executive Officer.

[a] The chapter heading was *substituted* by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2 and Sch. I for "Boards and Cantonment Boards." [b] Section 10 was *substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 5, for the original section.

^a11. Every Board shall, by the name of the place by reference to which the cantonment is known, be a body corporate having perpetual succession and a common seal with power to acquire and hold property both moveable and immoveable and to contract and shall, by the said name, sue and be sued.

[a] Section 11 was *substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 5.

^a12. (1) The Executive Officer of every cantonment shall be appointed by the ^b[Central Government], or by such person as the ^b[Central Government] may authorise in this behalf, from the Service of Executive Officers constituted by rules made under section 280 :

Provided that an Executive Officer appointed before the commencement^c of the Cantonments (Amendment) Act, 1936, shall, unless the ^b[Central Government] otherwise directs in any case, be deemed to have been duly appointed in accordance with this sub-section.

(2) Not less than half the cost of the salary of the Executive Officer shall be paid ^d[by the Central Government] and the balance from the cantonment fund :

Provided that the salary of an Executive Officer appointed before the commencement^c of the Cantonments (Amendment) Act, 1936, shall, until the ^b[Central Government] otherwise directs, continue to be paid from the source from which it was being paid at the commencement of the said Act.

(3) The Executive Officer shall be the Secretary of the Board and of every committee of the Board, but shall not be a member of the Board or of any such committee.

[a] Section 12 was *substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 5. [b] *Substituted* by A. O. for "Governor-General in Council". [c] The Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), came into force on the 31st October 1936. [d] *Substituted* by A. O. for "by Government".

Constitution of Cantonment Boards.

^a13. (1) Cantonments shall be divided into three classes, namely :—

- (i) Class I Cantonments, in which the civil population exceeds ten thousand ;
- (ii) Class II Cantonments, in which the civil population exceeds two thousand five hundred, but does not exceed ten thousand ; and
- (iii) Class III Cantonments, in which the civil population does not exceed two thousand five hundred :

Provided that the ^b[Central Government] may, by notification in the ^e[Official Gazette], place in Class II any cantonment in the North-West Frontier Province or in British Baluchistan which if it were situated elsewhere would be a Class I Cantonment, or place in Class III any such cantonment which if it were situated elsewhere would be a Class II Cantonment.

(2) For the purposes of sub-section (1), the civil population shall be calculated in accordance with the latest official census, or, if the ^b[Central Government], by general or special order, so directs, in accordance with a special census taken for the purpose.

Section 11 — Note 1.

[1] A Cantonment Committee is a public officer within S. 2, Civil P. C. Hence before a Committee can be sued the notice prescribed under S. 80, Civil P. C., must be given. (1910) 34 Bom 583 (588).

Section 12 — Note 1.

[1] The Cantonments (Amendment) Act, 1936, came into force on 31-10-1936. Sub-section (3) of S. 1 of that Act runs as follows:—"It shall come into force at once, but the Central Government may, by notification in the Official Gazette, direct either generally or in respect of a particular cantonment that a specified section or sections

shall not take effect until such date as it may by a like notification appoint in this behalf."

Section 13 — Note 1.

[1] Proviso to sub-section (1) of S. 13 gives power to the Central Government to alter the classification of cantonments in order to meet the difficulty apprehended in the N.-W.F.P. and Baluchistan that owing to the military duties and frequent movements of military personnel, it might not always be possible or convenient to supply members for a more numerous Board. — Report of Second Select Committee on the Cantonments (Amendment) Act, 1936.

- (3) In Class I Cantonments, the Board shall consist of the following members, namely :—
- (a) the Officer Commanding the station or, if the ^b[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command ;
 - (b) a Magistrate of the first class nominated by the District Magistrate ;
 - (c) the Health Officer ;
 - (d) the Executive Engineer ;
 - (e) four military officers nominated by name by the Officer Commanding the station by order in writing ;
 - (f) seven members elected under this Act.
- (4) In Class II Cantonments, the Board shall consist of the following members, namely :—
- (a) the Officer Commanding the station, or, if the ^b[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command ;
 - (b) a Magistrate of the first class nominated by the District Magistrate ;
 - (c) the Health Officer ;
 - (d) the Executive Engineer ;
 - (e) (i) in cantonments of which the civil population exceeds seven thousand five hundred three military officers,
 - (ii) in cantonments of which the civil population exceeds five thousand, but does not exceed seven thousand five hundred, two military officers,
 - (iii) in cantonments of which the civil population does not exceed five thousand and in cantonments which the ^b[Central Government] by notification under the proviso to sub-section (1), has placed in Class II, whatever be the population, one military officer, nominated by name by the Officer Commanding the station by order in writing ;
 - (f) such number of members elected under this Act as is equal to the number of members constituted or nominated by or under clauses (b) to (e).
- (5) In Class III Cantonments, the Board shall consist of the following members, namely :—
- (a) the Officer Commanding the station, or if the ^b[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command ;
 - (b) one military officer nominated by name by the Officer Commanding the station by order in writing ;
 - (c) one member elected under this Act.

(6) The Officer Commanding the station may, if he thinks fit, with the sanction of the Officer Commanding-in-Chief, the Command, nominate in place of any military officer whom he is empowered to nominate under clause (e) of sub-section (3), clause (e) of sub-section (4) or clause (b) of sub-section (5), any person, whether in the service of the ^d[Crown] or not, who is ordinarily resident in the cantonment or in the vicinity thereof.

(7) Every election or nomination of a member of a Board and every vacancy in the membership thereof shall be notified by the ^e[Central Government] in the ^f[Official Gazette].

[a] S. 13 was substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 5. [b] Substituted by A. O. for "Governor-General in Council". [c] Substituted by A. O. for "Gazette of India". [d] Substituted by A. O. for "Government". [e] Substituted by A. O. for "Local Government". [f] Substituted by A. O. for "local official Gazette".

Power to vary constitution of Boards in special circumstances. ^a14. (1) Notwithstanding anything contained in section 13, if the ^b[Central Government] is satisfied—

- (a) that, by reason of military operations it is necessary, or
 - (b) ^c[* * *] that, for the administration of the cantonment, it is desirable,
- to vary the constitution of the Board in any cantonment under this section, the ^b[Central Government] may, by notification in the ^d[Official Gazette], make a declaration to that effect.

(2) Upon the making of a declaration under sub-section (1), the Board in the cantonment shall consist of the following members, namely :—

- (a) the Officer Commanding the station ;

- (b) one military officer nominated by name by the Officer Commanding the station by order in writing;
- (c) one member, not being a person in the service of the Government, nominated by the Officer Commanding the station.
- (3) Every nomination of a member of a Board constituted under this section, and every vacancy in the membership thereof, shall be notified by the ^a[Central Government] in the ^f[Official Gazette].
- (4) The term of office of a Board constituted by a declaration under sub-section (1) shall not ordinarily extend beyond one year :

Provided that the ^b[Central Government] may from time to time, by a like declaration, extend the term of office of such a Board by any period not exceeding one year at a time :

Provided also that the ^b[Central Government] shall forthwith direct that the term of office of such a Board shall cease if, in the opinion of the ^b[Central Government], the reasons stated in the declaration whereby such Board was constituted, or its term of office was extended, have ceased to exist.

(5) When the term of office of a Board constituted under this section has expired or ceased, the Board shall be replaced by the former Board which, but for the declaration under sub-section (1), would have continued to hold office, or, if the term of office of such former Board has expired, by a Board constituted under section 13.

[a] Section 14 was substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 5.

[b] Substituted by A. O. for "Governor-General in Council". [c] Words "after consultation with the Local Government" were repealed by A. O. [d] Substituted by A. O. for "Gazette of India". [e] Substituted by A. O. for "Local Government". [f] Substituted by A. O. for "local official Gazette".

15. (1) Save as otherwise provided in this section, the term of office of a member of a Board *Term of office of* shall be three years and shall commence from the date of the notification of *members.* his election or nomination under ^a[sub-section (7) of section 13], or from the

date on which the vacancy has occurred in which he is elected or nominated, whichever date is later:

^b[Provided that the ^c[Central Government] may, when satisfied that it is necessary in order to avoid administrative difficulty, extend the term of office of all the elected members of a Board by such period, not exceeding one year, as ^d[it] thinks fit]:

^e[Provided further that until the termination of the hostilities in being at the commencement of the Cantonments (Amendment) Act, 1944, the foregoing proviso shall have effect as if the word 'elected' and the words 'not exceeding one year' were omitted.]

(2) The term of office of an *ex-officio* member of a Board shall continue so long as he holds the office in virtue of which he is such a member.

(3) The term of office of a member elected to fill a casual vacancy shall commence from the date of election, and shall continue so long only as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred.

(4) An outgoing member shall, unless the ^f[Central Government] otherwise directs, continue in office until the election or nomination of his successor is notified under ^a[sub-section (7) of section 13].

(5) Any outgoing member may, if qualified, be re-elected or re-nominated.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 6, for "sub-section (2) of section 14". [b] Inserted by S. 6, *ibid.* [c] Substituted by A. O. for "Governor-General in Council".

[d] Substituted by A. O. for "he". [e] Added after S. 15 (1), proviso, by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 3. [17-3-1944.] [f] Substituted by A. O. for "Local Government".

16. (1) Vacancies arising by efflux of time in the office of an elected member of a Board *Filling of vacancies.* shall be filled by an ordinary election to be held on such date as the ^a[Central Government] may, by notification in the ^b[Official Gazette], direct.

(2) A casual vacancy shall be filled by a casual election the date of which shall be fixed by the ^a[Central Government] by notification in the ^b[Official Gazette], and shall be, as soon as may be, after the occurrence of the vacancy:

Provided that no casual election shall be held to fill a vacancy occurring within three months of any date on which the vacancy will occur by efflux of time, but such vacancy shall be filled at the next ordinary election.

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for "local official Gazette".

17. (1) If from any cause at an ordinary election no member is elected, or if the elected member is unwilling to serve on the Board, the outgoing member shall, if qualified and willing to serve, be deemed to have been re-elected :

^a[Provided that where there are more outgoing members qualified and willing to serve than there are vacancies to be filled under this sub-section, the outgoing members so deemed to have been re-elected shall, failing agreement amongst such members, be determined by lot under the supervision of the President of the Board and in such manner as he may decide.]

^b[(2) Vacancies arising in any of the following cases shall be filled by nomination by the Central Government after consultation with the Officer Commanding-in-Chief, the Command, namely :—

(a) where at a casual election no member is elected;

(b) where at an ordinary election no member or an insufficient number of members is elected, or an elected member is unwilling to serve on the Board and the outgoing member is not qualified or is not willing to serve or is dead or cannot be found within a reasonable time;

(c) where at an election held when a Board is constituted for the first time no member or an insufficient number of members is elected or an elected member is unwilling to serve on the Board.]

^c[(3) For the purposes of sub-section (2) of section 16, a member nominated in pursuance of sub-section (2) of this section shall, where there has been a division of the cantonment into wards or of the inhabitants thereof into classes, be deemed to have been elected by such ward or class, as the case may be, as the Central Government may at the time of making the nomination or at any time thereafter declare.]

^d[(4)] The term of office of a member nominated or deemed to have been re-elected under this section shall expire at the time at which it would have expired if he had been elected at the ordinary or casual election, as the case may be.

[a] Proviso was added to sub-section (1) by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 2. [30-3-1942.] [b] Substituted by S. 2, *ibid.*, for original sub-section (2). [c] New sub-section (3) was added by S. 2, *ibid.* [d] Sub-section (3) was re-numbered as sub-section (4), *ibid.*

18. (1) Every person who is by virtue of his office, or who is nominated or elected to be, a member of a Board shall, before taking his seat, make at a meeting of the Board an oath or affirmation of his allegiance to the Crown in the following form, namely :—

"I, A. B., having ^{become} ~~been elected~~ ^{been nominated} a member of this Board, do solemnly swear (or affirm) that

I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, his heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter."

(2) If any such person fails to make the oath or affirmation within such time as the ^a[Central Government] considers reasonable, the ^a[Central Government] shall, by notification in the ^b[Official Gazette], declare his seat to be vacant.

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for "local official Gazette".

19. (1) Any nominated or elected member of a Board who wishes to resign his office may forward his resignation in writing through the President of the Board to the Officer Commanding-in-Chief, the Command, who shall forward it for orders to the ^a[Central Government].

(2) If the ^a[Central Government] accepts the resignation, such acceptance shall be communicated to the Board, and thereupon the seat of the member resigning shall become vacant.

[a] Substituted by A. O. for "Local Government".

^{President and Vice-President.} 20. (1) The ^a[Officer Commanding the station] ^b[if a member of the Board] shall be the President of the Board :

^c[Provided that when a military officer holding the office of President ceases to be the Officer Commanding the station merely by reason of a temporary absence from the station on duty or on station leave, or during the transfer of his headquarters to a hill station, he shall not vacate the office of President.]

^d[(2) Where the Officer Commanding the station is not a member of the Board, the military officer nominated in his place under clause (a) of sub-section (3), sub-section (4) or sub-section (5) of section 13 shall be President of the Board.

(3) In every Board in which there is more than one elected member, there shall be a Vice-President elected by the elected members only and from among their number], "[in accordance with such procedure as the Central Government may by rules prescribe.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the cantonment". [b] *Inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 7.

[c] *Inserted* by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 3. [d] *Substituted* by S. 7 of Act 24 [XXIV] of 1936, for the original sub-section. [e] These words were *added* to S. 20 (3) by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 8. [30-3-1942.]

Term of office of Vice-President. **21.** ^a[(1) The term of office of a Vice-President shall be three years or the residue of his term of office as a member, whichever is less.]

(2) A Vice-President may resign his office by notice in writing to the President and, on the resignation being accepted by the Board, the office shall become vacant.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 8, for the original sub-section.

Duties of President. **22.** (1) It shall be the duty of the President of every Board —

(a) unless prevented by reasonable cause, to convene and preside at all meetings of the Board and to regulate the conduct of business thereat ;

(b) to exercise supervision and control over the financial and executive administration of the Board ;

(c) to perform all the duties and exercise all the powers specifically imposed or conferred on the President by or under this Act ; and

(d) subject to any restrictions, limitations and conditions imposed by this Act, to exercise executive power for the purpose of carrying out the provisions of this Act and to be directly responsible for the fulfilment of the purposes of this Act.

(2) The President may, by order in writing, empower the Vice-President to exercise all or any of the powers and duties referred to in clause (c) of sub-section (1) other than any power, duty or function which he is by resolution of the Board expressly forbidden to delegate.

(3) The exercise or discharge of any powers, duties or functions delegated by the President under this section shall be subject to such restrictions, limitations and conditions, if any, as may be laid down by the President and to the control of, and to revision by, the President.

(4) Every order made under sub-section (2) shall forthwith be communicated to the Board and to the ^a[Officer Commanding-in-Chief, the Command].

[a] *Substituted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the District."

Duties of Vice-President. **23.** It shall be the duty of the Vice-President of every Board—

(a) in the absence of the President and unless prevented by reasonable cause, to preside at meetings of the Board and when so presiding to exercise the authority of the President under sub-section (1) of section 22 ;

(b) during the incapacity or temporary absence of the President or pending his appointment or succession, to perform any other duty and exercise any other power of the President ; and

(c) to exercise any power and perform any duty of the President which may be delegated to him under sub-section (2) of section 22.

Duties of the Executive Officer. **24.** The Executive Officer shall perform all the duties imposed upon him by or under this Act, and shall be responsible for the custody of all the records of the

^a[Board], and shall arrange for the performance of such duties relative to the proceedings of the Board or of any Committee of the Board or of any Committee of Arbitration constituted under this Act, as those bodies may respectively impose on him, and shall comply with every requisition of the ^a[Board], on any matter pertaining to the administration of the cantonment.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

25. The Executive Officer may, in cases of emergency, direct the execution of any work or the doing of any act which would ordinarily require the sanction of the ^a[Board] and the immediate execution or doing of which is, in his opinion, necessary

Section 25 — Note 1.

[1] "We think that the exercise by the Executive Officer of the emergency powers conferred by this clause

should be subject to the previous sanction of the President or in his absence of the Vice-President, and we have provided accordingly."—*Select Committee Report.*

for the service or safety of the public, and may direct that the expense of executing such work or doing such act shall be paid from the cantonment fund :—

Provided that—

- (a) ^b[* * *] he shall not act under this section without the previous sanction of the President or, in his absence, of the Vice-President ;
- (b) he shall not act under this section in contravention of any order of the ^a[Board] prohibiting the execution of any particular work or the doing of any particular act ; and
- (c) he shall report forthwith the action taken under this section and the reasons therefor to the ^a[Board].

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] The words, "Where there is a Board" were *repealed* by S. 9, *ibid*.

Elections.

26. (1) ^a[* * *] ^b[The Board or, where a Board is not constituted in any place declared *Electoral rolls*, by notification under sub-section (1) of section 3 to be a cantonment, the Officer Commanding the station], shall prepare and publish an electoral roll showing the names of persons qualified to vote at elections to the Board. Such roll shall be prepared, revised and finally published in such manner and on such date in each year as the ^c[Central Government] may by rule prescribe.

(2) Every person whose name appears in the final electoral roll shall, so long as the roll remains in force, be entitled to vote at an election to the Board, and no other person shall be so entitled.

(3) When a cantonment has been divided into wards, or the inhabitants into classes, the electoral roll shall be divided into separate lists for each ward or class, as the case may be.

(4) If a new electoral roll is not published in any year on the date prescribed, the ^c[Central Government] may direct that the old electoral roll shall continue in operation until the new roll is published.

[a] The words "Where a Board is to be constituted in any cantonment, otherwise than in accordance with the proviso to sub-section (1) of section 14," were *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 10. [b] *Substituted* by S. 10, *ibid*, for "the Cantonment Authority". [c] *Substituted* by A. O. for "Local Government".

27. (1) The following persons shall, if not otherwise disqualified, be entitled to be enrolled as *Qualification of electors*. electors, namely :—

- (a) every person who in any year has, on or before such date as may be fixed by the ^a[Central Government] in this behalf by notification in the ^b[Official Gazette] (hereinafter in this section referred to as the aforesaid date), been assessed directly and on his own account to taxes under this Act (other than octroi, toll or terminal tax), the aggregate value whereof is not less than such amount as the ^a[Central Government] may by rule prescribe, and who on the aforesaid date is not in arrears in the payment of any such tax ;
- (b) every person who has for a period of not less than twelve months immediately preceding the aforesaid date resided in the cantonment and on the aforesaid date —
 - (i) is the owner or the mortgagee in possession or the lessee of any building or land in the cantonment, of an annual value calculated in such manner, and of not less than such amount, as the ^a[Central Government] may by rule prescribe ; or
 - (ii) is carrying on any business in the cantonment from which he derives an annual income calculated in such manner, and of not less than such amount, as the ^a[Central Government] may by rule prescribe ; or
 - (iii) ^c[has passed the Matriculation or other equivalent examination] of any University established by law in British India ; or

Section 26 — Note 1.

[1] For the meaning of the word 'person', see S. 29.

Section 27 — Note 1.

[1] Under sub-clause (iii) of clause (b) as it stood before, the minimum qualification to be entitled to be enrolled as an elector was that the person should be a graduate. But by virtue of the amendment made in 1936, it is enough if he has passed the matriculation or other equivalent examination.

Under the new proviso added in 1936 to sub-section (2) any disqualification under clause (v) of sub-section (2) automatically terminates on the lapse of three years from the expiry of the sentence or order.

[2] For the meaning of the word 'person' and as to when 'a person shall be deemed to pay a tax *directly*,' see section 29. As to the removal of any member who becomes subject to any of the disqualifications mentioned in sub-section (2) of this section, see section 34 (1) (a).

^d[(iv) is a person whose name is entered on the current electoral roll of the constituency of which the cantonment forms part for the purposes of the Central or Provincial Legislatures; or]

^d[(v) is a retired or pensioned officer, whether commissioned or non-commissioned, of His Majesty's forces;

(c) every person who has, ^e[for] a period of not less than twelve months immediately preceding the aforesaid date, resided in the cantonment and has during that period been assessed to income-tax.

^f[*Explanation.* — When any place is declared a cantonment for the first time or when any local area is first included in a cantonment, residence in the area comprising the cantonment on the aforesaid date shall be deemed to be residence in the cantonment for the purposes of this sub-section.]

(2) A person, notwithstanding that he is otherwise qualified, shall not be entitled to be enrolled as an elector if he on the aforesaid date —

^g[(i) is not either a British subject, or a subject of an Indian State, or]

(ii) is less than 21 years of age, or

(iii) has been adjudged by a competent Court to be of unsound mind, or

(iv) is an undischarged insolvent, or

(v) has been sentenced by a Criminal Court to imprisonment for a term exceeding ^h[two years] or to transportation ⁱ[for an offence which is declared by the ^j[Central Government] to be such as to unfit him to become an elector] ^k[* * * *] or has been sentenced by a Criminal Court for any offence under Chapter IXA of the Indian Penal Code :

Provided that the ^a[Central Government] may, by order in writing, remove any disqualification incurred by a person under clause (v);

^l[Provided further that any disqualification incurred by a person under clause (v) shall terminate on the lapse of three years from the expiry of the sentence or order.]

(3) If any person having been enrolled as an elector in any electoral roll subsequently becomes subject to any of the disqualifications referred to in clauses (i), (iii), (iv) and (v) of sub-section (2), his name shall be removed from the electoral roll unless, in the case referred to in clause (v), the disqualification is removed by the ^a[Central Government].

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for "local official Gazette".

[c] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 11, for "is a graduate".

[d] Clause (iv) was inserted and original clause (iv) was re-numbered (v) by S. 11, *ibid.* [e] Substituted by S. 11, *ibid.* for "during". [f] Explanation was added by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 4 [30-3-1942]. [g] Substituted for original Clause (i) by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 2. [27-11-1940.] [h] Substituted by Act 24 [XXIV] of 1936, S. 11, for "six months".

[i] Inserted by S. 11, *ibid.* [j] Substituted by A. O. for "Governor-General in Council". [k] The words "or has been ordered to find security for good behaviour under the Code of Criminal Procedure, 1898," were repealed by Act 24 [XXIV] of 1936, S. 11. [l] Inserted by S. 11, *ibid.*

28. (1) Save as hereinafter provided, every person, not being ^a[a person ^b[in receipt of pay]. *Qualification for being a* in the military or civil service of the Crown in India], whose name is *member of the Board.* entered on the electoral roll of a cantonment shall be qualified for election as a member of the Board in that cantonment.

^c[(1A) No person shall be qualified for nomination as a member of a Board if he is subject to any of the disqualifications specified in sub-section (2) of section 27.]

(2) No person shall be qualified for election or nomination as a member of a Board, if he —

(a) has been dismissed from ^d[the service of the Crown] and is debarred from re-employment therein, or is a dismissed servant of ^e[a Board or an authority which, before the commencement^f of the Cantonments (Amendment) Act, 1936, exercised and performed the powers and duties of a Cantonment Authority under this Act];

(b) is debarred from practising as a legal practitioner by order of any competent authority;

(c) holds any place of profit in the gift or at the disposal of the Board, or is a ^g[* * * *] police officer, or is the servant or employer of a member of the Board; or

Section 28 — Note 1.

[1] For the meaning of the word 'person', see S. 29. ~~As to the removal of any member who becomes subject~~

to any of the disqualifications mentioned in sub-s. (2) of this section, see S. 34 (1) (a).

(d) is interested in a subsisting contract made with, or in work being done for, the Board except as a shareholder (other than a director) in an incorporated company; or

^b[(dd) is an officer or servant, permanent or temporary, of a Board; or]

(e) is disqualified under any other provision of this Act :

Provided that—

(i) any of the disqualifications referred to in clauses (a) and (b) may be removed by an order of the ⁱ[Central Government] in this behalf, and

(ii) a person shall not be deemed to have any interest in such a contract or work as is referred to in clause (d) by reason only of his having a share or interest in—

(a) any lease or sale or purchase of immoveable property or any agreement for the same; or

(b) any agreement for the loan of money or any security for the payment of money only; or

(c) any newspaper in which any advertisement relating to the affairs of the Board is inserted; or

(d) the sale to the Board of any articles in which he regularly trades or the purchase from the Board of any articles, to a value in either case not exceeding Rs. 1,500 in the aggregate in any year during the period of the contract or work.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 12, for a "stipendiary Magistrate or Military Officer or soldier". [b] *Added* after the words, "not being a person" by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 4. [17-3-1944]. [c] Sub-section (1A) was *inserted* by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 5. [30-3-1942.] [d] *Substituted* by A. O. for "Government service". [e] *Substituted* by Act 24 [XXIV] of 1936, S. 12, for "the Cantonment Authority". [f] Came into force on 31st October, 1936. [g] Words "stipendiary Magistrate or" were *repealed* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 4. [h] *Inserted* by Act 24 [XXIV] of 1936, S. 12. [i] *Substituted* by A. O. for "Local Government".

Interpretation. 29. For the purposes of sections 26, 27 and 28 —

(a) "person" means an individual human being, and

(b) a person shall be deemed to pay a tax directly if he pays the tax either himself or through a legally appointed agent.

30. Notwithstanding anything hereinbefore contained, the ^a[Central Government] may *Joint families, etc.* make rules conferring on the manager or representative of an undivided family or of any company or firm or other association or body or on any trustee of any land a right to be enrolled as an elector or to be nominated as a candidate at elections to a Board.

[a] *Substituted* by A. O. for "Local Government".

31. The ^a[Central Government] may, either generally or specially for any cantonment or *Power to make rules regulating elections.* group of cantonments, after previous publication, make rules consistent with this Act to regulate all or any of the following matters for the purpose of the holding of elections under this Act, namely:—

(a) the division of a cantonment into wards, or of the inhabitants of a cantonment into classes, or both ;

(b) the determination of the number of members to be elected by each ward or class of persons ;

(c) the method by which the annual value of buildings and lands shall be calculated for the purposes of section 27 ;

(d) the preparation, revision and final publication of electoral rolls ;

(e) the registration of electors, the nomination of candidates, the time and manner of holding elections and the method by which votes shall be recorded ;

(f) the authority ^b[which may be an officer of the Provincial Government] by which and the manner in which disputes relating to electoral rolls or arising out of elections shall be decided, and the powers and duties of such authority and the circumstances in which such authority may declare a casual vacancy to have been created or any candidate to have been elected ;

(g) any other matter relating to elections or election disputes in respect of which the ^a[Central Government] is empowered to make rules under this Chapter or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the ^a[Central Government], necessary.

[a] *Substituted* by A. O. for "Local Government". [b] *Inserted* by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 5. [17-3-1944.]

Members.

32. No member of a Board shall vote at a meeting of the Board ^a[or of any committee of the Board] on any question relating to his own conduct or on any matter, other than a matter affecting generally the inhabitants of the cantonment, which affects his own pecuniary interest or the valuation of any property in respect of which he is directly or indirectly interested, or of any property of or for which he is a manager or agent.

[a] *Inserted by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 3, [27-11-1940].*

33. Every member of a Board shall be liable for the loss, waste or misapplication of any money or other property belonging to the Board if such loss, waste or misapplication is a direct consequence of his neglect or misconduct while such member; and a suit for compensation for the same may be instituted against him either by the Board or by the ^a[Central Government].

[a] *Substituted by A. O. for "Secretary of State for India in Council".*

Removal of members. **34.** ^a[(1) The ^b[Central Government] may remove from a Board any member thereof who —

- (a) becomes ^c[or is found to have been at the time of his election or nomination] subject to any of the disqualifications specified in sub-section (2) of section 27, ^d[or in section 28]; or
- (b) has absented himself for more than three consecutive months from the meetings of the Board and is unable to explain such absence to the satisfaction of the Board; or
- (c) has knowingly contravened the provisions of section 32; or
- (d) being a legal practitioner, acts or appears on behalf of any other person against the Board in any legal proceeding or against the ^e[Crown] in any such proceeding relating to any matter in which the Board is or has been concerned, or acts or appears on behalf of any person in any criminal proceeding instituted by or on behalf of the Board against such person.]

(2) The ^b[Central Government] may remove from a Board any member who, in the opinion of the ^b[Central Government], has so flagrantly abused in any manner his position as a member of the Board as to render his continuance as a member detrimental to the public interests.

^f[(2A) The Central Government may, on receipt of a report from the Officer Commanding the station, through the Officer Commanding-in-Chief, the Command, remove from a Board any military officer nominated a member of the Board who is, in the opinion of the Officer Commanding the station unable to discharge his duties as member of the Board and has failed to resign his office]

(3) No member shall be removed from a Board under ^g[sub-section (1) or sub-section (2)] of this section, unless he has been given a reasonable opportunity of showing cause against his removal.

[a] *Substituted by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 4, for the original sub-section. [b] Substituted by A.O. for "Local Government". [c] Inserted by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 6. [30-3-1942.] [d] The words and figures were substituted by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 4 for the words, brackets and figures "or in sub-section (2) of section 28". [27-11-40.] [e] Substituted by A.O. for "Secretary of State in Council". [f] Inserted after S. 34 (2) by Act 31 [XXXI] of 1940, S. 4. [27-11-40.] [g] The words, brackets and figures were inserted by Act 15 [XV] of 1942, S. 6. [30-3-1942].*

^a[**35.** (1) A member removed under clause (b) of sub-section (1) ^b[or under sub-section (2A)] *Consequences of removal.* of section 34 shall, if otherwise qualified, be eligible for re-election or re-nomination.

(2) A member removed under clause (c) or clause (d) of sub-section (1) of section 34 shall not be eligible for re-election or nomination for the period during which, but for such removal, he would have continued in office.

(3) A member removed under sub-section (2) of section 34 shall not be eligible for re-election or nomination until the expiry of three years from the date of his removal.]

[a] *Substituted by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 5, for the original S. 35. [b] Inserted by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 5. [27-11-1940].*

Section 32 — Note 1.

[1] As to the removal of any member who has know-

ingly contravened the provisions of this section, see S. 34 (1) (c).

Servants.

36. (1) No person who has directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of a ^a[Board] or in any employment under, by or on behalf of a ^a[Board], otherwise than as a servant of the ^a[Board], shall become or remain a servant of such ^a[Board].

(2) A servant of a ^a[Board] who knowingly acquires or continues to have directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of the ^a[Board] or, in any employment under, by or on behalf of the ^a[Board], otherwise than as a servant of the ^a[Board], shall be deemed to have committed an offence under section 168 of the Indian Penal Code.

(3) Nothing in this section shall apply to any share or interest in any contract with, by or on behalf of, or employment under, by or on behalf of a ^a[Board] if the same is a share in a company contracting with, or employed by, or on behalf of, the ^a[Board] or is a share or interest acquired or retained with the permission of the ^b[Officer Commanding-in-Chief, the Command,] in any lease or sale to, or purchase by, the ^a[Board] of land or buildings or in any agreement for the same.

^c[(4) Every person applying for employment as a servant of a Board shall, if he is related by blood or marriage to any member of the Board or to any person, not being a menial servant, in receipt of remuneration from the Board, notify the fact and the nature of such relationship to the appointing authority before the appointment is made, and if he has failed to do so, his appointment shall be invalid but without prejudice to the validity of anything previously done by him.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the District". [c] Inserted by Act 24 [XXIV] of 1936, S. 13.

^a[36A. Every officer or servant, permanent or temporary, of a ^b[Board] shall be deemed to be a public servant within the meaning of the Indian Penal Code, and in the definition of "Legal remuneration" in section 161 of that Code the word "Government" shall, for the purposes of this section, be deemed to include a ^b[Board].]

[a] Inserted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 5. [b] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Procedure.

37. (1) Every Board shall ordinarily hold at least one meeting in every month on such day as may be fixed, and of which notice shall be given in such manner as may be provided, by regulations made by the Board under this Chapter.

(2) The President may, whenever he thinks fit, and shall, upon a requisition in writing by not less than one-fourth of the members of the Board, convene a special meeting.

(3) Any meeting may be adjourned until the next or any subsequent day, and an adjourned meeting may be further adjourned in like manner.

38. Subject to any regulation made by the Board under this Chapter, any business may be transacted at any meeting:

Provided that no business relating to the imposition, abolition or modification of any tax shall be transacted at a meeting unless notice of the same and of the date fixed therefor has been sent to each member not less than seven days before that date.

39. (1) The quorum necessary for the transaction of business at a meeting of a Board ^a[in which there is more than one elected member] shall be five or one-half of the number of members of the Board actually holding office at the time, whichever is the greater number:

^b[* * * * *]

^a[(1A) The quorum necessary for the transaction of business at a meeting of a Board constituted under sub-section (5) of section 13 or under sub-section (1) of section 14, shall be two.]

(2) If a quorum is not present, the President shall adjourn the meeting and the business which would have been brought before the original meeting if there had been a quorum present thereat shall be brought before, and may be transacted at, an adjourned meeting, whether there is a quorum present or not.

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 14. [b] The proviso was repealed by S. 14, *ibid*.

Presiding Officer. ^a[40. In the absence of —

- (a) both the President and the Vice-President from any meeting of a Board in which there is more than one elected member,
- (b) the President from a meeting of a Board constituted under sub-section (5) of section 13 or sub-section (1) of section 14,

the members present shall elect one from among their own number to preside.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 15, for the original section.

41. (1) Minutes of the proceedings of each meeting shall be recorded in a book and shall be signed by the President before the close of the meeting, and shall, at such times and in such place as may be fixed by the Board, be open to inspection free of charge by any inhabitant of the cantonment.

(2) Copies of the minutes shall, as soon as possible after each meeting, be forwarded for information to ^a[the Officer Commanding-in-Chief, the Command,] the Officer Commanding the District, the Officer Commanding the brigade area, ^b[the District Magistrate and the Military Estates Officer].

[a] *Inserted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 3. [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 16, for "and the District Magistrate".

42. Every meeting of a Board shall be open to the public unless in any case the President, *Meetings to be public.* for reasons to be recorded in the minutes, otherwise directs.

Method of deciding questions. **43.** (1) All questions coming before a meeting shall be decided by the majority of the votes of the members present and voting.

(2) In the case of an equality of votes, the President shall have a second or casting vote.

(3) The dissent of any member from any decision of the Board shall, if the member so requests, be entered in the minutes, together with a short statement of the grounds for such dissent.

^a[**43A.** (1) Every Board constituted under section 13 in a Class I Cantonment or Class II *Committees for Bazaars.* Cantonment shall appoint a committee consisting of the elected members of the Board, the Health Officer and the Executive Engineer for the administration of such areas in the cantonment as the ^b[Central Government] may, by notification in the ^c[Official Gazette], declare to be bazar areas, and may delegate its powers and duties to such committee in the manner provided in clause (e) of sub-section (1) of section 44.

(2) The Vice-President of the Board shall be the Chairman of the committee appointed under sub-section (1).]

[a] *Inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 17. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

44. (1) A Board may make regulations consistent with this Act and with the rules made *Power to make regulations.* thereunder to provide for all or any of the following matters, namely:—

- (a) the time and place of its meetings;
- (b) the manner in which notice of the meeting shall be given;
- (c) the conduct of proceedings at meetings and the adjournment of meetings;
- (d) the custody of the common seal of the Board and the purposes for which it shall be used; and
- (e) the appointment of committees for any purpose and the determination of all matters relating to the constitution and procedure of such committees, and the delegation to such committees, subject to any conditions which the Board thinks fit to impose, of any of the powers or duties of the Board under this Act other than a power to make regulations or bye-laws.

(2) No regulation made under clause (e) of sub-section (1) shall take effect until it has been approved by the ^a[Central Government].

(3) No regulation made under this section shall take effect until it has been published in such manner as the ^a[Central Government] may direct.

[a] *Substituted* by A. O. for "Local Government".

Section 43A — Note 1.

[1] Section 43A was newly added by the Cantonments (Amendment) Act, 1936. The Health Officer and the Executive Engineer have been made *ex officio*

members of the Bazar Committee at the suggestion of the Second Select Committee. Prior to this they were left to be co-opted.

Joint action with other local authority.

45. (1) A ^a[Board] may—

(a) join with any other local authority —

(i) in appointing a joint committee for any purpose in which they are jointly interested and in appointing a chairman of such committee,

(ii) in delegating to such committee power to frame terms binding on the ^a[Board] and such other local authority as to the construction and future maintenance of any joint work or to exercise any power which might be exercised by ^b[the Board or by such other local authority]; and

(iii) in making rules for regulating the proceedings of any such committee relating to the purposes for which it has been appointed; or

(b) with the previous sanction of ^c[the Officer Commanding-in-Chief, the Command and] the ^d[Provincial Government concerned], enter into an agreement with any other local authority regarding the levy of any tax or toll whereby the said tax or toll respectively leviable by the ^e[Board and by such other local authority] may be levied together instead of separately within the limits of the aggregate area comprising the areas subject to the control of the ^f[Board and such other local authority.]

(2) If any difference of opinion arises between any ^g[Board and other local authority] acting together under this section, the decision thereon of the ^d[Central Government] or of an officer appointed by the ^d[Central Government] in this behalf shall be final.

(3) When any agreement such as is referred to in clause (b) of sub-section (1) has been entered into, then—

(a) where the agreement relates to an octroi or terminal tax or toll, the other local authority with which the ^g[Board] has made such agreement shall have the same powers to establish octroi limits and octroi stations and places for the collection of the terminal tax and terminal toll within the cantonment, as it has within the area ordinarily subject to its control;

(b) such other local authority shall have the same power of collecting such tax or toll in the cantonment, and the provisions of any enactment in force relating to the levy of such tax or toll by such other local authority shall apply in the same manner, as if the cantonment were comprised within the area ordinarily subject to its control; and

(c) the total of the collection of such tax and toll made in the cantonment and in the area ordinarily subject to the control of such other local authority and the costs thereby incurred shall be divided between the cantonment fund and the fund subject to the control of such other local authority, in such proportion as may have been determined by the agreement.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by *ibid*, S. 16, for "either of the said authorities". [c] *Inserted* by *ibid*, S. 18.

[d] *Substituted* by A. O. for "Local Government". [e] *Substituted* by S. 18 of Act (24 [XXIV] of 1936), for "authorities so contracting". [f] *Substituted* by *ibid*, S. 18, for "said authorities". [g] *Substituted* by *ibid*, S. 18, for "authorities."

^a[**45A.** Every board shall, as soon as may be after the close of the year and not later than the date fixed in this behalf by the ^b[Central Government], submit to the ^b[Central Government] through the Officer Commanding-in-Chief, the Command, a report on the administration of the cantonment during the preceding financial year, in such form and containing such details as the ^b[Central Government] may direct. The comments, if any, of the Officer Commanding-in-Chief, the Command, on such report shall be communicated by him to the Board which shall be allowed a reasonable time to furnish a reply thereto, and the comments together with the reply, if any, shall be forwarded to the ^b[Central Government] along with the report.]

[a] *Inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 19. [b] *Substituted* by A. O. for "Governor-General in Council".

Control.

Power of Central Government to require production of documents. **46.** The ^a[Central Government] ^b[* * *] may at any time require a ^c[Board] :—

(a) to produce any record, correspondence, plan or other document in its possession or under its control;

(b) to furnish any return, plan, estimate, statement, account or statistics relating to its proceedings, duties or works;

(c) to furnish or obtain and furnish any report.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] The words "or the Local Government" were *repealed* by A. O. [c] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

47. The ^a[Central Government or the Officer Commanding-in-Chief, the Command,] may *Inspection.* depute any person in the service of the ^b[Crown] to inspect or examine any department of the office of, or any service or work undertaken by, or thing belonging to, a ^c[Board] and to report thereon, and the ^e[Board] and its officers and servants shall be bound to afford the person so deputed access at all reasonable times to the premises and property of the ^c[Board] and to all records, accounts and other documents the inspection of which he may consider necessary to enable him to discharge his duties.

[a] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command" were *substituted* for the words "Officer Commanding the District" by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 4; and the words "Central Government" were *substituted* for the words "Governor-General in Council" by A. O. [b] *Substituted* by A. O. for "Government". [c] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Power to call for documents. 48. ^a[The Officer Commanding-in-Chief, the Command,] may, by order in writing, —

(a) call for any book or document in the possession or under the control of the ^b[Board];

(b) require the ^b[Board] to furnish such statements, accounts, reports and copies of documents relating to its proceedings, duties or works as he thinks fit.

[a] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command," were *substituted* for the words "Officer Commanding the District" by S. 4 of the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926); and the words "The Governor-General in Council or" were *repealed* by S. 20 of Act (24 [XXIV] of 1936). [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Power to require execution of work, etc. 49. If, on receipt of any information or report obtained ^a[under section 46 or section 47] or section 48, the ^b[Central Government or the Officer Commanding-in-Chief, the Command,] is of opinion —

(a) that any duty imposed on a ^c[Board] by or under this Act has not been performed or has been performed in an imperfect, inefficient or unsuitable manner, or

(b) that adequate financial provision has not been made for the performance of any such duty, ^d[it or] he may ^e[* * *] direct the ^c[Board], within such period as ^d[it or] he thinks fit, to make arrangements to ^d[its or] his satisfaction for the proper performance of the duty, or, as the case may be, to make financial provision to ^d[its or] his satisfaction for the performance of the duty :

Provided that, unless in the opinion of the ^f[Central Government or the Officer Commanding-in-Chief, the Command, as the case may be,] the immediate execution of such order is necessary, ^d[it or] he shall, before making any direction under this section, give the ^c[Board] an opportunity of showing cause why such direction should not be made.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 21 for, "under S. 47".

[b] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command" were *substituted* for the words "Officer Commanding the District" by S. 5 of the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926); and the words "Central Government" were *substituted* by A. O. for the words "Governor-General in Council". [c] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority". [d] *Inserted* by A. O. [e] The words "after consultation with the Local Government" were *repealed* by A. O. The words "after consultation with" had been *substituted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 5 for the words "with the concurrence of the Officer Commanding-in-Chief, the Command, and of". [f] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command, as the case may be" were *substituted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), Ss. 5 and 6 for the words "Officer Commanding the District", and the words "Central Government" were *substituted* by A. O. for the words "Governor-General in Council".

50. If, within the period fixed by a direction made under section 49, any action the taking of which has been directed under that section has not been duly taken, the ^a[Central Government or the Officer Commanding-in-Chief, the Command, as the case may be,] may make arrangements for the taking of

Power to provide for enforcement of direction under section 49.

such action, and may direct that all expenses connected therewith shall be defrayed out of the cantonment fund.

[a] The words "Governor-General in Council or the Officer Commanding-in-Chief, the Command, as the case may be," were substituted for the words "Officer Commanding the District" by Ss. 5 and 6 of the Cantonments (Amendment) Act, 1926 (35 [XXV] of 1926), and the words "Central Government" were substituted by A. O. for the words "Governor-General in Council".

51. (1) If the President dissents from any decision of the Board, which he considers pre-judicial to the health, welfare or discipline of the troops in the cantonment, he may, for reasons to be recorded in the minutes, by order in writing, direct the suspension of action thereon for any period not exceeding one month and, if he does so, shall forthwith refer the matter to the Officer Commanding-in-Chief, the Command, ^a[the reference being made, save in cases where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act,] through the Officer Commanding the District, who may make such recommendations thereon as he thinks fit.

(2) If the District Magistrate considers any decision of a ^b[Board] to be prejudicial to the public health, safety or convenience, he may, after giving notice in writing of his intention to the ^b[Board], refer the matter to the ^c[Central Government]; and, pending the disposal of the reference to the ^c[Central Government], no action shall be taken on the decision.

(3) If any Magistrate who is a member of a Board, being present at a meeting, dissents from any decision which he considers prejudicial to the public health, safety or convenience, he may, for reasons to be recorded in the minutes and after giving notice in writing of his intention to the President, report the matter to the District Magistrate; and the President shall, on receipt of such notice, direct the suspension of action on the decision for a period sufficient to allow of a communication being made to the District Magistrate and of his taking proceedings as provided by sub-section (2).

[a] Inserted by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I. [b] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority". [c] Substituted by A. O. for "Local Government".

Power of Officer Commanding-in-Chief, the Command, on reference under section 51 or otherwise.

52. (1) The Officer Commanding-in-Chief, the Command, may at any time ^a[* * *]

(a) direct that any matter or any specific proposal other than one which has been referred to the ^b[Central Government] under sub-section (2) of section 51 be considered or re-considered by the ^c[Board]; or

(b) direct the suspension, for such period as may be stated in the order, of action on any decision of a ^c[Board] other than a decision which has been referred to him under sub-section (1) of section 51, and thereafter cancel the suspension or ^d[after giving the Board a reasonable opportunity of showing cause why such direction should not be made], direct that the decision shall not be carried into effect or that it shall be carried into effect with such modifications as he may specify.

(2) When any decision of a Board has been referred to him under sub-section (1) of section 51, the Officer Commanding-in-Chief, the Command, may, by order in writing, —

(a) cancel the order given by the President directing the suspension of action; or

(b) extend the duration of the order for such period as he thinks fit; or

^e[(c) after giving the Board a reasonable opportunity of showing cause why such direction should not be made, direct that the decision shall not be carried into effect or that it shall be carried into effect by the Board with such modifications as he may specify.]

[a] Certain words were repealed by the Cantonments (Amendment) Act, 1931 (7 [VII] of 1931), S. 3.

[b] Substituted by A. O. for "Local Government". [c] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [d] Inserted by S. 22, *ibid.* [e] Substituted by S. 22, *ibid.*, for the original clause.

Section 51 — Note 1.

[1] "We have also made an amendment to clause 51 (i. e., S. 51) in order to confine the powers of the President in the matter of overriding decisions of the Board to cases where those decisions appear to him prejudicial

to the health, welfare or discipline of the troops. This leaves the District Magistrate to exercise a similar power on behalf of the civil population generally" — *Select Committee Report*.

53. When any decision of a ^a[Board] has been referred to the ^b[Central Government] under *Powers of Central Government on a reference made under section 51.* sub-section (2) of section 51, the ^b[Central Government] may, after consulting the Officer Commanding-in-Chief, the Command, by order in writing, —

- (a) direct that no action be taken on the decision; or
- (b) direct that the decision be carried into effect either without modification or with such modifications as it may specify.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Substituted by A. O. for "Local Government".*

54. (1) If, in the opinion of the ^a[Central Government], any Board is not competent to perform or persistently makes default in the performance of the duties imposed on it by or under this Act or otherwise by law, or exceeds or abuses its powers, the ^a[Central Government] may ^b[* * *] by an order published, together with the statement of the reasons therefor, in the ^c[Official Gazette], declare the Board to be incompetent or in default or to have exceeded or abused its powers, as the case may be, and supersede it for such period as may be specified in the order :

Provided that no Board shall be superseded unless a reasonable opportunity has been given to it to show cause against the supersession.

(2) When a Board is superseded by an order under sub-section (1) —

- (a) all members of the Board shall, on such date as may be specified in the order, vacate their offices as such members but without prejudice to their eligibility for election or nomination under clause (c);
- (b) during the supersession of the Board, all powers and duties conferred and imposed upon the Board by or under this Act or otherwise by law shall be exercised and performed by the ^a[Officer Commanding the station] subject to such reservation, if any, as the ^a[Central Government] may prescribe in this behalf; and
- (c) before the expiry of the period of supersession elections shall be held and nominations made for the purpose of reconstituting the Board.

[a] *Substituted by A. O. for "Local Government".* [b] *The words "with the previous sanction of the Governor-General in Council" were repealed by A. O.* [c] *Substituted by A. O. for "local Official Gazette".*

[d] *Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".*

Validity of Proceedings.

Validity of proceedings, etc.
Board or committee.

55. (1) No act or proceeding of a Board or of any committee of a Board shall be invalid by reason only of the existence of a vacancy in the

(2) No disqualification or defect in the election, nomination or appointment of a person acting as the President or a member of a Board or of any such committee shall vitiate any act or proceeding of the Board or committee if the majority of the persons present at the time of the act being done or the proceeding being taken were duly qualified members thereof.

(3) Any document or minutes which purport to be the record of the proceedings of a Board or of any committee of a Board shall, if made and signed substantially in the manner prescribed for the making and signing of the record of such proceedings, be presumed to be a correct record of the proceedings of a duly convened meeting, held by a duly constituted Board or committee, as the case may be, whereof all the members were duly qualified.

CHAPTER IV.

SPIRITUOUS LIQUORS AND INTOXICATING DRUGS.

Unauthorised sale of spirituous liquor or intoxicating drug.

56. If within a cantonment, or within such limits adjoining a cantonment as the ^a[Central Government] may, by notification

Section 54 — Note 1.

[1] Under S. 9 the Central Government may, by notification in the Official Gazette, direct that any provision of this Act shall, in the case of any cantonment in which the Board is superseded under S. 54, apply with such modifications as may be so specified.

Section 56 — Note 1.

[1] The word 'supplies' in this section has a restricted meaning; it is inapplicable in the case of servant giving his master liquor belonging to the master himself. Thus, where the servant of a soldier buys liquor with soldier's money for his use, the servant cannot be said to

in the ^b[Official Gazette] define, any person not subject to military or air-force law or any person subject to military or air-force law otherwise than as a military officer or a soldier knowingly barter, sell or supply, or offers or attempts to barter, sell or supply, any spirituous liquor or intoxicating drug to or for the use of any soldier or follower or soldier's wife or minor child without the written permission of the ^c[Officer Commanding the station] or of some person authorised by the ^c[Officer Commanding the station] to grant such permission, he shall be punishable with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for 'local Official Gazette'.

[c] Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".

Unauthorised possession of spirituous liquor.

57. If within a cantonment, or within any limits defined under section 56,—

(a) any person subject to military or air-force law otherwise than as a military officer or a soldier, or

(b) the wife or servant of any such person or of a soldier, has in his or her possession, except on behalf of the ^a[Central Government] or for the private use of a military officer, more than one quart of any spirituous liquor, other than fermented malt-liquor, without the written permission of the ^b[Officer Commanding the station] or of some person authorised by the ^b[Officer Commanding the station] to grant such permission, he or she shall be punishable, in the case of a first offence, with fine which may extend to fifty rupees, and, in the case of a subsequent offence, with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees.

[a] Substituted by A. O. for "Government". [b] Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".

Arrest of persons and seizure and confiscation of things for offences against the two last foregoing sections.

58. (1) Any police officer or excise officer may, without an order from a Magistrate and without a warrant, arrest any person whom he finds committing an offence under section 56 or section 57, and may seize and detain any spirituous liquor or intoxicating drug in respect of which such an offence has been committed and any vessels or coverings in which the liquor or drug is contained.

(2) Where a person accused of an offence under section 56 has been previously convicted of an offence under that section, an officer in charge of a police station may, with the written permission of a Magistrate, seize and detain any spirituous liquor or intoxicating drug within the cantonment or within any limits defined under that section which, at the time of the alleged commission of the subsequent offence, belonged to, or was in the possession of, such person.

(3) The Court convicting a person of an offence under section 56 or section 57 may order the confiscation of the whole or any part of anything seized under sub-section (1) or sub-section (2).

(4) Subject to the provisions of Chapter XLIII of the Code of Criminal Procedure, 1898, anything seized under sub-section (1) or sub-section (2) and not confiscated under sub-section (3) shall be restored to the person from whom it was taken.

59. The foregoing provisions of this Chapter shall not apply to the sale or supply of any article

Saving of articles sold or supplied for medicinal purposes. in good faith for medicinal purposes by a medical practitioner, chemist or druggist authorised in this behalf by a general or special order of the ^a[Officer Commanding the station].

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".

CHAPTER V.

TAXATION.

Imposition of Taxation.

General power of taxation.

^a**[60.** (1) The Board may, with the previous sanction of the ^b[Central Government], impose in any cantonment any tax which,

have supplied liquor to the soldier. (1907) 31 Bom 523 (526).

[2] The words 'spirituous liquor' and 'intoxicating drugs' should be taken in their popular and ordinary meaning. Thus, 'tari' or 'toddy' is spirituous liquor. (1888) 45 Cal 452 (454). (Case under Cantonments Act, 1880, Section 14.)

[3] Country or home made beer is not included in

the term "spirituous liquor." (1873) 7 M H C R (App) 15 (16). (Decision under Madras Act 1 [I] of 1866, S. 30.)

[4] As to the meaning of 'soldier', see (1880) 3 All 214 (215).

Section 60 — Note 1

[1] Board empowered to levy tax on water cannot vary it without the sanction of the Government (Vol 13) 1926 Sind 130 (130, 131, 132) : 20 Sind L R 325.

under any enactment for the time being in force, may be imposed in any municipality in the Province wherein such cantonment is situated :

c[* * * * * * * *]
(2) Any tax imposed under this section shall take effect from the date of its notification in the ^d[Official Gazette].]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 23, for the original section. [b] *Substituted* by A. O. for "Local Government". [c] The proviso to sub-section (1) was *repealed* by A. O. [d] *Substituted* by A. O. for "local official Gazette".

^a[61. When a resolution has been passed by the Board proposing to impose a tax under *Framing of preliminary proposals.* section 60, the Board shall in the manner prescribed in section 255 publish a notice specifying—

(a) the tax which it is proposed to impose;

(b) the persons or classes of persons to be made liable and the description of the property or other taxable thing or circumstance in respect of which they are to be made liable; and

(c) the rate at which the tax is to be levied.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 24, for the original section.

^a[62. (1) Any inhabitant of the cantonment may, within thirty days from the publication of *Objections and disposal thereof.* the notice under section 61, submit to the Board an objection in writing to all or any of the proposals contained therein and the Board shall take any objection into consideration and pass orders thereon by special resolution.

(2) If the Board decides to modify its proposals, or any of them, it shall re-publish the modified proposals in the manner provided by section 61 indicating that the proposals are in modification of the proposals previously published; and the provisions of sub-section (1) of this section shall apply to such modified proposals.

(3) When the Board has finally settled the proposals, it shall submit them along with the objections, if any, made in connection therewith to the ^b[Central Government] through the Officer Commanding-in-Chief, the Command.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 24, for the original section. [b] *Substituted* by A. O. for "Local Government."

^a[63. The ^b[Central Government] may authorise the Board to impose the tax either in the *Imposition of tax.* original form or, if any objection has been submitted, in that form or any such modified form as it thinks fit.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 24, for the original section.

[b] *Substituted* by A. O. for "Local Government."

Definition of "annual value." 64. For the purposes of this Chapter, "annual value" means—

(a) in the case of railway stations, hotels, colleges, schools, hospitals, factories and any other buildings which a ^a[Board] decides to assess under this clause, one-twentieth of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appertaining thereto, and

(b) in the case of a building or land not assessed under clause (a), the gross annual rent for which such building (exclusive of furniture or machinery therein) or such land is actually let or, where the building or land is not let or in the opinion of the ^a[Board] is let for a sum less than its fair letting value, might reasonably be expected to let from year to year :

Provided that, where the annual value of any building is by reason of exceptional circumstances, in the opinion of the ^a[Board], excessive if calculated in the aforesaid manner, the ^a[Board] may fix the annual value at any less amount which appears to it to be just.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

65. (1) Save as otherwise expressly provided in the notification imposing the tax, every tax *Incidence of taxation.* ^a[assessed] on the annual value of buildings or lands or of both shall be leviable primarily upon the actual occupier of the property upon which the said tax is assessed,

Section 65 — Note 1

[1: "We have provided in sub-clause (4) of this clause that it should be lawful for a person who is compelled to

make a payment of tax on account of another person to deduct the amount paid from any rent due by him to such person."—*Select Committee Report.*

if he is the owner of the buildings or lands or holds them on a building or other lease ^b[granted by or on behalf of the ^c[Crown] or] the ^d[Board] or on a building lease from any person.

(2) In any other case, the tax shall be primarily leviable as follows, namely :—

(a) if the property is let, upon the lessor ;

(b) if the property is sub-let, upon the superior lessor ;

(c) if the property is unlet, upon the person in whom the right to let the same vests.

(3) On failure to recover any sum due on account of such tax from the person primarily liable, there may be recovered from the occupier of any part of the buildings or lands in respect of which the tax is due such portion of the sum due as bears to the whole amount due the same ratio which the rent annually payable by such occupier bears to the aggregate amount of rent so payable in respect of the whole of the said buildings or lands, or to the aggregate amount of the letting value thereof, if any, stated in the authenticated assessment list.

(4) An occupier who makes any payment for which he is not primarily liable under this section shall, in the absence of any contract to the contrary, be entitled to be reimbursed by the person primarily liable for the payment, and, if so entitled, may deduct the amount so paid from the amount of any rent from time to time becoming due from him to such person.

[a] *Inserted by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 7.* [b] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 25, for the words "from the Secretary of State in Council or from."* [c] *Substituted by A. O. for "Secretary of State in Council."* [d] *Substituted by Act 24 [XXIV] of 1936, S. 69, for "Cantonment Authority."*

Assessment List.

66. When a tax ^a[assessed] on the annual value of buildings or lands or both is imposed, the *Assessment list.* ^b[Board] shall cause an assessment list of all buildings or lands in the cantonment, or of both, as the case may be, to be prepared in such form as the ^c[Central Government] may by rule prescribe.

[a] *Inserted by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 8.* [b] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."* [c] *Substituted by A. O. for "Local Government."*

67. When the assessment list has been prepared, the ^a[Board] shall give public notice thereof, *Publication of assessment list.* and of the place where the list or a copy thereof may be inspected; and every person claiming to be the owner, lessee or occupier of any property included in the list, and any authorised agent of such person, shall be at liberty to inspect the list and to make extracts therefrom free of charge.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."*

68. (1) The ^a[Board] shall, at the same time, give public notice of a date, not less than one *Revision of assessment list.* month thereafter, when it will proceed to consider the valuations and assessments entered in the assessment list, and, in all cases in which any property is for the first time assessed or the assessment is increased, it shall also give written notice thereof to the owner and to any lessee or occupier of the property.

(2) Any objection to a valuation or assessment shall be made in writing to the ^a[Board] before the date fixed in the notice, and shall state in what respect the valuation or assessment is disputed, and all objections so made shall be recorded in a register to be kept for the purpose by the ^a[Board].

(3) The objections shall be inquired into and investigated, and the persons making them shall be allowed an opportunity of being heard either in person or by authorised agent, by an Assessment Committee appointed by the ^a[Board].

(4) The Assessment Committee shall consist of not less than three persons, and, ^b[* * *] it shall not be necessary to appoint to the Assessment Committee any member ^c[of the Board].

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."* [b] The words "where there is a Board" were *repealed* by Act 24 [XXIV] of 1936, S. 26. [c] *Substituted by S. 26, ibid., for "thereof."*

69. (1) When all objections made under section 68 have been disposed of and the revision *Authentication of assessment list.* of the valuation and assessment has been completed, the assessment list shall be authenticated by the signature of the members of the Assess-

Section 69 — Note 1

[1] As to the conditions of right to appeal, see S. 87 (a).

ment Committee who shall, at the same time, certify that they have considered all objections duly made and have amended the list so far as is required by their decisions on such objections.

(2) The assessment list so authenticated shall be deposited in the office of the ^a[Board], and shall there be open, free of charge, during office hours to all owners, lessees and occupiers of property comprised therein or the authorised agents of such persons, and a public notice that it is so open shall forthwith be published.

^a Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

70. Subject to such alterations as may thereafter be made in the assessment list under the *Evidential value of provisions of this Chapter and to the result of any appeal made there-* *assessment list.* under, the entries in the assessment list authenticated and deposited as provided in section 69 shall be accepted as conclusive evidence—

- (i) for the purpose of assessing any tax imposed under this Act, of the annual value or other valuation of all buildings and lands to which such entries respectively refer, and
- (ii) for the purposes of any tax imposed on buildings or lands, of the amount of each such tax leviable thereon during the year to which such list relates.

Amendment of assessment list. 71. ^a[(1) The Board may amend the assessment list at any time—

- (a) by inserting or omitting the name of any person whose name ought to have been or ought to be inserted or omitted, or
- (b) by inserting or omitting any property which ought to have been or ought to be inserted or omitted, or
- (c) by altering the assessment on any property which has been erroneously valued or assessed through fraud, accident or mistake, whether on the part of the Board or of the Assessment Committee or of the assessee, or
- (d) by revaluing or re-assessing any property the value of which has been increased, or
- (e) in the case of a tax payable by an occupier, by changing the name of the occupier :

Provided that no person shall by reason of any such amendment become liable to pay any tax or increase of tax in respect of any period prior to the commencement of the year in which the assessment is made.]

^b[(1a) Before making any amendment under sub-section (1) the Board shall give to any person affected by the amendment notice of not less than one month that it proposes to make the amendment.]

(2) Any person interested in any such amendment may tender an objection to the ^c[Board] in writing before the time fixed in the notice, and shall be allowed an opportunity of being heard in support of the same in person or by authorised agent.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 27, for the original sub-section. [b] Inserted by S. 27, *ibid.* [c] Substituted by S. 69, *ibid.*, for "Cantonment Authority".

72. The ^a[Board] shall prepare a new assessment list at least once in every three years, and *Preparation of new* for this purpose the provisions of sections 66 to 71 shall apply in like *assessment list.* manner as they apply for the purpose of the preparation of an assessment list for the first time.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

73. (1) Whenever the title of any person primarily liable for the payment of a tax on the annual *Notice of transfers.* value of any building or land to or over such building or land is transferred, the person whose title is transferred and the person to whom the same is transferred shall, within three months after the execution of the instrument of transfer or after its registration, if it is registered, or after the transfer is effected, if no instrument is executed, give notice of such transfer to the Executive Officer.

Section 71 — Note 1

[1] As to the conditions of right to appeal, see S. 87 (a).

Section 72 — Note 1

[1] "We think it unnecessary to require the prepara-

tion of a fresh assessment list every year, and have accordingly made it obligatory only once in three years." —*Select Committee Report.*

(2) In the event of the death of any person primarily liable as aforesaid, the person on whom the title of the deceased devolves shall give notice of such devolution to the Executive Officer within six months from the death of the deceased.

(3) The notice to be given under this section shall be in such form as the Executive Officer may direct, and the transferee or other person on whom the title devolves shall, if so required, be bound to produce before the Executive Officer any documents evidencing the transfer or devolution.

(4) Every person who makes a transfer as aforesaid without giving such notice to the Executive Officer shall continue liable for the payment of all taxes assessed on the property transferred until he gives notice or until the transfer has been recorded in the registers of the ^a[Board], but nothing in this section shall be held to affect the liability of the transferee for the payment of the said tax.

^b[(5) The Executive Officer shall record every transfer ^c[or] devolution of title notified to him under sub-section (1) or sub-section (2) in the assessment list and other tax registers of the Board.]

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Inserted by S. 28, *ibid.** [c] *Substituted by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Sch. II, for "on".*

74. (1) If any building is erected or re-erected within the meaning of section 179, the owner shall give notice thereof to the Executive Officer within thirty days from the date of its completion or occupation, whichever is earlier.

(2) Any person failing to give the notice required by sub-section (1) shall be punishable with fine which may extend to fifty rupees or ten times the amount of the tax payable on the said building, as erected or re-erected, as the case may be, in respect of a period of three months, whichever is greater.

Remission and Refund.

75. If any building is wholly or partly demolished or destroyed or otherwise deprived of value, the ^a[Board] may, on the application ^b[in writing] of the owner ^c[or occupier], remit or refund such portion of ^d[any tax assessed on the annual value thereof] as it thinks fit.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Inserted by the Cantonments (Amendment) Act, 1931 (7 [VII] of 1931), S. 4.* [c] *Inserted by Act 24 [XXIV] of 1936, S. 29.* [d] *Substituted by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 9, for "the tax payable thereon".*

76. In a cantonment ^a[* * * *] when any building or land has remained vacant and unproductive of rent for ^b[sixty] or more consecutive days ^c[* * *] the ^d[Board] shall remit or refund, as the case may be, such portion of ^e[any tax assessed on the annual value thereof] ^f[* * *] as may be proportionate to the number of days during which the said building or land has remained vacant and unproductive of rent.

^g[Provided that in any cantonment which the Central Government, by notification in the Official Gazette, has declared to be a hill cantonment and in respect of which the Central Government by the same or a like notification has declared a portion of the year to be the season for the cantonment, when any building or land is leased for occupation through the season only, but the rent charged is the full annual rent, no remission or refund shall be admissible under this section in respect of any time outside the season during which the building or land remains vacant, but in respect of any time, not being less than sixty consecutive days during which within the season such building or land has remained vacant and unproductive of rent, the Board shall remit or refund such portion of any tax assessed on the annual value thereof as bears to the whole of the tax so assessed the same proportion as the number of days during which the building or land has remained vacant and unproductive of rent bears to the total length of the season.]

[a] The words "other than a hill cantonment" were *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 30. [b] *Substituted by S. 30, *ibid.** for "ninety". [c] The words "during any year" were *repealed* by S. 30, *ibid.* [d] *Substituted by S. 69, *ibid.** for "Cantonment Authority". [e] *Substituted by Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 10, for "the tax payable thereon".* [f] The words "and payable in respect of that year" were *repealed* by Act 24 [XXIV] of 1936, S. 30. [g] Proviso was *added* by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 7. [30-3-1942.]

77. For the purpose of obtaining a partial remission or refund of tax, the owner of a building composed of separate tenements may request the ^a[Board], at the time of the assessment of the building, to enter in the assessment list, in addition to the annual value of the whole building, a note recording in detail the annual value of each separate tenement. When any tenement, the annual value of which

Power to require entry in assessment list of details of buildings.

has been thus separately recorded, has remained vacant and unproductive of rent for ^b[sixty] or more consecutive days ^c[* * *] such portion of ^d[any tax assessed on the annual value of the whole building ^e[* * *]] shall be remitted or refunded as would have been remitted or refunded if the tenement had been separately assessed.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Substituted by S. 30, ibid., for "ninety".* [c] The words "during any year" were *repealed* by S. 30, *ibid.* [d] *Substituted by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 11, for "the tax payable in respect of that year on the whole building".* [e] The words "and payable in respect of that year" were *repealed* by Act 24 [XXIV] of 1936, S. 30.

^a 77A.] ^b[No remission or refund under ^c[* * *] section 76 or section 77] shall be made unless notice in writing of the ^d[fact that the building, land or tenement has become vacant and unproductive of rent] has been given to the ^e[Board], and no remission or refund shall take effect in respect of any period commencing more than fifteen days before the delivery of such notice.

[a] The proviso to S. 77 was numbered as S. 77A by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 11. [b] *Substituted by S. 11, ibid., for "Provided that no such remission."* [c] The words "section 75" were *repealed* by the Cantonments (Amendment) Act, 1931 (7 [VII] of 1931), S. 5. [d] *Substituted by S. 5, ibid., for "circumstances in which it is claimed."* [e] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."*

78. (1) For the purposes of sections 76 and 77 no building, tenement or land shall be deemed *What buildings, etc., are* vacant if maintained as a pleasure resort or town or country house, or *to be deemed vacant,* be deemed unproductive of rent if let to a tenant who has a continuing right of occupation thereof, whether he is in actual occupation or not.

(2) The burden of proving all facts entitling any person to claim relief under section 75, or section 76, or section 77, shall be upon him.

79. (1) The owner of any building, tenement or land in respect of which a remission or *Notice to be given of every* refund of tax has been given under section 76 or section 77 shall *occupation of vacant build-* give notice of the re-occupation of such building, ^a[tenement] or land *ing or house.* within fifteen days of such re-occupation.

(2) Any owner failing to give the notice required by sub-section (1) shall be punishable with fine which shall not be less than twice the amount of the tax payable on such building, tenement or land in respect of the period during which it has been re-occupied and which may extend to fifty rupees, or to ten times the amount of the said tax, whichever sum is greater.

[a] *Inserted by the Repealing and Amending Act, 1934 (24 [XXIV] of 1934), S. 2 and Sch. I.*

Charge on Immoveable Property.

80. A tax assessed on the annual value of any building or land shall, subject to the prior *Tax on buildings and* payment of the land-revenue, if any, due to the Government thereon, be *land to be a charge thereon.* a first charge upon the building or land.

Octroi, Terminal Tax and Toll.

81. Every person bringing or receiving any goods, vehicles or animals within the limits of *Inspection of imported* any cantonment in which octroi or terminal tax or toll is leviable, shall, *goods, etc.* when so required by an officer duly authorised by the ^a[Board] in this behalf, so far as may be necessary for ascertaining the amount of tax chargeable —

(a) permit that officer to inspect, examine or weigh such goods, vehicles or animals; and

(b) communicate to that officer any information, and exhibit to him any bill, invoice or document of a like nature, which such person may possess relating to such goods, vehicles or animals.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

82. (1) Any person who takes or attempts to take past any octroi station or any other place *Evasion of octroi or* appointed within a cantonment for the collection of octroi, terminal tax or *terminal tax.* toll any goods, vehicles or animals, on account of which octroi, terminal tax or toll is leviable and thereby evades, or attempts to evade, the payment of such octroi, terminal tax or toll, and any person who abets any such evasion, or attempt at evasion,

Section 81 — Note 1

[1] As to the meaning of the word 'imported', see (1897) 22 Bom 843 (844).

Section 82 — Note 1

[1] "We have re-drafted the first part of sub-clause (1) of this clause in order to meet an objection

made to the original clause that, as octroi limits are frequently situated some distance inside the boundary of a cantonment, a person would be unable either to pay or tender octroi before introducing into the cantonment the goods on which the tax is payable." — *Select Committee Report.*

shall be punishable with fine which may extend either to ten times the value of such octroi, terminal tax or toll, or to fifty rupees, whichever is greater and which shall not be less than twice the value of such octroi, terminal tax or toll, as the case may be.

(2) In case of non-payment of any octroi or terminal tax or toll on demand, the officer empowered to collect the same may seize any goods, vehicles or animals on which the octroi, terminal tax or toll is chargeable or any part or number thereof which is of sufficient value to satisfy the demand ^a and shall give a receipt specifying the items seized.]

(3) The ^b [Board], after the lapse of five days from the seizure, and after the issue of a notice in writing to the person in whose possession the goods, vehicles or animals were at the time of seizure, fixing the time and place of sale, may cause the property so seized, or so much thereof as may be necessary, to be sold by auction to satisfy the demand and any expenses occasioned by the seizure, custody and sale thereof, unless the demand and expenses are in the meantime paid :

Provided that the Executive Officer may, in any case, order that any article of a perishable nature which cannot be kept for five days without serious risk of damage, or which cannot be kept save at a cost which, together with the amount of octroi, terminal tax or toll, is likely to exceed its value, shall be sold after the lapse of such shorter time as he may, having regard to the nature of the article, think proper.

(4) If, at any time before the sale has begun, the person whose property has been seized tenders to the Executive Officer the amount of all expenses incurred and of the octroi, terminal tax or toll, the Executive Officer shall release the property seized.

(5) The surplus, if any, of the sale-proceeds shall be credited to the cantonment fund, and shall, on application made to the ^b [Board] within one year after the sale, be paid to the person in whose possession the property was at the time of seizure, and, if no such application is made, shall be the property of the ^b [Board].

[a] Inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 31. [b] Substituted by S. 69, *ibid*, for "Cantonment Authority".

83. It shall be lawful for the ^a [Board], with the previous sanction of the ^b [Officer Commanding-Lease of octroi, terminal in-Chief, the Command,] to lease the collection of any octroi, terminal tax or toll. tax or toll for any period not exceeding one year ; and the lessee and all persons employed by him in the management and collection of the octroi, terminal tax or toll shall, in respect thereof,—

(a) be bound by any orders made by the ^a [Board] for their guidance ;

(b) have such powers exercisable by officers or servants of the ^a [Board] under this Act as the ^a [Board] may confer upon them ; and

(c) be entitled to the same remedies and be subject to the same responsibilities as if they were employed by the ^a [Board] for the management and collection of the octroi, terminal tax or toll, as the case may be :

Provided that no article distrained may be sold except under the orders of the ^a [Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority." [b] Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the District."

Appeals.

84. (1) An appeal against the assessment or levy of, or against the refusal to refund, any *Appeals against* tax under this Act shall lie to the District Magistrate or to such other officer *assessment.* as may be empowered by the ^a [Central Government] in this behalf :

Provided that, where ^b [* * *] the person to whom the appeal would ordinarily lie is, or was when the tax was imposed, a member of the Board, the appeal shall lie to the Commissioner of the Division, or, in a Province where there are no Commissioners, to the District Judge.

Section 84 — Note 1 — Suit for refund of tax

[1] Where a plaintiff brings a suit for the refund of tax assessed under this Act, if the Court is of opinion that the tax levied is *ultra vires* of the Act, the civil Court will have jurisdiction to entertain the suit; but not if the tax levied is *intra vires*. (Vol 26) 1939 Lah 147 (148).

[2] The jurisdiction of the civil Court is excluded in all matters relating to any valuation, assessment, liabi-

lity to assessment or taxation by the Board. (Vol 20) 1933 All 163 (165).

[3] Section 84 gives a remedy to an aggrieved person against the levy of tax. Section 88 provides that an order passed by an appellate authority shall be final. Hence, the remedy of the person to resort to a civil Court for refund of excess tax or for an injunction restraining the Cantonment Authorities to levy alleged excess tax in future is clearly barred. (Vol 24) 1937 Sind 305 (306).

(2) If, on the hearing of an appeal under this section, any question as to the liability to, or the principle of assessment of, a tax arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of the appellant, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer the statement with his own opinion on the point for the decision of the High Court.

(3) On a reference being made under sub-section (2), the subsequent proceedings in the case shall be, as nearly as may be, in conformity with the rules relating to references to the High Court contained in Order XLVI of the First Schedule to the Code of Civil Procedure, 1908.

[a] Substituted by A. O. for "Local Government." [b] The words "there is a Board and" were repealed by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 32.

85. In every appeal the costs shall be in the discretion of the officer hearing the appeal.

86. If the ^a[Board] fails to pay any costs awarded to an appellant within ten days after the date of the order for payment thereof, the Officer awarding the costs may order the person having the custody of the balance of the cantonment fund to pay the amount.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

Conditions of right to appeal. **87.** No appeal shall be heard or determined under this Chapter unless —

(a) the appeal is, in the case of a tax assessed on the annual value of buildings or lands or both, brought within thirty days next after the date of the authentication of the assessment list under section 69 (exclusive of the time requisite for obtaining a copy of the relevant entries therein), or, as the case may be, within thirty days of the date on which an amendment is finally made under section 71, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days next after the date of the presentation of the first bill in respect thereof:

Provided that an appeal may be admitted after the expiration of the period prescribed therefor by this section if the appellant satisfies the Court before whom the appeal is preferred that he had sufficient cause for not preferring it within that period;

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the ^a[Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

88. The order of an appellate authority confirming, setting aside or modifying an order in respect of any valuation or assessment or liability to assessment or taxation shall be final:

Finality of appellate orders.

Provided that it shall be lawful for the appellate authority, upon application or on its own motion, to review any order passed by it in appeal if application in this behalf is made within three months from the date of the original order.

Payment and Recovery of Taxes.

89. Save as otherwise expressly provided under this Act, any tax imposed under the provisions of this Act shall be payable on such dates and in such instalments, if any, as the ^a[Board] may, by public notice, direct.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

90. (1) When any tax has become due, the Executive Officer shall cause to be presented to the person liable for the payment thereof a bill for the amount due.

(2) Every such bill shall specify the particulars of the tax and the period for which the charge is made.

91. (1) If the amount of the tax for which any bill has been presented is not paid to the ^a[Board] within thirty days from the presentation thereof, the Executive Officer may cause to be served upon the person liable for the payment of the same a notice of demand in the form set forth in Schedule I.

(2) For every notice of demand which the Executive Officer causes to be served on any person under this section, a fee of such amount, not exceeding one rupee, as shall in each case be

fixed by the Executive Officer, shall be payable by the said person and shall be included in the costs of recovery.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

92. (1) If the person liable for the payment of any tax does not, within thirty days from the *Recovery of tax.* service of the notice of demand, pay the amount due, or show sufficient cause for non-payment of the same to the satisfaction of the Executive Officer, such sum, with all costs of recovery, may be recovered under a warrant, issued in the form set forth in Schedule II, by distress and sale of the moveable property of the defaulter :

Provided that the Executive Officer shall not recover any sum the liability for which has been remitted on appeal under this Chapter.

(2) Every warrant issued under this section shall be signed by the Executive Officer.

93. (1) It shall be lawful for any servant of the ^a[Board] to whom a warrant issued under *Distress.* section 92 is addressed to distrain, wherever it may be found ^b[in the cantonment], any moveable property of ^b[or standing timber, growing crops or grass belonging to] the person therein named as defaulter, subject to the following conditions, exceptions and exemptions; namely :—

(a) the following property shall not be distrained :—

- (i) the necessary wearing apparel and bedding of the defaulter, his wife and children,
 - (ii) tools of artisans,
 - (iii) books of account, or
 - (iv) when the defaulter is an agriculturist, his implements of husbandry, seed-grain, and such cattle as may be necessary to enable the defaulter to earn his livelihood ;
- (b) the distress shall not be excessive, that is to say, the property distrained shall be as nearly as possible equal in value to the amount recoverable under the warrant, and if any property has been distrained which, in the opinion of the Executive Officer, should not have been distrained, it shall forthwith be returned.

(2) The person charged with the execution of a warrant of distress shall forthwith make an inventory of the property which he seizes under such warrant, and shall, at the same time, give a written notice in the form set forth in Schedule III to the person in possession thereof at the time of seizure that the said property will be sold as therein mentioned.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Inserted* by S. 33, *ibid.*

94. (1) When the property seized is subject to speedy and natural decay, or when the *Disposal of distrained property.* expense of keeping it in custody is, when added to the amount to be recovered, likely to exceed its value, the Executive Officer shall give notice to the person in whose possession the property was at the time of seizure that it will be sold at once, and shall sell it accordingly by public auction unless the amount mentioned in the warrant is forthwith paid.

(2) If the warrant is not in the meantime suspended by the Executive Officer, or discharged, the property seized shall, after the expiry of the period named in the notice served under sub-section (2) of section 93, be sold by public auction by order of the Executive Officer.

(3) The surplus of the sale-proceeds, if any, shall forthwith be credited to the cantonment fund, and notice of such credit shall be given at the same time to the person from whose possession the property was taken, and, if the same is claimed by written application to the ^a[Board] within one year from the date of the notice, a refund thereof shall be made to such person. Any surplus not claimed within one year as aforesaid shall be the property of the ^a[Board].

(4) For every distraint made under this Chapter a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer shall be charged, and the said fee shall be included in the costs of recovery.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Section 93 — Note 1

[1] As to whether a distraint becomes invalid by reason of immaterial defect, see section 105.

Section 94 — Note 1

[1] "We have made a slight amendment in sub-clauses (1) and (2) which will require distrained property, if sold, to be sold by public auction." — *Select Committee Report.*

95. (1) If the Executive Officer has reason to believe that any person from whom any sum *Recovery from a person* is due ^a[or is about to become due] on account of any tax is about to *about to leave cantonment.* remove from the cantonment, he may direct the immediate payment by such person of the sum so due or about to become due, and cause a bill for the same to be served on such person.

(2) If, on the service of such bill, such person does not forthwith pay the sum so due or about to become due, the amount shall be leviable by distress and sale in the manner hereinbefore provided in this Chapter, except that it shall not be necessary to serve upon the defaulter any notice of demand and the warrant for distress and sale may be issued and executed without any delay.

[a] *Inserted* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Schedule I.

96. Instead of proceeding against a defaulter by distress and sale as hereinbefore provided *Power to institute* in this Chapter, or after a defaulter has been so proceeded against unsuccessfully *suit for recovery.* fully or with only partial success, any sum due or the balance of any sum due, as the case may be, from such defaulter on account of a tax may be recovered from him by a suit in any Court of competent jurisdiction.

Special Provisions relating to Taxation.

Power to prohibit or exempt from taxation. **97.** Every ^a[Board] shall be deemed to be a Municipal Committee for the purposes of the Municipal Taxation Act, 1881.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

98. A ^a[Board] may make special provision for the cleansing of any factory, hotel, club or *Power to make special provision for conservancy in certain cases.* group of buildings or lands used for any one purpose and under one management, and may fix a special rate and the dates and other conditions for periodical payment thereof, which shall be determined by a written agreement with the person liable for the payment of the conservancy or scavenging tax in respect of such factory, hotel, club or group of buildings or lands :

Provided that, in fixing the amount, proper regard shall be had to the probable cost to the ^a[Board] of the services to be rendered.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

99. (1) When, in pursuance of section 98, a ^a[Board] has fixed a special rate for the cleansing of any factory, hotel, club or group of buildings or lands, such *Exemption in the case of buildings.* premises shall be exempted from the payment of any conservancy or scavenging tax imposed in the cantonment.

(2) The following buildings and lands shall be exempt from any tax on property ^b[other than a tax imposed to cover the cost of specific services rendered by the Board], namely :—

- (a) places set apart for public worship and either actually so used or used for no other purpose ;
- (b) buildings used for educational purposes and public libraries, play-grounds and dharmshalas which are open to the public and from which no income is derived ;
- (c) hospitals and dispensaries maintained wholly by charitable contributions ;
- (d) burning and burial grounds, not being the property of ^c[the Crown] or a ^a[Board], which are controlled under the provisions of this Act ;
- (e) buildings or lands vested in a ^a[Board] ; and
- (f) any buildings or lands, used or acquired for the public service or for any public purpose, which are the property of ^d[the Crown] or in the occupation of ^e[the Central or any Provincial Government].

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority." [b] *Inserted* by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 8. [30-3-1942.]

[c] *Substituted* by A. O. for "Government." [d] *Inserted* by A. O. [e] *Substituted* by A. O. for "the Government."

General power of exemption. ^a[99A. The ^b[Central Government] may, by notification in the ^c[Official Gazette], exempt, either wholly or in part from the payment of any tax

Section 99 — Note 1

[1] "We have added a sub-clause (2) to this clause of buildings which are commonly so exempt under in order to exempt from property taxes certain classes municipal enactments." — *Select Committee Report.*

imposed under this Act, any person or class of persons or any property or goods or class of property or goods ^a[* * *].

[a] *Inserted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 7. [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "local official Gazette". [d] The words "belonging to the Secretary of State for India in Council" were *repealed* by the Cantonments (Amendment) Act, 1931 (7 [VII] of 1931), S. 6.

100. A ^a[Board] may exempt, for a period not exceeding one year at a time from the *Exemption of poor persons.* payment of any tax or any portion of a tax imposed under this Act, any person who is in its opinion by reason of poverty unable to pay the same.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

101. (1) A ^a[Board] may, with the previous sanction of the ^b[Officer Commanding-in-Chief, Composition. the Command,] allow any person to compound for any tax.

(2) Every sum due by reason of the composition of a tax under sub-section (1) shall be recoverable as if it were a tax.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by Act 35 [XXXV] of 1926, S. 2, for "Officer Commanding the District."

102. A ^a[Board] may write off any sum due on account of any tax ^b[or rate] or of the costs *Irrecoverable debts.* of recovering any tax ^b[or rate] if such sum is, in its opinion, irrecoverable:

^b[Provided that, where the sum written off in favour of any one person exceeds fifty rupees, the sanction of the Officer Commanding-in-Chief, the Command, shall be first obtained.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority." [b] *Inserted* by S. 34, *ibid.*

103. (1) The Executive Officer may, by written notice, call upon any inhabitant of the *Obligation to disclose liability.* cantonment to furnish such information as may be necessary for the purpose of ascertaining—

- (a) whether such inhabitant is liable to pay any tax imposed under this Act;
- (b) at what amount he should be assessed; or
- (c) the annual value of the building or land which he occupies and the name and address of the owner or lessee thereof.

(2) If any person, when called upon under sub-section (1) to furnish information, neglects to furnish it or furnishes information which is not true to the best of his knowledge or belief, he shall be punishable with fine which may extend to one hundred rupees.

104. No assessment and no charge or demand on account of any tax or fee shall be impeached *Immaterial error not to affect liability.* or affected by reason only of any mistake in the name of any person liable to pay such tax or fee, or in the description of any property or thing, or any mistake in the amount of the assessment, charge or demand, if the directions contained in this Act and the rules and bye-laws made thereunder have in substance and effect been complied with; but any person who sustains any special damage by reason of any such mistake shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

105. No distress levied under this Chapter shall be deemed unlawful, nor shall any person *Distraint not to be invalid by reason of immaterial defect.* making the same be deemed a trespasser, on account only of any defect of form in the notice of demand, warrant of distress or other proceeding relating thereto; nor shall any such person be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him; but any person who sustains any special damage by reason of any such irregularity shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

CHAPTER VI

CANTONMENT FUND AND PROPERTY.

Cantonment Fund.

106. There shall be formed for every cantonment a cantonment fund, and *Cantonment fund.* there shall be placed to the credit thereof the following sums, namely:—

- (a) the balance, if any, of the cantonment fund formed for the cantonment under the Cantonments Act, 1910,

Section 106 — Note 1

[1] The Indian Legislature had power under the Devolution Rules, 1920, to legislate with respect to

cantonments and with respect to criminal law; the latter power included a power to legislate with respect to the destination of fines imposed for breaches of the

(b) all sums received by or on behalf of the ^a[Board],

^b[* * * * *]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority." [b] The word "and" and cl. (c) were *repealed* by A. O. See however, para. 4 of the India and Burma (Transitory Provisions) Order, 1937.

107. (1) Where in or near a cantonment there is a Government treasury or sub-treasury, or *Custody of cantonment fund.* a branch of the Imperial Bank of India, the cantonment fund shall be kept in such treasury, sub-treasury or bank, as the case may be.

(2) Where there is no such treasury, sub-treasury or bank, the cantonment fund may be deposited with any bank to which the Government treasury business has been entrusted, and, in the absence of such a bank, with any banker or person acting as a banker who has given such security for the safe custody of the fund and the payment on demand of the funds so deposited as the ^a[Central Government] may in each case direct.

^b(3) A ^c[Board] may, from time to time, with the previous sanction of the ^d[Officer Commanding-in-Chief, the Command], invest any portion of its cantonment fund in securities of the ^e[Central Government] or in such other securities, including fixed deposits in banks, as the ^a[Central Government] may approve in this behalf, and may dispose of such investments or vary them for others of a like nature.]

(4) The income resulting from any fixed deposit or from any such security as is referred to in sub-section (3) or from the proceeds of the sale of any such security shall be credited to the cantonment fund.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by the Cantonments (Amendment) Act, 1927 (26 [XXVI] of 1927), S. 12, for the original sub-section. [c] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [d] *Substituted* by S. 35, *ibid*, for "Local Government". [e] *Substituted* by the A. O. for "Government of India".

Property.

108. Subject to any special reservation made by the ^a[Central Government] ^b[* * *], all *Property.* property of the nature hereinafter in this section specified which has been acquired or provided or is maintained by a ^c[Board] shall vest in and belong to that ^c[Board] and shall be under its direction, management and control, that is to say,—

- (a) all markets, slaughter-houses, manure and night-soil depots, and buildings of every description ;
- (b) all water-works for the supply, storage or distribution of water for public purposes and all bridges, buildings, engines, materials, and things connected therewith or appertaining thereto ;
- (c) all sewers, drains, culverts and water-courses, and all works, materials and things appertaining thereto ;
- (d) all dust, dirt, dung, ashes, refuse, animal matter, filth and rubbish of every kind, and dead bodies of animals collected by the ^c[Board] from the streets, houses, privies, sewers, cesspools or elsewhere, or deposited in places appointed by the ^c[Board] for such purpose;

Section 106 (contd.)

criminal law. If, therefore, the Indian Legislature chose to legislate as regards any Courts of criminal jurisdiction in a Province, including the Courts in cantonment areas, such legislation would prevail over any provincial legislation with respect to the administration of justice within the Province. A suit was instituted by the United Provinces against the Central Government for a declaration that S. 106 (c) was *ultra vires* the then Legislature and all fines imposed and realised by criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the United Provinces were entitled to recover and adjust all sums wrongly credited to the cantonment funds since 1924. It was held (i) that the United Provinces were not entitled to

a declaration that provisions of S. 106 (c) were *ultra vires*; (ii) that S. 106 (c) was a law in force immediately before the commencement of Part III of the Government of India Act, 1935, and under the India and Burma (Transitory Provisions) Order 1937, such fines credited to the cantonment funds must be deemed not to form part of the revenues of the United Provinces till 31st March 1939; and (iii) that as S. 106 (c) has been deleted under the Government of India (Adaptation of Indian Laws) Order, 1937, all such fines should be credited to the provincial revenues from 1st April 1939. (Vol 26) 1939 F. C. 58 (62, 64, 71) : I L R 1939 Kar F C 98 : 1939 F C R 124 (FC).

Section 108 — Note 1

[1] As to ownership of land situated in a cantonment, see Notes on Section 3.

- (e) all lamps and lamp-posts and apparatus connected therewith or appertaining thereto ;
- (f) all land or other property transferred to the ^a[Board] ^d[by the Central or a Provincial Government], or by gift, purchase or otherwise for local public purposes ; and
- (g) all streets and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements, and things existing on or appertaining to streets.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] The words "or the Local Government" were repealed by A. O. [c] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [d] *Substituted* by A. O. for "by His Majesty".

109. The cantonment fund and all property vested in a ^a[Board] shall be applied for *Application of cantonment fund and property.* the purposes, whether express or implied, for which, by or under this Act or any other law for the time being in force, powers are conferred or duties or obligations are imposed upon the ^a[Board] :

Provided that the ^a[Board] shall not incur any expenditure for acquiring or renting land beyond the limits of the cantonment or for constructing any work beyond such limits except —

- (a) with the sanction of the ^b[Central Government], and
- (b) on such terms and conditions as the ^b[Central Government] may impose :

Provided, further, that priority shall be given in the order hereinafter set forth to the following liabilities and obligations of a ^a[Board], that is to say, —

- (a) to the liabilities and obligations arising from a trust legally imposed upon or accepted by the ^a[Board] ;
- (b) to the repayment of, and the payment of interest on, any loan incurred under the provisions of the Local Authorities Loans Act, 1914 ;
- (c) to the payment of establishment charges ;
- (d) to the payment of such expenses on account of pauper lunatics sent from the cantonment to public lunatic asylums and mental hospitals as the ^b[Central Government] directs the ^a[Board] to pay ; and
- (e) to the payment of any sum the payment of which is expressly required by the provisions of this Act or any rule or bye-law made thereunder.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by A. O. for "Local Government".

110. When there is any hindrance to the permanent or temporary acquisition upon payment *Acquisition of immovable property.* of any land required by a ^a[Board] for the purposes of this Act, the ^b[Central Government] may, at the request of the ^a[Board], ^c[procure the acquisition thereof] under the provisions of the Land Acquisition Act, 1894, and on payment by the ^a[Board] of the compensation awarded under that Act and of the charges incurred by the Government in connection with the proceedings, the land shall vest in the ^a[Board].

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69 for "Cantonment Authority". [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "proceed to acquire it".

Power to make rules regarding cantonment fund and property.

111. The ^a[Central Government] may make rules^b consistent with this Act to provide for all or any of the following matters, namely :—

- (a) the conditions on which property may be acquired by ^c[Boards] or on which property vested in a ^d[Board] may be transferred by sale, mortgage, lease, exchange or otherwise ; and
- (b) any other matter relating to the cantonment fund or cantonment property in respect of which no provision or insufficient provision is made by or under this Act, and provision is, in the opinion of the ^a[Central Government], necessary.

[a] *Substituted* by A. O. for "Governor-General-in-Council". [b] For the Cantonment Property Rules, 1925, made under this section, see General Rules and Orders Vol. V, page 467. [c] *Substituted* by Act 24 [XXIV] of 1936, S. 69, for "Cantonment Authorities". [d] *Substituted* by S. 69, *ibid*, for "Cantonment Authority".

Section 109 — Note 1

[1] This section includes among the payments to which priority must be given by a Board the payment

of expenses on account of pauper lunatics sent from cantonments to public asylums, to such extent as the Central Government may direct. — See the Report of the Select Committee.

CHAPTER VII.

CONTRACTS.

Contracts by whom to be executed. **112.** Subject to the provisions of this Chapter, every ^a[Board] shall be competent to enter into and perform any contract necessary for the purposes of this Act.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

Sanction. **113. (1)** Every contract —

(a) for which budget provision does not exist, or

(b) which involves a value or amount exceeding one hundred rupees, shall require the sanction of the ^a[Board].

(2) Every contract other than a contract such as is referred to in sub-section (1) shall be sanctioned by the ^a[Board] or by the Executive Officer on behalf of the ^a[Board].

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

114. (1) Every contract made by or on behalf of a ^a[Board] the value or amount of which exceeds fifty rupees, shall be in writing, and every such contract shall, ^b[* * *] be signed by two members, of whom the President or the Vice-President shall be one, and be countersigned by the Executive Officer and be sealed with the common seal of the Board, ^c[* * *]:

Provided that ^b[* * *] Executive Officer may in a case of urgency, with the previous sanction of the President of the Board, execute on behalf of the Board any contract the value or amount of which does not exceed two hundred rupees.

(2) Where an Executive Officer executes a contract on behalf of a Board under sub-section (1), he shall submit a report of his action and of the reasons therefor to the Board at its next meeting.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] The words "where there is a Board" were *repealed* by S. 36, *ibid.* [c] The words "or, where there is no Board, be signed by the Officer Commanding the station, and be sealed with the official seal of the Cantonment Authority" were *repealed* by S. 36, *ibid.*

115. If any contract is executed by or on behalf of a ^a[Board] otherwise than in conformity with the provisions of this Chapter, it shall not be binding on the ^a[Board].

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

CHAPTER VIII.

DUTIES AND DISCRETIONARY FUNCTIONS OF ^a[BOARDS].

116. It shall be the duty of every ^b[Board], so far as the funds at its disposal permit, to make reasonable provision within the cantonment for—

- (a) lighting streets and other public places ;
- (b) watering streets and other public places ;
- (c) cleansing streets, public places and drains, abating nuisances and removing noxious vegetation ;
- (d) regulating offensive, dangerous or obnoxious trades, callings and practices ;
- (e) removing, on the ground of public safety, health or convenience, undesirable obstructions and projections in streets and other public places ;
- (f) securing or removing dangerous buildings and places ;
- (g) acquiring, maintaining, changing and regulating places for the disposal of the dead ;
- (h) constructing, altering and maintaining streets, culverts, markets, slaughter-houses, latrines, privies, urinals, drains, drainage works and sewerage works ;
- (i) planting and maintaining trees on roadsides and other public places ;
- (j) providing or arranging for a sufficient supply of pure and wholesome water, where such supply does not exist, guarding from pollution water used for human consumption, and preventing polluted water from being so used ;

- (k) registering births and deaths ;
- (l) establishing and maintaining a system of public vaccination ;
- (m) establishing and maintaining or supporting public hospitals and dispensaries, and providing public medical relief ;
- (n) establishing and maintaining ^c[or assisting] primary schools ;
- (o) rendering assistance in extinguishing fires, and protecting life and property when fires occur ;
- (p) maintaining and developing the value of property vested in, or entrusted to the management of, the ^b[Board] ; and
- (q) fulfilling any other obligation imposed upon it by or under this Act or any other law for the time being in force.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authorities". [b] *Substituted* by S. 69, *ibid.*, for "Cantonment Authority". [c] *Inserted* by S. 37, *ibid.*

^a[116A. A ^b[Board] may, subject to any conditions imposed by the ^c[Central Government], *Power to manage* manage any property entrusted to its management by the ^c[Central Government] on such terms as to the sharing of rents and profits accruing from such property. *property.* ment] as to the sharing of rents and profits accruing from such property as may be determined by rule made under section 280.]

[a] *Inserted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 6. [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [c] *Substituted* by A. O. for "Governor-General in Council".

Discretionary functions of Board. 117. ^a[(1)] A ^b[Board] may, within the cantonment, make provision for —

- (a) laying out in areas, whether previously built upon or not, new streets, and acquiring land for that purpose and for the construction of buildings, and compounds of buildings, to abut on such streets ;
- (b) constructing, establishing or maintaining public parks, gardens, offices, dairies, bathing or washing places, drinking fountains, tanks, wells and other works of public utility ;
- (c) reclaiming unhealthy localities ;
- (d) furthering educational objects by measures other than the establishment and maintenance of primary schools ;
- (e) taking a census and granting rewards for information which may tend to secure the correct registration of vital statistics ;
- (f) making a survey ;
- (g) giving relief on the occurrence of local epidemics by the establishment or maintenance of relief works or otherwise ;
- (h) securing or assisting to secure suitable places for the carrying on of any offensive, dangerous or obnoxious trade, calling or occupation ;
- (i) establishing and maintaining a farm or other place for the disposal of sewage ;
- (j) constructing, subsidising or guaranteeing tramways or other means of locomotion, and electric lighting or electric power works ; ^c[or]
- (k) adopting any measure, other than a measure specified in section 116 or in the foregoing provisions of this section, likely to promote the safety, health or convenience of the inhabitants of the cantonment ; ^d[*]

^e[* * * * *]

^f[(2) A Board may, either within or outside the cantonment, make provision for the doing of anything on which expenditure is declared by the Central Government, or by the Board with the sanction of the Central Government, to be an appropriate charge on the cantonment fund.]

[a] Section 117 was re-numbered as sub-section (1) of that section by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 9. [30-3-1942.] [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [c] The word "or" was added by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 9. [d] The word "or" was omitted by S. 9, *ibid.* [e] The Clause (l) was omitted by S. 9, *ibid.* [f] Sub-section (2) was added by S. 9, *ibid.*

Power of expenditure for educational purposes outside the cantonment.

^a[117A. A ^b[Board] may make provision for educational objects outside the cantonment if it is satisfied that the interests of the residents of the cantonment will be served thereby.]

[a] *Inserted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 8. [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

CHAPTER IX.

PUBLIC SAFETY AND SUPPRESSION OF NUISANCES.

General Nuisances.

Penalty for causing nuisances. **118, (1) Whoever —**

- (a) in any street or other public place within a cantonment, —
- (i) is drunk and disorderly or drunk and incapable of taking care of himself ; or
 - (ii) uses any threatening, abusive or insulting words, or behaves in a threatening or insulting manner with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned ; or
 - (iii) eases himself, or wilfully or indecently exposes his person ; or
 - (iv) loiters, or begs importunately, for alms ; or
 - (v) exposes or exhibits, with the object of exciting charity, any deformity or disease or any offensive sore or wound ; or
 - (vi) carries meat exposed to public view ; or
 - (vii) is found gaming ; or
 - (viii) pickets animals, or collects carts ; or
 - (ix) being engaged in the removal of night-soil or other offensive matter or rubbish, wilfully or negligently permits any portion thereof to spill or fall, or neglects to sweep away or otherwise effectually to remove any portion thereof which may spill or fall in such street or place ; or
 - (x) without proper authority affixes upon any building, monument, post, wall, fence, tree or other thing, any bill, notice or other document ; or
 - (xi) without proper authority defaces or writes upon or otherwise marks any building, monument, post, wall, fence, tree or other thing ; or
 - (xii) without proper authority removes, destroys, defaces or otherwise obliterates any notice or other document put up or exhibited under this Act ; or
 - (xiii) without proper authority displaces, damages, or makes any alteration in, or otherwise interferes with, the pavement, gutter, stormwater-drain, flags or other materials of any such street, or any lamp, bracket, direction-post, hydrant or waterpipe maintained by the ^a[Board] in any such street or public place, or extinguishes a public light ; or
 - (xiv) carries any corpse not decently covered or without taking due precautions to prevent risk of infection or injury to the public health or annoyance to passers-by or to persons dwelling in the neighbourhood ; or
 - (xv) carries night-soil or other offensive matter or rubbish at any hour prohibited by the ^a[Board] by public notice, or in any pattern of cart or receptacle which has not been approved for the purpose by the ^a[Board], or fails to close such cart or receptacle when in use ; or

Chapter IX — Note 1

[1] As to the power of the Central Government to extend any of the provisions of Chap. IX to any area beyond a cantonment and in the vicinity thereof, *see* Section 286.

Section 118 — Note 1

Section 118 (1) (a) (iii) — [1] The offence is complete if the exposure is "wilful or indecent" and in a public place. (Vol 13) 1926 All 263 (264) : 27 Cri L Jour 107.

Section 118 (1) (c). — [1a] The compound of a private house is not a public place. (1887) 1887 A W N 19 (19).

[2] Verandah of a private house accessible to a public street is not a public place within the meaning of S. 118 (1) (c). (Vol 18) 1931 Lah 576 (576) : 33 Cri L Jour 345.

[See (1890) 1890 Pun Be No. 11 (Cr). (Case under Gambling Act, 1867—Tharvas attached to shops and situated on the verge of bazar—Not a public place); (1887) 1887

A W N 75 (75). (Gambling Act, 1867—Chabutra of a private house—Not a public place); (1881) 1881 A W N 8 (8). (Gambling Act, 1867—Chabutra of a shop—Not a public place.)]

[3] A takhtposh or moveable wooden platform cannot be held to be "earth, or material of any description, or any offensive matter, or rubbish" within the meaning of S. 118 (1) (c). (Vol 14) 1927 Lah 647 (648) : 28 Cri L Jour 683.

[4] A master cannot be convicted for an act of his servant in carrying meat exposed to public view. (1908) 10 Bom L R 1052 (1052, 1053).

Section 118 (1) (f) — [5] Persons found gambling in a common gaming house cannot be convicted for "using" the house. (1906) 3 Cri L Jour 78 (79).

[6] A house rented by some members in the name of one, who kept the house. The use was restricted to members only, some of whom played for money with cards, the member keeping the house not making any profit. It was held that the house was not a "common gaming house." (1862-68) Rat 706 (706).

- (b) carries night-soil or other offensive matter or rubbish along any route in contravention of any prohibition made in this behalf by the ^a[Board] by public notice; or
- (c) deposits, or causes or permits to be deposited, earth or materials of any description, or any offensive matter or rubbish, in any place not intended for the purpose in any street or other public place or waste or unoccupied land under the management of the ^a[Board]; or
- (d) having charge of a corpse fails to bury, burn or otherwise lawfully dispose of the same within twenty-four hours after death; or
- (e) makes any grave or buries or burns any corpse in any place not set apart for such purpose; or
- (f) keeps or uses, or knowingly permits to be kept or used, any place as a common gaming house, or assists in conducting the business of any common gaming house; or
- (g) at any time or place at which the same has been prohibited by the ^a[Board] by public or special notice, beats a drum or tom-tom, or blows a horn or trumpet, or beats any utensil, or sounds any brass or other instrument, or plays any music; or
- (h) disturbs the public peace or order by singing, screaming or shouting; or
- (i) lets loose any animal so as to cause, or negligently allows any animal to cause, injury, danger, alarm or annoyance to any person; or
- (j) being the occupier of any building or land in or upon which an animal dies, neglects within three hours of the death of the animal, or, if the death occurs at night, within three hours after sunrise, either —
 - (i) to report the occurrence to the Executive Officer or to an officer, if any, appointed by him in this behalf with a view to securing the removal and disposal of the carcase by the public conservancy establishment; or
 - (ii) to remove and dispose of the carcase in accordance with any general directions given by the ^a[Board] by public notice or any special directions given by the Executive Officer on receipt of such report as aforesaid; or
- (k) save with the written permission of the ^a[Board] and in such manner as it may authorise, stores or uses night-soil, manure, rubbish or any other substance emitting an offensive smell; or
- (l) uses or permits to be used as a latrine any place not intended for that purpose; shall be punishable with fine which may extend to fifty rupees.

(2) Whoever does not take reasonable means to prevent any child under the age of twelve years being in his charge from easing himself in any street or other public place within the cantonment shall be punishable with fine which may extend to twenty-five rupees.

(3) The owner or keeper of any animal found picketed or straying without a keeper in a street or other public place in a cantonment shall be punishable with fine which may extend to twenty rupees.

(4) Any animal found picketed as aforesaid may be removed by any officer or servant of the ^a[Board] or by any police officer to a pound as if the animal had been found straying.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

Dogs.

Registration and control of dogs. 119. (1) A ^a[Board] may make bye-laws to provide for the registration of all dogs kept within the cantonment.

(2) Such bye-laws shall —

- (a) require the registration, by the Officer Commanding each military unit, of all dogs kept in the lines occupied by that unit;
- (b) require that every registered dog shall wear a collar to which shall be attached a metal token to be issued by the registration authority, and fix the fee payable for the issue thereof;
- (c) require that any dog which has not been registered or which is not wearing such token shall, if found in any public place, be detained at a place set apart for the purpose; and

- (d) fix the fee which shall be charged for such detention and provide that any such dog shall be liable to be destroyed or otherwise disposed of unless it is claimed and the fee in respect thereof is paid within one week ;

and may provide for such other matters as the ^a[Board] thinks fit.

(3) A ^a[Board] may —

- (a) cause to be destroyed, or to be confined for such period as ^b[it] may direct, any dog or other animal which is, or is reasonably suspected to be, suffering from rabies, or which has been bitten by any dog or other animal suffering or suspected to be suffering from rabies ;
- (b) by public notice direct that, after such date as may be specified in the notice, dogs which are without collars or without marks distinguishing them as private property and are found straying on the streets or beyond the enclosures of the houses of their owners, if any, may be destroyed, and cause them to be destroyed accordingly.

(4) No damages shall be payable in respect of any dog or other animal destroyed or otherwise disposed of under this section.

(5) Whoever, being the owner or person in charge of any dog, neglects to restrain it so that it shall not be at large in any street without being muzzled and without being secured by a chain lead in any case in which —

- (a) he knows that the dog is likely to annoy or intimidate any person, or
- (b) the ^a[Board] has, by public notice during the prevalence of rabies, directed that dogs shall not be at large without muzzles and chain leads,

shall be punishable with fine which may extend to one hundred rupees.

(6) Whoever in a cantonment —

- (a) allows any ferocious dog which belongs to him or is in his charge to be at large without being muzzled, or
- (b) sets on or urges any dog or other animal to attack, worry or intimidate any person, or
- (c) knowing or having reason to believe that any dog or animal belonging to him or in his charge has been bitten by an animal suffering or reasonably suspected to be suffering from rabies, neglects to give immediate information of the fact to the Executive Officer or gives information which is false,

shall be punishable with fine which may extend to two hundred rupees.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* for "that Authority" by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2 and Schedule I. [28-9-1939.]

Traffic.

120. Whoever in driving, leading or propelling a vehicle along a street fails, except in a *Rule of the road.* case of actual necessity, —

- (a) to keep to the left when passing a vehicle coming from the opposite direction, or
- (b) to keep to the right when passing a vehicle going in the same direction as himself,

shall be punishable with fine which may extend to fifty rupees.

Prevention of Fire, etc.

121. (1) A ^a[Board] may, by public notice, direct that within such limits in the cantonment

Use of inflammable materials for building purposes. as may be specified in the notice, the roofs and external walls of huts or other buildings shall not, without the permission in writing of the ^a[Board], be made or renewed of grass, mats, leaves or other inflammable materials, and may, by notice in writing, require any person who has disobeyed any such direction as aforesaid to remove or alter the roofs or walls so made or renewed.

(2) A ^a[Board] may, by notice in writing, require the owner of any building in the cantonment which has an external roof or wall made of any such material as aforesaid to remove such roof or wall within such time as may be specified in the notice, notwithstanding that a public notice under sub-section (1) has not been issued or that such roof or wall was made with the consent of the ^a[Board] or before the issue of such public notice :

Provided that, in the case of any such roof or wall in existence before the issue of such a public notice or made with the consent of the ^a[Board], that Authority^b shall make compensation,

not exceeding the original cost of constructing the roof or wall, for any damage caused by the removal.

[a] *Substituted* by S. 69 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936) for "Cantonment Authority". [b] *Sic.* The reference is obviously to the Board.

122. A ^a[Board] may, by public notice, prohibit in any case where such prohibition appears *Stacking or collecting* to it to be necessary for the prevention of danger to life or property, the *inflammable materials.* stacking or collecting of wood, dry grass, straw or other inflammable materials, or the placing of mats or thatched huts or the lighting of fires in any place in the cantonment, or within any limits therein, which may be specified in the notice.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

123. No person shall set a naked light on or near any building in any street or other public *Care of naked lights.* place in a cantonment in such manner as to cause danger of fire:

Provided that nothing in this section shall be deemed to prohibit the use, subject to the permission in writing of the ^a[Board], of lights for purposes of illumination on the occasion of a festival or public or private entertainment.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

124. (1) Notwithstanding anything contained in the Cinematograph Act, 1918, no exhibition *Regulation of cinematic and dramatic performances.* of pictures or other optical effects by means of a cinematograph or other like apparatus for the purpose of which inflammable films are used, and no public dramatic performance or pantomime, shall be given in any cantonment elsewhere than in premises for which a licence has been granted by the ^a[Board] under this section.

(2) If the owner of a cinematograph or other apparatus uses the apparatus or allows it to be used, or if any person takes any part in any public dramatic performance or pantomime, in contravention of the provisions of this section, or if the occupier of any premises allows them to be used in contravention of the provisions of this section or of any condition of any licence granted under this section, he shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with an additional fine which may extend to fifty rupees for each day after the first during which the offence continues.

(3) Nothing in this section shall be deemed to prohibit the giving of any exhibition or any dramatic performance or pantomime in any theatre or institute which is the property of ^b[the Crown] where the exhibition, performance or pantomime is held with the permission and under the control of the military authorities.

[a] *Substituted* by S. 69 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936) for "Cantonment Authority". [b] *Substituted* by A. O. for "Government".

125. Whoever in a cantonment discharges any fire-arm or lets off fire-works or fire-balloons, *Discharging fire-works, fire-arms, etc.* or engages in any game in such manner as to cause or to be likely to cause danger to persons passing by or dwelling or working in the neighbourhood or risk of injury to property shall be liable to fine which may extend to fifty rupees.

126. Where in a cantonment any building, or wall, or anything affixed thereto, or any well, *Power to require buildings, wells, etc., to be rendered safe.* tank, reservoir, pool, depression, or excavation, or any bank or tree, is in the opinion of the ^a[Board], ^b[in a ruinous state or], for want of sufficient repairs, protection or enclosure, ^b[a nuisance or] dangerous to persons passing by or dwelling or working in the neighbourhood, the ^a[Board] ^c[by notice in

Section 126 — Note 1

[1] There was a conflict of opinion as to whether S. 126 requires the Board to give, to the owner of property in regard to which action is taken under the section, an option whether to remove the same or to repair it or whether the Board can require the removal without such option. The amendment made to section in 1944 now sets the conflict at rest by establishing the latter view.

[2] Option to determine question whether the building is in a dangerous condition and whether the owner shall be required to remove or repair the same is an option given to the Board and not to the owner. (Vol 6) 1919 Bom 172 (173); 20 Cri L Jour 697.

[3] A notice, which does not specify at all what kind of repairs the cantonment authority requires the owner to make to the houses specified in the notice, is illegal. (1912) 13 Cri L Jour 17 (17, 18).

[4] The cantonment authorities have discretion to issue orders to repair buildings for public safety and Courts have no jurisdiction to interfere. (1904) 1904 Pun Re No. 19, p. 56.

[5] Cantonment committee must give the owner of a building destroyed by fire the option of removing its remains or repairing it and a conviction for failure to comply with a notice without the option is illegal. (1905) 1905 Pun Re No. 23, p. 56; 3 Cri L Jour 301 (302).

writing may] require the owner ^d[or part-owner or person claiming to be the owner or part-owner thereof, or, failing any of them, the occupier] thereof ^e[to remove the same, or may require him to repair], ^f[or to protect or to enclose] the same in such manner as it thinks necessary; and, if the danger is, in the opinion of the ^a[Board] imminent, it shall forthwith take such steps as it thinks necessary to avert the same.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Inserted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 7. [c] *Substituted* for the words "may, by notice in writing" by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 6. [17-3-1944]. [d] *Inserted* by S. 38 of Act 24 [XXIV] of 1936. [e] *Substituted* by S. 6 of Act 8 [VIII] of 1944, for "either to remove the same or to repair". [f] *Substituted* by Act 24 [XXIV] of 1936, S. 38, for "protect or enclose".

127. A ^a[Board] may, by notice in writing, require the owner or part-owner, or person *Enclosure of waste land* claiming to be the owner or part-owner, of any building or land in the *used for improper purposes.* cantonment, or the lessee or the person claiming to be the lessee of any such land, which, by reason of disuse or disputed ownership or other cause, has remained unoccupied and has become the resort of idle and disorderly persons or of persons who have no ostensible means of subsistence or cannot give a satisfactory account of themselves, or is used for gaming or immoral purposes, or otherwise occasions or is likely to occasion a nuisance, to secure and enclose the same within such time as may be specified in the notice.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

CHAPTER X.

SANITATION AND THE PREVENTION AND TREATMENT OF DISEASE.

Sanitary Authorities.

128. The following officers shall, for the purposes of sanitation, have control over, and be *Responsibility for sanitation.* responsible for maintaining in a sanitary condition, those parts of a cantonment, respectively, which are specified in the case of each, that is to say:—

- (a) the ^a[Officer Commanding the station]—all buildings and lands which are occupied or used for military purposes;
- (b) the Officer Commanding the air forces in the cantonment—all buildings and lands which are occupied or used for air-force purposes;
- (c) the head of any civil department or railway administration occupying as such any part of the cantonment—all buildings and lands in his charge as head of that department or administration.

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".

129. (1) The Health Officer shall exercise a general sanitary supervision over the whole *General duties of Health Officer.* cantonment and shall submit monthly to the ^a[Board] a report as to the sanitary condition of the cantonment, together with such recommendations in connection therewith as he thinks fit.

(2) The Assistant Health Officer shall perform such duties in connection with the sanitation of the cantonment as are, subject to the control of the ^a[Board], allotted to him by the Health Officer.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Conservancy and Sanitation.

130. All public latrines and urinals provided or maintained by a ^a[Board] shall be so *Public latrines, urinals and conservancy establishments.* constructed as to provide separate compartments for each sex and not to be a nuisance, and shall be provided with all necessary conservancy establishments, and shall regularly be cleansed and kept in proper order.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Section 126 (contd.)

[6] The section does not contemplate the issue of a notice for effecting repairs to houses that may be dangerous to the tenants or un-inhabitable. Where the repairs are not necessary for "public safety" the issue of notice is illegal and conviction based thereon is illegal. (1906) 1906 Pun Re No. 1 p. 4 (Cr). See also the following case. (1907) 5 Cri L Jour 493 (495). (Case

under 1899 Code—Notice issued without resolution of cantonment committee—Conviction for non-compliance of notice is illegal.)

Chapter X — Note 1

[1] As to the power of the Central Government to extend any of the provisions of Chap. X to any area beyond a cantonment and in the vicinity thereof, see S. 286.

131. (1) On the application or with the consent of the occupier of any building or land, or where the occupier of any building or land fails to make arrangements to the satisfaction of the ^a[Board] for the matters referred to in this section, without such consent, and after giving notice in writing to the occupier, a ^a[Board] may undertake the house scavenging of any building or land in the cantonment for such period as it thinks fit on such terms as it may prescribe in this behalf.

(2) Where the ^a[Board] has undertaken the duties referred to in this section, all matter removed in the performance of such duties shall be the property of that ^b[Board].

(3) For the purposes of this section, "house scavenging" means the removal of filth or rubbish or other offensive matter from a privy, latrine, urinal, drain, cesspool, or other common receptacle for such matter.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* for the word "Authority" by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2 and Sch. I. [28-9-1939].

132. (1) Every ^a[Board] shall provide or appoint, in proper and convenient situations, public receptacles, depots or places for the temporary deposit or disposal of household rubbish, offensive matter, carcases of dead animals and sewage.

(2) The ^a[Board] may, by public notice, issue directions as to the time at which, the manner in which, and the conditions subject to which, any matter referred to in sub-section (1) may be removed along a street or may be deposited or otherwise disposed of.

(3) All matter deposited in receptacles, depots or places provided or appointed under this section shall be the property of the ^a[Board].

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Cesspools, receptacles for filth, etc. **133.** The Executive Officer of any cantonment may, by notice in writing, —

(a) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

(i) to close any cesspool appertaining to the land or building which is, in the opinion of the Executive Officer, a nuisance, or

(ii) to keep in a clean condition, in such manner as may be prescribed by the notice, any receptacle for filth or sewage accumulating on the land or in the building, or

(iii) to prevent the water of any private latrine, urinal, sink or bathroom or any other offensive matter, from soaking, draining or flowing, or being put, from the land or building upon any street or other public place, or into any water-course or into any drain not intended for the purpose; or

(iv) to collect and deposit for removal by the conservancy establishment of the ^a[Board], within such time and in such receptacle or place, situate at not more than one hundred feet from the nearest boundary of the premises, as may be specified in the notice, any offensive matter or rubbish which such person has allowed to accumulate or remain under, in or on such building or land; or

(b) require any person to desist from making or altering any drain leading into a public drain; or

(c) require any person having the control of a drain in the cantonment to cleanse, purify, repair or alter the same, or otherwise put it in good order, within such time as may be specified in the notice.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

134. (1) Where any well, tank, cistern, reservoir, receptacle, or other place in the cantonment where water is stored or accumulates, whether within any private enclosure or not, is in such

Filling up of a condition as to create a nuisance or, in the opinion of the Health Officer, or the tank, etc. Assistant Health Officer, is or is likely to be a breeding place for mosquitoes, the

^a[Board] may, by notice in writing, require the owner, lessee or occupier thereof, within such period as may be specified in the notice, to fill up or cover the well, cistern, reservoir or receptacle, or to fill up the tank, or to drain off or remove the water, as the case may be.

(2) The ^a[Board] may, if it thinks fit, with the previous sanction of the ^b[Officer Commanding-in-Chief, the Command,] meet the whole or any portion of the expenses incurred in complying with a requisition under sub-section (1).

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for Cantonment Authority".* [b] *Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the District".*

135. A ^a[Board] may, by notice in writing, require the owner or lessee of any building or *Provision of* land in the cantonment to provide, in such manner as may be specified in the *latrines, etc.* notice, any latrine, urinal, cesspool, dust-bin or other receptacle for filth, sewage, or rubbish, or any additional latrine, urinal, cesspool or other receptacle as aforesaid, which should in its opinion, be provided for the building or land.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for Cantonment Authority".*

136. Every person employing, whether on behalf of the Government or otherwise, more than *Sanitation in factories,* ten workmen or labourers, and every person managing or having *etc.* control of a market, school, theatre or other place of public resort, in a cantonment shall give notice of the fact to the ^a[Board], and shall provide such latrines, and urinals, and shall employ such number of sweepers, as the ^a[Board] thinks fit, and shall cause the latrines and urinals to be kept clean and in proper order :

Provided that nothing in this section shall apply in the case of a factory to which the Indian Factories Act, 1911, ^b applies.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *See now the Indian Factories Act, 1934 (25 [XXV] of 1934).*

Private latrines.

137. A ^a[Board] may, by notice in writing, —

- (a) require the owner or other person having the control of any private latrine or urinal in the cantonment not to put the same to public use ; or
- (b) where any plan for the construction of private latrines or urinals has been approved by the ^a[Board], and copies thereof may be obtained free of charge on application, —
 - (i) require any person repairing or constructing any private latrine or urinal not to allow the same to be used until it has been inspected by or under the direction of the Health Officer and approved by him as conforming with such plan ; or
 - (ii) require any person having control of any private latrine or urinal to re-build or alter the same in accordance with such plan ; or
- (c) require the owner or other person having the control of any such private latrine or urinal which, in the opinion of the ^a[Board], constitutes a nuisance, to remove the latrine or urinal ; or
- (d) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment —
 - (i) to have any latrines provided for the same shut out by a sufficient roof and wall or fence from the view of persons passing by or dwelling in the neighbourhood, or
 - (ii) to cleanse in such manner as the ^a[Board] may specify in the notice any latrine or urinal belonging to the land or building ;
- (e) require any person being the owner and having the control of any drain in the cantonment to provide, within ten days from the service of the notice, such covering as may be specified in the notice.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

138. (1) Where it appears to a ^a[Board] that any block of buildings in the cantonment is in *Removal of congested* an unhealthy condition by reason of the manner in which the buildings are *buildings.* crowded together, or of the narrowness or closeness of the street, or of the want of proper drainage or ventilation, or of the impracticability of cleansing the buildings or other similar cause, it may cause the block to be inspected by a committee consisting of —

- (a) the Health Officer,

Section 137 — Note 1

[1] As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under S. 137 (a), see S. 276.

(b) the Civil Surgeon of the district, or, if his services are not available, some other medical officer ^b[in the service of the Crown].

(c) the Executive Engineer or a person deputed by the Executive Engineer in this behalf, and

^c[(d) Where the cantonment is a Class I or Class II cantonment, two non-official members of the Board, or where the cantonment is a Class III cantonment, one non-official member of the Board.]

(2) The committee shall make a report in writing to the ^a[Board] regarding the sanitary conditions of the block, and if it considers that the condition thereof is likely to cause risk of disease to the inhabitants of the building or of the neighbourhood or otherwise to endanger the public health, it shall clearly indicate on a plan verified by the Executive Engineer or the person deputed by him to serve on the committee, the buildings which should in its opinion wholly or in part be removed in order to abate the unhealthy condition of the block.

(3) If, upon receipt of such report, the ^a[Board] is of opinion that all or any buildings indicated should be removed, it may, by notice in writing, require the owners thereof to remove them :

Provided that the ^a[Board] shall make compensation to the owners for any buildings so removed which may have been erected under proper authority :

Provided, further, that the ^a[Board] may, if it considers it equitable in the circumstances so to do, pay to the owners such sum as it thinks fit as compensation for any buildings so removed which have not been erected under proper authority.

(4) For the purposes of this section "buildings" includes enclosure walls and fences appertaining to buildings.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by A. O. for "of the Government." [c] *Substituted* by S. 39 of Act 24 [XXIV] of 1936 for the original clause.

139. (1) Where it appears to a ^a[Board] that any building or part of a building in the *Overcrowding of cantonment which is used as a dwelling house is so overcrowded as to endanger the health of the inmates thereof, it may, after such inquiry as it thinks fit, by notice in writing require the owner or occupier of the building or part thereof, as the case may be, within such time not being less than one month as may be specified in the notice, to abate the overcrowding of the same by reducing the number of lodgers, tenants, or other inmates to such number as may be specified in the notice.*

(2) Any person who fails, without reasonable cause, to comply with a requisition made upon him under sub-section (1) shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, to an additional fine which may extend to five rupees for every day after the first during which the failure has continued.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

140. (1) Where any building in a cantonment is so ill-constructed or dilapidated as to be, *Power to require repair or alteration of building.* in the opinion of the ^a[Board], in an insanitary state, the ^a[Board] may, by notice in writing, require the owner, within such time as may be specified in the notice, to execute such repairs or to make such alterations as it thinks necessary for the purpose of removing such defects.

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted on the building to which it relates.

(3) A notice issued under sub-section (1) shall be deemed to have been complied with if the owner of the building to which it relates has, instead of executing the repairs or making the alterations directed by the notice, removed the building.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Section 140 — Note 1

[1] As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under this section, see S. 276.

141. (1) The Executive Officer may, by notice in writing, require the owner, lessee or occupier of any building or land in the cantonment, which appears to be in a filthy or insanitary state, within twenty-four hours to cleanse the same or otherwise put it in a proper state, in such manner as may be specified in the notice.

(2) If, within three months from the date of the service of a notice under sub-section (1), any building or land in respect of which the notice was issued is again in a filthy or insanitary state, the owner, lessee or occupier, as the case may be, shall be punishable with fine which may extend to two hundred rupees.

142. If a ^a[Board] is satisfied that any building or part of a building in the cantonment which is intended for or used as a dwelling place is unfit for human habitation, it may cause a notice to be posted on some conspicuous part of the building prohibiting the owner or occupier thereof from using the building or room for human habitation, or allowing it to be so used, until it has been rendered fit for such use to the satisfaction of the ^a[Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

143. A ^a[Board] may, by notice in writing, require the owner, lessee, or occupier of any land in the cantonment to clear away and remove any thick or noxious vegetation or undergrowth which appears to it to be injurious to health or offensive to persons residing in the neighbourhood.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

144. Where, in the opinion of a ^a[Board], the cultivation in the cantonment of any description of crop or the use therein of any kind of manure or the irrigation of any land therein in any specified manner is likely to be injurious to the health of persons dwelling in the neighbourhood, the ^a[Board] may, by public notice, prohibit such cultivation, use or irrigation after such date as may be specified in the notice, or may, by a like notice, direct that it shall be carried out subject to such conditions as the ^a[Board] thinks fit:

Provided that if, when a notice is issued under this section, any land to which it relates has been lawfully prepared for cultivation or any crop is sown therein or is standing thereon, the ^a[Board] shall, if it directs that the notice is to take effect on a date earlier than that by which the crop would ordinarily be sown or reaped, as the case may be, make compensation to all persons interested in the land or crop for the loss, if any, incurred by them respectively by reason of compliance with the notice.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Burial and Burning Grounds.

145. A ^a[Board] may, by notice in writing, require the owner or person in charge of any burial or burning ground in the cantonment to supply such information as may be specified in the notice concerning the condition, management or position of such ground.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

146. (1) No place in a cantonment which has not been used as a burial or burning ground before the commencement of this Act shall be so used without the permission in writing of the ^a[Board].

(2) Such permission may be granted subject to any conditions which the ^a[Board] thinks fit to impose for the purpose of preventing annoyance to, or danger to the health of, persons residing in the neighbourhood.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Section 141 — Note 1

[1] The use of the word "again" suggests that the offence contemplated in sub-s. (2) is a recurring and not a continuing offence. Hence, where a person fails to comply with notice under S. 141 (1) he cannot be prosecuted

under S. 141 (2). He can be dealt with under S. 141 (1) read with S. 268 and in case of a continuing failure to comply with it he is liable to an additional fine. (Vol 22) 1935 All 905(906,907):36 Cri L Jour 1493.

147. (1) Where a ^a[Board], after making or causing to be made local inquiry, is of opinion that any burial or burning ground in the cantonment has become offensive to, or dangerous to the health of, persons living in the neighbourhood, it may, with the previous sanction of the ^b[Central Government], by notice in writing, require the owner or person in charge of such ground to close the same from such date as may be specified in the notice.

(2) Where the ^b[Central Government] sanctions the issue of any notice under sub-section (1), it shall declare the conditions on which the burial or burning ground may be re-opened, and a copy of such declaration shall be annexed to the notice.

(3) Where the ^c[Central Government] sanctions the issue of any such notice, it shall require a new burial or burning ground to be provided at the expense of the cantonment fund, or, if the community concerned is willing to provide a new burial or burning ground, the ^b[Central Government] shall require a grant to be made from the cantonment fund towards the cost of the same.

(4) No corpse shall be buried or burnt in any burial or burning ground in respect of which a notice issued under this section is for the time being in force.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] Substituted by A. O. for "Local Government".

Exemption from operation of sections 145 to 147. **148.** The provisions of sections 145, 146 and 147 shall not apply in the case of any burial ground which is for the time being managed by or on behalf of the Government.

149. A ^a[Board] may, by public notice, prescribe routes in the cantonment by which alone removal of corpses. corpses may be removed to burial or burning grounds.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Prevention of Infectious or Contagious Diseases.

150. ^a[Any person], being in charge of, or in attendance, whether as a medical practitioner or otherwise, upon any person in a cantonment whom he knows or has reason to believe to be suffering from a contagious or infectious disease, or being the owner, lessee or occupier of any building in a cantonment in which he knows that any such person is so suffering, shall, if he fails to give information, or if he gives false information to the ^b[Board] respecting the existence of such disease, be punishable with fine which may extend to one hundred rupees :

Provided that no person shall be punishable under this section for failure to give information if he had reasonable cause to believe that the information had already been duly given :

Provided, further, that this section shall not apply in the case of venereal disease where the person suffering therefrom is under specific and adequate medical treatment and is, by reason of his habits and conditions of life and residence, unlikely to spread the disease.

[a] Substituted by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Sch. I, for "Whoever".

[b] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

151. (1) In the event of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease among the inhabitants thereof or of any epidemic disease among any animals therein, the ^a[Officer Commanding-in-Chief, the Command], if he thinks that the provisions of this Act or of any law for the time being in force in the cantonment are insufficient for the purpose, may, with the previous sanction of the ^b[Central Government], —

(a) take such special measures, and

(b) by public notice, make such temporary regulations to be observed by the public or by any class or section of the public, as he thinks necessary to prevent the outbreak or the spread of the disease :

Provided that, where in the opinion of the ^a[Officer Commanding-in-Chief, the Command], immediate measures are necessary, he may take action without such sanction as aforesaid and, if he does so, shall forthwith report such action to the ^b[Central Government].

Section 151 — Note 1

[1] Power is given under this section to the Officer Commanding-in-Chief, the Command, to take emergent measures for the prevention of the spread of disease in

cases of extreme urgency without having to wait for the previous sanction of the Central Government.—See the Report of the Select Committee.

(2) Whoever commits a breach of any temporary regulation made under sub-section (1) shall be deemed to have committed an offence under section 188 of the Indian Penal Code.

[a] *Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the district."* [b] *Substituted by A. O. for "Local Government".*

152. Where it is certified to the Executive Officer by a medical practitioner that the outbreak of any infectious or contagious disease in the cantonment is, in the opinion of such medical practitioner, attributable to the milk supplied by any dairyman, the Executive Officer may, by notice in writing, require the dairyman, within such time as may be specified in the notice, to furnish him with a full and complete list of the names and addresses of all his customers within the cantonment, or to give him such information as will enable him to trace the persons to whom the dairyman has sold milk.

153. Where it is certified to the Executive Officer by the Health Officer that it is desirable, with a view to prevent the spread of any infectious or contagious disease in the cantonment, that the Health Officer should be furnished with a list of the customers of any washerman, the Executive Officer may, by notice in writing, require the washerman, within a time to be specified in the notice, to furnish the Health Officer with a full and complete list of the names and addresses of all owners within the cantonment of clothes and other articles which the washerman washes or has washed during the six weeks immediately preceding the date of the notice.

154. Where, after inspection, the Health Officer is of opinion that any infectious or contagious disease is caused or is likely to arise in the cantonment from the consumption of the milk supplied from a dairy or from the washing of clothes or other articles in any place, or from any process employed by a washerman, he shall report the matter to the Executive Officer.

Report after inspection of dairy or washerman's place of business. **155.** Upon receipt of a report submitted by the Health Officer under section 154, the Executive Officer may, by notice in writing,—

- (a) prohibit the supply of milk from the dairy until the notice has been withdrawn; or
- (b) prohibit the washerman from washing clothes or other articles in any such place or by any such process as aforesaid until the notice has been withdrawn or unless he uses such place in such manner, or washes by such process, as the Executive Officer may direct in the notice.

156. The Health Officer may take possession of any milk, clothes or other articles which are or have recently been in the possession of any dairyman on whom a notice has been served under section 152, or of any clothes or other articles which are or have recently been in the possession of any washerman, on whom a notice has been served under section 153, and may subject the same or cause the same to be subjected to such chemical or other process as he may think necessary; and the ^a[Board] shall pay from the cantonment fund all the costs of the process and shall also pay to the owner of the milk, clothes or ^b[other] articles such sum as compensation for any loss occasioned by such process as may appear to it to be reasonable.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Substituted by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Sch. I for "their."*

Contamination of public conveyance.

157. Whoever in a cantonment —

- (a) uses a public conveyance while suffering from an infectious or contagious disease, or
- (b) uses a public conveyance for the carriage of a person who is suffering from any such disease, or
- (c) uses a public conveyance for the carriage of the corpse of a person who has died from any such disease,

shall be bound to take proper precautions against the communication of the disease to other persons using or who may thereafter use the conveyance and to notify such use to the owner, driver or person in charge of the conveyance, and further to report without delay to the Executive Officer the number of the conveyance and the name of the person so notified.

158. (1) Where any person suffering from, or the corpse of any person who has died from, an infectious or contagious disease has been carried in a public conveyance which ordinarily plies in a cantonment, the driver thereof shall forthwith

report the fact to the Executive Officer who shall forthwith cause the conveyance to be disinfected if that has not already been done.

(2) No such conveyance shall be brought again into use until the Executive Officer has granted a certificate stating that it can be used without causing risk of infection.

159. Whoever fails to make to the Executive Officer any report which he is required to make by section 157 or section 153, shall be punishable with fine which may extend to one hundred rupees.

160. Notwithstanding anything contained in any law for the time being in force, no owner, driver or person in charge of a public conveyance shall be bound to convey or to allow to be conveyed in such conveyance in or in the vicinity of a cantonment any person suffering from an infectious or contagious disease or the corpse of any person who has died from such disease unless and until such person pays or tenders a sum sufficient to cover any loss and expense which would ordinarily be incurred in disinfecting the conveyance.

161. Where a ^a[Board] is, upon the advice of the Health Officer, of opinion that the cleansing and disinfection of any building or part of a building in the cantonment or of any articles in any such building or part which are likely to retain infection, or the renewal of the flooring of any such building or part of such building, would tend to prevent or check the spread of any infectious or contagious disease, he may, by notice in writing, require the owner or occupier to cleanse and disinfect the said building, part or articles, as the case may be, or to renew the said flooring, within such time as may be specified in the notice :

Provided that where, in the opinion of the ^a[Board], the owner or occupier is from poverty or any other cause unable effectually to carry out any such requisition, the ^a[Board] may, at the expense of the cantonment fund, cleanse and disinfect the building, part or articles, or, as the case may be, renew the flooring.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

162. (1) Where the destruction of any hut or shed in a cantonment is, in the opinion of the ^a[Board], necessary to prevent the spread of any infectious or contagious disease, the ^a[Board] may, by notice in writing, require the owner to destroy the hut, or shed and the materials thereof within such time as may be specified in the notice.

(2) Where the President of a Board ^b[* * *] is satisfied that the destruction of any hut or shed in the cantonment is immediately necessary for the purpose of preventing the spread of any infectious or contagious disease, he may order the owner or occupier of the hut or shed to destroy the same forthwith, or may himself cause it to be destroyed after giving not less than two hours' notice to the owner or occupier thereof.

(3) The ^a[Board] shall pay compensation to the owner of any hut or shed destroyed under this section.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] The words "or, where there is no Board, the Officer Commanding the station" were repealed by S. 40, *ibid*.

163. The ^a[Board] shall provide free of charge temporary shelter or house accommodation for the members of any family in which an infectious or contagious disease has appeared who have been compelled to leave their dwelling by reason of any proceedings taken under section 161 or section 162, and who desire such shelter or accommodation as aforesaid to be provided for them.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

164. (1) Where in a cantonment any building or part of a building is intended to be let in which any person has, within the six weeks immediately preceding, been suffering from an infectious or contagious disease, the person letting the building or part shall before doing so disinfect the same in such manner as the ^a[Board] may, by public or special notice, direct, together with all articles therein liable to retain infection.

(2) For the purposes of this section, the keeper of an hotel, lodging house or sarai shall be deemed to let to any person who is admitted as a guest therein that part of the building in which such person is permitted to reside.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

165. No person shall, without previous disinfection of the same, give, lend, sell, transmit or otherwise dispose of to another person any article or thing which he knows or has reason to believe has been exposed to contamination by any infectious or contagious disease and is likely to be used in, or taken into, a cantonment.

Means of disinfection.

166. (1) Every ^a[Board] shall—

- (a) provide proper places with necessary attendants and apparatus for the disinfection of conveyances, clothing, bedding or other articles which have been exposed to infection ;
- (b) cause conveyances, clothing or other articles brought for disinfection to be disinfected either free of charge or on payment of such charges as it may fix.
- (2) A ^a[Board] may notify places at which articles of clothing, bedding, conveyances or other articles which have been exposed to infection shall be washed, and, if it does so, no person shall wash any such thing at any place not so notified without having previously disinfected such thing.
- (3) The President of a Board ^b[* * *] may direct the destruction of any clothing, bedding or other article in the cantonment likely to retain infection, and may give such compensation as he thinks fit for any article so destroyed.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority." [b] The words "or, where there is no Board, the Officer Commanding the station" were repealed by S. 41, *ibid*.

Making or selling of food etc., or washing clothes by infected person.

167. Whoever, while suffering from, or in circumstances in which he is likely to spread, any infectious or contagious disease, —

- (a) makes, carries or offers for sale in a cantonment or takes any part in the business of making, carrying or offering for sale therein any article of food or drink or any medicine or drug for human consumption, or any article of clothing or bedding for personal use or wear, or
 - (b) takes any part in the business of the washing or carrying of clothes,
- shall be punishable with fine which may extend to one hundred rupees.

168. When a cantonment is visited or threatened by an outbreak of any infectious or contagious disease, the ^a[Board] may, by public notice, restrict in such manner or prohibit for such period, as may be specified in the notice, the sale or preparation of any article of food or drink for human consumption specified in the notice or the sale of any flesh of any description of animals so specified.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

169. (1) If a ^a[Board] is of opinion that the water in any well, tank or other place is likely, if used for drinking, to engender, or cause the spread of, any disease, it may, —

- (a) by public notice, prohibit the removal or use of such water for drinking ;
- (b) by notice in writing, require the owner or person having control of such well, tank or place to take such steps as may be directed by the notice to prevent the public from having access to or using such water ; or
- (c) take such other steps as it may consider expedient to prevent the outbreak or spread of any such disease.

(2) In the event of a cantonment or any part of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease, the Health Officer or any person authorised by him in this behalf may, without notice and at any time, inspect and disinfect any well, tank or other place from which water is, or is likely to be, taken for the purposes of drinking, and may further take such steps as he thinks fit to ensure the purity of the water or to prevent the use of the same for drinking purposes.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Disposal of infectious corpse.

170. Where any person has died in a cantonment from any infectious or contagious disease, the Executive Officer may, by notice in writing,—

- (a) require any person having charge of the corpse to convey the same to a mortuary, thereafter to be disposed of in accordance with law ; or
- (b) prohibit the removal of the corpse from the place where death occurred except for the purpose of being buried or burned or of being conveyed to a mortuary.

*Hospitals and Dispensaries.**Maintenance or aiding of hospitals or dispensaries.*171. (1) A ^a[Board] may —

- (a) provide and maintain either within or without the cantonment as many hospitals and dispensaries as it thinks fit; or
- (b) make, upon such terms as it thinks fit to impose, a grant-in-aid to any hospital or dispensary ^b[or veterinary hospital], whether within or without the cantonment, not maintained by it.
- (2) Every hospital or dispensary maintained or aided under sub-section (1) shall have attached to it a ward or wards for the treatment of persons suffering from infectious or contagious diseases.
- (3) A medical officer, appointed in such manner as the ^c[Central Government] may direct, shall be in charge of every hospital or dispensary maintained or aided under this section.

[a] Substituted by S. 69 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936) for "Cantonment Authority". [b] Inserted by S. 42, *ibid.* [c] Substituted by A. O. for "Local Government".

172. (1) Every hospital or dispensary maintained or aided under section 171 shall be maintained in accordance with any general or special orders of the ^a[Central Government] ^b[for the conduct of hospitals and dispensaries or in accordance with the said orders modified in such manner as the ^a[Central Government] ^b[* * *] ^c[* * *], thinks fit.

(2) The ^d[Board] shall cause every such hospital or dispensary to be provided with all requisite drugs, instruments, apparatus, furniture and appliances and with sufficient cots, bedding and clothing for in-patients.

[a] Substituted by A. O. for "Governor-General in Council". [b] The words "or the Local Government" were repealed by A. O. [c] The words "as the case may be" were repealed by A. O. [d] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority."

173. At every hospital or dispensary maintained or aided under section 171, the sick-poor of *Free patients.* the cantonment and other inhabitants of the cantonment suffering from infectious or contagious diseases, and, with the sanction of the ^a[Board], any other sick persons, may receive medical ^b[or surgical] treatment free of costs, and, if treated as in-patients, shall be either dieted gratuitously or, if the medical officer in charge so directs, shall be granted subsistence allowance on such scale as the ^a[Board] may fix :

Provided that the subsistence allowance shall not be less than the lowest allowance for the time being fixed for the subsistence of judgment-debtors by the ^c[Provincial Government] under section 57 of the Code of Civil Procedure, 1908.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] Inserted by S. 43, *ibid.* [c] Substituted by A. O. for "Local Government".

174. Any sick person who is ineligible to receive medical ^a[or surgical] treatment free of *Paying patients.* costs in any hospital or dispensary under section 173 may be admitted to treatment therein upon such terms as the ^b[Board] thinks fit.

[a] Inserted by S. 44 of the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936). [b] Substituted by S. 69, *ibid.*, for "Cantonment Authority."

175. (1) If the Health Officer or the medical officer in charge of a hospital or dispensary *Power to order person to attend hospital or dispensary.* maintained or aided under section 171 has reason to believe that any person living in the cantonment is suffering from an infectious or contagious disease, he may, by notice in writing, call upon such person to attend for examination at any such hospital or dispensary at such time as may be specified in the notice and not to quit it without the permission of the medical officer in charge; and, on the arrival of such person at the hospital or dispensary, the medical officer in charge thereof may examine him for the purpose of satisfying himself whether or not such person is suffering from an infectious or contagious disease :

Provided that, if, having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, the Health

Section 175 — Note 1

[1] "We have, to a large extent, remodelled this clause in order to provide that, in the case of persons whose circumstances are such as to allow of their satisfactory segregation in their own houses, the Medical Officer concerned shall make the medical examination

at their private residences and shall not subsequently require their detention in hospital. We further think that the Health Officer of a cantonment, as well as the Medical Officer-in-charge of cantonment hospitals, should be able to exercise the power conferred by this clause." — *Select Committee Report.*

Officer or medical officer, as the case may be, considers that the attendance of such person at a hospital or dispensary is likely to prove unnecessary or inexpedient, he shall examine such person at such person's own residence.

(2) If any person, on examination under sub-section (1), is found to be suffering from an infectious or contagious disease, the Health Officer or medical officer, as the case may be, may cause him to be detained in hospital until he is free from the infection or contagion :

Provided that, if, having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, he considers that the detention of such person at a hospital or dispensary is unnecessary or inexpedient, he shall discharge such person and take such measures or give such directions in the matter as he thinks necessary.

176. (1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under section 171 reports in writing to the ^a[Officer Commanding the station] that any person having received a notice under section 175 has refused or omitted to attend at the hospital or dispensary, specified in the notice, or that such person, having attended the hospital or dispensary, has quitted it without the permission of such medical officer, or that any person has failed to comply with any direction given to him under section 175, the ^a[Officer Commanding the station] may, by order in writing, direct such person to remove from the cantonment within twenty-four hours and not to re-enter it without his permission in writing.

(2) No person who has under sub-section (1) been ordered to remove from and not to re-enter a cantonment shall enter any other cantonment in British India without the written permission of the ^b[Officer Commanding the station].

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment". [b] *Substituted* by S. 8, *ibid.*, for "Commanding Officer of that Cantonment".

Control of Traffic for Hygienic Purposes.

Routes for pilgrims and others.

177. (1) A ^a[Board] may provide or prescribe suitable routes for the use of persons passing through the cantonment —

(a) on their way to or from fairs or places of pilgrimage or other places of public resort; or

(b) during times when an infectious or contagious disease is prevalent;

and may, by public notice, require such persons as aforesaid to use such routes and no others.

(2) All routes provided or prescribed under sub-section (1) shall be clearly and sufficiently indicated by the ^a[Board].

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Special Conditions regarding Essential Services.

178. (1) Whoever, being a sweeper employed by a ^a[Board] in the absence of a written contract authorising him so to do and without reasonable cause, resigns his employment or absents himself from his duty without having given one month's notice to the ^a[Board], or neglects or refuses to perform his duties, or any of them, shall be punishable with imprisonment which may extend to one month.

(2) The ^b[Central Government] may, by notification in the ^c[Official Gazette], direct that on and from such date as may be specified in the notification, the provisions of this section shall apply in the case of any specified class of servants employed by a ^a[Board] whose functions intimately concern the public health or safety.

(3) For the purpose of this section, "sweeper" includes any menial servant employed by a ^a[Board] in the removal or disposal of filth or rubbish.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "local official Gazette".

Section 176 — Note 1

[1] As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under this section, see S. 276.

CHAPTER XI.

CONTROL OVER BUILDINGS, STREETS, BOUNDARIES, TREES, ETC.

Buildings.

^a[178A. No person shall erect or re-erect a building on any land in a cantonment, except with the previous sanction of the Board, nor otherwise than in accordance with the provisions of this Chapter and of the rules and bye-laws made under this Act relating to the erection and re-erection of buildings.]

[a] *Inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 45.*

179. (1) Whoever intends to erect or re-erect any building in a cantonment shall ^a[apply for sanction by giving notice] in writing of his intention to the ^b[Board].

(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who —

- (a) makes any material alteration or enlargement of any building, or
- (b) converts into a place for human habitation any building not originally constructed for that purpose, or
- (c) converts into more than one place for human habitation a building originally constructed as one such place, or
- (d) converts two or more places of human habitation into a greater number of such places, or
- (e) converts into a stable, cattle-shed or cowhouse any building originally constructed for human habitation, or
- (f) makes any alteration which there is reason to believe is likely to affect prejudicially the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or
- (g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye-law made under this Act.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 46, for "give notice".*

[b] *Substituted by S. 69, *ibid.*, for "Cantonment Authority".*

180. (1) A person giving the notice required by section 179 shall specify the purpose for which it is intended to use the building to which such notice relates.

(2) No notice shall be valid until the information required under sub-section (1) and any further information and plans which may be required under bye-laws made under this Act have been furnished to the satisfaction of the ^a[Board] along with the notice.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

181. The ^a[Board] may either refuse to sanction the erection or re-erection, as the case may be, of the building, or may sanction it either absolutely or subject to such directions as it thinks fit to make in writing in respect of all or any of the following matters, namely :—

- (a) the free passage or way to be left in front of the building ;
- (b) the space to be left about the building to secure free circulation of air and facilitate scavenging and the prevention of fire ;
- (c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storeys of which the building may consist ;
- (d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for filth ;

Chapter XI — Note 1

[1] As to the power of the Central Government to extend any of the provisions of Ch. XI to any area beyond a cantonment and in the vicinity thereof, *see* S. 286.

Section 181 — Note 1

[1] Permission once granted without any reservation cannot be subsequently modified or cancelled in part. (Vol 17) 1930 Lah 822 (822).

[*See* (Vol 14) 1927 Lah 891 (893). (Where once a Municipal Committee has given sanction to roof a drain it cannot revoke it.); (1900) 1900 Pnn Re No. 52. (Municipal Committee's power to revoke sanction once given.)]

[*But see* (Vol 9) 1922 Bom 247 (249). (New building — Permission granted by P. W. Committee — General Body can revoke permission.)]

- (e) the level and width of the foundation, the level of the lowest floor and the stability of the structure ;
 - (f) the line of frontage with neighbouring buildings if the building abuts on a street ;
 - (g) the means to be provided for egress from the building in case of fire ;
 - (h) the materials and method of construction to be used for external and party walls for rooms, floors, fire-places and chimneys ;
 - (i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on ; and
 - (j) any other matter affecting the ventilation and sanitation of the buildings ;
- and the person erecting or re-erecting the building shall obey all such written directions in every particular.

^b[(2) The Board may refuse to sanction the erection or re-erection of any building, either on grounds sufficient in the opinion of the Board affecting the particular building, or in pursuance of a general scheme sanctioned by the Officer Commanding-in-Chief, the Command, restricting the erection or re-erection of buildings within specified limits for the prevention of overcrowding or in the interests of persons residing within such limits or for any other public purpose.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Military Estates Officer, shall refer the application to the Military Estates Officer for ascertaining whether there is any objection on the part of Government to such erection or re-erection ; and the Military Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building—

(a) when the land on which it is proposed to erect or re-erect the building is held on a lease ^c[from the Crown], if the erection or re-erection constitutes a breach of the terms of the lease, or

(b) when the land on which it is proposed to erect or re-erect the building is not held on a lease ^c[from the Crown], if the right to build on such land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reasons for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section, and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect or omission continues for a further period of fifteen days from the date of such communication the Board shall be deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally :

Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received the report referred to in that sub-section.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] Sub-sections (2) to (6) were *substituted* by S. 47, *ibid.*, for the original sub-sections (2), (3) and (4). [c] *Substituted* by A. O. for "from Government."

182. (1) No compensation shall be claimable by any person for any damage or loss which he *Compensation.* may sustain in consequence of the refusal of the ^a[Board] of sanction to the erection of any building or in respect of any direction issued by it under sub-section (1) of section 181.

(2) The ^a[Board] shall make compensation to the owner of any building for any actual damage or loss sustained by him in consequence of the prohibition of the re-erection of any building or of its requiring any land belonging to him to be added to the street :

Section 182 — Note 1

[1] "We think that compensation should only be payable in cases where actual loss is caused by the refusal of a Cantonment Authority to allow a building to be re-erected and have provided accordingly. To enact, as was proposed in the Bill as introduced, that compensa-

tion should be payable in any case where the refusal is on the ground that the building is unsuitable in plan or design to the locality or is intended for a purpose unsuited to the locality would in our opinion be to invite a systematic blackmail of the Cantonment Authority." — *Select Committee Report.*

Provided that the ^a[Board] shall not be liable to make any compensation in respect of the prohibition of the re-erection of any building which for a period of three years or more immediately preceding such refusal has not been in existence or has been unfit for human habitation.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

183. Every sanction for the erection or re-erection of a building given or deemed to have *Lapse of sanction.* been given by the ^a[Board] as hereinbefore provided shall be available for one year from the date on which it is given, and, if the building so sanctioned is not begun by the person who has obtained the sanction or some one lawfully claiming under him within that period, it shall not thereafter be begun ^b[unless the Board on application made therefor has allowed an extension of that period.]

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Substituted by S. 48, ibid, for "without fresh sanction obtained in the manner hereinbefore provided".*

^a[**183A.** A Board, when sanctioning the erection or re-erection of a building as hereinbefore *Period for completion* provided, shall specify a reasonable period after the work has commenced of building. within which the erection or re-erection is to be completed, and, if the erection or re-erection is not completed within the period so fixed, it shall not be continued thereafter without fresh sanction obtained in the manner hereinbefore provided, unless the Board on application made therefor has allowed an extension of that period :

Provided that not more than two such extensions shall be allowed by the Board in any case.]

[a] *Inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 49.*

Illegal erection and re-erection. **184.** Whoever begins, continues or completes the erection or re erection of a building —

- (a) without having given a valid notice as required by sections 179 and 180, or before the building has been sanctioned or is deemed to have been sanctioned, or
- (b) without complying with any direction made under sub-section (1) of section 181, or
- (c) when sanction has been refused, or has ceased to be available, ^a[or has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 52,]

shall be punishable with fine which may extend to five hundred rupees.

[a] *Inserted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 50.*

185. ^a[(1)] A ^b[Board] may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection *Power to stop erection or re-erection or to demolish.* of a building in any case in which the ^b[Board] considers that such erection or re-erection is an offence under section 184, and may in any such case ^c[or in any other case in which the Board considers that the erection or re-erection of a building is an offence under section 184, within six months of the completion of such erection or re-erection] in like manner

Section 184 — Note 1

[1] Erecting or re-erecting a building without the permission and failure to comply with a notice to alter or demolish a building are separate offences. Non-compliance with a notice given after the enactment of 1924, is punishable under the Act of 1924, even though the building was erected before 1924. Prosecution for such disobedience may be launched within 6 months of such disobedience. (Vol 19) 1932 Lah 370 (372) : 33 Cri L Jour 336.

[2] Section 184 provides no penalty for a continuing failure or contravention, although such a penalty is provided in S. 268. (Vol 21) 1934 Oudh 29 (31) : 35 Cri L Jour 666.

[3] An order directing a person, who has erected a structure without sanction, to remove the structure within a certain time or in default to pay thereafter a daily fine is improper. If the Magistrate's directions are not carried out, then the proper course is to institute a further prosecution and allow the accused an opportunity of defending himself before the further fine is imposed. (1911) 12 Cri L Jour 371 (372). (Case under S. 104 of the Act of 1889).

[4] It is not proper to substitute a conviction under S. 268 for one under S. 184 (b). (Vol 21) 1934 Oudh 29 (31) : 35 Cri L Jour 666.

Section 184 (b). — [5] Section 184 (b) does not provide a punishment for mere non-compliance with direction made under sub-s. (1) of S. 181. What it makes punishable is the beginning, continuation or completion of the erection of building without complying with such direction. (Vol 21) 1934 Oudh 29 (31).

Section 185 — Note 1

[1] The owner should know the precise nature and extent of the repairs which he is expected to make. A notice which does not state what kind of repairs the Board requires the owner to make to the houses specified in the notice is illegal. (1912) 13 Cr L J 17 (17). (Case under S. 94 of old Act.)

[2] It was held in the following case that it was not necessary for the cantonment authority to issue a notice for the demolition within a reasonable time and that such a notice could be given at any time. (Vol 19) 1932 Lah 370 (371) : 33 Cri L Jour 336. But now see the amendment made in the section by the Cantonments (Amendment) Act, 1936.

direct the alteration or demolition as it thinks necessary, of the building or any part thereof, so erected or re-erected :

Provided that the ^b[Board] may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable :

^c[Provided further that the Board shall not, without the previous concurrence of the Officer Commanding-in-Chief, the Command, accept any sum by way of composition under the foregoing proviso in respect of any building on land which is not under the management of the Board.

(2) A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under section 181 sanctioning the erection or re-erection has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 52, and shall in any such case in like manner direct the demolition or alteration, as the case may be, of the building or any part thereof so erected or re-erected where the Officer Commanding-in-Chief, the Command, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him :

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erected prior to the date on which the order of the Officer Commanding-in-Chief, the Command, has been communicated to him.]

[a] The original S. 185 was *re-numbered* as sub-section (1) of that section by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 51. [b] *Substituted* by S. 69, *ibid.*, for "Cantonment Authority". [c] *Inserted* by S. 51, *ibid.*

Power to make bye-laws.

186. A ^a[Board] may make bye-laws prescribing—

- (a) the manner in which notice of the intention to erect or re-erect a building in the cantonment shall be given to the ^a[Board] and the information and plans to be furnished with the notice ;
- (b) the type or description of buildings which may or may not, and the purpose for which a building may or may not, be erected or re-erected ^b[in the cantonment or any part thereof];
- (c) the minimum cubic capacity of any room or rooms in a building which is to be erected or re-erected ; ^c[*]
- (d) the fees payable on provision by the ^a[Board] of plans or specifications of the type of buildings which may be erected in the cantonment or any part thereof ;
- ^d[(e) the circumstances in which a mosque, temple or church or other sacred building may be erected or re-erected ; and
- (f) with reference to the erection or re-erection of buildings, or of any class of building, all or any of the following matters, namely :—
 - (i) the line of frontage where the building abuts on a street ;
 - (ii) the space to be left about the building to secure free circulation of air and facilities for scavenging and for the prevention of fire ;
 - (iii) the materials and method of construction to be used for external and party-walls, roofs and floors ;
 - (iv) the position, the material and the method of construction of fire places, chimneys, drains, latrines, privies, urinals and cesspools ;
 - (v) height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on ;
 - (vi) the level and width of the foundation, the level of the lowest floor and the stability of the structure ;
 - (vii) the number and height of the storeys of which the building may consist ;
 - (viii) the means to be provided for egress from the building in case of fire ;
 - (ix) the safeguarding of wells from pollution ; or
 - (x) the materials and method of construction to be used for godowns intended for the storage of foodgrains in excess of fifty maunds in order to render them rat proof.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* for the words "in any specified area or areas," by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 6. [27-11-1940.] [c] The word "and" was *repealed* by Act 24 [XXIV] of 1936, S. 52. [d] Clauses (e) and (f) were *inserted* by S. 52, *ibid.*

187. (1) No owner or occupier of any building in a cantonment shall, without the permission in writing of the ^a[Board] add to or place against or in front of the building any projection or structure overhanging, projecting into, or encroaching on, any street or any drain, sewer or aqueduct therein.

(2) The ^a[Board] may, by notice in writing, require the owner or occupier of any such building to alter or remove any such projection or encroachment as aforesaid :

Provided that, in the case of any projection or encroachment lawfully in existence at the commencement of this Act, the ^a[Board] shall make compensation for any damage caused by the removal or alteration.

(3) The ^a[Board] may, by order in writing, give permission to the owners or occupiers of buildings in any particular street to put up open verandahs, balconies or rooms projecting from any upper storey thereof to an extent beyond the line of the plinth or basement wall at such height from the level ground or street as may be specified in the order.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

188. A ^a[Board] may, by notice in writing, require any person who has, without its permission in writing, newly erected or re-erected any ^b[structure] over any public sewer, drain, culvert, water-course or water-pipe in the cantonment to pull down or otherwise deal with the same as it thinks fit.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* for "building" by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 7. [27-11-1940.]

189. (1) A ^a[Board] may, by notice in writing, require the owner or lessee of any building or land in any street, at his own expense and in such manner as the ^a[Board] thinks fit, to put up and keep in good condition proper troughs and pipes for receiving and carrying rain water from the building or land and for discharging the same or to establish and maintain any other connection or communication between such building or land and any drain or sewer.

(2) For the purpose of efficiently draining any building or land in the cantonment, the ^a[Board] may, by notice in writing, require the owner or lessee of the building or land—

(a) to pave, with such materials and in such manner as it thinks fit, any courtyard, alley or passage between two or more buildings, or

(b) to keep any such paving in proper repair.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Section 187 — Note 1

[1] Notice under this section must be issued by the Cantonment Board. Conviction cannot be sustained for disobedience of notice issued by Executive Officer of Cantonment when notice was not issued by or with the approval of Cantonment Authority. Subsequent confirmation by the Board is of no avail. (Vol 20) 1933 Lah 545 (545) : 35 Cri L Jour 612.

[2] Where a person ordinarily authorised to communicate the sanction does so on an official form of the Board, the applicant making an application for the same is entitled to act on such communication, it being not his business to enquire whether the sanction conveyed to him was actually granted by the Board. (Vol 21) 1934 Lah 510 (511) : 36 Cri L Jour 700.

[3] A person is not bound to comply with the notice of the Board which is illegal and if he fails to comply with an illegal notice he cannot be liable to a fine under the Act. (Vol 20) 1933 All 486 (488). (1932 All 673, distinguished.)

[4] A Cantonment Board gave permission to build warning the applicant that the question of title to the land was doubtful and hence he would build it at his own risk. Immediately the construction was started the

board served a notice "to demolish the *unauthorized* construction" and thereafter prosecuted him under S. 268. It was held that prosecution could not stand as there was no construction for which sanction was not obtained. (Vol 20) 1933 All 486 (488). (1932 All 673, distinguished.)

[5] In the following case it was held that the open space in question in that case was not a 'street' within the meaning of S. 2 (37) and therefore paving it with burnt bricks did not amount to 'placing a structure encroaching on the street' within the meaning of this section. (Vol 22) 1935 Lah 588 (589) : 36 Cri L Jour 1475.

[6] A municipal committee passed a resolution : "the committee authorize the President . . . to take notice of any breach of the bye-laws, and to take action on the same, reporting the said action for the approval of the committee at the ensuing meeting." It was held that the resolution did not validate a notice for removal of a terrace given by a Deputy Commissioner as the President of the municipality and breach of such notice was not, therefore, punishable. (1881) 1881 Pun Re No. 32, p. 84 (87). ((Vol 13) 1926 Cal 1073 (1075), a case under Bengal Municipal Act, 1884, may be consulted.)

190. A ^a[Board] may attach to the outside of any building, or to any tree in the cantonment *Power to attach brackets for lamps.* brackets for lamps in such manner as not to occasion injury thereto or inconvenience.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Streets.

191. A ^a[Board] may by order in writing, permit the temporary occupation of any street, or *Temporary occupation of street, land, etc.* of any land vested in the ^a[Board], for the purpose of depositing any building materials or making any temporary excavation therein or erection thereon, subject to such conditions as it may prescribe for the safety or convenience of the public, and may charge a fee for such permission and may in its discretion withdraw such permission.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

192. (1) A ^a[Board] shall not permanently close any street or open any new street with- *Closing and opening of streets.* out the previous sanction of the ^b[Officer Commanding-in-Chief, the Command].

(2) A ^a[Board] may, by public notice, temporarily close any street or any part of a street for repair or for the purpose of carrying out any work connected with drainage, water-supply or lighting or any other work which it is by or under this Act required or permitted to carry out :

Provided that where, owing to any works or repairs or from any other cause, the condition of any street or of any water-works, drain, culvert or premises vested in the ^a[Board], is such as to be likely to cause danger to the public, the ^a[Board] shall —

(a) take all reasonable means for the protection of the adjacent buildings and land and provide reasonable means of access thereto;

(b) cause sufficient barriers or fences to be erected for the security of life and property, and cause such barriers or fences to be sufficiently lighted from sunset to sunrise.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by the Cantonments (Amendment) Act, 1926 (35 [XXV] of 1926), S. 2, for "Officer Commanding the District".

193. (1) A ^a[Board] may cause a name to be given to any street and to be affixed on any *Names of streets and numbers of buildings.* building in the cantonment in such place as it thinks fit, and may also cause a number to be affixed to any such building.

(2) Whoever destroys, pulls down, defaces or alters any such name or number or puts up any name or number differing from that put up by the order of the ^a[Board] shall be punishable with fine which may extend to twenty rupees.

^b[(3) When a number has been affixed to any building under sub-section (1), the owner of the building shall maintain the number in order, and shall replace it if removed or defaced, and if he fails to do so the Board may by notice in writing require him to replace it.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Inserted* by S. 53, *ibid.*

Boundaries and Trees.

Boundary walls, hedges and fences. **194.** (1) No boundary wall, hedge or fence of any material or description shall be erected in a cantonment without the permission in writing of the ^a[Board].

(2) A ^a[Board] may, by notice in writing, require the owner or lessee of any land in the cantonment—

(a) to remove from the land any boundary wall, hedge or fence which is in its opinion unsuitable, unsightly or otherwise objectionable; or

(b) to construct on the land sufficient boundary walls, hedges or fences of such material, description or dimensions as may be specified in the notice; or

(c) to maintain the boundary walls, hedges or fences of such lands in good order :

Section 194 — Note 1

[1] Before an order can legally be issued by the Board, it must form the opinion that the boundary wall is unsuitable, unsightly or otherwise objectionable. The

Executive Officer has no authority of his own initiative to issue an order under this section. (1909) 9 Cri L Jour 447 (448).

Provided that, in the case of any such boundary wall, hedge or fence which was erected with the consent or under the orders of the ^a[Board], or which was in existence at the commencement of this Act, the ^a[Board] shall make compensation for any damage caused by the removal thereof.

(3) The ^a[Board] may, by notice in writing, require the owner, lessee or occupier of any such land to cut or trim any hedge on the land in such manner and within such time as may be specified in the notice.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

195. (1) Where, in the opinion of a ^a[Board], the felling of any tree of mature growth *Felling, lopping and trimming of trees.* standing in a private enclosure in the cantonment is necessary for any reason, the ^a[Board] may, by notice in writing, require the owner, lessee or occupier of the land to fell the tree within such time as may be specified in the notice.

(2) A ^a[Board] may —

(a) cause to be lopped or trimmed any tree standing on land in the cantonment which belongs to ^b[the Crown] ; or

(b) by public notice require all owners, lessees or occupiers of land in the cantonment, or by notice in writing require the owner, lessee or occupier of any such land, to lop or trim, in such manner as may be specified in the notice, all or any trees standing on such land or to remove any dead trees from such land.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by A. O. for "Government".

196. Whoever, without the permission in writing of the ^a[Board], digs up the surface of any *Digging of public land.* open space in the cantonment, which is not private property, shall be punishable with fine which may extend to twenty rupees, and, in the case of a continuing offence, ^b[with an additional fine] which may extend to five rupees for every day after the first during which the offence continues.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Sch. I, for "to an additional fine".

197. (1) If, in the opinion of a ^a[Board], the working of a quarry in the cantonment, or the *Improper use of land.* removal of stone, earth or other material from the soil in any place in the cantonment, is dangerous to persons residing in or frequenting the neighbourhood of such quarry or place, or creates, or is likely to create, a nuisance, the ^a[Board] may, by notice in writing, prohibit the owner, lessee or occupier of such quarry or place or the person responsible for such ^b[working] or removal, from continuing or permitting the working of such quarry or the moving of such material, or require him to take such steps in the matter as the ^a[Board] may direct for the purpose of preventing danger or abating the nuisance arising or likely to arise therefrom.

(2) If, in any case referred to in sub-section (1), the ^a[Board] is of opinion that such a course is necessary in order to prevent imminent danger, it may, by order in writing, require a proper hoarding or fence to be put up for the protection of passers-by.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Sch. I, for "making".

CHAPTER XII.

MARKETS, SLAUGHTER-HOUSES, TRADES AND OCCUPATIONS.

198. (1) A ^a[Board] may provide and maintain, either within or without the cantonment, *Public markets and slaughter-houses.* public markets and public slaughter-houses, to such number as it thinks fit, together with stalls, shops, sheds, pens and other buildings or conveniences for the use of persons carrying on trade or business in or frequenting such markets or slaughter-

Section 195 — Note 1

[1] A notice under this section must be in writing; a disobedience of a notice not in writing is not punishable under S. 268. (Vol 6) 1919 All 158 (158); 20 Cri L Jour 384.

Chapter XII — Note 1

[1] As to the power of the Central Government to extend any of the provisions of Chapter XII to any area beyond a cantonment and in the vicinity thereof, see Section 286.

houses, and may provide and maintain in any such market buildings, places, machines, weights, scales and measures for the weighing or measurement of goods sold therein.

(2) When such market or slaughter-house is situated beyond cantonment limits, the ^a[Board] shall have the same power for the inspection and proper regulation of the same as if it were situated within those limits.

(3) The ^a[Board] may at any time, by public notice, close any public market or public slaughter-house or any part thereof.

(4) Nothing in this section shall be deemed to authorise the establishment of a public market or public slaughter-house within the limits of any area administered by any local authority other than the ^a[Board], without the permission of such local authority or otherwise than on such conditions as such local authority may approve.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

199. (1) No person shall, without the general or special permission in writing of the *Use of public markets.* ^a[Board], sell or expose for sale any animal or article in any public market.

(2) Any person contravening the provisions of this section, and any animal or article exposed for sale by such person, may be summarily removed from the market by or under the orders of the Executive Officer or any officer or servant of the ^a[Board] authorised by it in this behalf.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

Levy of stallages, rents and fees. **200.** A ^a[Board] may —

(a) charge for the occupation or use of any stall, shop, standing, shed or pen in a public market, or public slaughter-house, or for the right to expose goods for sale in a public market, or for weighing or measuring goods sold therein, or for the right to slaughter animals in any public slaughter-house, such stallages, rents and fees as it thinks fit; or

(b) with the sanction of the ^b[Officer Commanding-in-Chief, the Command], farm the stallages, rents and fees leviable as aforesaid or any portion thereof for any period not exceeding one year at a time; or

(c) put up to public auction, or with the sanction of the ^b[Officer Commanding-in-Chief, the Command], dispose of by private sale, the privilege of occupying or using any stall, shop, standing, shed or pen in a public market or public slaughter-house for such term and on such conditions as it thinks fit.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the District".*

201. A copy of the table of stallages, rents and fees, if any, leviable in any public market or *Stallages, rents, etc., to* public slaughter-house, and of the bye-laws made under this Act for the *be published.* purpose of regulating the use of such market or slaughter-house, printed in the English language and in such other language or languages as the ^a[Board] may direct, shall be affixed in some conspicuous place in the market or slaughter-house.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

202. (1) No place in a cantonment other than a public market shall be used as a market *Private markets and* and no place in a cantonment other than a public slaughter-house shall *slaughter-houses.* be used as a slaughter-house, unless such place has been licensed as a market or slaughter-house, as the case may be, by the ^a[Board] :

Section 200 — Note 1

[1] The cantonment authorities rented a shed to X for Rs. 300, for use as vegetable shop. The period of tenure was three years. Before the expiry of the period the shed was blown off. Some instalments were paid by X but he refused to pay instalments after the shed blew off. The agreement included a clause that any amount due would be recovered from the movable and immovable property of X. The cantonment authorities recovered the dues by issue of a warrant of attachment.

Thereupon X filed a suit for illegal restraint and damages.

Held that S. 200 applies to the case and not S. 210. The relationship between the authorities and X was that of ordinary landlord and tenant and it was optional for X to avoid the lease under S. 108 of the T. P. Act. (Vol 20) 1933 Lah 517 (519).

[2] Failure to pay rent for a stall rented from cantonment authority is not punishable. 1906 Pun Re No. 15 Cr. p. 70. (Case with reference to S. 131 of 1899 Act.)

Provided that nothing in this sub-section shall apply in the case of a slaughter-house established and maintained by the Government.

(2) Nothing in sub-section (1) shall be deemed —

(a) to restrict the slaughter of any animal in any place on the occasion of any festival or ceremony, subject to such conditions as to prior or subsequent notice as the Executive Officer with the previous sanction of the District Magistrate may, by public or special notice, impose in this behalf, or

(b) to prevent the Executive Officer, with the sanction of the ^a[Board], from setting apart places for the slaughter of animals in accordance with religious custom, when such animals are slaughtered for consumption by the troops or for the purpose of the sale of the flesh thereof to the troops.

(3) Whoever omits to comply with any condition imposed by the Executive Officer under clause (a) of sub-section (2) shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to ten rupees for every day after the first during which the offence is continued.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

203. (1) A ^a[Board] may charge such fees as it thinks fit to impose for the grant of a licence *Conditions of grant of licence for private market or slaughter-house.* to any person to open a private market or private slaughter-house in the cantonment, and may grant such licence subject to such conditions, consistent with this Act and any bye-laws made thereunder, as it thinks fit to impose.

(2) The ^a[Board] may refuse to grant any such licence without giving reasons for such refusal.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

204. (1) Any person who keeps open for public use any market or slaughter-house in respect of which a licence is required by or under this Act, without obtaining licence therefor, or while the licence therefor is suspended, or after the same has been cancelled, shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued. *Penalty for keeping market or slaughter-house open without licence, etc.*

(2) When a licence to open a private market or private slaughter-house is granted or refused or is suspended or cancelled, the ^a[Board] shall cause a notice of the grant, refusal, suspension or cancellation to be posted in English, and in such other language or languages as it thinks necessary, in some conspicuous place by or near the entrance to the place to which the notice relates.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

205. Whoever, knowing that any market or slaughter-house has been opened to the public without a licence having been obtained therefor when such licence is required by or under this Act, or that the licence granted therefor is for the time being suspended or that it has been cancelled, sells or exposes for sale any article in such market, or slaughters any animal in such slaughter-house, shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued. *Penalty for using unlicensed market or slaughter-house.*

206. (1) Where, in the opinion of the ^a[Board], it is necessary on sanitary grounds so to do, it may, by public notice, prohibit for such period, not exceeding one month, as may be specified in the notice, or for such further period, not exceeding one month, as it may specify by a like notice, the use of any private slaughter-house specified in the notice, or the slaughter therein of any animal of any description so specified. *Prohibition and restriction of use of slaughter-houses.*

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted in the slaughter-house to which it relates.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

207. (1) Any servant of a ^a[Board], authorised by order in writing in this behalf by the President of the Board ^b[* * *] or the Health Officer, may, if he has reason to believe that any animal has been, is being, or is about to be slaughtered in any place in contravention of the provisions of this Chapter, enter into and inspect any such place at any time, whether by day or by night.

(2) Every such order shall specify the place to be entered and the locality in which the same is situated and the period, which shall not exceed seven days, for which the order is to remain in force.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] The words "if any" were *repealed* by S. 54, *ibid.*

208. A ^a[Board] may, with the approval of the ^b[Central Government], make bye-laws consistent with this Act to provide for all or any of the following matters, namely :—

- (a) the days on, and the hours during, which any private market or private slaughter-house may be kept open for use;
- (b) the regulation of the design, ventilation and drainage of such markets and slaughter-houses, and the material to be used in the construction thereof;
- (c) the keeping of such markets and slaughter-houses and lands and buildings appertaining thereto in a clean and sanitary condition, the removal of filth and refuse therefrom, and the supply therein of pure water and of a sufficient number of latrines and urinals for the use of persons using or frequenting the same;
- (d) the manner in which animals shall be stalled at a slaughter-house;
- (e) the manner in which animals may be slaughtered;
- (f) the disposal or destruction of animals offered for slaughter which are, from disease or any other cause, unfit for human consumption; and
- (g) the destruction of carcases which from disease or any other cause are found after slaughter to be unfit for human consumption.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by A. O. for "Local Government".

Trades and Occupations.

209. (1) A ^a[Board] may provide suitable places for the exercise by washermen of their calling, and may require payment of such fees for the use thereof as it thinks fit.

(2) Where the ^a[Board] has provided such places as aforesaid it may, by public notice, prohibit the washing of clothes by washermen at any other place in the cantonment :

Provided that such prohibition shall not be deemed to apply to the washing by a washerman of his own clothes or of the clothes of any other person who is an occupier of the place at which they are washed.

(3) Whoever contravenes any prohibition contained in a notice issued under sub-section (2) shall be punishable with fine which may extend to twenty rupees.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Licences required for carrying on of certain occupations.

210. (1) No person of any of the following classes, namely :—

- (a) butchers and vendors of poultry, game or fish;
- (b) persons keeping pigs for profit, and dealers in the flesh of pigs which have been slaughtered in India;

Section 207 — Note 1

[1] Nothing in S. 241 shall be deemed to confer upon any person any power such as is referred to in this section; see proviso to S. 241.

Section 210 — Note 1

Sub-section (1) (1) — [1] The word "wood" is unqualified and not restricted to "inflammable wood" only. Hence a person selling bamboos, *ballies*, *takhats* and *karries* within cantonment without licence is guilty

under S. 268. (Vol 21) 1934 All 987 (987) : 36 Cri L Jour 261.

Sub-section (3). — [2] The word "locality" is not an unfair interpretation of the word "part" in cl. (a) of S. 210 (3). It covers all that part of the cantonment where the bazaar was situated and where the particular trader could carry on his occupation without offence or danger to other parts of the cantonment not used for the purpose of a bazaar, but where residences of officers

- (c) persons keeping milch cattle or milch goats for profit;
- (d) persons keeping for profit any animals other than pigs, milch cattle or milch goats;
- (e) dairymen, buttermen and makers and vendors of ghee;
- (f) makers of bread, biscuits or cake, and vendors of bread, biscuits or cake made in India
- (g) vendors of fruit or vegetables;
- (h) manufacturers of aerated or other potable waters or of ice or ice-cream, and vendors of the same;
- ^a[(i)] vendors of any medicines, drugs or articles of food or drink for human consumption (other than the flesh of pigs, milk, butter, bread, biscuits, cake, fruit, vegetables, aerated or other potable waters or ice or ice-cream) which are of a perishable nature;
- (j) vendors of water to be used for drinking purposes;
- (k) washermen;
- (l) dealers in hay, straw, wood, charcoal or other inflammable material;
- (m) dealers in fire-works, kerosene oil, petroleum or any other inflammable oil or spirit;
- (n) tanners and dyers;
- (o) persons carrying on any trade or occupation from which offensive or unwholesome smells arise;
- (p) vendors of wheat, rice and other grain or of flour; ^b[*]
- (q) makers and vendors of sugar or sweetmeats; ^c[and
- (r) barbers and keepers of shaving saloons;]

shall carry on his trade, calling or occupation in any part of a cantonment unless he has applied for and obtained a licence in this behalf from the ^d[Board].

(2) A licence granted under sub-section (1) shall be valid ^e[until the end of the year in which it is issued] and the grant of such licence shall not be withheld by the ^d[Board] unless it has reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to the public.

(3) Notwithstanding anything contained in sub-section (1),—

- (a) no person who was, at the commencement of this Act, carrying on his trade, calling or occupation in any part of a cantonment shall be bound to apply for a licence for carrying on such trade or occupation in that part until he has received from the ^d[Board] not less than three months' notice in writing of his obligation to do so, and if the ^d[Board] refuses to grant him a licence, it shall pay compensation for any loss, incurred by reason of such refusal;
- (b) no person shall be required to take out a licence for the sale or storage of petroleum or for the sale or possession for sale of poisons or white arsenic in any case in which he is required to take out a licence for such sale, storage or possession for sale by or under the Indian Petroleum Act, 1899,^f or the Poisons Act, 1919.

(4) The ^d[Board] may charge for the grant of licences under this section such fees ^e[not exceeding the cost of granting the licences,] as it may fix with the previous sanction of the ^g[Central Government].

[a] Original clauses (j) to (r) were re-lettered (i) to (q) by the Repealing and Amending Act, 1934 (24 [XXIV] of 1934), S. 2 and Sch. I. [b] The word "and" was repealed by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 55. [c] Inserted by S. 55, *ibid.* [d] Substituted by S. 69, *ibid.*, for "Cantonment Authority". [e] Substituted by S. 55, *ibid.*, for "for one year". [f] See now the Indian Petroleum Act, 1934 (30 [XXX] of 1934). [g] Substituted by A. O. for "Local Government".

Section 210 (contd.)

or the barracks for troops are situated. (Vol 29) 1942 Sind 95 (95) : 43 Cri L Jour 733.

[3] Where a person has been carrying on a trade in the same part of the cantonment from the commencement of the Cantonments Act, there is no obligation upon him to apply for licence to carry on the trade. Cantonment Authority must give him three months' notice of his obligation to apply for licence. Without such notice he cannot be convicted for carrying on trade without a licence. (Vol 29) 1942 Sind 95 (95) : 43 Cri L Jour 733.

[4] A notice was served on a person prohibiting him from selling fruit in the cantonment area. He made a representation under sub-s. (3) (a) whereupon he was allowed to continue the business but it was not clear whether the cantonment authorities required him to take a licence. However, he applied for a licence without paying the fee prescribed for it. No licence was issued and he was tried summarily for offence under Ss. 210 (g) and 213, and convicted. It was held that he could not, by reason of his conduct in applying for a licence, avail of sub-s. (3) (a). It was also remarked that the accused should not have been tried summarily. (Vol 25) 1938 Lah 427 (427).

211. A licence granted to any person under section 210 shall specify the part of the cantonment in which the licensee may carry on his trade, calling or occupation, and may regulate the hours and manner of transport within the cantonment of any specified articles intended for human consumption, and may contain any other conditions which the ^a[Board] thinks fit to impose in accordance with bye-laws made under this Act.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

General Provisions.

212. If a ^a[Board] is satisfied that any place used under a licence granted under this Chapter is a nuisance or is likely to be dangerous to life, health or property, the ^a[Board] may, by notice in writing, require the owner, lessee or occupier thereof to discontinue the use of such place or to effect such alterations, additions, or improvements as will, in the opinion of the ^a[Board], render it no longer a nuisance or dangerous.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

213. Whoever carries on any trade, calling or occupation for which a licence is required without obtaining a licence therefor or while the licence therefor is suspended or after the same has been cancelled, and whoever, after receiving a notice under section 212, uses or allows to be used any building or place in contravention thereof, shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing offence, with an additional fine which may extend to forty rupees for every day after the first during which the offence is continued.

214. Whoever feeds or allows to be fed on filthy or deleterious substances any animal, which is kept for the purpose of supplying milk to, or which is intended to be used as food for, the inhabitants of a cantonment or allows it to graze in any place in which grazing has, for sanitary reasons, been prohibited by public notice by the ^a[Board] shall be punishable with fine which may extend to fifty rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Entry, Inspection and Seizure.

215. (1) The President or the Vice-President ^a[* * *] the Executive Officer, the Health Officer, the Assistant Health Officer, or any other officer or servant of a ^b[Board] authorised by it in writing in this behalf,—

(a) may at any time enter into any market, building, shop, stall or other place in the cantonment for the purpose of inspecting, and may inspect any animals, article or thing intended for human food or drink or for medicine, whether exposed or hawked about for sale or deposited in or brought to any place for the purpose of sale, or of preparation for sale, or any utensil or vessel for preparing, manufacturing or containing any such article, or thing, and may enter into and inspect any place used as a slaughter-house and may examine any animal or article therein ;

(b) may seize any such animal, article or thing which appears to him to be diseased, or unwholesome or unfit for human food or drink or medicine, as the case may be, or to be adulterated or to be not what it is represented to be, or any such utensil or vessel which is of such a kind or in such a state as to render any article prepared, manufactured or contained therein unwholesome or unfit for human food or for medicine, as the case may be.

(2) Any article seized under sub-section (1) which is of a perishable nature may, under the orders of the Health Officer or the Assistant Health Officer, forthwith be destroyed if, in his opinion, it is diseased, unwholesome or unfit for human food, drink or medicine, as the case may be.

(3) Every animal, article, utensil, vessel or other thing seized under sub-section (1) shall, if it is not destroyed under sub-section (2), be taken before a Magistrate, ^c[who shall give orders as to its disposal].

Section 213 — Note 1

[1] A butcher who had no licence imported meat in large quantities and distributed it. There was no evidence of his receiving any money. He alleged that he was a salaried person employed for fetching meat by several persons. It was held that the presumption was that he imported meat for sale and sold it, and in the

absence of any other evidence conviction was proper. (Vol 16) 1929 Sind 150 (151).

Section 215 — Note 1

[1] Nothing in section 241 shall be deemed to confer upon any person any power such as is referred to in this section; see proviso to section 241.

(4) The owner or person in possession, at the time of seizure under sub-section (1), of any animal or carcase which is diseased or of any article or thing which is unwholesome or unfit for human food, drink or medicine as the case may be, or is adulterated or is not what it is represented to be, or of any utensil or vessel which is of such kind or in such state as is described in clause (b) of sub-section (1), shall be punishable with fine which may extend to one hundred rupees, and the animal, article, utensil, vessel or other thing shall be liable to be forfeited to the ^b[Board] or to be destroyed or to be so disposed of as to prevent its being exposed for sale or used for the preparation of food, drink or medicine, as the case may be.

Explanation I. — If any such article, having been exposed or stored in, or brought to, any place mentioned in sub-section (1) for sale as ghee, contains any substance not exclusively derived from milk, it shall be deemed, for the purposes of this section, to be an article which is not what it is represented to be.

Explanation II. — Meat subjected to the process of blowing shall be deemed to be unfit for human food.

Explanation III. — The article of food or drink shall not be deemed to be other than what it is represented to be merely by reason of the fact that there has been added to it some substance not injurious to health :

Provided that—

- (a) such substance has been added to the article because the same is required for the preparation or production thereof as an article of commerce in a state fit for carriage or consumption and not fraudulently to increase the bulk, weight or measure of the food or drink or conceal the inferior quality thereof, or
- (b) in the process of production, preparation or conveyance of such article of food or drink, the extraneous substance has unavoidably become intermixed therewith, or
- (c) the owner or person in possession of the article has given sufficient notice by means of a label distinctly and legibly written or printed thereon or therewith, or by other means of a public description, that such substance has been added, or
- (d) such owner or person has purchased the article with a written warranty that it was of a certain nature, substance and quality and had no reason to believe that it was not of such nature, substance and quality, and has exposed it or hawked it about or brought it for sale in the same state and by the same description as that in and by which he purchased it.

[a] The words "of a Board" were *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 56. [b] *Substituted* by S. 69, *ibid.*, for "Cantonment Authority". [c] *Added* by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 7. [17-3-1944.]

Import of Cattle and Flesh.

216. (1) No person shall, without the permission in writing of the ^a[Board], bring into a *Import of cattle and flesh.* cantonment any animal intended for human consumption, or the flesh of any animal slaughtered outside the cantonment otherwise than in a slaughter-house maintained by the Government or the ^a[Board].

(2) Any animal or flesh brought into a cantonment in contravention of sub-section (1) may be seized by the Executive Officer or by any servant of the ^a[Board] and sold or otherwise disposed of as the ^b[President of the Board] may direct, and, if it is sold, the sale-proceeds may be credited to the cantonment fund.

(3) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to fifty rupees.

(4) Nothing in this section shall be deemed to apply to cured or preserved meat or to animals driven or meat carried through a cantonment for consumption outside thereof, or to meat brought into a cantonment by any person for his immediate domestic consumption :

Provided that the ^a[Board] may, by public notice, direct that the provisions of this section shall apply to cured or preserved meat of any specified description or brought from any specified place.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* for "Board" by the Cantonments (Amendment) Act, 1944 (8 [VIII] of 1944), S. 8. [17-3-1944].

CHAPTER XIII.

WATER-SUPPLY, DRAINAGE AND LIGHTING.

Water-supply.

217. (1) In every cantonment where a sufficient supply of pure water for domestic use does not already exist, the ^a[Board] shall provide or arrange for the *Maintenance of water-supply.* provision of such a supply.

(2) The ^a[Board] shall, as far as possible, make adequate provision that such supply shall be continuous throughout the year, and that the water shall be at all times pure and fit for human consumption.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

218. (1) The ^a[Board] may, with the previous sanction of the ^b[Central Government], by *Control over sources of public water-supply.* public notice, declare any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of water-supply under the control of the ^c[Military Engineer] Services or the Public Works Department) from which water is or may be made available for the use of the public in the cantonment to be a source of public water-supply.

(2) Every such source shall be under the control of the ^a[Board].

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".* [b] *Substituted by A. O. for "Local Government".* [c] *Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 9, for "Military Works".*

Power to require maintenance or closing of private source of public drinking water-supply. 219. The ^a[Board] may, by notice in writing, require the owner or any person having the control of any source of public water-supply which is used for drinking purposes—

- (a) to keep the same in good order and to clear it from time to time of silt, refuse and decaying vegetation, or
- (b) to protect the same from contamination in such manner as the ^a[Board] may direct, or
- (c) if the water therein is proved to the satisfaction of the ^a[Board] to be unfit for drinking purposes, to take such measures as may be specified in the notice to prevent the public from having access to or using such water :

Provided that, in the case of a well, such person as aforesaid may, instead of complying with the notice, signify in writing his desire to be relieved of all responsibility for the proper maintenance of the well and his readiness to place it under the control and supervision of the ^a[Board] for the use of the public, and, if he does so, he shall not be bound to carry out the requisition, and the ^a[Board] shall undertake the control and supervision of the well.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

220. (1) The ^a[Board] may permit the owner, lessee or occupier of any building or land to *Supply of water.* connect the building or land with a source of public water-supply by means of communication pipes of such size and description as it may prescribe for the purpose of obtaining water for domestic use.

(2) The occupier of every building so connected with the water-supply shall be entitled to have for domestic use, in return for the water tax, if any, such quantity of water as the ^a[Board] may determine.

Chapter XIII — Note 1

[1] As to the power of the Central Government to extend any of the provisions of Chapter XIII to any area beyond a cantonment and in the vicinity thereof, see section 286.

Section 218 — Note 1

[1] "It has been pointed out that this clause as originally drafted would enable the cantonment authority to take under its own control sources of water-supply belonging to a municipality supplying water in the cantonment besides giving somewhat wide powers of confiscation of wells, etc. We have accordingly made the exercise of the powers conferred by this section subject to the sanction of the Local Government."

— *Select Committee Report.*

Section 219 — Note 1

[1] The Officer of the Military Engineer Services or the Public Works Department when in charge of water-supply may require the Board to exercise any of the powers conferred by this section ; see section 233 (1).

Section 220 — Note 1

[1] As to the penalty for using for other than domestic purposes any water supplied for domestic use, see section 226.

[2] As to whether the Board empowered to levy tax on water can increase or vary the tax without sanction from Government, see (Vol 13) 1926 Sind 130 (131, 132): 20 Sind L R 325.

(3) All water supplied in excess of the quantity to which such supply is limited under sub-section (2) and, in a cantonment in which a water tax is not imposed, all water supplied under this section, shall be paid for at such rate as the ^a[Board] may fix.

(4) The supply of water for domestic use shall not be deemed to include any supply —

- (a) for animals or for washing vehicles where such animals or vehicles are kept for sale or hire;
- (b) for any trade, manufacture or business;
- (c) for fountains, swimming baths or any ornamental or mechanical purpose;
- (d) for gardens or for purposes of irrigation;
- (e) for making or watering roads or paths; or
- (f) for building purposes.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

221. If it appears to the ^a[Board] that any building or land in the cantonment is without a proper supply of pure water, the ^a[Board] may, by notice in writing, require the owner, lessee or occupier of the building or land to obtain from a source of public water-supply such quantity of water as is adequate to the requirements of the persons usually occupying or employed upon the building or land, and to provide communication pipes of the prescribed size and description, and to take all necessary steps for the above purposes.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

222. (1) The ^a[Board] may, by agreement, supply, from any source of public water-supply, the owner, lessee or occupier of any building or land in the cantonment with any water for any purpose, other than a domestic purpose, on such terms and conditions, consistent with this Act and the rules and bye-laws made thereunder as may be agreed upon between the ^a[Board] and such owner, lessee or occupier.

(2) The ^a[Board] may withdraw such supply or curtail the quantity thereof at any time if it should appear necessary to do so for the purpose of maintaining sufficient supply of water for domestic use by inhabitants of the cantonment.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

223. Notwithstanding any obligation imposed on ^a[Boards] under this Act, a ^b[Board] shall not be liable to any forfeiture, penalty or damages for failure to supply water or for curtailing the quantity thereof if the failure or curtailment, as the case may be, arises from accident or from drought or other unavoidable cause unless, in the case of an agreement for the supply of water under section 222, the ^b[Board] has made express provision for forfeiture, penalty or damages in the event of such failure or curtailment.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authorities". [b] *Substituted* by S. 69, *ibid.*, for "Cantonment Authority".

224. Notwithstanding anything hereinbefore contained or contained in any agreement under section 222, the supply of water by a ^a[Board] to any building or land shall be, and shall be deemed to have been, granted subject to the following conditions, namely:—

- (a) the owner, lessee or occupier of any building or land in or on which water supplied by the ^a[Board] is wasted by reason of the pipes, drains or other works being out of repair shall, if he has knowledge thereof, give notice of the same to such officer as the ^a[Board] may appoint in this behalf;
- (b) the Executive Officer or any other officer or servant of the ^a[Board] authorised by it in writing in this behalf may enter into or on any premises supplied with water by the ^a[Board], for the purpose of examining all pipes, taps, works and fittings connected with the supply of water and of ascertaining whether there is any waste or misuse of such water;

(c) the ^a[Board] may, after giving notice in writing, cut off the connection between any source of public water-supply and any building or land to which water is supplied for any purpose therefrom, or turn off such supply if —

- (i) the owner or occupier of the building or land neglects to pay the water-tax or other charges connected with the water-supply within one month from the date on which such tax or charge falls due for payment ;
 - (ii) the occupier refuses to admit the Executive Officer or other authorised officer or servant of the ^a[Board] into the building or land for the purpose of making any examination or inquiry authorised by clause (b) or prevents the making of such examination or inquiry ;
 - (iii) the occupier wilfully or negligently misuses or causes waste of water ;
 - (iv) the occupier wilfully or negligently injures or damages his meter or any pipe or tap conveying water from the water-works ;
 - (v) any pipes, taps, works or fittings connected with the supply of water to the building or land are found, on examination by the Executive Officer, to be out of repair to such an extent as to cause a waste of water ;
- (d) the expense of cutting off the connection or of turning off the water in any case referred to in clause (c) shall be paid by the owner or occupier of the building or land ;
- (e) no action taken under or in pursuance of clause (c) shall relieve any person from any penalty or liability which he may otherwise have incurred.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

225. A ^a[Board] may allow any person not residing within the limits of the cantonment to *Supply to persons* take or be supplied with water for any purpose from any source of public *outside cantonment.* water-supply on such terms as it may prescribe, and may at any time withdraw or curtail such supply.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

Penalty.

226. Whoever—

- (a) uses for other than domestic purposes any water supplied by a ^a[Board] for domestic use, or
- (b) where water is supplied by agreement with a ^a[Board] for a specified purpose, uses that water for any other purpose,

shall be punishable with fine which may extend to fifty rupees, and the ^a[Board] shall be entitled to recover from him the price of the water misused.

[a] *Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".*

Water, Drainage and other Connections.

Power of Board to lay wires, connections, etc.

227. A ^a[Board] may carry any cable, wire, pipe, drain, sewer or channel of any kind,—

- (a) for the purpose of carrying out, establishing or maintaining any system of water-supply, lighting, drainage, or sewerage, through, across, under or over any road or street, or any place laid out or intended as a road or street, or, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated within the cantonment, or
- (b) for the purpose of supplying water or of the introduction or distribution of outfall of water or for the removal or outfall of sewage, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated outside the cantonment ;

and may at all times do all acts and things which may be necessary or expedient for repairing or maintaining any such cable, wire, pipe, drain, sewer or channel in an effective state for the purpose for which the same may be used or is intended to be used :

Provided that no nuisance shall be caused in excess of what is reasonably necessary for the proper execution of the work :

Provided, further, that compensation shall be payable to the owner or occupier for any damage sustained by him which is directly occasioned by the carrying out of any such operation.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

228. In the event of any cable, wire, pipe, drain, sewer or channel being laid or carried above the surface of any land or through, over or up the side of any building, such *Wires, etc., laid above surface of ground.* cable, wire, pipe, drain, sewer or channel shall be so laid or carried as to interfere as little as possible with the rights of the owner or occupier to the due enjoyment of such land or building, and compensation shall be payable by the ^a[Board] in respect of any substantial interference with the right to any such enjoyment.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

229. No person shall, for any purpose whatsoever, without the permission of the ^a[Board], at any time make or cause to be made any connection or communication with any cable, wire, pipe, drain, sewer or channel constructed or maintained by, or vested in, a ^a[Board]. *Connection with main not to be made without permission.*

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

230. A ^a[Board] may prescribe the size of the ferrules to be used for the supply of gas, if any, and may establish meters or other appliances for the purpose of testing the quantity of any water, or the quantity or quality of any gas supplied to any premises by the ^a[Board]. *Power to prescribe ferrules and to establish meters, etc.*

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

231. The ferrules, communication pipes, connections, meters, stand-pipes and all fittings thereon or connected therewith leading from water mains or from pipes, drains, sewers or channels into any house or land, to which water or gas is supplied by a ^a[Board], and the pipes, fittings, and works inside any such house or within the limits of any such land, shall in all cases be ^b[installed or] executed subject to the inspection and to the satisfaction of the ^a[Board]. *Power of inspection.*

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Inserted* by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Sch. I.

232. A ^a[Board] may fix the charges to be made for the establishment by them or through their agency of communications from, and connections with, mains, or pipes for the supply of water, or gas, or for meters or other appliances for testing the quantity or quality thereof supplied, and may levy such charges accordingly. *Power to fix rates and charges.*

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Application of this Chapter to Government Water-supplies.

233. (1) Where in any cantonment there is a water-supply under the control of the ^a[Military Engineer] Services or the Public Works Department, the Officer of the ^a[Military Engineer] Services or of the Public Works Department, as the case may be, in charge of such water-supply (hereinafter in ^b[this Chapter] referred to as the Officer) may publish in the cantonment in such manner as he thinks fit a notice declaring that any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of public water-supply) under the control of the ^c[Board] is a source of public water-supply and may, for the purpose of keeping any such source in good order or of protecting it from contamination or from use, require the ^c[Board] to exercise any power conferred upon ^d[it] by section 219.

(2) In the case of any water-supply such as is referred to in sub-section (1), the following provisions of this Chapter, namely, the provisions of sections 220, 222, 223, 224, 226, 227, 228, 229, 230, 231 and 232 shall, as far as may be, be applicable in respect of the supply of water to the cantonment, and for the purpose of such application references to the ^c[Board] shall be construed as references to the Officer, and references to the Executive Officer or other officer or servant of the ^c[Board] shall be construed as references to such person as may be authorised in this behalf by the Officer.

^e[(3) The provisions of section 222 shall be applicable in respect of the supply of water by agreement to the Board by the Officer for use for any purpose other than a domestic purpose in

like manner as they are applicable to such supply to the owner, lessee or occupier of any building or land in the cantonment.]

- [a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 9, for "Military Works".
 [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 57, for "this section and in section 234". [c] *Substituted* by S. 69, *ibid.*, for "Cantonment Authority". [d] *Substituted* for "that Authority" by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2 and Sch. I. [28-9-1939.]
 [e] Sub-section (3) was *added* by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 10. [30-3-1942.]

234. In any case in which the provisions of section 233 apply ^a[and in which the Board is not receiving a bulk supply of water under section 234A,] the water-tax, if any, imposed in the cantonment and all other charges arising out of the supply of water which may be imposed under the provisions of this Chapter as applied by section 233 shall be recovered by the ^b[Board], and all monies so recovered, or such proportion thereof as the ^c[Central Government] may in each case determine, shall be paid by the ^b[Board] to the Officer.

- [a] *Inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 58. [b] *Substituted* by S. 69, *ibid.*, for "Cantonment Authority". [c] *Substituted* by A. O. for "Local Government".

^a**[234A.** (1) Where in any cantonment there is a water-supply such as is referred to in sub-section (1) of section 233, the Board may ^b[and so long as the Board is unable to provide a water-supply of its own, it shall] receive from the Military Engineer Services or the Public Works Department, as the case may be, at such point or points as may be agreed upon between the Board and the Officer, a supply of water adequate to the requirements for domestic use of all persons in the cantonment other than entitled consumers.

(2) Any supply of water received under sub-section (1) shall be a bulk supply, and the Board shall make such payments to the Officer for all water so received as may be agreed upon between the Board and the Officer, or, in default of such agreement, as may be determined by the ^c[Central Government] to be reasonable having regard to the actual cost of supplying the water in the cantonment and the rate charged for water in any adjacent municipality :

Provided that, notwithstanding anything contained in this Act, the Board shall not charge for the supply to persons in the cantonment of water received by the Board under this section a rate calculated to produce more than the sum of the payments made to the Officer for water received and the actual cost of the supply thereof by the Board to consumers.

(3) If any dispute arises between the Board and the Officer regarding the amount of water adequate to the requirements of persons in the cantonment other than entitled consumers, the dispute shall be referred to the ^c[Central Government] whose decision shall be final.]

- [a] Section 234A was *inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 59.

[b] *Inserted* by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 11. [30-3-42].

- [c] *Substituted* by A. O. for "Governor-General in Council."

^a**[234B.** Where under the provisions of sub-section (1) of section 234A a bulk supply of water is received by the Board, the Board shall be solely responsible for the supply of water to all persons in the cantonment other than entitled consumers ; and the provisions of this Act shall apply as if such bulk supply were a source of public water-supply under the control of the Board and as if the communications from and connections with such bulk supply for the purpose of supplying water to such persons were a system of water-supply established and maintained by the Board.]

- [a] Section 234B was *inserted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 59.

CHAPTER XIV.

REMOVAL AND EXCLUSION FROM CANTONMENTS AND SUPPRESSION OF SEXUAL IMMORALITY.

235. The ^a[Officer Commanding the station] may, on receiving information that any building in the cantonment is used as a brothel or for purposes of prostitution, ^bby order in writing setting forth the substance of the information received, summon the owner, lessee, tenant or occupier of the building to appear before him either in person or by an authorised agent, and, if the ^b[Officer Commanding the station] is then satisfied

Chapter XIV — Note 1

- [1] As to the power of the Central Government to extend any of the provisions of Chapter XIV to any area beyond a cantonment and in the vicinity thereof, see section 286.

as to the truth of the information, he may, by order in writing, direct the owner, lessee, tenant or occupier, as the case may be, to discontinue such use of the building within such period as may be specified in the order.

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 10, for "Commanding Officer of a Cantonment". [b] *Substituted* by S. 14, *ibid*, for "Commanding Officer of the Cantonment".

236. (1) Whoever in a cantonment loiters for the purpose of prostitution or importunes any

Penalty for loitering and importuning for purposes of prostitution. person to the commission of sexual immorality, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to two hundred rupees.

(2) No prosecution for an offence under this section shall be instituted except on the complaint of the person importuned, or of a military officer in whose presence the offence was committed, or of a member of the Military or Air Force Police, being employed in the cantonment and authorised in this behalf by the ^a[Officer Commanding the station], in whose presence the offence was committed, or of a police officer not below the rank of a sub-inspector ^b[or a sergeant] who is employed in the cantonment and authorised in this behalf by the ^a[Officer Commanding the station] ^b[with the concurrence of the District Magistrate.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment". [b] *Inserted* by the Cantonments (Amendment) Act, 1931 (7 [VII] of 1931), S. 7.

237. If the ^a[Officer Commanding the station] is, after such inquiry as he thinks necessary,

Removal of lewd persons from cantonment. satisfied that any person residing in or frequenting the cantonment is a prostitute or has been convicted of an offence under section 236, or of the abetment of such an offence, he may cause to be served on such person an order in writing requiring such person to remove from the cantonment within such time as may be specified in the order, and prohibiting such person from re-entering it without the permission in writing of the ^b[Officer Commanding the station.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 10, for "Commanding Officer of a Cantonment". [b] *Substituted* by S. 14, *ibid*, for "Commanding Officer of the Cantonment".

Removal and exclusion from cantonment of disorderly persons.

238. (1) A Magistrate of the first class, having jurisdiction in a cantonment, on receiving information that any person residing in or frequenting the cantonment —

(a) is a disorderly person who has been convicted more than once of gaming or who keeps or frequents a common gaming house, a disorderly drinking shop or a disorderly house of any other description, or

(b) has been convicted more than once, either within the cantonment or elsewhere, of an offence punishable under Chapter XVII of the Indian Penal Code, or

(c) has been convicted, either within the cantonment or elsewhere, of any offence punishable under section 156 of the Army Act,^a or

(d) has been ordered under Chapter VIII of the Code of Criminal Procedure, 1898, either within the cantonment or elsewhere, to execute a bond for his good behaviour,

may record in writing the substance of the information received, and may issue a summons to such person requiring such person to appear and show cause why he should not be required to remove from the cantonment and be prohibited from re-entering it.

(2) Every summons issued under sub-section (1) shall be accompanied by a copy of the

Section 236 — Note 1

[1] As to when a police officer may arrest a person for an offence under this section, see S. 250 (b).

[2] Person importuning need not importune to commission of sexual immorality with himself or herself. (Vol 23) 1936 All 129 (130) : 37 Cri L Jour 372.

[3] A male can be convicted of the offence of loitering because prostitution may be female or male prostitution. (Vol 13) 1926 Bom 227 (227) : 27 Cri L Jour 555.

[4] In order that a conviction may be legal under sub-section (1) prosecution should be started strictly in accordance with sub-section (2). Thus, where an Executive Officer of a cantonment launched a prosecution under sub-section (1) and it was found that none of the conditions mentioned in sub-section (2) were fulfilled,

the conviction of the accused was set aside by the High Court as the prosecution was not legally instituted. (Vol 20) 1933 Lah 590 (591) : 35 Cri L Jour 509.

[5] Regimental Provost Sergeant sending complaint under S. 236 to Sub-Inspector — Latter forwarding original to Magistrate — Sergeant, member of Military Police, and authorised to make complaint under S. 236 — Part of the offence committed in his presence — Complaint held was properly made. (Vol 23) 1936 All 129 (130, 131) : 37 Cri L Jour 372.

Section 238 — Note 1

[1] As to whether all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal from an order under this section, see S. 276.

record aforesaid, and the copy shall be served along with the summons on the persons against whom the summons is issued.

(3) The Magistrate shall, when the person so summoned appears before him, proceed to inquire into the truth of the information received and take such further evidence as he thinks fit, and if upon such inquiry, it appears to him that such person is a person of any kind described in sub-section (1) and that it is necessary for the maintenance of good order in the cantonment that such person should be required to remove therefrom and be prohibited from re-entering the cantonment, the Magistrate shall report the matter to the ^b[Officer Commanding the station], and, if the ^b[Officer Commanding the station] so directs, shall cause to be served on such person an order in writing requiring him to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the ^b[Officer Commanding the station].

[a] (1881) 44 & 45 Vict., c. 58. [b] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".

239. (1) If any person in a cantonment causes or attempts to cause or does any act which he knows is likely to cause disloyalty, disaffection or breaches of discipline amongst any portion of His Majesty's forces or is a person who, the ^a[Officer Commanding the station] has reason to believe, is likely to do any such act, the ^a[Officer Commanding the station] may make an order in writing setting forth the reasons for the making of the same and requiring such person to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the ^a[Officer Commanding the station] :

Provided that no order shall be made under this section against any person unless he has had a reasonable opportunity of being informed of the grounds on which it is proposed to make the order and of showing cause why the order should not be made.

(2) Every order made under sub-section (1) shall be sent to the Superintendent of Police of the district, who shall cause a copy thereof to be served on the person concerned.

(3) Upon the making of any order under sub-section (1), the ^a[Officer Commanding the station] shall forthwith send a copy of the same to the ^b[Central Government].

(4) The ^b[Central Government] may, of its own motion, and shall, on application, made to it in this behalf within one month of the date of the order by the person against whom the order has been made, call upon the District Magistrate to make, after such inquiry as the ^b[Central Government] may prescribe, a report regarding the justice of the order and the necessity therefor. At every such inquiry the person against whom the order has been made shall be given an opportunity of being heard in his own defence.

(5) The ^b[Central Government] may, at any time after the receipt of a copy of an order sent under sub-section (3), or where a report has been called for under sub-section (4), on receipt of that report, if it is of opinion that the order should be varied or rescinded, ^c[make such order thereon as it thinks fit].

(6) Any person who has been excluded from a cantonment by an order made under this section may, at any time after the expiry of one month from the date thereof, apply to the Officer Commanding-in-Chief, the Command, for the rescission of the same and, on such application being made, the said Officer may, after making such inquiry, if any, as he thinks necessary, either reject the application or rescind the order.

[a] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment". [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "refer the case to the Governor-General in Council, who shall pass such orders thereon as he thinks fit".

Penalty. **240.** Whoever—

(a) fails to comply with an order issued under this Chapter within the period specified therein, or, whilst an order prohibiting him from re-entering a cantonment without permission is in force, re-enters the cantonment without such permission, or

Section 239 — Note 1

[1] "We recognise that preventive powers of the nature given in this section are necessary, and we are satisfied that sufficient safeguards against the possibility of abuses are provided, subject to the incorporation of two amendments which we have made. The first of these makes it clear that the person whom it is proposed

to expel shall be given an opportunity of hearing the grounds on which his expulsion is considered necessary before being required to show cause under sub-clause (1). The second makes it clear that at any inquiry by the District Magistrate under sub-clause (4) the person expelled shall be given an opportunity of being heard in his own defence." — *Select Committee Report.*

(b) knowing that any person has, under this Chapter, been required to remove from the cantonment and has not obtained the requisite permission to re-enter it, harbours or conceals such person in the cantonment, shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the offence.

CHAPTER XV.

POWERS, PROCEDURE, PENALTIES AND APPEALS.

Entry and Inspection.

241. It shall be lawful for the President or the Vice-President of a Board, or the Executive Officer, or the Health Officer or Assistant Health Officer, or any person specially authorised by the Health Officer or the Assistant Health Officer, or for any other person authorised by general or special order of a ^a[Board] in this behalf, to enter into or upon any building or land with or without assistants or workmen in order to make any inquiry, inspection, measurement, valuation or survey, or to execute any work, which is authorised by or under this Act or which it is necessary to make or execute for any of the purposes or in pursuance of any of the provisions of this Act or of any rule, bye-law or order made thereunder:

Provided that nothing in this section shall be deemed to confer upon any person any power such as is referred to in section 207 or section 215 or to authorise the conferment upon any person of any such power.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

242. With the previous sanction of the President, any member of a Board may inspect any work or institution constructed or maintained, in whole or part, at the expense of the Board, and any register, book, accounts or other document belonging to, or in the possession of, the Board.

Power of inspection, etc. **243.** (1) A ^a[Board] may, by general or special order, authorise any person—

- (a) to inspect any drain, privy, latrine, urinal, cesspool, pipe, sewer or channel in or on any building or land in the cantonment, and, in his discretion, to cause the ground to be opened for the purpose of preventing or removing any nuisance arising from the drain, privy, latrine, urinal, cesspool, pipe, sewer or channel, as the case may be;
- (b) to examine works under construction in the cantonment, to take levels or to remove, test, examine, replace or read any meter.

(2) If, on such inspection, the opening of the ground is found to be necessary for the prevention or removal of a nuisance, the expenses thereby incurred shall be paid by the owner or occupier of the land or building, but if it is found that no nuisance exists or but for such opening would have arisen the ground or portion of any building, drain, or other work opened, injured or removed for the purpose of such inspection shall be filled in, reinstated, or made good, as the case may be, by the ^a[Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

244. (1) The Executive Officer of a cantonment may, with or without assistants or workmen, enter on any land within fifty yards of any work authorised by or under this Act for the purpose of depositing thereon any soil, gravel, stone or other materials, or of obtaining access to such work, or for any other purpose connected with the carrying on of the same.

(2) The Executive Officer shall, before entering on any land under sub-section (1), give the occupier, or, if there is no occupier, the owner not less than three days' previous notice in writing of his intention to make such entry, and shall state the purpose thereof, and shall, if so required by the occupier or owner, fence off so much of the land as may be required for such purpose.

Chapter XV — Note 1

[1] As to the power of the Central Government to extend any of the provisions of Chapter XV to any area beyond a cantonment and in the vicinity thereof, see Section 286.

(3) The Executive Officer shall, in exercising any power conferred by this section, do as little damage as may be, and compensation shall be payable by the ^a[Board] to the owner or occupier of such land, or to both, for any such damage whether permanent or temporary.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

In making into premises. 245. It shall be lawful for any person, authorised by or under this Act to make any entry into any place, to open or cause to be opened any door, gate or other barrier —

(a) if he considers the opening thereof necessary for the purpose of such entry; and

(b) if the owner or occupier is absent, or being present refuses to open such door, gate or barrier.

Entry to be made in the day time. 246. Save as otherwise expressly provided in this Act, no entry authorised by or under this Act shall be made except between the hours of sunrise and sunset.

247. Save as otherwise expressly provided in this Act, no building or land shall be entered without the consent of the occupier, or if there is no occupier, of the owner thereof, and no such entry shall be made without giving the said occupier or owner, as the case may be, not less than four hours' written notice of the intention to make such entry :

Provided that no such notice shall be necessary if the place to be inspected is a stable for horses or a shed for cattle, or a latrine, privy or urinal, or a work under construction.

248. When any place used as a human dwelling is entered under this Act, due regard shall be paid to the social and religious customs and usages of the occupants of the place entered, and no apartment in the actual occupancy of a female shall be entered or broken open until she has been informed that she is at liberty to withdraw and every reasonable facility has been afforded to her for withdrawing.

249. Whoever obstructs or molests any person employed by a ^a[Board], who is not a public servant within the meaning of section 21 of the Indian Penal Code or any person with whom the ^a[Board] has lawfully contracted, in the execution of his duty or of anything which he is empowered or required to do by virtue or in consequence of any of the provisions of this Act or of any rule, bye-law or order made thereunder, or in fulfilment of his contract, as the case may be, shall be punishable with fine which may extend to one hundred rupees.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Powers and Duties of Police Officers.

250. Any member of the police force employed in a cantonment may, without a warrant, arrest any person committing in his view a breach of any of the provisions of this Act which are specified in Schedule IV :

Provided that—

(a) in the case of the breach of any such provision as is specified in Part B of Schedule IV, no person shall be so arrested who consents to give his name and address, unless there is reasonable ground for doubting the accuracy of the name or address so given, the burden of proof of which shall lie on the arresting officer, and no person so arrested shall be detained after his name and address have been ascertained; and

(b) no person shall be so arrested for an offence under section 236 except—

(i) at the request of the person importuned or of a military officer in whose presence the offence was committed; or

(ii) by or at the request of a member of the Military or Air Force Police, who is employed in the cantonment and authorised in this behalf by the ^a[Officer Commanding the station], and in whose presence the offence was committed or by or at the request of

Section 247 — Note 1

[1] The entry which is contemplated in S. 247 which requires four hours' written notice is an entry *without* the consent of the occupier or the owner. But if the entry is with the implied consent of the occupier or the owner no question of four hours' written notice arises.

(Vol 22) 1935 All 160 (161) : 36 Cri L Jour 356.

Section 249 — Note 1

[1] Mere refusal to pay rent is not an obstruction within the meaning of this section. (Vol 19) 1932 All 386 (389).

any police officer not below the rank of a sub-inspector who is employed in the cantonment and authorised in this behalf by the ^a[Officer Commanding the station].

[a] Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment".

251. It shall be the duty of all police officers to give immediate information to the ^a[Board] of the commission of any offence against the provisions of this Act or of any rule or bye-law made thereunder, and to assist all cantonment officers and servants in the exercise of their lawful authority.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Notices.

252. Where any notice, order or requisition made under this Act or any rule or bye-law made thereunder requires anything to be done for the doing of which no time is fixed in this Act or in the rule or bye-law, the notice, order or requisition shall specify a reasonable time for doing the same.

253. Every notice, order or requisition issued by a ^a[Board] under this Act or any rule or bye-law made thereunder shall be signed —

(a) ^b[] either by the President of the Board or by the Executive Officer, or, ^c[]

(b) by the members of any committee especially authorised by the ^a[Board] in this behalf.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] The words "where there is a Board" were repealed by S. 60, *ibid.* [c] The words "where there is no Board, by the Executive Officer ; or" were repealed by S. 60, *ibid.*

254. (1) Every notice, order or requisition issued under this Act or any rule or bye-law made thereunder shall, save as otherwise expressly provided, be served or presented —

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the person for whom it is intended ; or

(b) if such person cannot be found, by affixing the notice, order or requisition on some conspicuous part of his last known place of abode or business, if within the cantonment, or by giving or tendering the notice, order or requisition to some adult male member or servant of his family, or by causing it to be affixed on some conspicuous part of the building or land, if any, to which it relates.

(2) When any such notice, order or requisition is required or permitted to be served upon an owner, lessee or occupier of any building or land, it shall not be necessary to name the owner, lessee or occupier therein, and the service thereof shall, save as otherwise expressly provided, be effected either —

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the owner, lessee or occupier, or, if there are more owners, lessees or occupiers than one, ^a[to] any one of them ; or

(b) if no such owner, lessee or occupier can be found, by giving or tendering the notice, order or requisition to the authorised agent, if any, of any such owner, lessee or occupier, or to an adult male member or servant of the family of any such owner, lessee or occupier, or by causing it to be affixed on some conspicuous part of the building or land to which it relates.

(3) When the person on whom a notice, order or requisition is to be served is a minor, service upon his guardian or upon an adult male member or servant of his family shall be deemed to be service upon the minor.

[a] Substituted for "on" by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Sch. II. [27-11-1940.]

255. Every notice which, by or under this Act, is to be given or served as a public notice or as a notice which is not required to be given to any individual therein specified shall, save as otherwise expressly provided, be deemed to have been sufficiently given or served if a copy thereof is affixed in such conspicuous part of the office of the ^a[Board] or in such other public place, during such period, or is published in such local newspaper or in such other manner, as the ^a[Board] may direct.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

256. In the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any rule or bye-law made thereunder, requiring such person to execute any work or to do any act, it shall be lawful for the ^a[Board], whether or not the person in default is liable to punishment for such default or has been prosecuted or sentenced to any punishment therefor, after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work required to be done or executed by him, and all the expenses incurred on such account shall be recoverable by the ^a[Board].

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Recovery of Money.

257. (1) If any such notice as is referred to in section 256 has been given to any person in respect of property of which he is the owner, the ^a[Board] may require any occupier of such property or of any part thereof to pay to it, instead of to the owner, any rent payable by him in respect of such property, as it falls due, up to the amount recoverable from the owner under section 256 :

Provided that, if the occupier, on application made to him by the ^a[Board], refuses truly to disclose the amount of his rent or the name or address of the person to whom it is payable, the ^a[Board] may recover from the occupier the whole amount recoverable under section 256.

(2) Any amount recovered from an occupier instead of from an owner under sub-section (1) shall, in the absence of any contract between the owner and the occupier to the contrary, be deemed to have been paid to the owner.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

258. (1) Where any person, by reason of his receiving the rent of immovable property as an agent or trustee, or of his being as an agent or trustee the person who would receive the rent if the property were let to a tenant, would under this Act be bound to discharge any obligation imposed on the owner of the property for the discharge of which money is required, he shall not be bound to discharge the obligation unless he has, or but for his own improper act or default might have had, funds in his hands belonging to the owner sufficient for the purpose.

(2) The burden of proving any fact entitling an agent or trustee to relief under sub-section (1) shall lie upon him.

(3) Where any agent or trustee has claimed and established his right to relief under this section, the ^a[Board] may, by notice in writing, require him to apply to the discharge of such obligation as aforesaid the first monies which may come to his hands on behalf, or for the use, of the owner, and, on failure to comply with the notice, he shall be deemed to be personally liable to discharge the obligation.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

259. (1) Notwithstanding anything elsewhere contained in this Act, arrears of any tax and any other money recoverable by a Board under this Act may be recovered together with the cost of recovery either by suit or, on application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax or money is recoverable may for the time being be residing, by the distress and sale of any moveable property of, or standing timber, growing crops or grass belonging to, such person which is within the limits

Section 259 — Note 1

[1] This section was substituted for the old section by the Cantonments (Amendment) Act, 1936. Under the old section only moveable property was mentioned; but under the new section in addition to moveable property, standing timber, growing crops or grass are also included. Further, under the new section the proviso to sub-section (1) exempts tools of artisans from such distress and sale.

[2] The expression 'recoverable by a Board under this Act' applies to such dues as are recoverable by the

Board under the express provisions of certain sections of this Act, which entitle it to levy fees for permitting acts to be done which cannot otherwise be done without the sanction or permission of the Board in the interest of sanitation and general welfare of the cantonment. It does not include moneys which are payable to the Board under express agreements or contracts which the Board is authorised to enter into or to make like an ordinary individual. Where, therefore, the Board proceeds to recover arrears of rent due from a tenant by distress and sale of his moveable property its action is illegal. (Vol 20) 1933 Lah 517 (520).

of such Magistrate's jurisdiction, and shall, if payable by the owner of any property as such, be a charge on the property until paid :

Provided that the tools of artisans shall be exempt from such distress or sale.

(2) An application to a Magistrate under sub-section (1) shall be in writing and shall be signed by the President or Vice-President of the Board or by the Executive Officer, but shall not require to be personally presented.]

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 61, for the original section.

Committees of Arbitration.

260. In the event of any disagreement as to the liability of a ^a[Board] to pay any compensation under this Act, or as to the amount of any compensation so payable, the person claiming such compensation may apply to the ^a[Board] for the reference of the matter to a Committee of Arbitration, and the ^a[Board] shall forthwith proceed to convene a Committee of Arbitration to determine the matter in dispute.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

261. When a Committee of Arbitration is to be convened, the ^a[Board] shall cause a public notice to be published stating the matter to be determined, and shall forthwith send copies of the order to the District Magistrate, and to the other party concerned, and shall, as soon as may be, nominate such members of the Committee, as it is entitled to nominate under section 262, and, by notice in writing, call upon the other persons who are entitled to nominate a member or members of the Committee to nominate such member or members in accordance with the provisions of that section.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

262. (1) Every Committee of Arbitration shall consist of five members, namely :—

(a) a Chairman who shall be a person not in the service of the ^a[Crown] or the ^b[Board], and who shall be nominated by the ^c[Officer Commanding the station];

(b) two persons nominated by the ^b[Board];

(c) two persons nominated by the other party concerned.

d[* * * *]

(2) If the ^b[Board] or the other party concerned or the ^c[Officer Commanding the station] fails within seven days of the date of issue of the notice referred to in section 261 to make any nomination which it or he is entitled to make or, if any member who has been so nominated neglects or refuses to act and the ^b[Board] or other person by whom such member was nominated fails to nominate another member in his place within seven days from the date on which it or he may be called upon to do so by the District Magistrate, the District Magistrate shall forthwith appoint a member or members, as the case may be, to fill the vacancy or vacancies.

[a] Substituted by A. O. for "Government". [b] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [c] Substituted by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 14, for "Commanding Officer of the Cantonment". [d] The words "who shall be persons liable to pay taxes in the cantonment and ordinarily resident therein or in the immediate vicinity thereof" were repealed by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 62.

No person to be nominated who has direct interest or whose services are not immediately available.

263. (1) No person who has a direct interest in the matter under reference or whose services are not immediately available for the purposes of the Committee, shall be nominated a member of a Committee of Arbitration.

(2) If, in the opinion of the District Magistrate, any person who has been nominated has a direct interest in the matter under reference, or is otherwise disqualified for nomination, or if the services of any such person are not immediately available as aforesaid, and if the ^a[Board] or other person by whom any such person was nominated fails to nominate another member within seven days from the date on which it or he may be called upon to do so by the District Magistrate, such failure shall be deemed to constitute a failure to make a nomination within the meaning of section 262.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

264. (1) When a Committee of Arbitration has been duly constituted, the ^a[Board] shall, by Meetings and powers of notice in writing, inform each of the members of the fact, and the Committees of Arbitration. Committee shall meet as soon as may be thereafter.

(2) The Chairman of the Committee shall fix the time and place of meetings, and shall have power to adjourn any meeting from time to time as may be necessary.

(3) The Committee shall receive and record evidence, and shall have power to administer oaths to witnesses, and, on requisition in writing signed by the Chairman of the Committee, the District Magistrate shall issue the necessary processes for the attendance of witnesses and the production of documents required by the Committee, and may enforce the said processes as if they were processes for attendance or production before himself.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

265. (1) The decision of every Committee of Arbitration shall be in accordance with the Decisions of Committees majority of votes taken at a meeting at which the Chairman and at least three of the other members are present.

(2) If there is not a majority of votes in favour of any proposed decision, the opinion of the Chairman shall prevail.

(3) The decision of a Committee of Arbitration shall be final and shall not be questioned in any Court.

Prosecutions.

266. ^a[(1)] Save as otherwise expressly provided in this Act, no Court shall proceed to the Prosecutions. trial of any offence made punishable by or under this Act, other than an offence specified in Schedule IV, except on the complaint of, or upon information received from the ^b[Board] concerned or a person authorised by the ^b[Board] by a general or special order in this behalf.

^c[(2) No offence made punishable under this Act shall be tried by any Magistrate or by any Bench, if such Magistrate or any of the Magistrates composing the Bench is a member of the Board.]

[a] Section 266 was re-numbered as sub-section (1) of that section by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 63. [b] Substituted by S. 69, *ibid.*, for "Cantonment Authority". [c] Inserted by S. 63, *ibid.*

267. (1) A ^a[Board], or any person authorised by it, by general or special order in this Composition of offence. behalf, may, either before or after the institution of the proceedings, compound any offence made punishable by or under this Act other than an offence under Chapter XIV:

Section 266 — Note 1

[1] "We have excepted from the general rule that cognizance is not to be taken of offences otherwise than on complaint by or under the authority of the Cantonment Authority, those offences under the Act for which the Police can arrest without warrant."—*Select Committee Report*.

[2] This section merely lays down that no Court shall proceed to the trial of any offence under this Act unless moved by the persons mentioned in the section. After such persons initiate the proceedings, the Court must follow the procedure laid down in the Criminal P. C. This section does not lay down that on the information or complaint of certain persons the Court should proceed with the trial of the case irrespective of the provisions of the Criminal P. C. (1928) 29 Cri L Jour 591 (592).

[3] Offences under S. 141 (1) and offences under S. 141 (2) are not specified in Sch. IV. Therefore, no Court can proceed with the trial of any of these offences except on the complaint filed in accordance with S. 266. (Vol 22) 1935 All 905 (906).

[4] The letter on record, which was written to the Sub-Divisional Magistrate, purported to be signed by the Executive Officer of Cantonment Authority. No evidence was called to prove this letter. Neither was it proved to have been signed by the Cantonment Authority nor was the officer proved to have been authorised by the Authorities. Held that S. 266 was not complied with and the proceedings commenced on that letter and the orders passed were invalid. (Vol 22) 1935 All 905 (906) : 36 Cri L Jour 1493.

[5] Cantonment Board lodging a complaint signed by its Executive Officer—Executive Officer filing no authority but having power to file such complaint—Affidavit filed in revision Court showing that he had an authority to do so—Omission to file authority held was curable under S. 537, Criminal P. C. (Vol 15) 1928 Lah 946 (947) : 29 Cri L Jour 822.

[6] On the report of a Cantonment Official, the Cantonment Magistrate wrote : "A is to blame ; prosecute A." The Magistrate then proceeded to try A himself without informing him that he was entitled to have the case tried by another Magistrate. It was held that the Magistrate should not have tried the case without informing the accused of his right to trial by another Magistrate. (Vol 7) 1920 Lah 203 (204).

[7] Sub-section (2), as inserted by the amending Act in 1936, now specifically provides that no offence made punishable under this Act shall be tried by a Magistrate if such Magistrate is a member of the Board. The following case decided in 1928 holding that a cantonment Magistrate can try a complaint even though he is a member of the Board is no longer good law. (Vol 15) 1928 Lah 946 (947) : 29 Cri L Jour 822.

Provided that no offence shall be compoundable which is committed by failure to comply with a notice, order or requisition issued by or on behalf of the ^a[Board], unless and until the same has been complied with in so far as compliance is possible.

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of the offence so compounded.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

General Penalty Provisions.

268. Whoever, in any case in which a penalty is not expressly provided by this Act, fails to *General penalty.* comply with any notice, order or requisition issued under any provision thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing failure or contravention, with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the failure or contravention.

269. Where any person to whom a licence has been granted under this Act or any agent or *Cancellation and suspension of licences.* servant of such person commits a breach of any of the conditions thereof, or of any bye-law made under this Act for the purpose of regulating the manner or circumstances in, or the conditions subject to, which anything permitted by such licence is to be or may be done, the ^a[Board] may, without prejudice to any other penalty which may have been incurred under this Act, by order in writing, cancel the licence or suspend it for such period as it thinks fit :

Provided that no such order shall be made until an opportunity has been given to the holder of the licence to show cause why it should not be made.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

270. Where any person has incurred a penalty by reason of having caused any damage to *Recovery of amount payable in respect of damage to cantonment property.* the property of a ^a[Board], he shall be liable to make good such damage, and the amount payable in respect of the damage shall, in case of disputes, be determined by the Magistrate by whom the person incurring such penalty is convicted, and, on non-payment of such amount on demand, the same shall be recovered by distress and sale of the moveable property of such person, and the Magistrate shall issue a warrant for its recovery accordingly.

[a] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Limitation.

271. No Court shall try any person for an offence made punishable by or under this Act, *Limitation for prosecution.* after the expiry of six months from the date of the commission of the offence, unless complaint in respect of the offence has been made to a Magistrate within the six months aforesaid.

Suits.

Protection of Board, Executive Officer, etc. **272.** No suit or prosecution shall be entertained in any Court against any ^a[Board] ^b[* * *] or against any ^c[Officer Commanding a station], or

Section 268 — Note 1

[1] Where no notice is issued to the accused, this section cannot be invoked. (1910) 11 Cri L Jour 17 (18).

[2] A fine cannot be inflicted under this section for breach of conditions of a licence, where the licence only provides for suspension or cancellation in case of such breach. (1910) 11 Cri L Jour 17 (17).

[3] Section 184 provides no penalty for a continuing failure or contravention ; such a penalty is provided in S. 268. (Vol 21) 1934 Oudh 29 (31) : 35 Cri L Jour 666.

[4] The punishment of whipping is not one of the sentences mentioned by the Cantonments Act. (1893) 1893 Rat 682 (682). (Case under old Act, 1889).

[5] The imposition of a prospective daily fine under this section is illegal. The proper course is to institute a further prosecution if need be before further fine is imposed. (1911) 12 Cri L Jour 371 (372).

[6] The penal sections of the Act are of so rigorous a nature that they must be construed strictly in favour of an accused as well as against him. (1911) 12 Cri L Jour 371 (372).

[7] See also Notes on Sections 187 and 210.

Section 269 — Note 1

[1] A Magistrate in his judicial capacity has no authority to cancel a licence. That power is now vested in the Board. (1888) 15 Cal 452 (455).

Section 271 — Note 1

[1] Where there is nothing to show that any new building was built by the accused within limitation and what was built had been completed more than six months before the date of complaint, trial for an offence under S. 271 is not proper. (Vol 21) 1934 Oudh 29 (31) : 35 Cri L Jour 666.

against any member of a Board, or against any officer or servant of a ^a[Board], for anything in good faith done, or intended to be done under this Act or any rule or bye-law made thereunder.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] The words "or authority appointed under sub-section (2) of section 10" were *repealed* by section 64, *ibid.* [c] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 11, for "Commanding Officer of a Cantonment".

273. (1) No suit shall be instituted against any ^a[Board] or against any member of a Board, *Notice to be given* or against any officer or servant of a ^a[Board], in respect of any act done, or *of suits.* purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the ^a[Board], and, in the case of such member, officer or servant, unless notice in writing has also been delivered to him or left at his office or place of abode, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left.

(2) If the ^a[Board], member, officer or servant has, before the suit is instituted, tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.

(3) No suit, such as is described in sub-section (1), shall, unless it is an action for the recovery of immoveable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(4) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit or proceeding.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Appeals and Revision.

274. (1) Any person aggrieved by any order described in the second column of Schedule V *Appeals from* may appeal to the authority specified in that behalf in the third column *executive orders.* thereof.

(2) No such appeal shall be admitted if it is made after the expiry of the period specified in that behalf in the fourth column of the said Schedule.

(3) The period specified as aforesaid shall be computed in accordance with the provisions of the Indian Limitation Act, 1908, with respect to the computation of periods of limitation thereunder.

275. (1) Every appeal under section 274 shall be made by petition in writing accompanied *Petition of appeal.* by a copy of the order appealed against.

(2) Any such petition may be presented to the authority which made the order against which the appeal is made, and that authority shall be bound to forward it to the appellate authority, and may attach thereto any report which it may desire to make by way of explanation.

276. On the admission of an appeal from an order, other than an order contained in a notice *Suspension of action* issued under clause (a) of section 137, section 140, section 176, or section 238 *pending appeal.* all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal, and, if the order is set aside on appeal, disobedience thereto shall not be deemed to be an offence.

Section 273 — Note 1

[1] Sub-section (1) of this section does not apply to suits on private contracts for which specific rules of limitation are prescribed by the Limitation Act. The section contemplates actions brought against the Board in respect of acts done in pursuance of the Act or any rules or bye-laws made thereunder. A suit for the recovery of the price of the goods supplied to the cantonment Board is not a suit within the ambit of this section. Hence, such a suit is governed by Art. 52, Limitation Act, and not by this section. (Vol 21) 1934 All 436 (437).

Section 274 — Note 1

[1] Conviction by Cantonment Magistrates of offences punishable under Cantonment Rules are appealable to the same extent as convictions by other Magistrates of the same class. (1897) 1897 Pun Re No. 1 Cr.

[2] A Cantonment Magistrate was expressly made subordinate to the District Magistrate by the Cantonments Act, 1889, section 7. (1896) 1896 Rat 849 (849).

[3] The Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court of Bombay in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of S. 526, Criminal P. C. (1885) 9 Bom 333 (341, 342).

277. ^a[

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^a[(1)] Where an appeal from an order made by the ^b[Board] has been disposed of by the *Revision.*

District Magistrate ^c[either party to the proceedings] may, within thirty days from the date thereof, apply, through the ^d[Officer Commanding-in-Chief, the Command], to the ^e[Central Government], or to such authority as the ^e[Central Government] may appoint in this behalf, for a revision of the decision.

^a[(2.)] The provisions of this Chapter with respect to appeals shall apply, as far as may be, to applications for revision made under this section.

[a] The original sub-section (1) was omitted and sub-sections (2) and (3) were re-numbered as (1) and (2) by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 9. [b] Substituted by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [c] Substituted by S. 65, *ibid.*, for "the Cantonment Authority". [d] Substituted by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 9, for "Officer Commanding the District". [e] Substituted by A. O. for "Local Government".

Finality of appellate orders.

278. Save as otherwise provided in section 277, every order of an appellate authority shall be final.

279. No appeal shall be decided under this Chapter unless the appellant has been heard, or has had a reasonable opportunity of being heard in person or through a legal practitioner.

CHAPTER XVI.

RULES AND BYE-LAWS.

280. (1) The ^a[Central Government] may, after previous publication, make rules^b to carry out the purposes and objects of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the manner in which, and the authority to which, application for permission to occupy land belonging to ^c[the Crown] in a cantonment is to be made;

(b) the authority by which such permission may be granted and the conditions to be annexed to the grant of any such permission;

^d[(bb) the allotment to a ^e[Board] of a share of the rents and profits accruing from property entrusted to its management under the provisions of section 116A;]

(c) the appointment, control, supervision, suspension, removal, dismissal and punishment of servants of ^f[Boards];

^g[(cc) the constitution of a service of Executive Officers and the appointment, control, supervision, conditions of service, pay and allowances, suspension, removal, dismissal and punishment of the members thereof;]

(d) the circumstances in which security shall be demanded from servants of ^f[Boards] and the amount and nature of such security;

(e) the grant of leave, absentee or acting allowance to servants of ^f[Boards];

(f) the creation and management of Provident Funds, and the circumstances in which, and the conditions subject to which, contributions thereto shall be made from cantonment funds and by servants of ^f[Boards];

(g) the keeping of accounts by ^f[Boards] and the manner in which such accounts shall be audited and published;

Section 277 — Note 1

[1] An order inflicting a fine under S. 268 is a judicial order and, therefore, is open to revision. (1910) 11 Cri L Jour 17 (18).

[2] It is no part of the duty of the superior Court to search through a voluminous enactment like the Cantonments Act in order to ascertain whether convictions are maintainable otherwise than under the precise section quoted by the Magistrate as his authority. Where, therefore, a Magistrate convicts under a wrong section, the accused is entitled to the benefit of the mistake and the Magistrate's orders are liable to be set aside in revision as being illegal. (1911) 12 Cri L Jour 371 (372).

Section 280 — Note 1

[1] As to the power of the Central Government to extend any rules framed under this section to any area beyond a cantonment and in the vicinity thereof, see S. 286.

[2] For cases decided with reference to the rules framed under this section, see (1862-68) 1862-68 Rat 505 (505, 506). (Erection of building on a public road); (1895) 1895 Pun Re No. 9 (Cr) page 34 (35). (Disregard of Magistrate's proclamation against disease.); (1885) 1885 Pun Re No. 2 (Cr) pages 5 (6); (1870) 1870 Pun Re No. 12 (Cr) page 21 (22, 23). (Breach of rules extended outside cantonment limits.)

(h) the definition of the persons by whom, and the manner in which, money may be paid out of a cantonment fund ;

h[* * * * *]

(i) the preparation of estimates of income and expenditure by ¹[Boards] and the definition of the persons by whom, and the conditions subject to which, such estimates may be sanctioned ;

(j) the regulation of the procedure of Committees of Arbitration ; and

(k) the prescribing of registers, statements and forms to be used and maintained by any authority for the purposes of this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For the Cantonment Account Code, 1924, and the Cantonment Fund Servants Rules, 1925, made under this section, see General Rules and Orders, Vol. V, pp. 470-546 and pp. 591-611; and for the Cantonment Land Administration Rules, 1937, see Gazette of India, 1937, Pt. I, p. 1841. [c] *Substituted* by A. O. for "Government". [d] *Inserted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 12. [e] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [f] *Substituted* by S. 69, *ibid.*, for "Cantonment Authorities". [g] *Inserted* by S. 66, *ibid.* [h] Clause (hh) which was *inserted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 10 was *repealed* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 66.

Supplemental provisions respecting rules. 281. (1) A rule under section 280 may be made either generally for all cantonments or for the whole or any part of any one or more cantonments.

(2) All rules so made shall be published in the ^a[Official Gazette] and in such other manner, if any, as the ^b[Central Government] may direct and, on such publication, shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Gazette of India." [b] *Substituted* by A. O. for "Governor-General in Council."

282. Subject to the provisions of this Act and of the rules made thereunder, a ^a[Board] may, *Power to make bye-laws.* in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters in the cantonment, namely :—

- (1) The registration of births, deaths and marriages, and the taking of a census ;
- (2) the enforcement of compulsory vaccination ;
- (3) the regulation of the collection and recovery of taxes, tolls and fees under this Act and the refund of taxes ;
- (4) the regulation or prohibition of any description of traffic in the streets ;
- (5) the manner in which vehicles standing, driven, led or propelled in the streets between sunset and sunrise shall be lighted ;
- (6) the seizure and confiscation of ownerless animals straying within the limits of the cantonment ;
- (7) the prevention and extinction of fire ;
- (8) the construction of scaffolding for building operations to secure the safety of the general public and of persons working thereon ;
- (9) the regulation in any manner not specifically provided for in this Act of the construction, alteration, maintenance, preservation, cleaning, and repairs of drains, ventilation-shafts, pipes, waterclosets, privies, latrines, urinals, cesspools and other drainage works ;
- (10) the regulation or prohibition of the discharge into, or deposit in, drains or sewage, polluted water and other offensive or obstructive matter ;
- (11) the regulation or prohibition of the stabling or herding of animals, or of any class of animals, so as to prevent danger to public health ;
- (12) the proper disposal of corpses, the regulation and management of burial and burning places and other places for the disposal of corpses, and the fees chargeable for the use of such places where the same are provided or maintained by Government or at the expense of the cantonment fund ;

Section 282 — Note 1

[1] As to the power of the Central Government to extend any bye-laws framed under this section to any area beyond a cantonment and in the vicinity thereof, see S. 286.

[2] See also the following cases: (1907) 1907 Pun L.R. No. 22. (Failure to pay hackney carriage fee) ; (1887) 1887 Pun Re No. 48. (Owner of house failing to appoint an agent.); (1887) 1887 A W N 219 (220). ('Registered prostitute'—Failure to go to hospital for inspection.)

- (13) the permission, regulation or prohibition of the use or occupation of any street or place by itinerant vendors or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall, and the fees chargeable for such use or occupation ;
- (14) the regulation and control of encamping grounds, pounds, washing-places, serais, hotels, dak-bungalows, lodging-houses, boarding-houses, buildings let in tenements, residential clubs, restaurants, eating-houses, cafes, refreshment-rooms and places of public recreation, entertainment or resort ;
- (15) the regulation of the ventilation, lighting, cleansing, drainage and water-supply of the buildings used or the manufacture or sale of aerated or other potable waters and of butter, milk, sweet-meats and other articles of food or drink for human consumption ;
- (16) the matters regarding which conditions may be imposed by licences granted under section 210 ;
- 17. the control and supervision of places where dangerous or offensive trades are carried on so as to secure cleanliness therein or to minimise any injurious, offensive or dangerous effects arising or likely to arise therefrom ;
- (18) the regulation of the erection of any enclosure, fence, tent, awning or other temporary structure of whatsoever material or nature on any land situated within the cantonment ;
- (19) the laying out of streets, and the regulation and prohibition of the erection of buildings without adequate provision being made for the laying out and location of streets ;
- (20) the regulation of the use of public parks and gardens and other public places, and the protection of avenues, trees, grass and other appurtenances of streets and other public places ;
- (21) the regulation of the grazing of animals ;
- (22) the fixing and regulation of the use of public bathing and washing places ;
- (23) the regulation of the posting of bills and advertisements, and of the position, size, shape or style of name-boards, sign-boards and sign-posts ;
- (24) the fixation of a method for the sale of articles whether by measure, weight, piece or any other method ;
- (25) the rendering necessary of licences within the cantonment —
 - (a) for persons working as job porters for the conveyance of goods ;
 - (b) for animals or vehicles let out on hire ;
 - (c) for the proprietors or drivers of vehicles, boats or other conveyances, or of animals kept or plying for hire ; ^b[*]
 - (d) for persons impelling or carrying such vehicles or other conveyances ; ^c[or
 - (e) for persons practising as nurses, midwives or *dais*.]
- (26) the prescribing of the fee payable for any licence required under clause (25), and of the conditions subject to which such licences may be granted, revised, suspended or withdrawn.
- (27) the regulation of the charges to be made for the services of such job porters and of the hire of such animals, vehicles or other conveyances, and for the remuneration of persons impelling or carrying such vehicles or conveyances as are referred to in clause (25) ;
- (28) the regulation or prohibition, for purposes of sanitation or the prevention of disease or the promotion of public safety or convenience, of any act which occasions or is likely to occasion a nuisance, and for the regulation or prohibition of which no provision is made elsewhere by or under this Act ;
- (29) the circumstances and the manner in which owners of buildings or land in the cantonment, who are temporarily absent from, or are not resident in, the cantonment, may be required to appoint as their agents, for all or any of the purposes of this Act or of any rule or bye-law made thereunder, persons residing within or near the cantonment ;
- (30) the prevention of the spread of infectious or contagious diseases within the cantonment ;
- (31) the segregation in, or the removal and exclusion from, the cantonment, or the destruction, of animals suffering or reasonably suspected to be suffering from any infectious or contagious disease ;

- (32) the supervision, regulation, conservation and protection from injury, contamination or trespass of sources and means of public water-supply and of appliances for the distribution of water whether within or without the limits of the cantonment ;
- (33) the manner in which connections with water-works may be constructed or maintained, and the agency which shall or may be employed for such construction and maintenance ;
- (34) the regulation of all matters and things relating to the supply and use of water including the collection and recovery of charges therefor and the prevention of evasion of the same ;
- (35) the maintenance of schools, and the furtherance of education generally ;
- (36) the regulation or prohibition of the cutting or destruction of trees or shrubs, or of the making of excavations, or of the removal of soil or quarrying, where such regulation or prohibition appears to the ^a[Board] to be necessary for the maintenance of a water-supply, the preservation of the soil, the prevention of landslips or of the formation of ravines or torrents, or the protection of land against erosion or against the deposit thereon of sand, gravel or stones ;
- (37) the rendering necessary of licences for the use of premises within the cantonment as stables or cowhouses or as accommodation for sheep, goats or fowls ;
- (38) the control of the use in the cantonment of mechanical whistles, syrens or trumpets; and
- (39) generally for the regulation of the administration of the cantonment under this Act.
- [a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] The word "or" was *omitted* by the Cantonments (Amendment) Act, 1942 (15 [XV] of 1942), S. 12. [30-3-1942]. [c] *Added* by S. 12, *ibid*.

Penalty for breach of bye-laws. **283.** Any bye-law made by a ^a[Board] under this Act may provide that a contravention thereof shall be punishable—

- (a) with fine which may extend to one hundred rupees ; or
- (b) with fine which may extend to one hundred rupees and, in the case of a continuing contravention, with an additional fine which may extend to twenty rupees for every day during which such contravention continues after conviction for the first such contravention ; or
- (c) with fine which may extend to ten rupees for every day during which the contravention continues after the receipt of a notice from the ^a[Board] by the person contravening the bye-law requiring such person to discontinue such contravention.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

284. (1) Any power to make bye-laws conferred by this Act is conferred subject to the *Supplemental provisions regarding bye-laws.* condition of the bye-laws being made after previous publication and of their not taking effect until they have been approved and confirmed by the ^a[Central Government] and published in the ^b[Official Gazette].

(2) The ^a[Central Government] in confirming a bye-law may make any change therein which appears to it to be necessary.

(3) The ^a[Central Government] may, after previous publication of its intention, cancel any bye-law which it has confirmed, and thereupon the bye-law shall cease to have effect.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette".

Rules and bye-laws to be available for inspection and purchase. **285.** (1) A copy of all rules and bye-laws made under this Act shall be kept at the office of the ^a[Board] and shall, during office hours, be open free of charge to inspection by any inhabitant of the cantonment.

(2) Copies of all such rules and bye-laws shall be kept at the office of the ^a[Board], ^b[and shall be sold to the public at cost price singly, or in collections at the option of the purchaser.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority". [b] *Substituted* by S. 67, *ibid*, for "for sale to the public".

Section 283 — Note 1

[1] The additional fine is to be imposed only *after* first conviction and that too on proof that failure is per-

sisted in. The continuing failure must be matter of separate inquiry and proof. (1898) 22 Bom 841 (843). (Failure to re-build latrines according to plan.)

CHAPTER XVII.

SUPPLEMENTAL PROVISIONS.

286. The ^a[Central Government], may, by notification in the ^b[Official Gazette], and subject to any conditions as to compensation or otherwise which it thinks fit to impose, extend to any area beyond a cantonment and in the vicinity thereof, with or without restriction or modification, any of the provisions of Chapters IX, X, XI, XII, XIII, XIV and XV or of any rule or bye-law made under this Act for the cantonment which relates to the subject-matter of any of those Chapters, and every enactment, rule or bye-law so extended shall thereupon apply to that area as if the area were included in the cantonment.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "local official Gazette".

286A. The ^a[Board] may empower any of its members or officers to exercise or perform in the absence of the Executive Officer from the cantonment all or any of such powers or duties of an Executive Officer under this Act as the ^c[Central Government] may, by notification in the ^d[Official Gazette], specify in this behalf.]

[a] *Inserted* by the Cantonments (Amendment) Act, 1931 (7 [VII] of 1931), S. 8. [b] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority." [c] *Substituted* by A. O. for "Governor-General in Council." [d] *Substituted* by A. O. for "Gazette of India".

287. (1) Paragraphs 2 and 3 of section 54, and sections 59, 107 and 123 of the Transfer of Property Act, 1932, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every cantonment.

^a[(2) The Registrar or Sub-Registrar of the district or sub-district formed for the purposes of the Indian Registration Act, 1908, in which any cantonment is situated, shall, ^b[when any document relating to immoveable property within the cantonment is registered, send information of the registration] forthwith to the ^c[Board] or such other authority as the ^d[Central Government] may prescribe in this behalf.]

[a] *Substituted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 11, for the original subsection. [b] *Substituted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I, for the original words. [c] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority" and "Cantonment Authorities", respectively. [d] *Substituted* by A. O. for "Governor-General in Council".

288. No notice, order, requisition, licence, permission in writing or other such document issued under this Act shall be invalid merely by reason of any defect of form.

289. A copy of any receipt, application, plan, notice, order or other document or of any entry in a register, in the possession of a ^a[Board] shall, if duly certified by the legal keeper thereof or other person authorised by the ^a[Board] in this behalf, be admissible in evidence of the existence of the document or entry, and shall be admitted as evidence of the matters and transactions therein recorded in every case where, and to the same extent to which, the original document or entry would, if produced, have been admissible to prove such matters.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, "Cantonment Authority."

290. No officer or servant of a ^a[Board] shall, in any legal proceeding to which the ^a[Board] is not a party, be required to produce any register or document the contents of which can be proved under section 289 by a certified copy, or

Section 287 — Note 1

[1] The effect of S. 32 of the Cantonments Act of 1889 (corresponding to S. 287 of the present Act) is that a gift of property situate in a cantonment must be made in the manner provided by S. 123 of the T. P. Act. An oral gift by a Muhammadan of such property is, therefore, not valid. (Vol 7) 1920 Lah 249 (251).

[2] Transaction purporting to create a mortgage by deposit of title deeds effected in a cantonment area is invalid. The determining factor in such a case is not the place where the property is situated but the formalities required by the law for a mortgage at a place where the title-deeds are delivered to the creditor. (Vol 20) 1933 Lah 972 (974).

[3] This section makes S. 59 of the T. P. Act appli-

cable to cantonments. Hence a mortgage by deposit of title-deeds within the limits of the cantonment is invalid. (Vol 20) 1933 Lah 1001 (1001, 1002).

[4] Section 107 of the Transfer of Property Act has been made applicable to cantonments by this section; hence lease of land in cantonment from month to month has to be registered. (Vol 18) 1931 Lah 501 (502).

Section 289 — Note 1

[1] Where the General Lands Register of a Cantonment Board was found not to have been carefully prepared: *Held*, that the Court will not rely on it without corroborative evidence from other records of the cantonment or other testimony. (Vol 22) 1935 Lah 588 (589).

to appear as a witness to prove any matter or transaction recorded therein save by order of the Court made for special cause.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

Application of Act IV of 1899.

291. For the purposes of the Government Buildings Act, 1899, cantonments and ^a[Boards] shall be deemed to be municipalities and municipal authorities respectively.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authorities".

292. [Repeals.] *Repealed by the Repealing Act, 1927 (XII of 1927.)*

SCHEDULE I.

NOTICE OF DEMAND.

[See Section 91.]

To
residing at
Take notice that the ^a[Board] demands from
the sum of _____ due from _____ on account of
(here describe the property, occupation, circumstance or
thing in respect of which the sum is payable) leviable under
for the period of _____ commencing on the _____ day of
19, and ending on the _____ day of
and that if, within thirty days from the service of this notice, the said sum is not paid to the ^a[Board]
at _____ or sufficient cause for non-payment is not shown to the satisfaction of
the Executive Officer, a warrant of distress will be issued for the recovery of the same with costs.
Dated this _____ day of 19 _____.
(Signed) _____ Executive Officer,
Cantonment.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

SCHEDULE II.

FORM OF WARRANT.

(See Section 92.)

(Here insert the name of the officer charged with the execution of the warrant.)

Whereas A. B. of _____ has not paid, and has not shown satisfactory cause for
the non-payment of, the sum of _____ due on account of *
for the period of _____ commencing on the _____ day of
19, and ending with the _____ day of 19, which sum is
leviable under _____;

And whereas thirty days have elapsed since the service on him of notice of demand for the same;

This is to command you to distrain, subject to the provisions of the Cantonments Act, 1924, the moveable
property of the said A. B. to the amount of the said sum of Rs. _____; and forthwith to certify to me,
together with this warrant, all particulars of the property seized by you thereunder.

Dated this _____ day of 19 _____.
(Signed) _____ Executive Officer,
Cantonment.
*(Here describe the liability.)

SCHEDULE III.

FORM OF INVENTORY OF PROPERTY DISTRAINED AND NOTICE OF SALE.

(See Section 93.)

To
residing at
Take notice that I have this day seized the property specified in the inventory annexed hereto, for the value
of _____ due for the liability* mentioned in the margin for the period commencing with the
day of _____ 19, and ending with the _____ day of _____ 19, together with Rs.
due for service of notice of demand, and that, unless within seven days from the date of the service of this notice
you pay to the ^a[Board] the said amount, together with the costs of recovery, the said property will be sold by
public auction.
Dated this _____ day of _____ 19 _____.
(Signature of officer executing the warrant.)

INVENTORY.

(Here state particulars of property seized.)

*(Here describe the liability.)

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority".

SCHEDULE IV.

CASES IN WHICH POLICE MAY ARREST WITHOUT WARRANT.

(See section 250)

1 Section.	2 Subject.
	PART A.
118 (1) (a) (i)	. Drunkenness, etc.
167 . . .	. Making or selling of food, etc., or washing of clothes, by infected person.
	PART B.
118 (1) (a) (ii)	. Using threatening or abusive words, etc.
118 (1) (a) (iii)	. Indecent exposure of person, etc.
118 (1) (a) (iv)	. Begging.
118 (1) (a) (v)	. Exposing deformity, etc.
118 (1) (a) (vi)	. Gaming.
118 (1) (a) (xii)	. Destroying notice, etc.
118 (1) (a) (xiii)	. Breaking direction-post, etc.
118 (1) (f)	. Keeping common gaming-house, etc.
118 (1) (g)	. Beating drum, etc.
118 (1) (h)	. Singing, etc., so as to disturb public peace or order.
119 (6)	. Letting loose, or setting on, ferocious dog.
125 . . .	. Discharging fire-arms, etc., so as to cause danger.
176 (1) . . .	. Remaining in, or re-entering cantonment after notice of expulsion for failure to attend hospital or dispensary.
193 (2)	. Destroying, etc., name of street or number affixed to building.
214 . . .	. Feeding animal on filth, etc.
236 . . .	. Loitering or importuning for sexual immorality.
240 (a) . . .	. Remaining in, or returning to, a cantonment after notice of expulsion.

SCHEDULE V.

APPEALS FROM ORDERS.

(See section 274.)

1 Section.	2 Executive Order.	3 Appellate Authority.	4 Time allowed for appeal.
126	^a [Board's] notice to ^b [remove] repair, protect or enclose a building, wall or anything affixed thereto, or well, tank, reservoir, pool, depression or excavation.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Thirty days from service of notice.
134	^a [Board's] notice to fill up well, tank, etc., or to drain off or remove water.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Thirty days from service of notice.
^f [*	* * * *	* * *	* * * *]
140	^a [Board's] notice requiring a building to be repaired or altered so as to remove sanitary defects.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Thirty days from service of notice.

(Schedule V. — Appeals from Orders. (contd.))

1 Section.	2 Executive Order.	3 Appellate Authority.	4 Time allowed for appeal.
176	Order of ^a [Officer Commanding the station] on report of Medical Officer, directing a person to remove from the cantonment and prohibiting him from re-entering it without permission.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Thirty days from service of notice.
181	^a [Board's] refusal to sanction the erection or re-erection of a building.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	^h [Thirty days from the date on which the refusal shall have been communicated to the person applying for sanction.]
185	^a [Board's] notice to alter or demolish a building.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Thirty days from service of notice.
188	^a [Board's] notice to pull down or otherwise deal with a building newly erected or rebuilt without permission over a sewer, drain, culvert, water-course or water-pipe.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Thirty days from service of notice.
206	^a [Board's] notice prohibiting or restricting the use of a slaughterhouse.	^c [Officer Commanding-in-Chief, the Command] ^d [, or other authority authorised in this behalf by the ^e [Central Government].]	Twenty-one days from service of notice.
238	Magistrate's notice directing disorderly person to remove from cantonment and prohibiting him from re-entering it without permission.	District Magistrate	Thirty days from service of notice.

[a] *Substituted* by the Cantonments (Amendment) Act, 1936 (24 [XXIV] of 1936), S. 69, for "Cantonment Authority's". [b] *Inserted* by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2 and Sch. I. [c] *Substituted* by the Cantonments (Amendment) Act, 1926 (35 [XXXV] of 1926), S. 2, for "Officer Commanding the District". [d] *Inserted* by S. 68 of Act 24 [XXIV] of 1936. [e] *Substituted* by A. O. for "Governor-General in Council". [f] Entry relating to S. 137 was *omitted* by the Cantonments (Amendment) Act, 1940 (31 [XXXI] of 1940), S. 8. [27-11-1940]. [g] *Substituted* by the Cantonments (Amendment) Act, 1925 (7 [VII] of 1925), S. 13, for "Commanding Officer of Cantonment". [h] *Substituted* by S. 68, Act 24 [XXIV] of 1936, for "Thirty days from date of refusal".

SCHEDULE VI. — [Enactments Repealed.] *Repealed by the Repealing Act, 1927 (XII of 1927).*

THE CANTONMENTS (HOUSE-ACCOMMODATION ACT), 1923 (ACT VI of 1923)

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STATEMENT OF OBJECTS AND REASONS.

"The committee which was appointed in the winter of 1920-21 to enquire into and make recommendations in regard to the administration of cantonments recommended *inter alia* that the Cantonments (House-Accommodation) Act should be revised, so as to remove certain defects which have been brought to light and to carry out more fully the intention of the Act, namely, the better provision of house-accommodation for military officers in cantonments. These recommendations have now been examined by the Government of India whose conclusions are embodied in the draft Bill.

2. A number of the amendments are designed merely to bring the Act up-to-date by specifying, in place of the authorities by whom the Act is at present administered, other authorities recently constituted, e.g., District Commanders in lieu of Divisional Commanders.

3. The principal changes of substance which the Bill seeks to introduce are, *firstly*, to substitute for the procedure under which houses are liable to be appropriated for use, on a monthly tenancy, by military officers holding direct from the house-owner, a procedure under which Government will take such houses as may be

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required on a repairing lease for a term of at least five years and will allot the houses so leased to officers requiring accommodation. Under this procedure, officers will become the tenants of Government who alone will deal with the house-owners. *Secondly*, it is proposed to repeal those sections of the existing Act which provide for interference in the settlement of disputes between house-owners and individual tenants. If the Bill becomes law, individual officers will, as already explained, cease to be the direct tenants of house owners. Where the military officer prefers to take a house by private agreement with a house-owner, and not from Government, it is considered that there is no justification for interference between the two parties in cases of disputes, which will in future be settled as they would outside a cantonment, either by agreement between the parties or by recourse to the law Courts. *Thirdly*, the Bill alters the constitution of Committees of Arbitration and provides for an appeal to the Court against the decisions of such committees."

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

- Amended by Acts X of 1925; IX of 1930; XXII of 1933; XXXII of 1940.
- Adapted by A. O.
- Repealed in part by Act, XII of 1927.

COGNATE ACTS AND PROVISIONS.

1. CANTONMENTS ACT, II of 1924.

THE CANTONMENTS (HOUSE-ACCOMMODATION) ACT, 1923

(ACT VI OF 1923)^a.

[5th March 1923.]

An Act further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments.

WHEREAS it is expedient further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments; It is hereby enacted as follows:—

[a] For Report of Joint Committee, see Gazette of India, 1923, Pt. V, p. 5.

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called the Cantonments (House-Accommodation) Act, 1923.

(2) It extends to the whole of British India (inclusive of British Baluchistan) ^a[* * *].

(3) It shall come into force on the first day of April, 1923, but it shall not become operative in any cantonment or part of a cantonment until the issue, or otherwise than in pursuance, of a notification as hereinafter provided by section 3:

Provided that any notification made under section 3 of the ^bCantonments (House-Accommodation) Act, 1902, which is in force at the commencement of this Act, shall be deemed to be a notification made under section 3 of this Act.

[a] The words "except Aden" were repealed by A. O. [b] Repealed by this Act, S. 39 and Schedule.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "Brigade area" means one of the Brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes any area which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be a Brigade area for all or any of the purposes of this Act;

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India".

^a[(b) "Cantonment Board" means a Cantonment Board constituted under the Cantonments Act, 1924;]

[a] This clause originally lettered (bb) was inserted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 2. It was re-lettered (b), and the original clause (b) was repealed, see *ibid*, 1930 (9 [IX] of 1930), S. 2.

(c) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be a Command for all or any of the purposes of this Act;

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India".

(d) ^a["Officer Commanding the station"] means the officer for the time being in command of the forces in a cantonment ^b[or, if that officer is the Officer Commanding the District, the military officer who would be in command of those forces in the absence of the Officer Commanding the District].

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment". [b] Inserted, see *ibid*, 1930 (9 [IX] of 1930), S. 2.

(e) "District" means one of the Districts into which India is for military purposes for the time being divided; it includes a Brigade area which does not form part of any such District and any area which the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be a District for all or any of the purposes of this Act;

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India".

(f) "house" means a house suitable for occupation by a military officer or a military mess, and includes the land and buildings appurtenant to a house ;

(g) "military officer" means a commissioned or warrant officer of His Majesty's military or air forces on military or air force duty in a cantonment, and includes a Chaplain on duty with troops in a cantonment, ^a[an officer of the Cantonments Department] and any person in Army departmental employment whom the Officer Commanding the District may at any time, by an order in writing, place on the same footing as a military officer for the purposes of this Act ;

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 2, for "a Cantonment Magistrate".

(h) "owner" includes the person who is receiving, or is entitled to receive, the rent of a house, whether on his own account or on behalf of himself and others or as an agent or trustee, or who would so receive the rent, or be entitled to receive it, if the house were let to a tenant ; and

(i) a house is said to be in a state of reasonable repair when —

(i) all floors, walls, pillars and arches are sound and all roofs sound and watertight,

(ii) all doors and windows are intact, properly painted or oiled, and provided with proper locks or bolts or other secure fastenings, and

(iii) all rooms, out-houses and other appurtenant buildings are properly colour-washed or white-washed.

(2) If any question arises whether any land or building is appurtenant to a house, it shall be decided by the ^a[Officer Commanding the station] whose decision thereon shall, subject to revision by the ^b[Collector], be final.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment". [b] *Substituted*, see *ibid*, 1930 (9 [IX] of 1930), S. 2, for "District Magistrate".

CHAPTER II.

APPLICATION OF ACT.

3. (1) The ^a[Central Government] ^b[* * *] may, by notification in the ^c[Official Gazette], declare this Act to be operative in any cantonment or part of a cantonment ^d[* * *] other than a cantonment situate within the limits of a presidency-town.

Cantonments or parts of cantonments in which Act to be operative.

(2) Before issuing a notification under sub-section (1) in respect of any cantonment or part of a cantonment, the ^a[Central Government] shall cause local inquiry to be made with a view to determining whether it is expedient to issue such notification, and what portion (if any) of the area proposed to be included therein should be excluded therefrom.

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council" were repealed by A. O. [c] *Substituted* by A. O. for "local official Gazette". [d] The words "situate in the Province" were repealed by A. O.

Saving of written instruments. ^a[4. Nothing in this Act shall affect the provisions of any written Crown contract^b unless all the parties to that contract consent in writing to be bound by the terms of this Act.]

[a] *Substituted* by A. O. for the original section. [b] For definition, see the General Clauses Act, 1897 (10 [X] of 1897), S. 3 (141).

CHAPTER III.

APPROPRIATION OF HOUSES.

5. Every house situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of section 3 is for the time being in force shall be liable to appropriation by ^a[the Central Government] on a lease in the manner and subject to the conditions hereinafter provided.

[a] *Substituted* by A. O. for "the Government".

Section 4 — Note 1

[1] Section 4 does not apply to a licence under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Act. (Vol 23) 1936 Lah 582 (583).

[2] Where Government once owned land in a cantonment to which General Order No. 179 applied, the occupiers of buildings thereon are licensees and the onus is upon them to show that they own the land. (Vol 23) 1936 Pesh 217 (227, 228).

Conditions on which houses may be appropriated.

^a[6. (1) Where—

(a) a military officer who is stationed in or has been posted to the cantonment, or a President of a military mess in the cantonment, applies in writing to the Officer Commanding the Station stating that he is unable to secure suitable accommodation in the cantonment for himself or the mess on reasonable terms by private agreement, and that no suitable house or quarter ^b[belonging to the Crown] is available for his occupation or for the occupation of the mess, and the Officer Commanding the Station is satisfied on inquiry of the truth of the facts so stated; or

(b) the Officer Commanding the Station is satisfied on inquiry that there is not in the cantonment a sufficient and assured supply of houses available at reasonable rates of rent by private agreement to meet the requirements of the military officers and military messes whose accommodation in the cantonment is in his opinion necessary or expedient,

the Officer Commanding the Station may, with a view to enforcing the liability under section 5, serve a notice on the owner of any house which appears to him to be suitable for occupation by a military officer or a military mess, as the case may be, within the cantonment, or, if this Act is in force in part only of the cantonment, within that part, requiring the owner to permit the house to be inspected, measured and surveyed by such person and on such date, not being less than three clear days from the service of the notice, and at such time between sunrise and sunset, as may be specified in the notice.

(2) On the date and at the time so specified the owner shall be bound to afford all reasonable facilities to the person specified in the notice for the purpose of the inspection, measurement and survey of the house and if he refuses or neglects to do so, such person may, subject to any rules made under this Act, enter on the premises and do all such things as may be reasonably necessary for the said purpose.]

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 3, for the original section. [b] Substituted by A. O. for "belonging to Government".

7. (1) If, on the report of such person as aforesaid, the ^a[Officer Commanding the station]

Procedure for taking house on lease. is satisfied that the house is suitable for occupation by a military officer or a military mess, he may ^b[* * *] by notice—

(a) require the owner to execute a lease of the house to ^c[the Central Government] for a specified period which shall not be less than five years:

(b) require the existing occupier, if any, to vacate the house; and

(c) require the owner to execute within such time as may be specified in the notice such repairs as may, in the opinion of the ^a[Officer Commanding the station], be necessary for the purpose of putting the house into a state of reasonable repair.

(2) Every notice issued under sub-section (1) shall state the amount of the annual rent proposed as reasonable for the house, calculated on the assumption that the owner will carry out the required repairs, if any. It shall also contain an estimate of the cost of such repairs.

(3) The following shall be deemed to be conditions of every lease executed under sub-section (1), namely :—

(a) that the house shall, on the expiration of the lease, be re-delivered to the owner in a state of reasonable repair, and

(b) that the grounds and the garden, if any, appertaining to the house shall be maintained in the condition in which they are at the time at which the lease is executed :

^d[Provided that nothing in this sub-section shall be deemed to affect the right of ^e[the Central Government] to avoid the lease in any such event as is specified in clause (e) of section 108 of the Transfer of Property Act, 1882.]

[a] Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment". [b] The words "with the previous sanction of the Officer Commanding the District" were repealed by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 4. [c] Substituted by A. O. for "the Government". [d] Inserted by Act 9 [IX] of 1930, S. 4.

Section 5 — Note 1

[1] As to service of notice, see Section 34.

Section 7 — Note 1

[1] As to appeal to Officer Commanding the District, see S. 30; and as to service of notice, see Section 34.

[2] Best criterion for arriving at a reasonable figure

of rent of a house is to find out the rent of the houses in the locality. (Vol 26) 1939 Pesh 22 (22, 23).

[3] When the procedure prescribed in the Act is not followed, the amount of rent payable by a military officer is a matter of contract expressed or implied between the officer and the owner. (1913) 11 All L Jour 129 (192).

8. [Procedure to be observed before taking a house on lease.] *Repealed by the Cantonments House-Accommodation Amendment) Act, 1930 (IX of 1930), S. 5.*

9. No house in any cantonment or part of a cantonment in which this Act is operative shall, *Sanction to be obtained before a house is occupied as a hospital, etc.* unless it was so occupied at the date of the issue of the notification declaring this Act or the ^aCantonments (House-Accommodation) Act, 1902, as the case may be, to be operative, be occupied for the purposes of a hospital, school, school hostel, bank, hotel, or shop, or by a railway administration, a company or firm engaged in trade or business or a club, without the previous sanction of the Officer Commanding the District given with the concurrence of the Commissioner or, in a Province where there are no Commissioners, of the Collector.

[a] *Repealed by this Act, S. 39 and Schedule.*

Houses not to be appropriated in certain cases.

10. No notice shall be issued under section 7 if the house —

(a) was, at the date of the issue of the notification declaring this Act or the ^aCantonments (House-Accommodation) Act, 1902, as the case may be, to be operative in the cantonment or part of the cantonment, or is, with such sanction as is required by section 9, occupied as a hospital, school, school hostel, bank, hotel or shop, and has been so occupied continuously during the three years immediately preceding the time when the occasion for issuing the notice arises, or

(b) was, at the date of such a notification as is referred to in clause (a), or is, with such sanction as aforesaid, occupied by a railway administration or by a company or firm engaged in trade or business or by a club, or

(c) is occupied by the owner, or

(d) has been appropriated by the ^b[Provincial Government] with the concurrence of the Officer Commanding the District, or by the ^c[Central Government], for use as a public office or for any other purpose.

[a] *Repealed by this Act, S. 39 and Schedule.* [b] *Substituted by A.O. for "Local Government".* [c] *Substituted by A. O. for "Governor-General in Council".*

11. (1) If a house is unoccupied, a notice issued under section 7 may require the owner to *Time to be allowed for giving possession of house.* give possession of the same to the ^a[Officer Commanding the station] within twenty-one days from the service of the notice.

(2) If a house is occupied, a notice issued under section 7 shall not require its vacation in less than thirty days from the service of the notice.

(3) Where a notice has been issued under section 7 and the house has been vacated in pursuance thereof, the lease shall be deemed to have commenced on the date on which the house was so vacated.

[a] *Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment".*

12. If the owner fails to give possession of a house to the ^a[Officer Commanding the station] *Surrender of house when to be enforced.* in pursuance of a notice issued under section 7, or if the existing occupier fails to vacate a house in pursuance of such a notice, the District Magistrate, by himself or by another person generally or specially authorised by him in this behalf, shall enter on the premises and enforce the surrender of the house.

[a] *Substituted by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment".*

Option in certain cases for owner on whom notice is issued under section 7 to call upon the Government to purchase.

13. (1) If a house, in respect of which a notice is issued under section 7, is shown to the satisfaction of the ^a[Central Government], or is proved by a decree or order of a Court of competent jurisdiction, to have been erected—

(a) under any conditions, rules, regulations or orders which were in force in Bengal prior to the eighth day of December, 1864, and conferred on the owner the option of offering the

Section 10 — Note 1

[1] The owner of a house in cantonment may agree with authorities that if the house is required by a military officer, he would deliver possession thereof to him. Such an agreement does not defeat the provision contained in S. 10 (c). (Vol 11) 1924 Bom 258

(259). (Cantonment tenure — Sale of lands subject to sanction of cantonment authorities — Requisition by cantonment authorities that the intending purchaser should vacate house when required for military officer — Requisition is not illegal.)

house for sale to the military officer applying for its appropriation for his occupation or to the East India Company or the Government, or

(b) under any conditions, rules, regulations or orders which were in force in Bombay prior to the first day of June, 1875, and conferred such an option as is described in clause (a), then the owner shall have the option of either complying with the notice or offering the house^b [for sale to the Central Government].

(2) If the owner elects to sell the house, and^c [the Central Government] is willing to purchase it, the question of the amount of the purchase-money to be paid shall, in the event of disagreement, be referred to^d [a Civil Court, in accordance with the provisions of Chapter IV].

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "for sale to the Government". [c] *Substituted* by A. O. for "the Government". [d] *Substituted* by Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 6, for "a Committee of Arbitration".

14. (1) If a house, in respect of which a notice is issued under section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease for any term exceeding one year,^a [the Central Government] shall, for the term of one year from the date on which the house is vacated in pursuance of the notice, or for the unexpired term of the lease whichever is the shorter, be liable to the owner for the rent fixed by the registered lease instead of for the rent payable under this Act if the rent so fixed exceeds the rent so payable.

(2) If a house, in respect of which a notice is issued under section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease from year to year,^a [the Central Government] shall be liable as aforesaid for the term of six months from the date on which the house is vacated in pursuance of the notice.

(3) Nothing in this section shall be deemed —

(a) to render^b [the Central Government] so liable unless an application in writing in this behalf is made by the owner to the^c [Officer Commanding the station] within fifteen days from the service of the notice; or

(b) to limit or otherwise affect any agreement between^b [the Crown] and the owner.

[a] *Substituted* by A. O. for "the Secretary of State for India in Council". [b] *Substituted* by A. O. for "the said Secretary of State in Council". [c] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment".

15. (1) If the owner considers that the rent stated in a notice issued under section 7 is not reasonable, he may, within a period of^a [thirty] days from the service of such notice,^b [refer the matter to a Civil Court, in accordance with the provisions of Chapter IV] :

^c [Provided that where an appeal has been made to the Officer Commanding the District under section 30, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of section 32.]

(2) If the owner does not make such a^d [reference] within the said period, he shall be deemed to have accepted the rent so offered.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 7, for "fifteen". [b] *Substituted* by S. 7, *ibid.*, for "require that the matter be referred by the Officer Commanding the station to a Committee of Arbitration". [c] *Inserted* by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 [XXII] of 1933), S. 2. [d] *Substituted* by Act, 9 [IX] of 1930, S. 7, for "requisition".

Section 15 — Note 1

[1] As to computation of period of limitation, see Section 34A.

[2] Where owner does not raise question of enhancement until commencement of tenancy, and is served with notice for repairs, he is not entitled to enhanced rent from commencement of tenancy. (Vol 13) 1926 All 746 (747).

[3] It is the owner alone that can make a reference under this section to the Civil Court. Therefore, in a reference the owner is not bound to make a mortgagee, who is not in possession of the lease property, a party to the reference and his non-joinder will not defeat the

suit. However, the Court may join the mortgagee as a proper party under Civil P. C., O. 1, R. 10. (Vol 24) 1937 Pesh 17 (17, 18).

[4] The Peshawar Court has observed that there is a lacuna in the Act which should be filled up by the Legislature. It has, therefore, suggested that there should be a provision to the effect that where the house has been taken over and the question of rent is contested by the landlord the amount fixed by the authorities should be paid to the landlord without prejudice to his right to fight in Court the question as to the reasonableness of the rent proposed. (Vol 26) 1939 Pesh 22 (23).

16. (1) If the owner fails to execute any repairs to a house as required by a notice issued to him under section 7, the ^a[Officer Commanding the station] may by *Power for owner to refer to Civil Court on question of repairs.* notice require the owner to execute the repairs within such period, not being less than ^b[thirty] days, as may be specified in the notice.

(2) If the owner objects to any requisition contained in a notice issued under sub-section (1), he may, within ^b[thirty] days from the service of the notice, ^c[refer the matter to a Civil Court in accordance with the provisions of Chapter IV] :

^d[Provided that where an appeal has been made to the Officer Commanding the District under section 80, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of section 82.]

^e[3] Every reference under sub-section (2) shall be accompanied by an estimate of the repairs, if any, which the owner considers necessary in order to put the house into a state of reasonable repair.]

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment". [b] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 8, for "fifteen". [c] *Substituted* by S. 8, *ibid.*, for "require that the matter be referred by the Officer Commanding the station to a Committee of Arbitration". [d] *Inserted* by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 [XXII] of 1933), S. 3. [e] *Inserted* by Act 9 [IX] of 1930, S. 8.

^a[17. If the owner fails to comply with a notice issued under sub-section (1) of section 16, *Power to have repairs executed and recover cost.* the Military Engineer Services or the Public Works Department may, with the previous sanction of the Officer Commanding the Station and notwithstanding any right of reference conferred by that section, cause the repairs specified in the notice to be executed at the expense of ^b[the Central Government], and the cost thereof, or, where a reference has been made, the amount finally determined by the Civil Court may be deducted from the rent payable to the owner.]

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 9, for the original section. [b] *Substituted* by A. O. for "the Government".

18. Every person on whom devolves, by transfer, by succession or by operation of law, the *Notice to be given of devolution of interest in house in cantonment.* interest of an owner in any house, or in any part of any house, situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of section 8 is for the time being in force, shall be bound to give notice of the fact to the ^a[Officer Commanding the station] within one month from the date of such devolution, and, if he, without reasonable cause, fails to do so, he shall be punishable with fine which may extend to fifty rupees.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment".

^aCHAPTER IV.

PROCEDURE IN REFERENCES.

19. All references under this Act shall be made by application to, and tried by, the Court of *Jurisdiction in references.* the District Judge.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 10, for the original Chapter IV entitled "Committees of Arbitration" and consisting of Ss. 19 to 28.

20. References under this Act shall be deemed to be proceedings within the meaning of *Procedure and powers of the Court.* section 141 of the Code of Civil Procedure, 1908, and in the trial thereof the Court may exercise any of its powers under that Code.

21. The scope of the inquiry in a reference under this Act shall be restricted to a consideration of the matters referred to the Court in accordance with the provisions *Restriction of scope of inquiry.* of this Act.

22 to 28. [See Legislative Note a, given under s. 19.]

Section 16 — Note 1

[1] As to service of notice, see S. 34; and as to computation of period of limitation, see S. 34A.

[2] Tenant, a military officer, deciding repairs to be necessary and executing the repairs himself — Tenant not entitled to recover cost of repairs from landlord so as to make landlord liable for costs where procedure

under the Act is not followed. (1911) 8 All L Jour. 1060 (1062).

Section 18 — Note 1

[1] As to service of notice, see Section 34.

Section 19 — Note 1

[1] Provision for references under this Act is made in Ss. 13 (2), 15 (1) and 16 (2).

CHAPTER V.

APPEALS.

^a29. (1) An appeal shall lie to the High Court against the decision of the Court of the District *Appeal to High Court.* Judge upon a reference tried by it.

(2) No appeal under this section shall be admitted unless it is made within thirty days from the date of the decision against which it is preferred.

(3) An appeal preferred under this section shall be deemed to be an appeal from an order within the meaning of section 108 of the Code of Civil Procedure, 1908.]

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 11, for the original section.

^a30. The owner or any tenant of a house in respect of which a notice has been issued under *Appeal to Officer Commanding the District.* section 7 may, within a period of ^b[ten days] from the date of the service thereof, appeal to the Officer Commanding the District against the decision of the Officer Commanding the Station to appropriate the house.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 12, for the original section. [b] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 [XXII] of 1933), S. 4, for "twenty-one days."

31. (1) Every petition of appeal under section 30 shall be in writing and accompanied by a *Petition of appeal.* copy of the notice appealed against.

(2) Any such petition may be presented to the ^a[Officer Commanding the station], and that officer shall be bound to forward it to the authority empowered by section 30 to hear the appeal, and may attach thereto any report which he may desire to make in explanation of the notice appealed against.

(3) If any such petition is presented direct to the Officer Commanding the District and an immediate order on the petition is not necessary, the Officer Commanding the District may refer the petition to the ^a[Officer Commanding the station] for report.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 6, for "Commanding Officer of the Cantonment".

32. ^a[(1)] The decision on any such appeal of the Officer Commanding the District ^b[* * *] *Order in appeal final.* shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a cantonment, or part of a cantonment, in which this Act is not operative :

Provided that no appeal shall be decided until the appellant has been heard or has had a reasonable opportunity of being heard in person or through a legal practitioner ^c[and in giving a decision the Officer Commanding the District shall record briefly the grounds therefor.]

^a[(2) Notice of the result of the appeal shall be given to the appellant as soon as may be, and, where the appellant is a tenant of the house, to the owner of the house also.]

[a] The original S. 32 was *re-numbered* as sub-section (1) of that section by the Cantonments (House-Accommodation Amendment) Act, 1933 (22 [XXII] of 1933), S. 5. [b] The words "or of the General Officer Commanding-in-Chief, the Command, as the case may be" were *repealed* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 13. [c] *Inserted* by Act 9 [IX] of 1930, S. 13. [d] *Inserted* by Act 22 [XXII] of 1933, S. 5.

33. Where an appeal has been presented under section 30 within the period prescribed ^a[therein], *Suspension of action* all action on the notice shall, on the application of the appellant, be held *pending appeal.* in abeyance pending the decision of the appeal.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 14, for "by sub-section (2) of that section".

Section 29 — Note 1

[1] As to computation of period of limitation, *see* Section 34A.

[2] As this Act is a special Act, S. 5 of the Limitation Act does not apply to an appeal under this section. (Vol 28) 1941 All 207 (208) : 1 L R (1941) All 356.

Section 30 — Note 1

[1] As to suspension of action pending appeal, *see* Section 33; and as to computation of period of limitation, *see* Section 34A.

[2] A person aggrieved by the notice issued under S. 7 to vacate the house in the cantonment has to

adopt the only remedy of appealing under S. 30, whether the notice is legal or not. A Civil Court has no jurisdiction to entertain a suit in respect of such notice. (Vol 12) 1925 Bom 162 (164) : 49 Bom. 152.

Section 32 — Note 1

[1] As to how the time for referring a matter to a Civil Court under S. 15 or S. 16 is to be computed, *see* Section 15 (1) Proviso and Section 16 (2) Proviso.

[2] Officer Commanding the District is the tribunal to which a person aggrieved by a notice under S. 7 must apply for redress and the decision of the officer thereon is final under this section. (Vol 4) 1917 Sind 30 (42) : 10 Sind L R 113.

CHAPTER VI.

SUPPLEMENTAL PROVISIONS.

34. Every notice or requisition prescribed by this Act shall be in writing, signed by the person *Service of notice by whom it is given or made or by his duly appointed agent, and may be and requisitions.* served by post on the person to whom it is addressed, or, in the case of an owner who does not reside in or near the cantonment, on his agent appointed ^a[in accordance with a bye-law made under clause (29) of section 282 of the Cantonments Act, 1924].

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 4, for "under the Cantonments Act, 1910, or any rule made thereunder".

^a**[34A.]** The period prescribed for making any reference or preferring any appeal under this *Computation of periods of limitation.* Act shall be computed in accordance with the provisions of the Indian Limitation Act, 1908.]

[a] *Inserted* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 15.

Power for Central Government to make rules. **35. (1)** The ^a[Central Government] may make rules^b to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

^c[^{*}]
(b) define the powers of entry, inspection, measurement or survey which may be exercised in carrying out the purposes and objects of this Act or of any rule made hereunder.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] For such rules see General Rules and Orders. Volume V, p. 251. [c] Clause (a) was *repealed* by the Cantonments (House-Accommodation Amendment) Act, 1930 (9 [IX] of 1930), S. 16.

36. (1) The power to make rules under section 35 shall be subject to the condition of the *Further provisions respecting rules.* rules being made after previous publication and of their not taking effect until they have been published in the ^a[Official Gazette] and in such other manner (if any) as the ^b[Central Government] may direct.

(2) Any rule under section 35 may be general for all cantonments or parts of cantonments in British India in which this Act is for the time being operative, or may be special for any of such cantonments or parts as the ^b[Central Government] may direct.

(3) A copy of the rules under section 35 for the time being in force in a cantonment shall be kept open to inspection free of charge at all reasonable times in the office of the Cantonment ^c[Board].

(4) In making any rule under clause (b) of sub-section (2) of section 35, the ^b[Central Government] may direct that whoever obstructs any person, not being a public servant within the meaning of section 21 of the Indian Penal Code, in making any entry, inspection, measurement or survey, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with fine which, in addition to such fine as aforesaid, may extend to five rupees for every day after the first during which such offence continues.

[a] *Substituted* by A. O. for "Gazette of India". [b] *Substituted* by A. O. for "Governor-General in Council".

[c] *Substituted* by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Schedule II, for "Authority".

37. No Judge or Magistrate shall be deemed, within the meaning of section 556 of the Code *Inapplicability of section 556 of the Code of Criminal Procedure, 1898, to trials of offences.* of Criminal Procedure, 1898, to be a party to, or personally interested in, any prosecution for an offence constituted by or under this Act merely because he is a member of the Cantonment ^a[Board] or has ordered or approved the prosecution.

[a] *Substituted* by the Cantonments (House-Accommodation Amendment) Act, 1925 (10 [X] of 1925), S. 5, for "Committee".

Protection to persons acting under Act. **38.** No suit or other legal proceeding shall lie against any person for anything in good faith done, or intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act.

39. [Repeals.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

THE SCHEDULE. — [Enactments Repealed.] *Repealed by the Repealing Act, 1927 (XII of 1927), S. 2 and Schedule.*

THE INDIAN CARRIAGE BY AIR ACT, 1934

(ACT XX of 1934)

STATEMENT OF OBJECTS AND REASONS.

"An International Convention for the unification of certain rules relating to international carriage by air was signed at Warsaw in October, 1929, by certain Governments. The convention defines the liability of air carriers for injury or damage caused to passengers or goods. The convention was not signed on behalf of India, but its provisions have been examined by the Government of India and are, in their opinion, suitable to Indian conditions. They, therefore, propose to adhere to the convention as soon as requisite legislation to

implement its provisions has been enacted. To that end they have framed the present Bill.

The convention applies only in respect of international carriage by air, i. e. carriage between two States signatory to the convention but as there is no law on the subject in India, beyond the general law of contract and the law relating to carriages on land, the Bill seeks to provide power to the Governor-General in Council to make rules extending the provisions of the convention also to internal carriage by air."

—Gazette of India, 1934, part V, p. 78.

THE INDIAN CARRIAGE BY AIR ACT, 1934

(ACT XX OF 1934.^a)

[as amended by Act XXXI of 1939]

[19th August 1934.]

An Act to give effect in British India to a Convention for the unification of certain rules relating to international carriage by air.

WHEREAS a Convention for the unification of certain rules relating to international carriage by air (hereinafter referred to as the Convention) was, on the 12th day of October, 1929, signed at Warsaw ;

AND WHEREAS it is expedient that British India should accede to the Convention and should make provision for giving effect to the said Convention in British India ;

AND WHEREAS it is also expedient to make provision for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air in British India which is not international carriage within the meaning of the Convention ;

It is hereby enacted as follows :—

[a] For Report of Select Committee, see Gazette of India, 1934, Pt. V, p. 189.

Short title, extent and commencement.

1. (1) This Act may be called the Indian Carriage by Air Act, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date^a as the ^b[Central Government] may, by notification in the ^c[Official Gazette], appoint.

[a] 18th February 1935, See Gazette of India, 1935, Pt. I, P. 320. [b] Substituted by A. O. for "Governor-General in Council". [c] Substituted by A. O. for "Gazette of India."

2. (1) The rules contained in the First Schedule, being the provisions of the Convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall, subject to the provisions of this Act, have the force of law in British India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.

(2) The ^a[Central Government] may, by notification in the ^b[Official Gazette], certify who are the High Contracting Parties to the Convention, in respect of what territories they are parties, and to what extent they have availed themselves of the Additional Protocol to the Convention, and any such notification shall be conclusive evidence of the matters certified therein.

(3) Any reference in the First Schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to all the territories in respect of which he is a party.

^c[(3A) Any reference in the First Schedule to agents of the carrier shall be construed as including a reference to servants of the carrier.]

(4) Notwithstanding anything contained in the Indian Fatal Accidents Act, 1855, or any other enactment or rule of law in force in any part of British India, the rules contained in the First Schedule shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger, and the rules contained in the Second Schedule shall determine the persons by whom and for whose benefit and the manner in which such liability may be enforced.

(5) Any sum in francs mentioned in rule 22 of the First Schedule shall, for the purpose of any action against a carrier, be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier is ascertained by the Court.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Gazette of India."
[c] *Inserted* by the Indian Carriage by Air (Amendment) Act, 1939 (31 [XXXI] of 1939), S. 2. [28-9-1939.]

3. (1) Every High Contracting Party to the Convention who has not availed himself of the provisions of the Additional Protocol thereto shall, for the purposes of any suit brought in a Court in British India in accordance with the provisions of rule 23 of the First Schedule to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that Court and to be a person for the purposes of the Code of Civil Procedure, 1908.

(2) The High Court may make rules of procedure providing for all matters which may be expedient to enable such suits to be instituted and carried on.

(3) Nothing in this section shall authorise any Court to attach or sell any property of a High Contracting Party to the Convention.

4. The ^a[Central Government] may, by notification in the ^b[Official Gazette], apply the rules contained in the First Schedule and any provision of section 2 to such carriage by air, not being international carriage by air as defined in the First Schedule, as may be specified in the notification, subject however to such exceptions, adaptations and modifications, if any, as may be so specified.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India."

FIRST SCHEDULE

(See section 2.)

RULES.

CHAPTER I.

SCOPE—DEFINITIONS.

1. (1) These rules apply to all international carriage of persons, luggage or goods performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an air transport undertaking.

(2) In these rules "High Contracting Party" means a High Contracting Party to the Convention.

(3) For the purposes of these rules the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of these rules.

(4) A carriage to be performed by several successive air carriers is deemed, for the purposes of these rules, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

2. (1) These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in rule 1.

(2) These rules do not apply to carriage performed under the terms of any international postal Convention.

CHAPTER II.

DOCUMENTS OF CARRIAGE.

Part I. — Passenger ticket.

3. (1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars :—

(a) the place and date of issue ;

(b) the place of departure, and of destination ;

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character ;

(d) the name and address of the carrier or carriers ;

(e) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts a

passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

Part II. — Luggage ticket.

4. (1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

(2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The luggage ticket shall contain the following particulars :—

- (a) the place and date of issue ;
- (b) the place of departure and of destination ;
- (c) the name and address of the carrier or carriers ;
- (d) the number of the passenger ticket ;
- (e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket ;
- (f) the number and weight of the packages ;
- (g) the amount of the value declared in accordance with rule 22 (2) ;
- (h) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) of sub-rule (3), the carrier shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

Part III. — Air consignment note.

5. (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of rule 9, be none the less governed by these rules.

6. (1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign an acceptance of the goods.

(4) The signature of the carrier may be stamped ; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

7. The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

8. The air consignment note shall contain the following particulars :—

- (a) the place and date of its execution ;
- (b) the place of departure and of destination ;
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character ;
- (d) the name and address of the consignor ;
- (e) the name and address of the first carrier ;
- (f) the name and address of the consignee, if the case so requires ;
- (g) the nature of the goods ;
- (h) the number of the packages, the method of packing and the particular marks or numbers upon them ;
- (i) the weight, the quantity and the volume or dimensions of the goods ;
- (j) the apparent condition of the goods and of the packing ;
- (k) the freight, if it has been agreed upon, the date and place of payment and the person who is to pay it ;
- (l) if the goods are sent for payment on delivery, the price of the goods and, if the case so requires, the amount of the expenses incurred ;
- (m) the amount of the value declared in accordance with rule 22 (2) ;
- (n) the number of parts of the air consignment note ;
- (o) the documents handed to the carrier to accompany the air consignment note ;
- (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon ;
- (q) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

9. If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in rule 8 (a) to (c) inclusive and (g), the carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability.

10. (1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

(2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

11. (1) The air consignment note is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.

(2) The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

12. (1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or, by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with rule 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

13. (1) Except in the circumstances set out in rule 12, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

14. The consignor and the consignee can respectively enforce all the rights given them by rules 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

15. (1) Rules 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of rules 12, 13 and 14 can only be varied by express provision in the air consignment note.

16. (1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III.

LIABILITY OF THE CARRIER.

17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by

air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

20. (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

21. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may exonerate the carrier wholly or partly from his liability.

22. (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of 65½ milligramms gold of millesimal fineness 900.

23. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.

24. (1) In the cases covered by rules 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule.

(2) In the cases covered by rule 17 the provisions of sub-rule (1) also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

25. (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

26. (1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

27. In the case of the death of the person liable, an action for damages lies in accordance with these rules against those legally representing his estate.

28. An action for damages must be brought at the option of the plaintiff, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

30. (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in sub-rule (4) of rule 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV.

PROVISIONS RELATING TO COMBINED CARRIAGE.

31. (1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to the carriage by air, provided that the carriage by air falls within the terms of rule 1.

(2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air.

CHAPTER V.

GENERAL AND FINAL PROVISIONS.

32. Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of goods arbitration clauses are allowed, subject to these rules, if the arbitration is to take place in the territory of one of the High Contracting Parties within one of the jurisdictions referred to in rule 25.

33. Nothing contained in this Schedule shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Schedule.

34. This Schedule does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

35. The expression "days" when used in these rules means current days, not working days.

36. When a High Contracting Party has declared at the time of ratification of or of accession to the Convention that the first paragraph of Article 2 of the Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority, these rules shall not apply to international carriage by air so performed.

SECOND SCHEDULE.

(See section 2.)

PROVISIONS AS TO LIABILITY OF CARRIERS IN THE EVENT OF THE DEATH OF A PASSENGER.

1. The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

In this rule the expression "member of a family" means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, step-child, grandchild :

Provided that, in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

2. An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under the last preceding rule enforceable, but only one action shall be brought in British India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in British India, or, not being domiciled there, express a desire to take the benefit of the action.

3. Subject to the provisions of the next succeeding rule the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court may direct.

4. The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside British India in respect of the death of the passenger in question.

THE INDIAN CARRIAGE OF GOODS BY SEA ACT, 1925.

(ACT XXVI of 1925).

STATEMENT OF OBJECTS AND REASONS.

"A bill of lading was originally a receipt for the goods placed on a ship and also a document for transferring the title of the goods to the consignee. With the development of trade, it became recognised as a negotiable instrument in which shippers, the carriers and the consignees or purchasers of the goods as well as bankers and under-writers became increasingly interested. Concurrently with this it became the custom to show on the bill of lading the terms of the contract on which the goods were delivered to and received by the ship, and from time to time new clauses were added usually in the direction of contracting the carrier out of liability for some kind of loss or damage to the goods. There thus arose great diversity between the conditions on which goods were carried by sea and considerable

uncertainty about the liabilities which still attached to the carrier.

2. There has been a demand for many years among the different commercial interests which handle bills of lading for uniformity among all maritime countries in the definition of the liabilities and risks attaching to the carrier of goods by sea. Some countries, e. g. Canada, Australia, and the United States of America, enacted legislation prohibiting carriers of goods by sea from contracting themselves out of certain kinds of liability. The matter was discussed at several International Conferences between shipowners, shippers and bankers in an attempt to secure the universal adoption of an agreed set of rules.

3. A code of rules was drawn up in 1921 by the

International Law Association at the Hague. These were subjected to criticism by the various interests affected till finally agreement was reached at the International Conferences on Maritime Law held in Brussels in October, 1922, and again in October 1923. A Code of rules defining the responsibilities and liabilities to which a carrier of goods by sea should be subject and also the rights and immunities he was entitled to enjoy was drawn up, and it was unanimously recommended that every country should give legal sanction to these rules. The United Kingdom has done so by the Carriage of Goods by Sea Act (1924) (14 and 15 Geo. V, c. 22). It

is proposed to do the same in India by this Bill.

4. This Bill follows closely the English Act. The agreed Code of Rules are reproduced in the Schedule. Clause 5 of the Bill exempts from these rules goods carried in the coasting trade under documents other than bills of lading whilst clause 6 saves the carrier from claims for shortage of weight in certain cases of bulk shipments where, by the custom of the trade, the weight entered in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or shipper and this fact is so stated in the bill of lading."—Gazette of India, 1925, Part V, page 37.

REPORT OF JOINT COMMITTEE.

"The following report of the Joint Committee on the Bill to amend the law with respect to the carriage of goods by sea was presented to the Legislative Assembly on the 31st August 1925 :—

We, the undersigned, Members of the Joint Committee to which the Bill to amend the law with respect to the carriage of goods by sea was referred, have considered the Bill and the papers noted in the margin and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

We have made one change in the Bill the substitution of new clause 5.

Original clause 5, following lines of the English Act, exempted the whole of the coasting trade from the requirement that in all cases a bill of lading should be issued subject to the conditions prescribed in the Rules, that is to say, such trade was excluded from the operation of the Rules.

It is clear from the opinions received that, contrary to the English practice, bills of lading are almost invariably issued by steamship companies engaged in the Indian coasting trade, and that it is the desire of the mercantile community that the provisions of the Bill relating to bills of lading should apply to such trade.

It is not, however, the practice for sailing vessels engaged in the coasting trade or proceeding from Indian ports to issue bills of lading and these have been exempted accordingly.

The provision in clause (b) is intended to cover the case of goods carried by the South Indian Railway ferry boat from Dhanushkodi to Talaimanar. Bills of lading are not issued for the short sea journey and cargo is carried subject to the provisions of the Railway Act."

* * * * *

MINUTE OF DISSENT.

[By Purushotamdas Thakurdas] "I think it is necessary to draw the attention of the Indian Legislature to the opinion of Mr. Justice J. R. Ellis Cunliffe of the Rangoon High Court. He says that the English statute corresponding to the Bill under report 'was the result of a so-called International Maritime Conference at Brussels, which has been subject to acute criticism on the part of high legal authorities at Home.' These authorities 'regarded the draft provisions of the Bill as being extremely difficult to interpret and likely to lead to much unnecessary litigation arising out of their obscurity.' The learned Judge further remarks :

"The construction of Article 6 under the Schedule will be extremely difficult to decide. How the Courts are to come to a satisfactory conclusion as to whether the stipulation mentioned in the first part of the Article is or is not contrary to public opinion, I do not know. And

further, the ordinary trader is bound to be in very great doubt as to the difference between the receipt mentioned therein, which is ruled to be a non-negotiable instrument and to be so marked and, the ordinary bill of lading, which is, by custom, largely a formally printed document.'

The only reason that I know of for recommending the Indian Legislature to adopt the Rules given in the Schedule to this Bill is to ensure uniformity in a matter which has been under discussion between experts of the various countries for a number of years. But in this long and protracted discussion, it must be noted that, Indian interests had no direct say or representation. Whilst I see no reason, so far, to oppose the Bill as amended by the "Select Committee", I deem it my duty to bring the opinion expressed by Justice Cunliffe to the notice of the Legislature by a separate Minute."

—Gazette of India, 1925, Part V, page 205.

Cognate Acts and Provisions. See under Merchant Shipping Act, 1923.

THE INDIAN CARRIAGE OF GOODS BY SEA ACT, 1925.

(ACT XXVI OF 1925.)^a

[21st September 1925]

An Act to amend the Law with respect to the carriage of goods by sea.

WHEREAS at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading ;

AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference ;

AND WHEREAS provision has been made by the Carriage of Goods by Sea Act, 1924, that the said rules as so amended and as set out with modifications in the Schedule, shall, subject to the

provisions of that Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;

AND WHEREAS it is expedient that like provision should be made in British India; It is hereby enacted as follows:—

[a] [This Indian Act follows, with slight modifications, the provisions contained in the English Carriage of Goods by Sea Act, 1924 (14 and 15, Geo. V, c. 22).]

Short title and extent. 1. (1) This Act may be called the INDIAN CARRIAGE OF GOODS BY SEA ACT, 1925.

(2) It extends to the whole of British India.

2. Subject to the provisions of this Act, the rules set out in the Schedule (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India.

[(1924) 14 and 15 Geo. V, c. 22—S. 1.]

Absolute warranty of seaworthiness not to be implied in contracts to which Rules apply. 3. There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

[(1924) 14 and 15 Geo. V, c. 22—S. 2.]

4. Every bill of lading, or similar document of title, issued in British India which contains *Statement as to application of Rules* or is evidence of any contract to which the Rules apply, shall *to be included in bills of lading.* contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

[(1924) 14 and 15 Geo. V, c. 22—S. 3.]

Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes.

5. Article VI of the Rules shall, in relation to —

(a) the carriage of goods by sea in sailing ships carrying goods from any port in British India to any other port whether in or outside British India, and

(b) the carriage of goods by sea in ships carrying goods from a port in British India notified^a in this behalf in the ^b[Official Gazette] by the ^c[Central Government] to a port in Ceylon specified in the said notification,

have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

[(1924) 14 and 15 Geo. V, c. 22—S. 4.]

[a] For such a notification, see Gazette of India, 1925, Pt. I, p. 950. [b] Substituted by A. O. for "Gazette of India". [c] Substituted by A. O. for "Governor-General in Council".

6. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

[(1924) 14 and 15 Geo. V, c. 22—S. 5.]

7. (1) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty, both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels.

(2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day,^a not being earlier than the first day of January, 1926, as the ^b[Central Government] may, by notification in the ^c[Official Gazette], appoint, nor to any bill of lading or similar

Section 2 — Note 1

[1] Lighter carrying goods from port not to another port but to a ship lying at anchor in the sea does not come within the scope of this section. (Vol 26) 1939 Mad 401 (402).

document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

[(1924) 14 & 15 Geo. V, c. 22 — S. 6 (2), (3).]

[a] For Notification appointing such day as the 1st of January, 1926, see Gazette of India, 1925, Pt. I, p. 950.

[b] *Substituted* by A. O. for "Governor-General in Council." [c] *Substituted* by A. O. for "Gazette of India".

SCHEDULE.

RULES RELATING TO BILLS OF LADING.

ARTICLE I.

Definitions.

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say —

- (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper :
- (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same :
- (c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried :
- (d) "Ship" means any vessel used for the carriage of goods by sea :
- (e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

[(1924) 14 & 15 Geo. V, c. 22—Art. I.]

ARTICLE II.

Risks.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

[(1924) 14 & 15 Geo. V, c. 22—Art. II.]

ARTICLE III.

Responsibilities and Liabilities.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

- (a) make the ship seaworthy :
- (b) properly man, equip, and supply the ship :
- (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall on demand of the shipper, issue to the shipper a bill of lading showing among other things—

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage :
- (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper :
- (c) The apparent order and condition of the goods :

Article III — Note 1

[1] *Paragraph 3 (b)*—In a suit for short delivery of goods, where the bill of lading expressly says 'weight, contents and value when shipped unknown', the burden is on the plaintiff to prove shortage. (Vol 10) 1923 Mad 523 (523).

[2] *Paragraph 4* — A bill of lading is evidence and sometimes conclusive evidence of the contract of affreightment, but is not the contract of affreightment itself. (Vol 6) 1919 Mad 931 (935).

[3] *Paragraph 6* — Paragraph 6 is to be construed strictly — Ship leaving port on a particular date must be deemed to have delivered cargo to consignee — Consignee cannot take advantage of survey unduly delayed to extend period of limitation. (Vol 24) 1937 Sind 11 (13) : 30 Sind L R 345.

[4] Paragraph 6 does not only purport to limit the time within which the holder of a bill of lading may enforce his rights against the carrier, but it goes much further. It extinguishes the right itself. (Vol 18) 1931 Sind 124 (126) : 25 Sind L R 222.

[5] Condition in a bill of lading that carrier or ship will not be liable unless claim for damages for short delivery is brought within one year after delivery of goods — Suit for damages brought after one year of delivery—*Held* condition extinguished consignee's right to claim damages. (Vol 19) 1932 Bom 330 (332); (Vol 27) 1940 Rang 294 (295, 296) : 1940 Rang L R 552. (By virtue of Art. II the carrier is liable under the contract and not by way of tort in addition to it.)

[6] 'Removal' means physical removal. (Vol 24) 1937 Sind 11 (13) : 30 Sind L R 345.

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage, the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that, if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier, such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

[(1924) 14 & 15 Geo. V, c. 22 — Art. III.]

ARTICLE IV.

Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

- (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ;
- (b) fire, unless caused by the actual fault or privity of the carrier ;
- (c) perils, dangers and accidents of the sea or other navigable waters ;
- (d) act of God ;
- (e) act of war ;
- (f) act of public enemies ;
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process ;
- (h) quarantine restriction ;
- (i) act or omission of the shipper or owner of the goods, his agent, or representative ;
- (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general ;
- (k) riots and civil commotions ;
- (l) saving or attempting to save life or property at sea :

Article IV — Note 1

[1] *Paragraph 2 (g)*—Where a lighter carries goods from the port but does not carry goods to any other port, the fact that goods transported are placed in another ship, which itself carries them to another port, would not bring the lighter within the purview of S. 2

of the Act. Moreover, even if this lighter is a 'ship' to which the Act applies, then Art. IV, Para. 2, clause (g) would make the owners of the lighter liable for the loss of goods which is due to the fault of the agent of the carriers. (Vol 26) 1939 Mad 401 (402).

- (m) waslage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods :
- (n) insufficiency of packing :
- (o) insufficiency or inadequacy of marks :
- (p) latent defects not discoverable by due diligence :
- (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in any amount exceeding 100% per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

[(1924) 14 & 15 Geo. V, c. 22 — Art. IV.]

ARTICLE V.

Surrender of Rights and Immunities, and Increase of Responsibilities and Liabilities.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these Rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

[(1924) 14 & 15 Geo. V, c. 22 — Art. V.]

ARTICLE VI.

Special Conditions.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect :

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

[(1924) 14 & 15 Geo. V, c. 22—Art. VI.]

ARTICLE VII.

Limitations on the Application of the Rules.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or

Article VII — Note 1

[1] In a bill of lading there was a condition to the effect that "in all cases and under all circumstances the liability of the shipowner shall absolutely cease where the goods are free from the ships tackle. The

goods were delivered to a landing agent who disposed of them without the production of a bill of lading or a delivery order. It was held that the condition in the bill afforded complete protection to the shipowner. (1909) 19 Mad L Jour 316 (323, 324) (P O).

damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

[(1924) 14 & 15 Geo. V, c. 22—Art. VII.]

ARTICLE VIII.

Limitation of liability.

The provisions of these Rules shall not affect the rights and obligations of the carrier under any Statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

[(1924) 14 & 15 Geo. V, c. 22—Art. VIII.]

ARTICLE IX.

The monetary units mentioned in these Rules are to be taken to be gold value.

[(1924) 14 & 15 Geo. V, c. 22—Art. IX.]

THE CARRIERS ACT, 1865.

(ACT III of 1865)

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STATEMENT OF OBJECTS AND REASONS.

"The defective state of the Law of India in respect of the liabilities of carriers, whether companies or individuals, has for some time past attracted the attention of the Governor-General in Council, but it was thought desirable to postpone any enactment on the subject, until it should be seen whether the labours of Her Majesty's Commissioners for preparing a Body of Substantive Law would relieve the Indian Legislature from the necessity of special legislation.

Meantime, however, the question has become pressing, from the increase in the numbers of carrying companies, from the transfer of part of the Government carrying business to one of them, and from the prospect of Tramways being constructed under Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken). The necessity for prompt legislation has further been urged on the Government in petitions, and by the Government of Madras in an official letter.

The Bill now published by the Viceroy's permission follows the principles, though not the form or language, of the English Statutes regulating the liability of carriers.

The earlier sections extend to India the principle embodied in the English Statute 11 Geo. IV, and 1 Will. IV, Cap. 68. They relieve carriers from the extraordinary liabilities which would be imposed on them by the delivery to them, without notice, of articles of peculiar value or perishableness. Any customer, delivering to the carrier any of the articles enumerated

in the Schedule, must declare them, and then the carriers may charge at a higher rate for the additional risk, in conformity with a scale to be publicly exhibited in his place of business. Under the ordinary law of contract, the carrier might relieve himself from the liability by such a notice, but it would be necessary to bring the notice home to the customer by evidence. From the necessity of giving such evidence, the carrier will now be relieved by this enactment.

By Section VI it is provided that the carrier shall not rid himself of his liability for articles, neither unusually valuable nor unusually perishable, by any public notice, but (unless he be the owner of a Tramway) he is permitted to modify his legal obligations by special contract.

Section VII extends to Tramways constructed under Act XXII of 1863, the same rule which is applied to Railways by Act XVIII of 1854. It seems highly expedient that the same law should, if possible, be made to govern both Railways and Tramways.

The rule applicable to Indian Railway Companies is contained in Section XI of Act XVIII of 1854, and is as follows :—

"The liability of such a Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act, shall not be deemed or construed to be limited, or in anywise affected by any public notice given, or any private contract made by them; but such a Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants."

On this Section the Government of Madras observes : "The first clause prohibiting any private contract in limitation of liability goes far beyond the Common Law of England and Statute 17 and 18 Vic., Cap. 31, S. VII, which admits of such contracts if just and reasonable. It is difficult to see why a Railway Company in India should be deprived of that power of protecting itself by special contract which a Railway Company in England possesses. If the latter clause of the section, which makes a company liable for gross negligence or misconduct of their agents, is meant to relieve them from liability in all other cases, it would be well to say so by distinct negative words. But it is very questionable whether so wide an exemption from responsibility is desirable or was intended."

If, however, the word "only" be supplied after "answerable" in the last line but three of the extract from the Railways Act as printed above, the Section becomes intelligible. It limits the liability of Railway Companies to the consequences of gross negligence or misconduct on the part of their agents or servants, but declares that from this liability so limited they shall not be allowed to relieve themselves by any kind of contract. There cannot indeed be much doubt that the intention of the Legislature was to place all Railway Companies in what was once supposed to be the exact position of a carrier who had contracted for himself as favourably as the law of England would permit.

It was, in fact, long supposed in England that, while a carrier could by contract relieve himself from most of his liabilities, his power of doing so stopped short of

liability for negligence or misconduct. Such is the view of the law taken by Mr. Justice Story in his "Commentaries on the law of Bailments", Section 549, and such is understood to be still the law in America. But a series of decisions in the English Courts overturned the older doctrine, and it was settled that a carrier could, by a properly framed contract, deliver himself from liability even for misconduct or negligence. The liberty thus conceded was, however, found to be a practical evil, and the English Legislature intervened by 17 and 18 Vic., Cap. 31.

The nearly contemporaneous enactment of the Indian Legislature, embodied in Section XI of Act XVIII of 1854, is obviously aimed at the same object.

It seems very undesirable to adopt the rule contained in Section VII of 17 and 18 Vic., Cap. 31, which permits companies to contract themselves on certain conditions, out of their liability for negligence. The Section in question has been severely condemned by the present Lord Chancellor of England on the ground both of obscurity of expression and of difficulty of application :—(*Peek v. The North Staffordshire Railway Company*, 32 Law Journal N. S. Q. B. 241). On the other hand, the rule of the Indian Legislature is comparatively simple; it would probably be sustained by the general sense of the mercantile community and it is especially applicable to a country in which there exists considerable difference of opinion as to the general liabilities of carriers."

—Gazette of India, Extraordinary, dated 1-8-1864, p. 2.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act X of 1899.

—Adopted by A. O.

—Repealed in part by Acts IX of 1890; X of 1914.

—Repealed in part and Amended by Act XIII of 1921.

COGNATE ACTS AND PROVISIONS.

1. CARRIAGE BY AIR ACT, XX OF 1934.

2. CARRIAGE OF GOODS BY SEA ACT, XVI OF 1925.

3. CONTRACT ACT, IX OF 1872, Ss. 151, 152, 161.

4. RAILWAYS ACT, IX OF 1890, Ss. 72 TO 82.

5. SALE OF GOODS ACT, III OF 1930, Ss. 50, 51.

THE CARRIERS ACT, 1865.^a

(ACT III OF 1865.)

[14th February 1865.]

An Act relating to the rights and liabilities of Common Carriers.

WHEREAS it is expedient, not only to enable common carriers to limit their liability for loss or damage to property delivered to them to be carried, but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants, or agents; It is enacted as follows :

[a] For Proceedings relating to the Bill, see Gazette of India 1864 Supplement, p. 497, and *ibid*, 1865, pp. 51, 64 and 65.

The Act has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 [XV] of 1874), S. 3.

It has been applied to the Santhal Parganas, by the Santhal Parganas Settlement Regulation, 1872 (3 [III] of 1872), S. 31.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 [XIV] of 1874), to be in force in the following Scheduled Districts, namely :—

Sind, see Gazette of India, 1880, Pt. I, p. 672; West Jalpaiguri, the Western Hills of Darjilling, the Darjilling Tarai and the Damson Sub-division of the Darjilling District, see *ibid*, 1881, Pt. I, p. 74; The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see *ibid*, 1881, Pt. I, p. 504; The Porahat Estate in the District of Singhbhum, see *ibid*, 1897, Pt. I, p. 1059; Kumaon and Garhwal, see *ibid*, 1876, Pt. I, p. 605; The Scheduled portion of the Mirzapur District, see *ibid*, 1878, Pt. I, p. 383; Janunsar Bawar, see *ibid*, 1878, Pt. I, p. 382; The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan, [Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N. W. F. P., see Gazette of India, 1901, Pt. I, p. 857, and *ibid*, 1902, Pt. I, p. 575 : but its application to that part of the Hazara District known as Upper Tanawal is barred by the Hazara (Upper Tanawal) Regulation, 1900 (2 [II] of 1900)] see *ibid*, 1886, Pt. I, p. 48; The Scheduled Districts of the C. P., see *ibid*, 1879, Pt. I, p. 771; The Scheduled Districts in Ganjam and Vizagapatam, see *ibid*, 1898, Pt. I, p. 870; The District of Sylhet see *ibid*, 1879, Pt. I, p. 681; The rest of Assam (except the North Lushai Hills) see *ibid*, 1897, Pt. I, p. 299.

It has been declared, by notification under S. 3 (b) of the last-mentioned Act, not to be in force in the Scheduled District of Lohal—*Sec Gazette of India*, 1886, Pt. I, p. 301.

It has been extended, by notification under S. 5 of the same Act to the following Scheduled Districts, namely: The Tanai of the Province of Agra—*Sec Gazette of India*, 1876, Pt. I p. 505; Ajmer and Merwar, *see ibid*, 1877, Pt. I, page 605.

It has been repealed as to carriers by rail by the Indian Railways Act, 1879 (4 [IV] of 1879).

For the Indian Railways Act now in force, *see* the Indian Railways Act, 1890 (9 [IX] of 1890).

Short title. 1. This Act may be cited as the CARRIERS ACT, 1865.

Interpretation clause. 2. In this Act, unless there be something repugnant in the subject or context,—

“Common carrier” denotes a person, other than the Government, engaged in the business of “*Common carrier.*” transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately :

“*Person.*” “Person” includes any association or body of persons, whether incorporated or not :

b[* * *]

[a] *Cf.* Definition in the General Clauses Act, 1897 (10 [X] of 1897), S. 3 (39). [b] The paragraph relating to “number” was repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914).

3. No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared, to such carrier or his agent, the value and description thereof.^a

[a] The earlier sections extend to India the principle embodied in the Carriers Act, 1830 (11 Geo. IV, and 1 Will IV, c. 68) — *See Statement of Objects and Reasons.*

1. Preamble

[1] The duties and liabilities of a common carrier are governed in India by the principles of the common law in England on that subject except where they have been departed from in the case of particular class of common carriers, e.g. by the Carriers Act or the Railways Act. A common carrier's responsibility is not within the Contract Act. (Vol 2) 1915 Mad 833 (834) : 38 Mad 941 ; (Vol 6) 1919 Upp Bur 17 (18) : 3 Upp Bur Rul 120 ; (1911) 38 Cal 28 (41, 42).

[2] In a suit against defendants who are carriers by sea and hence not “common carriers” within this Act the law applicable was held to be *lex loci contractus*, and the *lex loci* being the Law of England; it was held that the defendants were common carriers and the English law as to common carriers applied to them. (1905) 28 Mad 400 (403). (Now *see* the Carriage of Goods by Sea Act, 1925.)

[3] Carriers by sea are not “common carriers” within the meaning of S. 2 of this Act and hence this Act will not apply to them; but they are nevertheless common carriers whose liabilities and duties are governed by the principles of the common law of England regarding the common carriers. (Vol 2) 1915 Mad 833 (833, 834) : 38 Mad 941. (Now *see* the Carriage of Goods by Sea Act, 1925.)

[4] This Act is not applicable in the case of railways except to a very limited extent. (Vol 18) 1931 Cal 585 (586).

[5] Enactments like the Carriers Act and the Railways Act are not affected by the Contract Act. (1878-79) 3 Bom 109 (113).

Section 2 — Note 1

[1] The Act does not apply to carriers by sea. (Vol 15) 1928 Bom 5 (6) : 52 Bom 37 ; (Vol 3) 1916 Bom 265 (267) : 40 Bom 529.

[2] Though carriers by sea are not contemplated by this Act they are nevertheless common carriers for other

purposes, e.g. for the purpose of Limitation Act. (1881) 3 Mad 107 (110).

[3] The definition of a “common carrier” in S. 2 is framed without reference to the extent of his liability. Thus, a common carrier does not cease to be so if he enters into special contract lawfully limiting his liability. (Vol 2) 1915 Nag 6 (7) : 11 Nag L R 174.

[4] “For all persons indiscriminately” means simply that carriers are not at liberty to refuse business. (Vol 11) 1924 P C 40 (42) : 51 Ind App 28 : 51 Cal 304 (P C).

[5] Where under the terms of the licence, a licensee is under the obligation to carry goods of all persons, except when due to special reasons he may refuse, he is a common carrier. (Vol 20) 1933 Cal 735 (737, 738) : 60 Cal 879.

[6] A licensee of a ferry is a “common carrier.” (Vol 6) 1919 Upp Bur 17 (18) : 3 Upp Bur Rul 120.

[7] Where a canal company which transported goods under a contract with a railway company was sued for damages for loss of goods, it was held that canal company was a common carrier and liable as such. (Vol 18) 1931 Mad 115 (117).

Section 3 — Note 1

[1] When a package containing both scheduled and non-scheduled articles is lost, the value of the non-scheduled articles may be recovered although the value of the scheduled articles cannot be recovered. (Vol 19) 1932 Cal 344 (346) : 59 Cal 472.

[2] Liability for loss or damage of property is not defeated by the fact that the goods delivered as luggage are in fact merchandize. (Vol 1) 1914 Cal 150 (151) : 41 Cal 80.

[3] Misdescription of property lost in transit does not exonerate the carrier from his liability for the loss. The liability is limited to the value declared and not the value of the actual contents of the package consigned. (1879) 3 Bom 120 (129, 130).

4. Every such carrier may require payment for the risk undertaken in carrying property

For carrying such property payment may be required at rates fixed by carrier. exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix :

Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited, in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

5. In case of the loss of or damage to property exceeding in value one hundred rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared, and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

The person entitled to recover in respect of property loss or damaged may also recover money paid for its carriage. 6. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice ;

but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of "Act XXII of 1863 (to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken)" may, by special contract, signed by the owner of such property so delivered as last aforesaid, or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

[a] See now the Land Acquisition Act, 1894 (1 [I] of 1894), S. 2.

Section 4 — Note 1

[1] Where a person makes a declaration about the nature of the articles consigned but the carrier does not demand higher payment, the carrier is liable for the loss of articles although the higher payment is not made. (1892) 19 Cal 538 (540, 541).

Section 6 — Note 1

[1] The rights and liabilities of a common carrier are outside the Contract Act and are governed by the principles of the English Common Law as modified by the Carriers Act. In India, a common carrier is, therefore, subject to two distinct classes of liability, the one for loss for which he is liable as an insurer, the other for loss for which he is liable under his obligation to carry safely. The effect of sections 6, 8 and 9 is that the liability of a common carrier for the loss of goods not being of the description contained in the schedule may be limited by special contract signed by the owner save when such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants. (1911) 38 Cal 28 (41, 42).

[2] The position of common carriers is different from that of railway companies who are only bailees coming under Ss. 151, 152 and 161 of the Contract Act. The liability of common carriers is that of an insurer subject to certain exceptions under S. 6 of this Act. (1913) 40 Cal 716 (718, 719).

[3] Certain goods were lost in transit by the defendants who were common carriers. It was found that the loss had not been occasioned by act of God or the Queen's enemies. The defendants had taken as much care of them as a man of ordinary prudence would take of similar goods belonging to himself. It was held that Ss. 151 and 152, Contract Act, did not apply, and defendants were liable for loss, in the absence of a special contract such as is provided for in S. 6 of Carriers Act. (1884) 10 Cal 166 (182) (FB).

[4] What is required to limit the liability of "carrier"

is that the nature of the contract entered into must either have limitation of liability under the Act made expressly and in writing or the facts must be such, that the contractor was engaging in a different type of business from that of common carriers. (Vol 11) 1924 P C 40 (42) : 51 Ind App 28 : 51 Cal 304 (PC).

[5] In the case of continuous carriers, (1) when goods have to be carried with the aid of different transport agencies in order to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction of the goods on portions beyond his own system or in consequence of acts or default of persons other than his own servants; (2) in the absence of a contract to the contrary, the consignor cannot hold the company with whom he does not contract liable for damages when all that can be complained of is non-feasance, though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another; (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued at the option of the consignor. (Vol 5) 1918 Mad 341 (343).

[6] Goods were delivered to M Railway Company. The destination was a station on the G Railway lines. M and G Companies had an agreement between themselves for conveyance of goods handed over by one another for carriage on their own lines. The goods were lost after they were handed over to G company. It was held that a suit by the consignor against G company was maintainable. (1880-81) 5 Bom 371 (378).

[7] The plaintiffs consigned goods through a steam navigation company knowing that it would be carried by another railway company in latter part of the journey. The goods were lost after being delivered to the railway

7. The liability of the owner of any railroad or tramroad constructed under the provisions of

Liability of owner of railroad or tramroad constructed under Act XXII of 1863, not limited by special contract. In what case owner of railroad or tramroad answerable for loss or damage.

the said "Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

[a] Section 7 (so far as it relates to railways) has been repealed by the Indian Railways Act, 1890 (9 [IX] of 1890), S. 72. [b] See now the Land Acquisition Act, 1894 (1 [I] of 1894), S. 2.

8. Notwithstanding anything hereinbefore contained, every common carrier shall be liable to

Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.

the owner for loss of or damage to any property delivered to such carrier to be carried, where such loss or damage shall have arisen from the "[]" criminal act of the carrier or any of his agents or servants

and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants].

[a] The words "negligence or" were repealed by the Carriers (Amendment) Act, 1921 (13 [XIII] of 1921), S. 2.

[b] Inserted by S. 2, *ibid*.

9. In any suit brought against a common carrier for the loss, damage, or non-delivery of

Plaintiffs, in suits for loss, damage or non-delivery, not required to prove negligence or criminal act.

goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents.

Section 6 (contd.)

company. It was held that the agreement was in substance, with both companies and that the railway company was absolved from liability under S. 75 of the Railways Act. (1907) 11 Cal W N 1076 (1077).

[8] A consignor entered into a contract with a railway company for carrying certain goods to a port and thence to England. Owing to a breach on the railway line the goods had to be conveyed in steamers by a steamship company with whom the Railway Company had entered into an agreement. It was held that a suit by the consignor against the steamship company for loss of goods during transit by the latter company was maintainable. (Vol 7) 1920 Cal 758 (762) : 47 Cal 6.

[9] Where goods are booked to be carried over the lines of several carriers the proper person who is liable is one to whom the goods are delivered by the consignor. The contract is an indivisible contract and not so many contracts with different persons. The question with whom the contract is made is a question of fact. (Vol 14) 1927 Cal 394 (398) : 54 Cal 430.

Section 8 — Note 1

[1] Sections 8 and 9 are declared by S. 72 of the Railways Act not to affect the responsibility of the Railway Company as defined in the latter section. (1894) 17 Mad 445 (446).

[2] A common carrier is responsible for safety of goods except when loss is caused by act of God or King's enemies. (Vol 3) 1916 Cal 647 (648).

[3] A common carrier does not cease to be a common carrier simply because he agreed to a special stipulation, to carry goods safely. Special stipulations do not absolve the carrier from his liabilities under the Act. (Vol 20) 1933 Cal 735 (737, 738) : 60 Cal 879.

[4] The combined effect of Ss. 6 and 8 is that in respect of the property not mentioned in the schedule common carriers may limit their liability by special contract but not so as to get rid of their liability for negligence. (1891) 18 Cal 620 (628, 629) : 18 Ind App 12 (P. C.); (1890) 17 Cal 39 (43, 44).

[5] Agreement limiting liability of carrier does not

relieve carriers of liability arising from the negligence of their servants. (1911) 38 Cal 28 (42).

[6] Where a special contract absolves the carrier from liability in the case of loss or damage by accident as well as resulting from negligence, the clause absolving from liability due to negligence is bad; but this does not make the contract wholly void. The carriers are nevertheless absolved from their liability in case of accident. (1890) 17 Cal 39 (44).

[7] Where one transporting agency undertakes to transport goods which are to be transported by several agencies consecutively, the other agencies are agents of the contracting agency which is responsible for the loss of goods during the whole transport. An agreement that the contracting agency will not be liable after it has delivered goods to another agency is void as offending against S. S. (Vol 19) 1932 Cal 344 (346) : 59 Cal 472.

Section 9 — Note 1

[1] Negligence is presumed by the loss of goods. (Vol 18) 1931 Mad 115 (117).

[2] Loss from unknown cause is presumptive proof of negligence. (Vol 15) 1928 Cal 371 (376).

[3] Occurrence of fire without any explanation as to origin of it is evidence of negligence. (1899) 26 Cal 393 (403) : 26 Ind App 1 (P. C.).

[4] Onus of proving negligence of the carrier is not upon the person who seeks to make the carrier liable. (Vol 1) 1914 Cal 150 (152) : 41 Cal 80.

[5] Loss or damage to the goods sent is *prima facie* evidence of negligence. The burden of proving absence of negligence is on the carrier. (Vol 3) 1916 Cal 647 (648); (Vol 8) 1921 Cal 315 (317) : 47 Cal 1027 ; (1899) 26 Cal 398 (401, 402, 403) : 26 Ind App 1 (P. C.); (1897) 24 Cal 786 (818) ; (Vol 18) 1931 Mad 115 (117, 118).

[6] But where parties have placed all evidence on which they rely before the Court, it is for the Court to say upon that evidence whether or not the loss was caused by negligence of the carriers or their servants. Where, in an action brought against common carriers for loss of goods delivered to them for carriage from one

^a[10. No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.]

[a] *Inserted by the Indian Carriers Act, 1899 (10 [X] of 1899), S. 2. The original section was repealed by the Indian Railways Act, 1890 (9 [IX] of 1890).*

^a[11. The ^b[Provincial Government] may, by notification in the ^c[Official Gazette], add to the list of articles contained in the Schedule to this Act, and the Schedule shall, on the issue of any such notification, be deemed to have been amended accordingly.]

[a] *Inserted by the Carriers (Amendment) Act, 1921 (13 [XIII] of 1921), S. 3. [b] Substituted by A. O. for "Governor-General in Council". [c] Substituted by A. O. for "Gazette of India".*

SCHEDULE

Gold and silver coin.	Shawls and lace.
Gold and silver in a manufactured or unmanufactured state.	Cloths and tissues embroidered with the precious metals or of which such metals form part.
Precious stones and pearls.	Articles of ivory, ebony or sandalwood.
Jewellery.	^b [Art pottery and all articles made of marble.
Time-pieces of any description.	Furs.
Trinkets.	Government securities.
Bills and hundis.	Opium.
Currency-notes of the ^a [Central Government] or notes of any Banks, or securities for payment of money, English or foreign.	Coral.
Stamps and stamped paper.	Musk, <i>Itr</i> , Sandalwood oil, and other essential oils used in the preparation of <i>itr</i> or other perfumes.
Maps, prints, and works of art.	Musical and scientific instruments.
Writings.	Feathers.
Title deeds.	Narcotic preparations of hemp.
Gold or silver plate, or plated articles.	Crude India-rubber.
Glass.	Jade, Jade-stone and amber.
China.	Gooroochand or Gooroochandian.
Silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.	Cinematograph films and apparatus.
	Zahir Mohra Khatai.]

[a] *Substituted by A. O. for "Government of India". [b] Inserted by Notification No. 5299, dated 14th October 1922, see Gazette of India, 1922, Pt. I, p. 1235.*

Section 9 (contd.)

place to another, nothing appears to have been done which was inconsistent with due care and skill, the presumption of negligence is rebutted, and the carriers are entitled to have the action dismissed. (1897) 24 Cal 787 (787, 789, 791).

[7] The burden of proving negligence is not on the plaintiff even where the consignment note provides that the defendant company is not liable for damage or loss caused by fire, etc., and the goods are actually damaged by fire. (1879) 3 Bom 120 (129, 130); (1913) 40 Cal 716 (719).

Section 10 — Note 1

[1] To maintain a suit for damages for short delivery against a common carrier, notice of claim under S. 10 must be given even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods. (Vol 5) 1918 Cal 896 (897); (1911) 38 Cal 50 (51).

[2] This section places Steamship Company in the same position as a Railway and makes it obligatory upon person wanting to sue Steamer Company to give notice of such suit within the time mentioned in section. (1908) 8 Cal L Jour 192 (192).

[3] In a suit against a common carrier, plaintiff need not state the fact of issue of notice under S. 10 in the plaint. It is implied under O. 6, R. 6, Civil P. C. Defendants should raise plea of absence of notice. On their failure to do so, the onus is on them to prove absence of negligence on their part. (Vol 25) 1938 Rang 437 (438, 439). (Per *Dunkley J.* — Absence of plea of want of notice in the written statement amounts to waiver on the part of the defendant.)

[4] The essential of a good notice appears to be that it should reach the person liable for the loss. Notice to local agent is sufficient. (Vol 14) 1927 Cal 394 (398); 54 Cal 430.

[5] A contract with a proviso: "No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the Company . . . within six months from the date of any default, loss or damage in respect of which such claim arises," is not unreasonable. (3 Mad 107 and 27 Cal L J 294, rel. on.) (Vol 15) 1928 Cal 371 (374).

[6] For limitation for suits against carriers, see A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edition, Notes on Articles 3 and 31.

THE CASTE DISABILITIES REMOVAL ACT, 1850^a. (ACT XXI of 1850.)

[11th April 1850.]

An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code, throughout the Territories subject to the Government of the East India Company.

Whereas it is enacted by section 9, Regulation VII, 1832,^b of the Bengal Code, that "whenever *Preamble.* in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion : or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions : the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company : It is enacted as follows :—

[a] The short title was given by the Indian Short Titles Act, 1897 (14 [XIV] of 1897).

The Act (21 [XXI] of 1850) has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 [XV] of 1874), S. 3.

It has been declared to be in force in the Santhal Parganas, by the Santhal Parganas Settlement Regulation (3 [III] of 1872), S. 3. It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 [XIV] of 1874), to be in force in the following Scheduled Districts, namely :— Sind, see Gazette of India, 1880, Pt. I, page 672 ; West Jalpaiguri, see *ibid*, 1881, Pt. I, page 74 ; The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, page 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see *ibid*, 1881, Pt. I, page 504; the Scheduled portion of the Mirzapur District, see *ibid*, 1879, Pt. I, page 383; Jaunsar Bawar, see *ibid*, 1879, Pt. I, page 382; The Districts of Peshawar, Hazara, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. [*Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N. W. F. P., see Gazette of India, 1901, Pt. I, page 557, and ibid, 1902, Pt. I, page 575; but its application has been barred in that part of the Hazara District known as Upper Tanawal by the Hazara (Upper Tanawal) Regulation, 1900 (2 [II] of 1900), S. 3, see ibid, 1886, Pt. I, page 48; The District of Lahaul see ibid, 1886, Pt. I, page 301; the Scheduled Districts of the C. P., see ibid, 1879, Pt. I, page 771; the Scheduled Districts in Ganjam and Vizagapatam, see ibid, 1898, Pt. I, page 870 ; Coorg, see ibid, 1898, Pt. I, page 870; the District of Sylhet, see ibid, 1879, Pt. I, page 631; the rest of Assam (except the North Lushai Hills), see ibid, 1897, Pt. I, page 299; the Porahat Estate in the Singhbhum District see ibid, 1897, Pt. I, page 1059.*

It has been extended, by notification under S. 5 of the same Act, to the following Scheduled Districts, namely:— Kumaon and Garhwal, see Gazette of India, 1876, Pt. I, page 606; the Tarai of the Province of Agra, see Gazette of India, 1876, Pt. I, page 505.

[b] *Repealed* by the Bengal Civil Courts Act, 1871 (6 [VI] of 1871), which was *repealed* by the Bengal, North Western Provinces and Assam Civil Courts Act, 1887 (12 [XII] of 1887).

1. So much of any law or usage now in force within the territories subject to the Government

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.

of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being

deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

SECTION 1. — SYNOPSIS.

1. Applicability and scope.
2. 'Deprived of caste.'
3. 'Forfeiture of rights.'
4. 'Right of inheritance.'

1. Applicability and scope.— [1] The Act is not retrospective. (1907) 29 All 487 (492).

[2] Before the enactment of this Act, upon degradation from caste a Hindu, whether male or female, was considered as dead by Hindu law. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. (1880) 5 Cal 776 (792) : 7 Ind App 115 (PC). (The question as to what would be the effect of this Act on the vested estate of a Hindu widow on her being degraded or deprived of caste for unchastity was left unconsidered in this case.)

[3] The Act provides for the cases of those who, (a) have renounced, or (b) have been excluded from the communion of any religion, or (c) have been deprived of caste, meaning those who by their own choice, or by action of their caste fellows, have been finally shut out, or temporarily deprived. (1873) 19 Suth W R 367 (406) (FB). (This case is useful for its discussion on the object and construction of this Act.)

[4] This Act sets aside the provisions of Hindu law which penalises the renunciation of religion or exclusion from caste by enforcing forfeiture of property of the convert. (1911) 33 All 356 (365, 366) : 35 Ind App 87 (PC).

[5] Section 1 applies only to person actually converted or outcasted. (Vol 17) 1930 P C 251 (252) : 57 Ind App 313 (P C). (11 All 100, overruled.)

[6] The Act secures after apostasy the same rights to individuals in property as they enjoyed before apostasy. (Vol 2) 1915 Lah 441 (441) : 1915 Pun Re No. 89.

Section 1 (*contd.*)

[7] The Act deals with rights to property of the apostate and with the property of the convert. (Vol 27) 1940 All 134 (140) : I L R (1940) All 100.

[8] Provisions apply only to the convert and not to his descendants. (Vol 5) 1918 Mad 430 (430) : 40 Mad 1118.

[9] The Act only abrogates any law or usage which inflicts forfeiture by reason of change of religion or caste but does not lay down any rule of succession after conversion. (1909) 1909 Pun Re No. 36, p. 106.

[10] This Act provides not only for prevention of forfeiture of rights of those who are put out of caste on account of their renouncing, or being excluded from Hindu religion, but also relieves those who are deprived of caste on grounds other than change of religion. But there is nothing in the Act which has the effect of placing outcaste, in every respect, in the position which he would occupy if he had not been put out of caste, or of restoring to him all rights which he, as casteman, could have civilly enforced. It does not contemplate the restoration of privileges the granting of which would amount to interference with autonomy of caste. (1900) 23 Mad 171 (176).

[11] Since Act 21 [XXI] of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights or property. (1877) 1 Bom 559 (560).

[12] Held that S. 9 of Regulation VII of 1832 did not abrogate the Hindu law as to the consequence of apostasy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce these consequences; but it did not purport to affect the substantive law. (1907) 29 All 487 (491). (Hindu joint family of father and son—Father embracing Islamism—Son immediately becomes sole owner of joint property.)

[13] Province of Oudh was annexed on 13th February, 1856. Therefore, Regulation 7 [VII] of 1832 and Act 21 [XXI] of 1850 did not apply to the case of convert who renounced his religion prior to that date. (Vol 15) 1928 Oudh 138 (139) : 3 Luck 154.

2. 'Deprived of caste.'—[1] Deprivation of caste in the Act means deprivation owing to change of religion and not merely for moral degradation. (Vol 18) 1931 Cal 741 (744) : 53 Cal 1392.

3. 'Forfeiture of rights.'—[1] A general principle of Hindu law is that the degradation of the husband from caste does not dissolve the marriage tie. (1870) 2 N.-W. P. 300 (302); (1880) 4 Bom 330 (332). (Convert's marriage with a Muhammadan during the life-time of her former husband will amount to an offence under S. 494, Penal Code.); (1891) 18 Cal 264 (269). (Do.); (1886) 9 Mad 466 (470); (1907) 1907 Pun Re No. 49, page 198 (200).

[2] Where a Hindu widow after embracing Islamism marries a Muhammadan, she does not thereby lose her right as a devisee of property bequeathed to her by her Hindu sister. (Vol 12) 1925 Mad 861 (870).

[3] Excommunication from caste as of itself does not deprive a wife of the right to joint enjoyment of her husband's property. (1892) 4 Mad 243 (243).

[4] This Act does not repeal the usage of Hindu temples or of religious or quasi-religious institutions. A right consisting in the participation, along with other members of a caste, in the benefits of a religious institution appropriated to the members of the caste is not within the purview of this Act. (1890) 13 Mad 293 (298, 299).

[5] Suit for restitution of conjugal rights—Hindu husband turned out of caste at the time of institution of suit—Decree for restitution of conjugal rights conditional on plaintiff's obtaining restoration to caste may be passed. (1886) 8 All. 78 (81).

[6] A Hindu deprived of his caste does not incur forfeiture of his right as guardian to the custody of his minor daughter. (1877) 1 All 549 (560).

[7] The word 'rights' means not merely rights of property or inheritance but also includes the right of guardianship of infant children. (1901) 1901 Pun Re No. 60, page 191 (199).

[8] In the absence of any special reason to the contrary, Hindu mother has better right to guardianship of her infant daughter than infant's paternal grandfather, and this right is not taken away by the fact that mother has been an outcaste. (1906) 23 All 233 (235).

[9] The right of giving his son in adoption is not lost by a Hindu father even after his conversion to Muhammadanism. (1901) 25 Bom 551 (555).

[10] Conversion does not give right to partition if there is none prior to conversion. (Vol 8) 1921 Mad 224 (224) : 44 Mad 891 (F.B). (1912 MWN 386, overruled.)

[11] Conversion of a Hindu coparcener creates a partition by operation of Hindu law. Hence, the right of survivorship is not retained by the convert unless the partition by conversion is renounced by convert. (Vol 14) 1927 Mad 883 (884, 885).

[12] Under the strict Hindu law, converts not only become divided in status but forfeit all rights to their tarwad property. But Act 21 [XXI] of 1850 preserves their right to the property in that they can still continue to possess the rights incidental to their ownership. However, the Act does not preserve their status as a member of the tarwad or the incidents appropriate to and dependent thereon. (Vol 25) 1938 Mad 242 (245).

[13] A Christian becoming Muhammadan after marrying Christian woman—Held that an Indian Christian domiciled in India and married to a Christian woman also domiciled in India can validly marry a Muhammadan woman after his conversion. There is nothing in this Act which invalidates such marriage. (Vol 26) 1939 Cal 417 (418) : I L R (1939) 2 Cal 12.

4. 'Right of inheritance.'—[1] Their Lordships of the Privy Council observe : "It is perfectly true that the words 'his or her' are not so easy to apply, because there is not a person expressed in the Act who is represented by 'his or her', but it seems to their Lordships to be plain that the words 'or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing' should be read 'any right of inheritance of any person by reason of his or her renouncing.' The clause is given a simple meaning by this construction and their Lordships think that that is the correct view." (Vol 17) 1930 P C 251 (252, 253). (11 All 100 overruled.)

[2] The effect of the Act is not to enlarge the convert's interest in any property or to get rid of any condition of restriction to which it was originally subject. (Vol 8) 1921 Mad 224 (224) : 44 Mad 891 (F.B). (1912 M W N 386, overruled; 40 Cal 407, dissented.)

[3] Exclusion from caste no longer entails forfeiture of right of inheritance. (Vol 17) 1930 Pat 564 (568); (Vol 27) 1940 All 134 (140) : I L R (1940) All 100. (The Act does not deal with succession to estate of convert.)

[4] The Act only relieves from forfeiture of rights to property the person who has changed his religion and not any other person who may be affected by such a change. (Vol 14) 1927 Mad 72 (72).

[5] Succession to a person converted is governed by the law applicable to convert after conversion. (Vol 17) 1930 P C 251 (252) : 57 Ind App 813 (P.C). (11 All 100 overruled.); (Vol 23) 1936 All 202 (204).

[6] The Act has abrogated the rule of Muhammadan law by which a non-Muslim is excluded from succession to a Muslim. (Vol 7) 1920 Lah 276 (277) : 1 Lah 376.

THE CATTLE-TRESPASS ACT, 1871.

(ACT I of 1871)

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[7] The words "any right of inheritance" in the Act refer to any right of inheritance, which is not affected by conversion, accruing to any person. Hindu son of a Mohamedan convert is entitled to inherit the property of his apostate father. (Vol 1) 1914 Sind 36 (36, 39) : 8 Sind L R 156.

[8] Hindu embracing Shia faith—Heirs to the estate of such person are to be determined by Shia law and not by this Act. (Vol 15) 1928 Oudh 138 (139, 140) : 3 Luck 154.

[9] Succession to property of the convert would be governed by Muhammadan law in the case of a Christian converted to Muhammadanism. Neither this Act nor S. 37, Bengal, Agra and Assam Civil Courts Act has application to such succession. (Vol 26) 1939 Cal 417 (419) : 1 L R (1939) 2 Cal 12.

[10] A Hindu who was joint in estate with his son became a convert to Muhammadanism in 1845 and died in 1851. It was held that the convert's son who remained a Hindu did not acquire any enforceable right to his father's share in the joint family property. (1911) 38 All 356 (366) : 38 Ind App 87 (P C). (29 All 487, reversed.)

[11] Provisions of the Act cannot be extended beyond its specific provisions. Conversion of a Hindu to Muhammadanism does not entail forfeiture of any rights to ancestral property which his descendants may otherwise possess. (1902) 1902 Pun Re No. 104, p. 462.

[12] Even after conversion right to inheritance is not lost. (Vol 11) 1924 Pat 420 (430) : 3 Pat 152.

[13] If any ancestor of the propositus in any degree of ascent has changed his religion the Act would not apply in determining the status of an heir to such a

propositus. (Vol 15) 1928 Oudh 138 (141) : 3 Luck 154. (11 All 100, explained and dissented from.)

[14] A Hindu married woman embracing Muhammadanism and marrying a Muhammadan during lifetime of her Hindu husband without having been divorced from her former husband is disqualified from inheriting her father's property on the ground of unchastity. The provisions of this Act do not save her right of inheritance, as she has not lost her right by reason of her renouncing or being excluded from the Hindu communion. (1905) 32 Cal 871 (873, 874).

[15] A widow of a separated Hindu marrying a Muhammadan after embracing Islamism does not lose her interest in the property in her late husband. (1913) 35 All 466 (469). (Hindu Widow's Remarriage Act, 1856 does not apply to such a case — 19 Cal 289, not followed.)

[16] Hindu widow becoming Muhammadan and then marrying a Muhammadan forfeits first husband's estate. (Vol 6) 1919 Mad 854 (859, 860) (FB). (The forfeiture is also entailed by reason of S. 2 of Act 15 [XV] of 1856—(Vol 5) 1918 Mad 314, overruled.)

[17] This Act has no application to the case of a son born of a marriage of a Brahmin with a Sudra female. He inherits the portion of the father's estate according to Hindu law. (Vol 18) 1931 Bom 89 (93, 94) : 55 Bom 1.

[18] A Hindu daughter cannot inherit from her father who has been converted to Muhammadanism. (Vol 14) 1927 Mad 72 (72). (11 All 100, not followed.)

[19] The Burmese Buddhist relations of the deceased Muhammadan convert cannot succeed unless they show that they had right to succeed otherwise than as Muhammadans. (Vol 9) 1922 Low Bur 15 (16).

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STATEMENT OF OBJECTS AND REASONS.

"The primary object of this Bill is to consolidate the law relating to cattle trespass, which is now scattered through three Acts,—III of 1857, V of 1860 and XXII of 1861. The opportunity has been taken to improve the arrangement and the wording of the law; to provide that damages awarded for illegal seizures may be recovered as if they were fines; and (with reference to the case of *Reg. v. Lingana bin Gubana*, 4 Bom. High

Court Rep. C. C. 14) to declare expressly that a person who, through neglect, permits a public road to be damaged by allowing his pigs to trespass thereon, is liable to be fined. The case of *Reg. v. Mir Saheb Kassamia*, 1 Bom. High Court Rep. 100; *Reg. v. Mathur Purshotam*, 4 ib. C. C. 13; and *Reg. v. Ganga Ram Mhasu*, 5 ib. C. C. 13 have also been carefully considered."—Gazette of India, 1870, Part V, page 310.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts I of 1891; XVII of 1921.

—Amended in :—

Assam, by Assam Act, I of 1936 ;

Bengal, by Bengal Act, V of 1934 ;

Bombay, by Bombay Act, V of 1931 ;

Central Provinces and Berar by C. P. and Berar Acts XII of 1935 ; XXII of 1937.

—Adapted by A. O.

—Repealed in part by Acts, X of 1914 ; I of 1938.

COGNATE ACTS AND PROVISIONS.

1. CRIMINAL PRO. CODE, 1898, Section 4 (1) (o) ;
Section 260 (1) (m).
2. FOREST ACT, XVI of 1927, Ss. 70 and 71.
3. RAILWAYS ACT, IX of 1890, S. 125.

THE CATTLE-TRESPASS ACT, 1871.

(ACT NO. I OF 1871).^a

[13th January 1871.]

An Act to consolidate and amend the law relating to Trespasses by Cattle.

WHEREAS it is expedient to consolidate and amend the law relating to trespasses by cattle ;

Preamble. It is hereby enacted as follows :—

[a] For Proceedings in Council, see Gazette of India, Supplement, pp. 1150, 1200, 1290, and Supplement, 1871, p. 178.

This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Schedule ; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Schedule.

CHAPTER I.

PRELIMINARY.

Title and extent. ^a[1. (1) This Act may be called THE CATTLE-TRESPASS ACT, 1871 ; and
(2) It extends to the whole of British India ^b[except the presidency-towns and such local

Section 1 — Note 1

[1] The maintenance of private cattle pounds is incompatible with the provisions of the Cattle-trespass Act and the establishment and maintenance of cattle pounds under the superintendence and control of Government. Officials assisted by the police may be considered essential for the maintenance of law and order

and the peace and good government of the country. Hence, where the Executive Government takes over the charge of the pounds from private persons who were previously controlling them it is not competent to the Civil Courts to interfere. (1912) 39 Cal 615 (662) : 39 I A 31 (P C).

areas as the "[Provincial Government]" by notification^d in the Official Gazette, may from time to time exclude from its operation.]

e[* * *]
[a] Substituted by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 1, for original S. 1. [b] This Act has been declared in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 [II] of 1913), S. 3; in the Santhal Parganas by the Santhal Parganas Settlement Regulation, 1872 (3 [III] of 1872); in Angul and the Khondmal by the Angul Laws Regulation, 1913 (3 [III] of 1913), S. 3; in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 [I] of 1929), S. 2 and in the Chittagong Hill Tract by notification under the Chittagong Hill Tracts Regulation, 1900 (1 [I] of 1900), S. 4 (2). It has been declared by notification under the Scheduled Districts Act, 1874 (14 [XIV] of 1874), S. 3 (a) to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga, Manbhum, Pargana Dhalbhum and the Kolhan in the District of Singhbhum [Gazette of India 1881, Pt. I, p. 504; the District of Lohardaga included at this time the present District of Palamau, which was separated in 1894; the District of Lohardaga is now called the Ranchi District, see Calcutta Gazette, 1890, Pt. I, p. 44; and the North Western Provinces Tarai, Gazette of India 1876, Pt. I, p. 505; the Scheduled Districts in Ganjam and Vizagapatam, *ibid.*, 1899, Pt. I, p. 720

[c] Substituted by A. O. for "Local Government". [d] For notification issued by the Government of the United Provinces under this power, see U. P. Rules and Orders. [e] Sub-section (3) of S. 1 was repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914), S. 3, and Schedule II.

2. [Repeal of Acts. References to repealed Acts.] Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and the Schedule.

Interpretation-clause. 3. In this Act,—

"officer of police" includes also village-watchmen, and

"cattle" includes also elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats, and kids, and

"local authority" means any body of persons for the time being invested by law with the control and administration of any matters within a specified local area, and

"local fund" means any fund under the control or management of a local authority.]

[a] Inserted by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 2. [b] Cf. definition in the General Clauses Act, 1897 (10 [X] of 1897), S. 3 (28), which applies to all Acts passed after the 14th January 1887, see S. 4 (2), *ibid.*

CHAPTER II.

POUNDS AND POUND-KEEPERS.

4. Pounds shall be established at such places as the Magistrate of the District, subject to the Establishment of pounds. general control of the "[Provincial Government]", from time to time directs.

The village by which every pound is to be used shall be determined by the Magistrate of the District.

[a] Substituted by A. O. for "Local Government".

Control of pounds. Rates of charge for feeding impounded cattle.

5. The pounds shall be under the control of the Magistrate of the District; and he shall fix, and may from time to time alter, the rates of charge for feeding and watering impounded cattle.

Appointment of pound-keepers.

6. [The Provincial Government shall appoint a pound-keeper for every pound.

Pound-keepers may hold other offices.

Any pound-keeper may hold simultaneously any other office under the Crown.

Pound-keepers to be "public servants."

Every pound-keeper shall be deemed to be a public servant within the meaning of the Indian Penal Code.]

[a] Substituted by the Supplemental A. O. for the following:—

"The Magistrate of the District shall also appoint for each pound a pound-keeper:

Provided that, in the Presidency of Fort St. George, the heads of villages and, in the Presidency of Bombay, the police patils, or (where there are no police patils) the heads of villages shall be *ex-officio* the keepers of village pounds.

Every pound-keeper appointed by the Magistrate of the District may be suspended or removed by such Magistrate.

Any pound-keeper may hold simultaneously any other office under Government.

Every pound-keeper shall be deemed a public servant within the meaning of the Indian Penal Code "

[b] This expression includes also such person as the Provincial Government may direct under the Government of India Act, 1935, S. 241 (1) (b). See the General Clauses Act, 1897, S. 4A (2).

Section 3—Note 1
Sub-section (5) of S. 125, Railways Act, 1890, runs as

follows: "The word 'cattle' has the same meaning in this section as in the Cattle-trespass Act, 1871."

Duties of Pound-keepers.

To keep registers and furnish returns.

7. Every pound-keeper shall keep such registers and furnish such returns as the ^a[Provincial Government] from time to time directs.

[a] *Substituted by A. O. for "Local Government".*

To register seizures.

8. When cattle are brought to a pound, the pound-keeper shall enter in his register,—

- (a) the number and description of the animals,
- (b) the day and hour on and at which they were so brought,
- (c) the name and residence of the seizer, and
- (d) the name and residence of the owner, if known,

and shall give the seizer or his agent a copy of the entry.

To take charge of and feed cattle.

9. The pound-keeper shall take charge of, feed and water the cattle until they are disposed of as hereinafter directed.

CHAPTER III.

IMPOUNDING CATTLE.

10. The cultivator or occupier of any land, or any person who has advanced cash for the *Cattle damaging land.* cultivation of the crop or produce² on any land, or the vendee or mortgagee of such crop or produce or any part thereof, may seize or cause to be seized any cattle trespassing on such land, and doing damage¹ thereto or to any crop or produce thereon, and ^a[send them or cause them to be sent within twenty-four hours⁴] to the pound established for the village in which the land is situate.

All officers of police shall, when required, aid in preventing (a) resistance to such seizures, and *Police to aid seizures.* (b) rescues from persons making such seizures.

[a] *Substituted by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 3, for "take them or cause them to be taken without unnecessary delay".*

PROVINCIAL AMENDMENT.

Central Provinces and Berar. — For section 10, the following section¹ shall be *substituted*, namely: —

"10. The owner or occupier of any land or the person having interest in any land may seize or cause to be seized any cattle trespassing on such land and doing damage thereto or to any crop, produce or property thereon belonging to such owner, occupier or interested person, or causing hurt or injury or obstruction to any of them or to any person by leave or licence present on, or having charge of, such land or of any such crop, produce or property, and send them or cause to be sent within twenty-four hours to the pound established for the local area in which the land is situate.

All officers of police shall, when required, aid in preventing (a) resistance to such seizures and (b) rescues from persons making such seizures."

— C. P. and Berar Act 12 [XII] of 1935, S. 2. [30-3-1935]

Section 8 — Note 1

[1] When the cattle are brought to the pound it is not necessary to inform the pound-keeper whether the cattle were seized rightly or wrongly. (Vol 30) 1943 Oudh 280 (282) : 44 Cri L Jour 640.

SECTION 10 — SYNOPSIS.

- (1) Damage, whether essential.
- (2) "Produce" on the land.
- (3) Seizure, when to be made.
- (4) "Within twenty-four hours."
- (5) Who can seize.

1. Damage, whether essential. — [1] A person is not entitled to seize cattle which has not done any damage. A clear finding of damage done by the trespassing cattle is essential to a conviction under S. 24. (Vol 27) 1940 Pat 299 (300) : 41 Cri L Jour 257; (Vol 32) 1945 Oudh 116 (117). (A finding that cattle were grazing crops implies that they were doing damage); (Vol 5) 1918 Pat 649 (650) : 19 Cri L Jour 157; (Vol 7) 1920 Pat 832 (838) : 21 Cri L Jour 640. (Lower Court relied

on the evidence of a witness who deposed that he saw the cattle grazing on the complainant's *bhoga* paddy.— *Held* that the evidence was insufficient to show that damage was caused); (Vol 5) 1918 Pat 628 (628) : 19 Cri L Jour 202; (1905) 1 Weir 709; (Vol 5) 1918 All 267 (268) : 19 Cri L Jour 368.

[2] Where the damage done by the cattle is only little, their seizure may be *unreasonable* but is not *illegal*. (1939) 1939 O W N 150 (152). (Hence compensation under S. 22 cannot be granted.)

2. "Produce" on the land. — [1] Grass is "produce" on the land within the meaning of S. 10. (Vol 30) 1943 Sind 152 (154) : 1 L R (1943) Kar 112 : 44 Cri L Jour 761.

3. Seizure, when to be made. — [1] Where there is a trespass by cattle, the mere fact that they had left the land trespassed before they could be seized does not deprive the owner of land of the right of seizure conferred upon him by S. 10. (Vol 15) 1928 Lah 692 (693) : 30 Cri L Jour 627.

[But see (1905) 1 Weir 709 (709). (It is only when cattle are actually trespassing that they can be seized

*11. Persons in charge of public roads, pleasure-grounds, plantations, canals, drainage-works, *Cattle damaging public roads, embankments and the like* and officers of police, may seize or *canals and embankments.* cause to be seized any cattle doing damage to such roads, grounds, plantations, canals, drainage-works, embankments and the like, or the sides or slopes of such roads, canals, drainage-works or embankments or found straying thereon,

and shall ^b[send them or cause them to be sent within twenty-four hours] to the nearest pound.

^a[As to the application of S. 11 to forests, see the Indian Forest Act, 1927 (16 [XVI] of 1927), S. 70, and the Assam Forest Regulation, 1891 (7 [VII] of 1891), S. 66; to railways, see the Indian Railways Act, 1890 (9 [IX] of 1890), S. 125 (4). ^b[Substituted by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 4, for "take them without unnecessary delay".]

PROVINCIAL AMENDMENT.

Central Provinces and Berar. — In Section 11 after the words "and the like" insert the words "officers and servants of the local authorities".

— C. P. and Berar Act 12[XII] of 1935, S. 3. [30-3-1935]

*12. For every head of cattle impounded as aforesaid, the pound-keepers shall levy a fine *Fines for cattle* in accordance with the scale for the time being prescribed by the ^b[Provincial Government] in this behalf by notification in the Official Gazette. Different scales may be prescribed for the different local areas.

Section 10 (contd.)

and impounded under S. 10.; (Vol 12) 1925 Nag 50 (50) : 25 Cri L Jour 1004. (Right to seize subsists only until the cattle leave the land.)

[2] Although the right of capture would not extend to following them to their sheds and seizing them there, yet the person who attempts to seize the cattle while actually trespassing on the land has a right to capture them before they have definitely made their escape from the spot though they may not be actually inside the field trespassed when captured. (Vol 21) 1934 Nag 258 (259) : 31 Nag L R 139 : 36 Cri L Jour 361. ((Vol 12) 1925 Nag 50 : 25 Cri L Jour 1004, distinguished.)

4. "Within twenty-four hours." — [1] Where the person seizing a cow kept it overnight in his custody and released it next morning (before 24 hours of the seizure) on receipt of some money from the owner: Held that no offence under S. 379 of the Penal Code or under any other provision was committed. (Vol 10) 1923 Nag 64 (65) : 23 Cri L Jour 511.

5. Who can seize. — [1] What is or is not "occupation" must depend on the nature of the land. (Vol 30) 1943 Sind 152 (154) : 1 L R (1943) Kar 112 : 44 Cri L Jour 761.

[2] A person in exclusive possession of land is an occupier thereof under S. 10. (Vol 3) 1916 Lah 281 (281) : 1916 Pun Re No. 3 (Cr) : 17 Cri L Jour 63. (The question of title of the owner of the cattle to the land trespassed does not affect the right to seize.)

[3] A private protected forest and embankment are included within the meaning of the term "land". Proprietor of such forest or embankment is an "occupier" of land. (1939) 20 P L T 310 (341).

[4] Unless the *burgadar* is shown to be a mere servant of the lessor, *burgadar* can seize the cattle of the lessor if they trespass on his land under *burga* lease. (Vol 6) 1919 Cal 93 (93) : 20 Cri L Jour 398.

[5] The impounding of the cattle by a watchman who has got general instructions from the occupier to seize them while trespassing, is authorised under S. 10. (Vol 3) 1916 Mad 786 (786) : 16 Cri L Jour 772; (Vol 9) 1922 Pat 317 (317). ((Vol 3) 1916 Mad 786 : 16 Cri L Jour 772, followed)

[6] Where an indigo factory supplies the seeds, pays for the labour of sowing, and gives compensation to raiyats growing indigo on their own land, but no advance in cash has been made, held that, although the indigo is grown for the factory, a servant of the factory is not a person authorised under S. 10 of the Act, to

seize cattle doing damage to the indigo. (1905) 2 Cri L Jour 345 (346, 347) (Cal).

[7] Seizure by a claimant to the disputed possession of land is illegal under this section, when his intention is to take by force the cattle of his opponent and not to protect his crop or produce. (Vol 30) 1943 Sind 152 (154) : 1 L R (1943) Kar 112 : 44 Cri L Jour 761.

[8] The fact that the lessee seizing the cattle intends that in order to prevent impounding the owner of the cattle may pay the grazing charges, will not make the seizure illegal if it is otherwise legal. (Vol 5) 1918 Cal 701 (702) : 18 Cri L Jour 849. (Per Tennon J.—Huda J., *contra*.)

Section 11—Note 1.

[1] Sub-section (4) of S. 125, Railways Act, 1890, runs as follows : "The expression 'public road' in Ss. 11 and 26, Cattle-trespass Act, 1871, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections."

[2] Section 70, Forest Act, 1927, is as follows : "Cattle trespassing in a reserved forest or in any portion of a protected forest which has been lawfully closed to grazing shall be deemed to be cattle doing damage to a public plantation within the meaning of S. 11, Cattle-trespass Act, 1871, and may be seized and impounded as such by any Forest Officer or Police Officer."

[3] Actual damage must be proved to sustain conviction under S. 24. (Vol 17) 1930 Oudh 250 (250) : 6 Luck 26 : 31 Cri L Jour 1015. (Cattle passing over regular Railway track — No fencing—Damage not proved—No conviction.)

[See however (Vol 21) 1934 Sind 34 (36) : 28 Sind L R 73 : 35 Cri L Jour 830. (Straying cattle may be seized and impounded before damage to property is caused—Actual damage is not necessary.)]

[4] There is "trespass" within the meaning of S. 70, Forest Act, even where the cattle do not go into the reserved forest themselves but are driven into it. Such cattle are liable to seizure. (1892) Rat Un Cr C 602 (603).

[5] See also Notes on S. 10.

Section 12—Note 1.

[1] Section 71, Forest Act, 1927, is as follows : "The Provincial Government may, by notification in the Official Gazette, direct that, in lieu of the fines fixed under S. 12, Cattle trespass Act, 1871, there shall be levied for each head of cattle impounded under S. 70

All fines so levied shall be sent to the Magistrate of the District through such officer as the [Provincial Government] may direct.

A list of the fines and of the rates of charge for feeding and watering cattle shall be posted in a conspicuous place on or near to every pound.]

[a] *Substituted* by the Cattle-trespass (Amendment) Act, 1921 (17 [XVII] of 1921), S. 2, for original S. 12.

The Amendment Act 17 [XVII] of 1921 has been declared to be in force in —

(1) Madras Presidency, from 1st April 1923, *see* Fort St. George Gazette, 1923, Pt. I., p. 488; (2) Bombay Presidency (excluding the town of Bombay), from 1st May 1924, *see* Bombay Government Gazette, 1924, Pt. I, p. 654; (3) Bengal Presidency, except the town of Calcutta, from 1st April 1923, *see* Calcutta Gazette, 1923, Pt. I, p. 455; (4) Punjab, from 28th April 1922, *see* Punjab Gazette, 1922, Pt. I, p. 401; (5) Bihar and Orissa, from 1st October 1923, *see* B. and O. Gazette, 1923, Part II p. 1264; Santhal Parganas under the Santhal Parganas Settlement Regulation 3 [III] of 1872), S 3 (3) (a), *see* *ibid*, 1922, Pt. II, p. 271; (6) Central Provinces, from 1st May 1922, *see* C. P. Gazette, 1922, Part III, p. 351; (7) Kohat District, *see* N.W.F.-P. Gazette, 1929, Pt. I-A, p. 1357; and District of Peshawar, Bannu, Dehra Ismail Khan, *see* *ibid*, 1930, Pt. I-A, p. 18; (8) British Baluchistan, from 23rd February 1933, *see* Gazette of India, 1933, Pt. II-A, p. 110; (9) Delhi, from 10th December, 1925 *see* Gazette of India 1925, Pt. II-A, p. 397; (10) Coorg, from 22nd August 1935, *see* Coorg Gazette, 1935, Pt. I, p. 39; and (11) Andamans and Nicobar Islands, *see* the Chief Commissioner's Notification No. 2 [II] of 1933, dated 20th January 1933.

See the Indian Forest Act, 1927 (16 [XVI] of 1927) S. 71 under which the Provincial Government may fix different scale of fines for cattle impounded under S. 70 of that Act.

[b] *Substituted* by A. O. for "Local Government".

CHAPTER IV.

DELIVERY OR SALE OF CATTLE.

Procedure when owner claims the cattle and pays fines and charges.

13. If the owner of the impounded cattle or his agent appear and claim the cattle, the pound-keeper shall deliver them to him on payment of the fines and charges incurred in respect of such cattle.

The owner or his agent, on taking back the cattle, shall sign a receipt for them in the register kept by the pound-keeper.

14. If the cattle be not claimed within seven days from the date of their being impounded, *Procedure if cattle be not claimed within a week.* the pound-keeper shall report the fact to the officer in charge of the nearest police-station, or to such other officer as the Magistrate of the District appoints in this behalf.

Such officer shall thereupon stick up in a conspicuous part of his office a notice stating —

- (a) the number and description of the cattle,
- (b) the place where they were seized,
- (c) the place where they are impounded,

and shall cause proclamation of the same to be made by beat of drum in the village and at the market-place nearest to the place of seizure.

If the cattle be not claimed within seven days from the date of the notice, they shall be sold by public auction by the said officer, or an officer of his establishment deputed for that purpose, at such place and time and subject to such conditions as the Magistrate of the District by general or special order from time to time directs :

Provided that, if any such cattle are, in the opinion of the Magistrate of the District, not likely to fetch a fair price if sold as aforesaid, they may be disposed of in such manner as he thinks fit.

PROVINCIAL AMENDMENTS.

Bombay. — In the proviso to section 14 for the words "Magistrate of the District" the words "officer authorised to sell them by public auction" shall be *substituted*. —Bombay Act 5 [V] of 1931, S. 2. [23-5-1931]

Central Provinces and Berar. — After the proviso to section 14 the following proviso shall be *added*, namely:—

"Provided further that the Magistrate of the District may sell asses and infirm cattle, at any time after the expiry of seven days from the date of their being impounded, without the issue of a notice and proclamation."

—C. P. and Berar Act 22 [XXII] of 1937, S. 2. [29-1-1937]

Section 12 (*contd.*)

of this Act such fines as it thinks fit, but not exceeding the following, that is to say, for each elephant — ten rupees; for each buffalo or camel—two rupees; for each horse, mare, gelding, pony, colt, filly, mule, bull,

bullock, cow or heifer—one rupee; for each calf, ass, pig, ram, ewe, sheep, lamb, goat, or kid—eight annas."

[2] A fine levied by a pound-keeper under this section is not a punishment imposed on conviction for an 'offence'. (1870) 7 Bom H C R Cr 55 (56).

15. If the owner or his agent appear and refuse to pay the said fines and expenses, on the ground that the seizure was illegal and that the owner is about to make a complaint under section 20, then, upon deposit of the fines and charges incurred in respect of the cattle, the cattle shall be delivered to him.

Delivery to owner disputing legality of seizure but making deposit.

16. If the owner or his agent appear and refuse or omit to pay or (in the case mentioned in section 15) to deposit the said fines and expenses, the cattle, or as many of them as may be necessary, shall be sold by public auction by such officer at such place and time, and subject to such conditions, as are referred to in section 14.

The fines leviable and the expenses of feeding and watering, together with the expenses of sale, if any, shall be deducted from the proceeds of the sale.

Deduction of fines and expenses.

Delivery of unsold cattle and balance of proceeds. The remaining cattle and the balance of the purchase-money, if any, shall be delivered to the owner or his agent, together with an account showing —

- (a) the number of cattle seized,
- (b) the time during which they have been impounded,
- (c) the amount of fines and charges incurred,
- (d) the number of cattle sold,
- (e) the proceeds of sale, and
- (f) the manner in which those proceeds have been disposed of.

The owner or his agent shall give a receipt for the cattle delivered to him and for the balance of the purchase-money (if any) paid to him according to such account.

Receipt.

Disposal of fines, expenses and surplus proceeds of sales. **17.** The officer by whom the sale was made shall send to the Magistrate of the District the fines so deducted.

The charges for feeding and watering deducted under section 16 shall be paid over to the pound-keeper, who shall also retain and appropriate all sums received by him on account of such charges under section 13.

The surplus unclaimed proceeds of the sale of cattle shall be sent to the Magistrate of the District, who shall hold them in deposit for three months, and, if no claim thereto be preferred and established within that period, shall, at its expiry, ^a[be deemed to hold them as part of the revenues of the Province.]

[a] *Substituted by A. O. for "dispose of them as hereinafter provided."*

18. [Application of fines and unclaimed proceeds of sale.] *Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.*

Officers and pound-keepers not to purchase cattle at sales under Act. **19.** No officer of police or other officer or pound-keeper appointed under the provisions herein contained shall, directly or indirectly, purchase any cattle at a sale under this Act.

No pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this Chapter, unless such release or delivery is ordered by a Magistrate or Civil Court.

Pound-keepers when not to release impounded cattle.

CHAPTER V.^a

COMPLAINTS OF ILLEGAL SEIZURE OR DETENTION.

20. Any person whose cattle have been seized under this Act, or, having been so seized, have been detained in contravention of this Act, may, at any time within ten days from the date of the seizure, make a complaint^b to the Magistrate of the District or any Magistrate authorized to receive and try charges without reference by the Magistrate of the District.

Power to make complaints.

[a] *Substituted for the original Chap. V by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 6.* [b] The term "offence" as defined by the Code of Criminal Procedure, 1898 (5 [V] of 1898), S. 4 (1) (c), includes any act in respect of which a complaint may be made under this section. Offences under this section may be tried in a summary way, see Act 5 [V] of 1898, S. 260 (1) (m).

Section 20—Note 1.

[1] An act in respect of which a complaint could be made under this section was held not to be an offence in the cases decided under the Criminal P. C. of 1882;

and hence a request for action against such act was not a complaint within the meaning of that Act. (1896) 18 All 353 (354); (1871) 8 Bom H C R 22 (23); (1886) 13 Cal 304 (305); (1896) 23 Cal 248 (249); (1896) 23 Cal

21. The complaint shall be made by the complainant in person, or by an agent personally acquainted with the circumstances. It may be either in writing or verbal. *Procedure on complaint.* If it be verbal, the substance of it shall be taken down in writing by the Magistrate.

If the Magistrate, on examining the complainant or his agent, sees reason to believe the complaint to be well founded, he shall summon the person complained against, and make an enquiry into the case.

22. If the seizure or detention be adjudged illegal, the Magistrate shall award to the complainant, for the loss caused by the seizure or detention, or detention, reasonable compensation, not exceeding one hundred rupees, to be paid by the person who made the seizure or detained the cattle together with all fines paid and expenses incurred by the complainant in procuring the release of the cattle,

and, if the cattle have not been released, the Magistrate shall, besides awarding such compensation, order their release and direct that the fines and expenses leviable under this Act shall be paid by the person who made the seizure or detained the cattle.

Section 20 (contd.)

442 (445) ; (1886) 9 Mad 102 (103) ; (1886) 9 Mad 374 (375) ; (1898) 11 C P L R Cr 10 (11).

[2] But the addition of the words "it also includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871" in the definition of the word "offence" in S. 4 (1) (o), Criminal P. C., 1898, now makes it clear that such an act is an offence. (Vol 7) 1920 Bom 85 (85) : 44 Bom 42 : 21 Cri L Jour 95; (1907) 6 Cri L Jour 363 (364) : 34 Cal 926; (Vol 14) 1927 Mad 396 (397) : 50 Mad 841: 28 Cri L Jour 301.

[3] Though a complaint under S. 20 of the Cattle-trespass Act must be entertained either by a District Magistrate or a Magistrate specially authorised, such Magistrate has power under Criminal P. C., S. 192, sub-s. (1) to transfer the case, after taking cognizance of it, to any Subordinate Magistrate. (1907) 34 Cal 926 (927). (23 Cal 300, 23 Cal 442, overruled.); (1879) 1879 Pun Re No. 26 Cr, page 76 (77) (F B).

[4] A Magistrate authorised under S. 190, Criminal P. C., to take cognizance of offences upon receiving complaints can take cognizance of an offence under S. 20 of the Cattle-trespass Act, 1871, though there is no special authorisation in that behalf. (Vol 7) 1920 Bom 85 (85) : 44 Bom 42 : 21 Cri L Jour 95; (Vol 14) 1927 Mad 396 (397) : 50 Mad 841 : 28 Cri L Jour 301.

[5] Subject to the conditions mentioned in S. 260 (1), Cr. P. C., the offence under this section is triable in a summary way. See cl. (m) of S. 260 (1), Cr. P. C.

[6] Complaint after ten days of seizure is barred by time under S. 20. (Vol 22) 1935 Cal. 116 (116) : 36 Cri L Jour 495.

[7] Where a complaint is filed under S. 22 within ten days from date of seizure of cattle to a Court having no jurisdiction and that Court transfers it to a proper Court after expiry of ten days, the complaint cannot be entertained. S. 537, Cr. P. C. would not cure the defect. (Vol 25) 1938 Oudh 183 (184) : 39 Cri L Jour 827.

[8] Though the General Clauses Act does not apply to this Act, S. 10, General Clauses Act (which provides for extension of period of limitation in case of last day being holiday) should be applied to complaints under S. 20. (Vol 16) 1929 Nag 96 (96) : 30 Cri L Jour 125.

Section 21 — Note 1

[1] The expression 'agent personally acquainted' in S. 21, means an agent or servant who could be said to have acted as an agent, such as a *kamdar* who, if not present at the time of seizure, had received information of it soon after the event. It cannot, however, include an agent, who lives at a distance and who has received information of the seizure at second hand.

Where a complaint is made by a wrong person, there is no complaint at all and the Court has no jurisdiction to inquire into the matter. (Vol 18) 1931 Nag 98 (99) : 27 Nag L R 167 : 32 Cri L Jour 896.

[2] Agent is authorised to file a complaint though he is not capable of giving direct evidence of all circumstances. (Vol 10) 1923 Nag 156 (156) : 26 Cri L Jour 327.

[3] Grazier of cattle is agent of owner of cattle within the meaning of S. 21. (Vol 16) 1929 Nag 152 (153) : 26 Nag L R 201 : 30 Cri L Jour 633.

[4] Where the cattle belonging to one person are in the custody of another, and are seized from his custody, the owner, if he is not personally acquainted with the circumstances, is not entitled to institute a complaint under S. 21. (1903) 5 Bom L R 205 (206).

[5] Under S. 21, the District Magistrate is enjoined to summon the person complained against for impounding cattle illegally and make an inquiry into the case. (Vol 24) 1937 Lah 748 (750).

SECTION 22 — SYNOPSIS.

1. Applicability and scope.
2. Appeal.
3. Compensation.
4. Compensation, to whom awarded.
5. Compensation order against several persons—Joint liability.
6. "Fines and expenses."
7. Proceeding under section 22, nature of.
8. Sentence of fine.
9. Sentence of imprisonment.
10. Specific claim for compensation, whether necessary.

1. Applicability and scope.—[1] Where there was a dispute between the complainant and party charged as to the ownership of land on which the complainant's cattle were found, the order of the Magistrate referring the parties to the Civil Court was illegal; he should dispose of the case himself under S. 22. (1875) 23 Suth W R (Cr) 2 (3).

[2] Where the seizure and detention of cattle were wrongful and illegal, the jurisdiction of the Magistrate to grant compensation under this section is not affected even if the person detaining them happens to be a Forest Officer who claims to act under the colour of the Forest Act, if the seizure and detention had nothing to do with any forest. (Vol 25) 1938 Mad 820 (821) : 39 Cri L Jour 956 (1).

[3] Where an accused person was found to have loosed the complainant's cattle at night and to have driven them to the pound with the object of sharing

23. The compensation, fines and expenses mentioned in section 22 may be recovered as if *Recovery of compensation.* they were fines imposed by the Magistrate.^a

[a] See Sections 63 to 70, Penal Code, 1860, and Section 386, Criminal P. C., 1898, see also Section 25, General Clauses Act, 1897.

Section 22 (contd.)

with the pound-keeper the fees to be paid for the release: *Held* that the accused was not liable under this section inasmuch as there was no illegal seizure and detention of the cattle. The accused was ordered to be charged and tried for theft. (1895) 22 Cal 139 (142).

[4] The fact that the damage was likely to be very small does not make the seizure of the cattle *illegal* though it may be *unreasonable*. Hence, compensation under S. 22 cannot be awarded in such cases. (1939) 1939 Oudh W N 150 (151, 152).

[5] The illegal seizure, for which the accused was convicted, took place after passing of Act I of 1871. This Act of 1871 repealed the old Act under which the accused was convicted. No injustice was, however, done to the accused taking into consideration the provisions of the Act of 1871. It was held that the conviction should not be interfered with. (1871) 18 Suth W R (Cr) 12 (12).

2. Appeal. — [1] By S. 4 of the Code of Criminal Procedure, 1898, the word "offence" includes an act in respect of which a complaint may be made under S. 20 of the Cattle-trespass Act. It follows, therefore, that a person against whom an order under S. 22 of the Cattle-trespass Act is made is "a person convicted on a trial". An appeal against the conviction lies, therefore, under Ss. 407 and 408 of the Criminal P. C. (1905) 1 Weir 712 (713); (Vol 9) 1922 Bom 191 (191) : 46 Bom. 58 : 22 Cri L Jour 624. (Compensation awarded under S. 22 not being a fine, the restrictive provisions of S. 413 of the Criminal P. C. are not applicable.); (1908) 6 Cri L Jour 121 (122) : 4 Low Bur Rul 10.

[2] The following cases, decided prior to 1898, are no longer good law : (1886) 10 Bom 230 (231) ; (1888) 15 Cal. 712 (713) ; (1888) 11 Mad. 359 (360) ; (1896) 19 Mad. 238 (239).

3. Compensation.—[1] Compensation for wrongful seizure of cattle under S. 22 should be by way of reasonable compensation for the costs caused by the seizure and detention of cattle; and not by way of penalty, or of an award of general damages to the complainant. (1878) 1878 Pun Re No. 25 (Cr), Page 65 (65).

[2] In awarding compensation for illegal seizure of cattle, the complainant's costs incurred in prosecuting his complaint may be included in the compensation awarded. (1872-92) 1872-92 Low Bur Rul 515.

[3] Court-fees paid by the complainant may form part of the compensation. (1878) 2 Cal L Rep 507 (508), (1905) 1 Weir 715 (715).

[4] Under the head of compensation for the loss caused by the seizure and detention of cattle, it is open to a Magistrate to include the process fees. (1905) 1 Weir 715 (715).

[5] Section 22 does not contemplate the award of compensation for damage to the reputation of the complainant. (1878) 1878 Pun Re No. 37 (Cr), Page 87 (88).

[6] In awarding compensation under S. 22, fees paid by the complainant to his counsel should not be considered. (Vol 25) 1938 Mad 820 (821) : 39 Cri L Jour 956; (Vol 20) 1933 Mad 502 (502) : 34 Cri L Jour 676. (Especially when the cattle had been released long before the complainant engaged a pleader.)

[7] Where some compensation was awarded in addition to the sum allowed on account of the fines and "expenses" or other charges incurred in procuring the release of the cattle, *held* that the High Court would not consider the sufficiency or insufficiency of the amount allowed. (1905) 1 Weir 715 (716).

[8] Where an order under S. 22 directed that the amount mentioned be paid to the complainant as compensation for the cost and damages incurred by him, and the words with which the decretal part of the judgment began were "I therefore fine the accused" *held* that latter portion was a mere surplusage and that, although the order was inaccurately worded, the intention to award compensation was clear. (1905) 1 Weir 715 (716).

4. Compensation, to whom awarded.—[1] Compensation may be awarded to owner of the cattle and not to agent filing complaint. (Vol 16) 1929 Nag 152 (153) : 26 Nag L R 201 : 30 Cri L Jour 633.

5. Compensation order against several persons — Joint liability. [1] Where compensation is ordered to be paid by two persons without specifying the proportionate amount payable by each they are jointly and severally liable to pay it (1887) 14 Cal 175 (176).

6. "Fines and expenses"—[1] A Magistrate is not authorised under S. 22 to fine, but only to award compensation. But he is also authorised to add to the compensation, fines and expenses paid to the pound-keeper by the owner on releasing the cattle, and order them to be paid by the party who made the seizure. (1905) 1 Weir 710 (710).

7. Proceeding under S. 22, nature of. — [1] A proceeding under S. 22 is not a regular criminal proceeding but a quasi-civil proceeding in which a Magistrate is authorised to assess and enforce, in a summary manner, compensation for an injury, for which a civil action might be brought. (1887) 14 Cal 175 (176).

[2] The summary procedure laid down in Ch. XXII of the Criminal P. C. is applicable to the trial of offences under S. 22. (1896) 1896 All W N 136 (136).

8. Sentence of fine.—[1] A Magistrate is not competent, under S. 22, to pass any sentence of *fine*. He can only award *compensation* for an illegal seizure of cattle. (1900) 27 Cal 992 (992); (1905) 1 Weir 710 (710); (1878) 1878 Pun. Re. No. 37 (Cr), Page 87 (88) :

[But see (1880) 1880 Pun Re No. 5 (Cr), Page 11 (11); (1878) 1878 Pun Re No. 36 (Cr), Page 87 (87).]

9. Sentence of imprisonment. — [1] Order for imprisonment, in default of payment of compensation awarded under S. 22, is illegal. (1896) 19 Mad. 238 (239); (Vol 17) 1930 Nag 149 (149) : 31 Cri L Jour 278 : 26 Nag L R 158; (Vol 26) 1939 Oudh 37 (38) : 14 Luck 325 : 40 Cri L Jour 141 ; (1905) 1 Weir 712 (712) ; (1872-92) 1872-92 Low Bur Rul 515 ; (1905) 1 Weir 711 (711, 712) ; (1900) 27 Cal. 992 (992) ; (1872-92) 1872-92 Low Bur Rul 429.

10. Specific claim for compensation, whether necessary.—(1) No compensation can be awarded for loss caused by the seizure of cattle unless the complainant makes the specific claim for it. (Vol 26) 1939 Oudh 37 (38) : 14 Luck. 325 : 40 Cri L Jour 141 ; (Vol 17) 1930 Nag 149 (149) : 31 Cri L Jour 278 ; 26 Nag L R 158 ; (Vol 10) 1923 Pat 292 (293) : 24 Cri L Jour 311 ; (1907) 6 Cri L Jour 122 (122) : 4 Low Bur Rul 11. (But he is entitled to a refund of the expenses incurred in procuring the release of the cattle, fees paid on the complaint and process fees.)

[But see (Vol 22) 1935 All 925 (926) : 37 Cri L Jour 29 ; (Vol 15) 1928 Mad 369 (370) : 29 Cri L Jour 325.]

Section 23 — Note 1.

[1] Section 25 of the General Clauses Act, 1897, is as follows : "Sections 63 to 70 of the Indian Penal

CHAPTER VI.

PENALTIES.

Penalty for forcibly opposing the seizure of cattle or rescuing the same.

24. Whoever forcibly opposes the seizure of cattle liable to be seized under this Act,

and whoever rescues the same after seizure, either from a pound, or from any person taking or about to take them to a pound, such person being near at hand and acting under the powers conferred by this Act,

shall, on conviction before a Magistrate, be punished with imprisonment for a period not exceeding six months, or with fine not exceeding five hundred rupees, or with both.

^a25. Any fine imposed ^b[under the next following section or] for the offence of mischief by causing cattle to trespass on any land may be recovered by sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the

Recovery of penalty for mischief committed by causing cattle to trespass.

Section 23 (contd.)

Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule or bye-law contains an express provision to the contrary."

SECTION 24—SYNOPSIS.

1. Appeal.
2. Conviction — Legality of.
3. Offence under Penal Code.
4. Offence whether compoundable.
5. Opposing seizure.
6. Rescue of cattle.
7. Withdrawal of complaint.

1. Appeal. — (1) Where a person was convicted under S. 447, Penal Code, and S. 24, Cattle-trespass Act and the two punishments of fine of Rs. 50 and of Rs. 20 were combined just as in S. 414, Cr. P. C., the sentence was held to be appealable. (Vol 19) 1932 Oudh 27 (28) : 7 Luck 501: 33 Cri L Jour 278.

2. Conviction—Legality of.—[1] For a conviction under S. 24, it is not enough that the cattle were removed from the pound or a person taking or about to take them to a pound. The cattle must be proved to be liable to seizure under this Act. (Vol 5) 1918 Pat 649 (650): 19 Cri L Jour 157; (Vol 13) 1926 All 276 (276) : 27 Cri L Jour 313.

[2] Where a conviction was not justified under S. 24 and especially where the fine was arbitrary, High Court interfered to set aside the conviction in revision. (Vol 17) 1930 Oudh 250 (251): 6 Luck 26: 31 Cri L Jour 1015.

[3] Where an act is punishable both under the Penal Code and this Act, the accused can be punished only under one of the two enactments and not both. A person convicted for theft under the Penal Code cannot be convicted under S. 24 of this Act. (Vol 18) 1931 Mad 18 (19): 32 Cri L Jour 354.

[4] Where a charge is framed under S. 379, Penal Code, and the defence is directed only to that charge, conviction for an offence under S. 24 of this Act is illegal in the absence of the framing of another charge and giving proper opportunity to produce evidence. (Vol 5) 1918 Pat 628 (630): 19 Cri L Jour 202.

3. Offence under Penal Code.—[1] A conviction under S. 24 is not essential before any offence under the Penal Code connected with such an offence can be taken into consideration. (Vol 32) 1945 Oudh 116 (117).

[2] "Offence" in S. 441, Penal Code, includes offence under S. 24 of this Act. (Vol 14) 1927 Lah 495 (496): 8 Lah 331: 28 Cri L Jour 665.

[3] Entering the cattle pound with intent to commit an offence under S. 24 amounts to criminal trespass within S. 447, Penal Code. (Vol 14) 1927 Lah 495 (496): 8 Lah 331: 28 Cri L Jour 665.

4. Offence whether compoundable. — Offence under S. 24 is not compoundable. (Vol 6) 1919 All 31 (31) : 42 All 202: 21 Cri L Jour 305.

5. Opposing seizure. — [1] Opposition to unlawful seizure of cattle is not an offence punishable under S. 24. (1891) 1891 Pun Re No. 4, page 11.

[2] To resist the seizure of the cattle, which escaped from pound and which were found grazing in charge of their owner, is not an offence punishable under S. 24. (1886) Rat. Un- Cr. C 294 (295).

[3] Where an owner of the cattle opposes the seizure of the cattle trespassing a land, on the ground that he has a title over that land, the question of title does not affect the right of the person in exclusive possession of the land to seize the cattle. (Vol 8) 1916 Lah 281 (281): 1916 Pun Re No. 3 (Or) : 17 Cri L Jour 63.

6. Rescue of cattle. — [1] A conviction under S. 24 can only be supported if the cattle were "liable to be seized" under the Act. If not, their rescue is no offence. (1901) 24 Mad 318 (319) , (Vol 6) 1919 Cal 93 (93) : 20 Cri L Jour 398.

[2] 'Rescue' in S. 24 includes driving away cattle by shouts and cries. (Vol 10) 1923 Mad 608 (608): 24 Cri L Jour 456.

[3] A person who removes cattle from the pound without paying the fees, has undoubtedly the dishonest intention of escaping from the payment. Such removal amounts to theft. (Vol 18) 1931 Mad 18 (19) : 32 Cri L Jour 354.

[But see (1891) 1 Weir 716 (716). (Removing of cattle from a pound with intention of returning it to the owner is an offence punishable under S. 24 and not of theft in a building.)]

[4] The offence of causing hurt is a separate offence from that of rescuing cattle and separate sentence may legally be passed. (Vol 15) 1928 Mad 18 (18) : 28 Cri L Jour 982.

7. Withdrawal of complaint. — [1] An offence under this section is triable as a summons-case. Hence, a complaint of such an offence can be withdrawn under section 248, Cr. P. C. (Vol 6) 1919 All 31 (31) : 42 All 202 : 21 Cri L Jour 305.

[2] Offence under this section joined with S. 323, Penal Code—Offence under Penal Code compounded — Offence under this section should be deemed to be withdrawn. (Vol 6) 1919 All 31 (31) : 42 All 202 : 21 Cri L Jour 305.

Section 25 — Note 1

[1] As to application of fine recovered under this section, see section 28.

property of the person convicted of the offence, or were only in his charge when the trespass was committed.

[a] As to the application of S. 25 in the case of cattle trespassing on a railway, see the Indian Railways Act, 1890 (9 [IX] of 1890), S. 125 (3). [b] *Inserted* by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 7.

26. Any owner or keeper of pigs who, through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land, or any public road^a, by allowing such pigs to trespass thereon, shall, on conviction before a Magistrate, be punished with fine not exceeding ten rupees.

Penalty for damage caused to land or crops or public roads by pigs. [The "Provincial Government] by notification in the Official Gazette, may from time to time, with respect to any local area specified in the notification, direct that the foregoing portion of this section shall be read as if it had reference to cattle generally, or to cattle of a kind described in the notification, instead of to pigs only, or as if the words "fifty rupees" were substituted for the words "ten rupees," or as if there were both such reference and such substitution.]

[a] "Public road" includes a railway, see the Indian Railways Act, 1890 (9 [IX] of 1890), S. 125 (4). [b] *Inserted* by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 8. [c] *Substituted* by A. O. for "Local Government". [d] The last paragraph was *repealed* by the Repealing and Amending Act, 1914 (10 [X] of 1914).

27. Any pound-keeper releasing or purchasing or delivering cattle contrary to the provisions of section 19, or omitting to provide any impounded cattle with sufficient food and water, or failing to perform any of the other duties imposed upon him by this Act, shall, over and above any other penalty to which he may be liable, be punished, on conviction before a Magistrate, with fine not exceeding fifty rupees.

Such fines may be recovered by deductions from the pound-keeper's salary.

Application of fines recovered under sections 25, 26 or 27.

28. All fines recovered under section 25, section 26 or section 27 may be appropriated in whole or in part as compensation for loss or damage proved to the satisfaction of the convicting Magistrate.

Section 25 (contd.)

[2] Sub-section (3) of Section 125, Railways Act, 1890, runs as follows:—"Any fine imposed under this section may, if the Court so directs, be recovered in manner provided by section 25 of the Cattle-trespass Act, 1871."

Section 26 — Note 1

[1] As to application of fine recovered under this section, see section 28.

[2] Section 125, sub-ss. (1) and (2), Railways Act, 1890, run as follows: "(1) The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine which may extend to five rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle-trespass Act, 1871.

(2) If any cattle are wilfully driven, or knowingly permitted to be, on any railway otherwise than for the purpose of lawfully crossing the railway or for any other lawful purpose, the person in charge of the cattle, or at the option of the railway administration, the owner of the cattle shall be punished with fine which may extend to ten rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle-trespass Act, 1871."

[3] Sub-section (4) of Section 125, Railways Act, 1890, runs as follows:—"The expression 'public road' in

sections 11 and 26 of the Cattle-trespass Act, 1871, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections."

[4] Before any person can be convicted under S. 26, prosecution must establish that owner has, through neglect or otherwise, damaged or caused or permitted to be damaged land, etc., by allowing his cattle to trespass thereon. A personal neglect on the part of the owner, and his allowing his cattle to trespass must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to exist. (1896) Rat Un Cr C 867 : Cr Rg 36 of 1896.

Section 27 — Note 1

[1] A person, who is not himself a pound-keeper, but has been merely engaged by a Police Patel, who was ex-officio the pound-keeper, is not a pound-keeper within the meaning of S. 27, and cannot, therefore, be convicted under that section. (1872) 9 B H C R (A C) 164 (165).

[2] Where the pound-keeper falsifies accounts, the offence committed does not fall under S. 27, but falls under Ss. 409 and 511 of the Penal Code. (1896) Rat Un Cr C. 632 : Cr Rg 2 of 1893.

[3] As to application of fine recovered under this section, see section 28.

CHAPTER VII.

SUITS FOR COMPENSATION.

29. Nothing herein contained prohibits any person whose crops or other produce of land have been damaged by trespass of cattle from suing for compensation in any competent Court.

Saving of right to sue for compensation.

PROVINCIAL AMENDMENT.

Central Provinces and Berar.—In section 29 for the words “whose crops or other produce of land have been damaged” substitute the words “whose property, crops or other produce of land have been damaged or to whom any hurt or injury or obstruction has been caused”. —C. P. and Berar Act 12 [XII] of 1935, S. 4. [30-3-1935]

30. Any compensation paid to such person under this Act by order of the convicting Magistrate shall be set-off and deducted from any sum claimed by or awarded to him as compensation in such suit.

Set-off.

CHAPTER VIII.^a

SUPPLEMENTAL.

Power for Provincial Government to transfer certain functions to local authority and direct credit of surplus receipts to local fund.

31. The ^b[Provincial Government] may, from time to time, by notification in the Official Gazette,—

(a) transfer to any local authority^c within any part of the territories under its administration in which this Act is in operation, all or any of the functions of the ^b[Provincial Government] or the Magistrate of the District under this Act, within the local area subject to the jurisdiction of the local authority.

d[* * * * *

[a] Chapter VIII was added by the Cattle-trespass Act (1871) Amendment Act, 1891 (1 [I] of 1891), S. 9. [b] Substituted by A. O. for “Local Government”. [c] For special enactments see, as to the Central Provinces and Berar, the C. P. and Berar Local Self-Government Act, 1920 (C. P. and Berar Act 4 [IV] of 1920), S. 21 (h), Vol 1; and as to the Punjab, the Punjab District Boards Act 1883 (20 [XX] of 1883), S. 20 (n). [d] Originally there were the following words:—“Or (b) direct that the whole or any part of the surplus accruing in any district under S. 18 of this Act shall be placed to the credit of such local fund or funds as may be formed for any local area or local areas comprised in that district, [and may from time to time, by notification in the Official Gazette, cancel or vary any notification under this section]. The bracketed words were repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914) and the rest by A. O.

PROVINCIAL AMENDMENT

Bengal. — After section 31 the following section shall be inserted, namely :—

“32. (1) The Magistrate of the District may appoint for the purposes of this Act, a President of a Union Board constituted under the Bengal Village Self-Government Act, 1919, to discharge the functions of an officer appointed under section 14, in respect of cattle impounded within the local area subject to the jurisdiction of that Union Board :—

Power for Magistrate of the District to appoint Presidents of Union Boards to discharge the functions of an officer under section 14.

Provided that a President so appointed may, by general or special order, delegate all or any of his functions under section 14 to the Vice-President of such Union Board and may at any time withdraw the same.

(2) A President so appointed or Vice-President to whom the President may delegate his functions shall not, directly or indirectly, purchase any cattle at a sale under this Act.”

— Bengal Act 5 [V] of 1934, S. 3. [19-4-1934.]

[Schedule.] Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and the Schedule.

Section 29 — Note 1

[1] In a suit for damages for illegal seizure of cattle the onus lies on defendant to prove that the seizure was justifiable. Such a suit is not barred by reason of Ch. 5. (Vol 5) 1918 Nag 124 (125); (1871) 15 W R 279 (280); (1889) 16 Cal 159 (160); (2 Cal L Rep 344, dissented from).

[2] Where in a suit against joint tortfeasors for damages, the plaintiff compromises with some of them without releasing the entire cause of action, he is not debarred from getting a decree against the others. (Vol 29) 1942 Oudh 73 (74); 17 Luck 284.

[3] In a suit for damages under this section it was alleged that the defendants dishonestly let loose their cattle. It was not alleged that the defendants did so with a view to have the defendant's crops grazed. It was not found that the defendants had acted jointly or in concert. The extent of damage caused by the cattle of each defendant was not known. It was held that a joint decree for all the damages against all the defendants could not be passed. Further, in the absence of evidence to show what damages were caused by the cattle of each defendant, only nominal damages could be awarded against each defendant. (Vol 29) 1942 Oudh 73 (74, 75); 17 Luck 284.

THE CENTRAL BOARD OF REVENUE ACT, 1924.

(ACT IV of 1924).^a

[Repealed in part by Acts XII of 1927; XXXIV of 1939.]

[13th March 1924]

An Act to provide for the constitution of a Central Board of Revenue and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Board.

WHEREAS it is expedient to provide for the constitution of a Central Board of Revenue and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Board; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1924, Pt. V, p. 30; and for Report of Select Committee, see *ibid*, p. 37.

Short title and commencement. 1. (1) This Act may be called the CENTRAL BOARD OF REVENUE Act, 1924.

(2) It shall come into force on the first day of April, 1924.

2. As soon as may be after the commencement of this Act, the ^a[Central Government] shall constitute^b a Central Board of Revenue, consisting of one or more persons appointed by ^c[it], which shall be subject to the control of the ^a[Central Government] in the exercise of such powers and the performance of such duties as may be entrusted to it by the ^a[Central Government] or by or under any law.

[a] Substituted by A. O. for "Governor-General in Council". [b] For Notification constituting a Central Board of Revenue, see General Rules and Orders, Vol. V, p. 612. [c] Substituted by A. O. for "him".

3. The ^a[Central Government] may make rules^b for the purpose of regulating the transaction of business by the Central Board of Revenue, and every order made or act done in accordance with such rules shall be deemed to be the order or act, as the case may be, of the Central Board of Revenue.

[a] Substituted by A. O. for "Governor-General in Council". [b] For such rules, see General Rules and Orders, Vol. V, p. 612.

4. [Amendments of enactments.] *Repealed by the Repealing and Amending Act, 1939 (XXXIV of 1939), S. 3 and Sch. II.*

[The Schedule. Enactments Amended]. *Repealed by the Repealing and Amending Act, 1939 (XXXIV of 1939), S. 3 and Sch. II.*

THE CENTRAL EXCISES AND SALT ACT, 1944.

(ACT I of 1944).

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STATEMENT OF OBJECTS AND REASONS.

"The administration of internal commodity taxation in British India has grown up piecemeal over many years and has been considerably expanded during the last decade. Hitherto, the introduction of a new central duty of excise has required the enactment of a self-contained law and the preparation of a separate set of statutory rules. There are now no less than 10 separate excise Acts (the excise on kerosene being covered by a part of the Indian Finance Act, 1922) and 11 sets of statutory rules; and there are also 5 Acts relating to salt, the duty on which is by a wide margin the oldest of our taxes on indigenous commodities. The taxes being closely akin to one another, the methods of collection follow the same general pattern, and many of the provisions of the various Acts are identical or closely similar; and this is the case also with many of the statutory rules. The agglomeration of statutes and regulations dealing with similar matters is neither convenient for the public nor conducive to well-organised administration. Moreover, under this disjunctive arrangement, we have not, and cannot readily construct, a comprehensive code of standing instructions for the governance of the excise staff and each set of statutory rules is burdened with departmental instructions in which the public has no concern or interest and which, even taken together, do not form an adequate administrative code.

2. It is accordingly proposed to consolidate in a single enactment all the laws relating to central duties of excise and to the tax on salt and to embody therein

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FIRST SCHEDULE

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a Schedule, similar to that in the Indian Tariff Act, 1934, setting forth the rates of duty leviable on each class of goods. At the same time the statutory rules will be similarly amalgamated and disembarassed of their unnecessary detail. The Act and the consolidated statutory rules, together with as many manuals of departmental instructions as may be necessary, will then form a complete Central Excise Code, which will simplify the administration of this branch of the revenue system and aid such further development as may be necessary; and any proposal for a new excise which may hereafter be laid before the Legislature may then take the simpler and more convenient form of a clause in the annual Finance Bill.

3. The intention of the Bill is to reproduce provisions already existing in the Acts which it is proposed to repeal, but in the process certain small amendments have been made, either in modernising the language or for dovetailing the provisions and otherwise adapting them to present circumstances. These amendments are the minimum consistent with such blending and adaptation.

4. The combination of a number of separate measures, each of which has been moulded to fit its particular subject, necessarily includes their special features as well as those which are common to others in the group and it follows that certain provisions which have hitherto applied only to certain goods will, after consolidation, become applicable over the whole field, either

as a matter of course or by notification as circumstances may require. In particular the Bill provides that certain features of the salt law relating to transport by small coastal craft will become adaptable, as necessary, in the administration of other excise duties.

5. No interference of any kind is made in any of the existing duties. These have been merely collected from

the various Acts and reproduced in the Schedule; and the item relating to salt has been so worded as to preserve to the Central Legislature the right which it has so long exercised of voting annually on the rate of duty to be fixed."

—Gazette of India, 1943, Part V, page 243.

EXTRACT FROM THE SELECT COMMITTEE REPORT.

"The changes made in the Bill are nearly all of a formal nature dictated by the advisability of emphasising, more pointedly than the Bill as drafted did, the differences between salt and the other articles subjected to duties of central excise, and the difference between the salt duty and the other central excise duties, differences referred to in the judgment of the Federal Court in the case, *Lahore Municipality v. Daulat Ram*, 1942 F. C. R. 31. It is inadvisable to exhibit, as the Bill did, the duty on salt as indistinguishable from those other duties of excise. The competence of the Central Legislature to legislate on salt is derived from entry 47 of List I of the Seventh Schedule to the Government of India Act and extends to salt in all its aspects. Legislative competence in respect of other articles is derived from item 45 of that list and extends only to the imposition of duties of excise upon them and, in so far as provisions which might fall within the scope of entries 27 and 29 of List II of the Seventh Schedule are concerned, to the making only of such provisions as are essential for the purpose of effectively implementing the power of imposing such duties.

The changes made by us in the long title, preamble, short title, and clause (2) (d) and (e) recognise the peculiar status under the Constitution Act of salt as compared with the other excisable articles with which the Bill deals, while leaving the provisions applicable generally to all excisable articles applicable also to salt.

The alteration of clause (3) (1) again recognizes a distinction between other central excise duties and the duty on salt and is responsible for the small consequential amendment made in clause (5).

The limitations on the power of the Central Legislature to legislate on matters coming ordinarily within the scope of items 27 and 29 of the Provincial Legislative List have suggested the alterations made by us in clauses (6) and (8) and in the items (v), (x) and (xiv) of clause 37 (1).^a The extent to which incursion into the Provincial legislative field is necessitated for the purpose of effective legislation on the subject dealt with by the Bill is particularised. Under clause (6) the power to control manufacture by licence is essential for the purpose of effectively levying and collecting the excise duty in all cases, but so far as purchase, sale and storage are concerned the power is essential and has so far been taken only in respect of tobacco, though subsequent additions to the articles subjected to duties of central excise may necessitate further entries in Part A of the new Schedule II. Clause (8) dealing with the possession of excisable goods has been recast on similar lines for similar reasons. The alterations in clause 3 (1) again specifically state the limitations which are, under the Constitution Act, attached to Central legislation on the matters dealt with."

—Gazette of India, 1944, Part V, page 13.

[a] This seems to be a discrepancy for clause 37 (2).

Act how affected by subsequent legislation.

—Amended by Acts VI of 1945; VII of 1946.

—Amended by Finance Acts, 1944 and 1945.

THE CENTRAL EXCISES AND SALT ACT, 1944.

(ACT I OF 1944.)

[24th February 1944.]

An Act to consolidate and amend the law relating to central duties of excise and to salt.

WHEREAS it is expedient to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in British India and to salt;

It is hereby enacted as follows:—

CHAPTER I.

Short title, extent and commencement.

1. (1) This Act may be called the CENTRAL EXCISES AND SALT ACT, 1944;

(2) It extends to the whole of British India;

(3) It shall come into force on such date^a as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

[a] This Act came into force on 28th February, 1944.—See Gazette of India, 1944, Extraordinary, page 293.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "broker" or "commission agent" means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others;

(b) "Central Excise Officer" means any officer of the Central Excise Department, or any person (including an officer of the Provincial Government) invested by the Central Board of Revenue with any of the powers of a Central Excise Officer under this Act;

Section 2 (b) — Note 1

[1] The words "including an officer of the Provincial Government" were inserted by the Select Committee.

"The insertion in cl. 2 (b) makes clear that an officer of the Provincial Government may be invested with the powers of a Central Excise Officer." — *Select Committee Report*.

- (c) "curing" includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture ;
- (d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt ;
- (e) "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on ;
- (f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product ; and
 - (i) in relation to tobacco includes the preparation of cigarettes, cigars, cheroots, birms, cigarette or pipe or hookah tobacco, chewing tobacco or snuff ; and
 - (ii) in relation to salt, includes collection, removal, preparation, steeping, evaporation, boiling, or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre, the separation of salt from earth or other substance so as to produce alimentary salt, and the excavation or removal of natural saline deposits or efflorescence ; and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those goods are intended for sale ;
- (g) "prescribed" means prescribed by rules made under this Act ;
- (h) "sale" and "purchase," with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration ;
- (i) "saltpetre" includes *rasi*, *sajji*, and all other substances manufactured from saline earth, and *kharinun* and every form of sulphate or carbonate of soda ;
- (j) "salt factory" includes—
 - (i) a place used or intended to be used in the manufacture of salt and all embankments, reservoirs, condensing and evaporating pans, buildings and waste places situated within the limits of such place ; as defined from time to time by the Collector of Central Excise ;
 - (ii) all drying grounds and storage platforms and storehouses appertaining to any such place ;
 - (iii) land on which salt is spontaneously produced ;

and a "private salt factory" is one not solely owned or not solely worked by the Central Government ;

(k) "wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale.

CHAPTER II.

LEVY AND COLLECTION OF DUTY.

Duties specified in the First Schedule to be levied.

3. (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which

Section 2 (c) — Note 1

[1] "Clause 2 (c) has been made general in its terms so as to be applicable to other excisable goods than tobacco." — *Select Committee Report.*

Section 2 (e) — Note 1

[1] "The definition of 'factory' in cl. 2 (e) has been made inapplicable to a place used for the manufacture of salt." — *Select Committee Report.*

Section 2 (j) — Note 1

[1] The words "as defined from time to time by the Collector of Central Excise" were added in sub-cl. (i) of cl. (j) by the Select Committee. "Cl. 2 (j) has been

amended to supply a definition of 'salt factory,' those words being substituted for 'salt-work' here and in cls. 31 and 32. The words added to cl. 2 (j) bring the definition of 'salt factory' into accord with the definition contained in the Madras Salt Act, 1889, S. 3 (f)." — *Select Committee Report.* The reference to S 3 (f) of the Madras Act, it seems, should be taken as a reference to S. 3 (i) of that Act.

Section 3 — Note 1

[1] As to the punishment of a person who evades the payment of duty, see section 9 (b) and (d). See also section 12.

are produced or manufactured in British India, and a duty on salt manufactured in, or imported by land into, any part of British India as, and at the rates, set forth in the First Schedule.

(2) The Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force;

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

4. Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the wholesale cash price for the purposes of duty. for which an article of the like kind and quality is sold or is capable of being sold for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement or deduction whatever except trade discount and the amount of duty then payable.

5. The Central Government may, by notification in the Official Gazette, impose on any excisable goods other than salt brought into British India from the territory of any Indian State, not being territory which has been declared under section 5 of the Indian Tariff Act, 1934, to be foreign territory for the purposes of that section, a duty of customs equivalent to the duty imposed by this Act on the like goods produced or manufactured in British India.

6. The Central Government may, by notification^a in the Official Gazette, provide that, from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under this Act, engage in —

- (a) the production or manufacture or any process of the production or manufacture of any specified excisable goods or of saltpetre or of any specified component parts or ingredients of such goods or of specified containers of such goods, or
- (b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any excisable goods specified in this behalf in Part A of the Second Schedule.

[a] For such notification, see Gazette of India, 1944, Extraordinary, dated 28-2-1944, page 297.

7. Every licence under section 6 shall be granted for such area, if any, for such period, subject to such restrictions and conditions, and in such form and containing such particulars, as may be prescribed.

8. From such date as may be specified in this behalf by the Central Government by notification in the Official Gazette, no person shall, except as provided by rules made under this Act, have in his possession any excisable goods specified in this behalf in Part B of the Second Schedule in excess of such quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.

Offences and Penalties. 9. Whoever commits any of the following offences, namely:—

- (a) contravenes any of the provisions of a notification issued under section 6 or of section 8, or of a rule made under clause (iii) of sub-section (2) of section 37;
- (b) evades the payment of any duty payable under this Act;
- (c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information;
- (d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section;

shall, for every such offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

10. Any Court trying an offence under this Chapter may order the forfeiture to His Majesty of any goods in respect of which the Court is satisfied that an offence under this Chapter has been committed, and may also order the forfeiture

Section 6 — Note 1

[1] As to the form and conditions of a licence, see the provisions of a notification issued under this section 7; for punishment for contravention of any of section, see section 9 (a) and (d).

of any receptacles, packages or coverings in which such goods are contained and the animals, vehicles, vessels or other conveyances used in carrying the goods, and any implements or machinery used in the manufacture of the goods.

11. In respect of duty and any other sums of any kind payable to the Central Government *Recovery of sums due to Government.* under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central Board of Revenue to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land-revenue.

12. The Central Government may, by notification^a in the Official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modification and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3.

[a] For such notification, see Gazette of India, 1944, Extraordinary, dated 28-2-1944, page 297.

CHAPTER III.

POWERS AND DUTIES OF OFFICERS AND LANDHOLDERS

13. (1) Any Central Excise Officer duly empowered by the Central Government in this behalf *Power to arrest.* may arrest any person whom he has reason to believe to be liable to punishment under this Act.

(2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.

14. (1) Any Central Excise Officer duly empowered by the Central Government in this behalf *Power to summon persons to give evidence and produce documents in inquiries under this Act.* shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required :

Provided that the exemptions under sections 182 and 183 of the Code of Civil Procedure shall be applicable to requisition for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code.

Section 14 - Note 1

[1] Sections 182 and 183, Civil P. C., deal respectively with exemption from personal appearance in Court of women who according to the custom and manners of the country ought not to be compelled to appear in public and with the power vested in the Provincial Government to exempt from personal appearance

in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of such exemption.

Sections 193 and 228, Penal Code, deal respectively with punishment for false evidence and intentional insult or interruption to public servant sitting in judicial proceeding.

15. All officers of Police and Customs and all officers of Government engaged in the collection of land-revenue, and all village officers are hereby empowered and required to assist the Central Excise officers in the execution of this Act.

16. Every owner or occupier of land, and the agent of any such owner or occupier, in charge of the management of that land, if contraband excisable goods are manufactured thereon, shall in the absence of reasonable excuse be bound to give notice of such manufacture to a Magistrate, or to an officer of the Central Excise, Customs, Police, or Land Revenue Department, immediately the fact comes to his knowledge.

17. Any owner or occupier of land, or any agent of such owner or occupier in charge of the management of that land, who wilfully connives at any offence against the provisions of this Act or of any rules made thereunder shall for every such offence be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

18. All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898, relating respectively to searches and arrests made under that Code.

19. Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise officer within a reasonable distance, to the officer-in-charge of the nearest police-station.

20. The officer-in-charge of a police-station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate.

Inquiry how to be made by Central Excise officers against persons forwarded to them under section 19.

21. (1) When any person is forwarded under section 19 to a Central Excise officer empowered to send persons so arrested to a Magistrate, the Central Excise officer shall proceed to enquire into the charge against him.

(2) For this purpose the Central Excise officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police-station may exercise and is subject to under the Code of Criminal Procedure, 1898, when investigating a cognizable case :

Provided that —

- (a) if the Central Excise officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;
- (b) if it appears to the Central Excise officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise officer may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

Vexatious search, seizure, etc., by Central Excise officer.

22. Any Central Excise or other officer exercising powers under this Act or under the rules made thereunder who —

- (a) without reasonable ground of suspicion searches or causes to be searched any house, boat or place ;
- (b) vexatiously and unnecessarily detains, searches or arrests any person;
- (c) vexatiously and unnecessarily seizes the moveable property of any person, on pretence of seizing or searching for any article liable to confiscation under this Act ;

Section 21 — Note 1

[1] The words "either admit him to bail to appear before" and "or forward him in custody to such Magistrate" in Proviso (a) to sub-section (2) were added by

the Select Committee. "The addition made to cl. 21 (2) makes it clear that a Central Excise officer has power to admit a person suspected by him of an offence to bail." — *Select Committee Report.*

(d) commits, as such officer, any other act to the injury of any person, without having reason to believe that such act is required for the execution of his duty ;
shall, for every such offence, be punishable with fine which may extend to two thousand rupees.

Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall be punishable with fine which may extend to two thousand rupees or with imprisonment for a term which may extend to two years or with both.

23. Any Central Excise officer who ceases or refuses to perform or withdraws himself from the duties of his office, unless he has obtained the express written permission of the Collector of Central Excise, or has given to his superior officer two months' notice in writing of his intention or has other lawful excuse, shall on conviction before a Magistrate be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to three months' pay, or with both.

CHAPTER IV.

TRANSPORT BY SEA.

24. When any excisable goods are carried by sea in any vessel other than a vessel of the burden of three hundred tons and upwards, the owner and master of such vessel shall each be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Exceptions.

25. Nothing in section 24 applies to —

- (a) any excisable goods covered by a permit granted under rules made under this Act ;
- (b) any excisable goods covered by a pass granted by any officer whom the Central Board of Revenue may appoint in this behalf ;
- (c) such amount of excisable goods carried on board any vessel for consumption by her crew or by the passengers or animals (if any) on board as the Central Board of Revenue may from time to time exempt from the operation of section 24.

26. When any officer empowered by the Central Board of Revenue, to act under this section has reason to believe, from personal knowledge or from information taken down in writing, that any excisable goods are being carried, or have within the previous twenty-four hours been carried, in any vessel so as to render the owner or master of such vessel liable to the penalties imposed by section 24, he may require such vessel to be brought to and thereupon may—

- (a) enter and search the vessel ;
- (b) require the master of the vessel to produce any documents in his possession relating to the vessel or the cargo thereof ;
- (c) seize the vessel if the officer has reason to believe it liable to confiscation under this Act, and cause it to be brought with its crew and cargo into any port in British India ; and
- (d) where any excisable goods are found on board the vessel, search and arrest without a warrant any person on board the vessel whom he has reason to believe to be punishable under section 24.

27. Any master of a vessel refusing or neglecting to bring to the vessel or to produce his papers when required to do so by an officer acting under section 26, and any person obstructing any such officer in the performance of his duty, may be arrested by such officer without a warrant, and shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

28. (1) Every vessel (including all appurtenances) in which any excisable goods are carried so as to render the owner or master of such vessel liable to penalties imposed by section 24, the cargo on board such vessel and the excisable

Section 24 — Note 1

[1] As to the locality of the offence for the purpose of jurisdiction, see section 29.

Section 27 — Note 1

[1] As to the locality of the offence for the purpose of jurisdiction, see section 29.

goods in respect of which an offence under this Act has been committed shall be liable to confiscation on the orders of the officer empowered in this behalf by the Central Government.

(2) Whenever any Customs-officer is satisfied that any article is liable to confiscation under this section he may seize such article, and shall at once report the seizure to his superior officer for the information of the officer empowered to order confiscation under sub-section (1) and such officer may, if satisfied on such report or after making such inquiry as he thinks fit, that the article so seized is liable to confiscation, either declare it to be confiscated, or impose a fine in lieu thereof not exceeding the value of the article.

29. Any offence punishable under section 24 or section 27 may be deemed to have been committed within the limits of the jurisdiction of the Magistrate of any place where the offender is found, or to which, if arrested under section 26 or section 27, he may be brought.

30. The Central Government may, by notification in the Official Gazette, exempt the carriage of excisable goods within any local limits or in any class of vessels from the operation of this Chapter. the operation of this Chapter, and, by like notification, again subject such carriage to the operation of this Chapter.

CHAPTER V.

SPECIAL PROVISIONS RELATING TO SALT.

31. The proprietor of a private salt factory who has by virtue of a sanad granted by the British or any former Government, a special and permanent right to manufacture salt, or to excavate or collect natural salt, shall on application made in accordance with the rules made under this Act be entitled to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act, his licence has been cancelled by an officer duly empowered by the Central Government in this behalf.

32. Every proprietor of a private salt-work, other than a private salt factory, to which section 31 applies, of which under the provisions of section 17 of the Bombay Salt Act, 1890, the proprietor was entitled on application to a licence to manufacture or to excavate or collect natural salt at such factory, shall continue to be entitled, on application made in accordance with the rules made under this Act, to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act, his licence has been cancelled by an officer duly empowered by the Central Government in this behalf :

Provided that the Collector of Central Excise may at any time withdraw or withhold a licence from the proprietor of any such salt factory, if no salt has been manufactured, excavated or collected in such salt factory for the three years ending on the thirtieth day of June last preceding the date of his order, or, with the previous sanction of the Central Board of Revenue, if such salt factory has not produced, on an average, during the said three years, at least five thousand maunds of salt per annum.

Section 32 — Note 1

[1] Taking into consideration the intention of the Select Committee as expressed in their Report (*see* Note on S. 2 (j)), the words 'salt factory' ought to have been substituted for the words 'salt-work' where they occur in this section. By an oversight of the draftsman of this Act this has not been done in the place where these words occur for the first time in this section.

[2] Sub-section (1) of section 17, Bombay Salt Act, 1890, ran as follows: "Except as is hereinafter otherwise provided, every proprietor of a private salt-work, to

which S. 16 does not apply and which is being lawfully worked at the time when this Act comes into force, or which was lawfully worked at any time within three years next before the date on which this Act comes into force, shall, unless his salt-work is suppressed under S. 24 of this Act or has been suppressed under S. 33 of the Bombay Salt Act, 1878, be entitled, on application, to a licence to manufacture salt or to excavate or collect natural salt at such work." The Bombay Salt Act, 1890, is now repealed by this Act.

CHAPTER VI.

ADJUDICATION OF CONFISCATIONS AND PENALTIES.

33. Where by the rules made under this Act any thing is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged —

(a) without limit, by a Collector of Central Excise ;

(b) up to confiscation of goods not exceeding five hundred rupees in value and imposition of penalty not exceeding two hundred and fifty rupees, by an Assistant Collector of Central Excise :

Provided that the Central Board of Revenue may, in the case of any officer performing the duties of an Assistant Collector of Central Excise, reduce the limits indicated in clause (b) of this section, and may confer on any officer the powers indicated in clause (a) or (b) of this section.

34. Wherever confiscation is adjudged under this Act or the rules made thereunder, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

35. (1) Any person deeming himself aggrieved by any decision or order passed by a Central Excise officer under this Act or the rules made thereunder may, within three months from the date of such decision or order, appeal therefrom to the Central Board of Revenue, or, in such cases as the Central Government directs, to any Central Excise officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against :

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation or penalty than has been adjudged against him in the original decision or order.

(2) Every order passed in appeal under this section shall, subject to the power of revision conferred by section 36, be final.

36. The Central Government may on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any Central Excise officer or by the Central Board of Revenue, and from which no appeal lies, reverse or modify such decision or order.

CHAPTER VII.

SUPPLEMENTAL PROVISIONS.

37. (1) The Central Government may make rules^a to carry into effect the purposes of this Act.

[a] For the Central Excise Rules, 1944, see Gazette of India, 1944, Extraordinary, dated 28-2-1944, page 297.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may —

(i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid ;

(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose ;

(iii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the bringing of excisable goods into British India from the

Section 37 (2) (iii) — Note 1

As to the punishment for contravention of a rule made under S. 37 (2) (iii), see S. 9 (a) and (d).

- territory of any specified Prince or Chief in India, or the transit of excisable goods from any part of British India to any other part thereof ;
- (iv) regulate the removal of excisable goods from the place where produced; stored or manufactured or subjected to any process of production or manufacture and their transport to or from the premises of a licensed person, or a bonded warehouse, or to a market ;
 - (v) regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt, and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, or of any component parts or ingredients or containers thereof ;
 - (vi) provide for the employment of officers of the Crown to supervise the carrying out of any rules made under this Act ;
 - (vii) require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation ;
 - (viii) provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses ;
 - (ix) provide for the distinguishing of goods which have been manufactured under licence, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act ;
 - (x) impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified ;
 - (xi) require that excisable goods shall not be sold or offered or kept for sale in British India except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed ;
 - (xii) provide for the issue of licences and transport permits and the fees, if any, to be charged therefor ;

Provided that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely :

	Rs.
Licence to manufacture and refine saltpetre and to separate and purify salt in the process of such manufacture and refining	50
Licence to manufacture saltpetre	2
Licence to manufacture sulphate of soda (<i>Kharinum</i>) by solar heat in evaporating pans	10
Licence to manufacture sulphate of soda (<i>Kharinum</i>) by artificial heat	2
Licence to manufacture other saline substances	2

- (xiii) provide for the detention of goods, plant, machinery or material, for the purpose of exacting the duty, the procedure in connexion with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed, and the disposal of goods so detained or confiscated ;
- (xiv) authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and, so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods ;

(xv) authorise and regulate the composition of offences against, or liabilities incurred under, this Act or the rules made thereunder ;

(xvi) provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India :

Provided that rules made under this clause shall provide that when steel ingots on which the duty of excise imposed by this Act has been paid, or articles of iron or steel manufactured in British India from such ingots, are exported out of India, there shall be payable to the exporter of such ingots or articles, subject to such conditions as may be prescribed, a refund at the following rates, namely :—

on ingots, blooms and billets—a refund at the rate of four rupees per ton ;

on other manufactures of iron or steel —

(a) not fabricated—a refund at the rate of five and one-third rupees per ton ;

(b) fabricated—a refund at the rate of six rupees per ton ;

(xvii) exempt any goods from the whole or any part of the duty imposed by this Act ;

(xviii) define an area no point in which shall be more than one hundred yards from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which saltpetre is manufactured or refined, and regulate the possession, storage and sale of salt within such area ;

(xix) define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area ;

(xx) authorise the Central Board of Revenue or Collectors of Central Excise appointed for the purposes of this Act to provide, by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section.

(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding two thousand rupees and that any article in respect of which any such breach is committed shall be confiscated.

38. All rules made and notifications issued under this Act shall be made and issued by publication in the Official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act :

Provided that every such rule shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.

39. The enactments specified in the "[Third Schedule] are hereby repealed to the extent mentioned in the fourth column thereof. But all rules made, notifications published, licences, passes or permits granted, powers conferred and other things done under any such enactment and now in force shall, so far as they are not inconsistent with this Act, be deemed to have been respectively made, published, granted, conferred or done under this Act.

[a] Substituted for "Second Schedule" by the Repealing and Amending Act, 1945 (6 [VI] of 1945), S. 3 and Schedule II. [16-4-1945].

Bar of suits and limitation of suits and other legal proceedings.

40. (1) No suit shall lie against the Central Government or against any officer of the Crown in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

FIRST SCHEDULE

(See section 3)

Item No.	Description of goods.	Rate of duty.
1.	KEROSENE — “Kerosene” means any inflammable hydro-carbon (including any mixture of hydro-carbons or any liquid containing hydro-carbons but excluding motor-spirit) which — (i) is made from petroleum as defined in section 2 of the ^a [Petroleum Act, 1934 (XXX of 1934)], and (ii) is intended to be or is ordinarily used in liquid form for purposes of illumination.	The rate at which Customs duty is for the time being leviable under the Indian Tariff Act, 1934 (XXXII of 1934), read with any other enactment for the time being in force. Repealing and Amending Act, 1945
[a.]	Substituted for “Indian Petroleum Act, 1899 (VIII of 1899)” by the (6 [VI] of 1945), S. 3 and Sch. II. [16-4-1945].	
2.	MATCHES — “Match” includes a firework in the form of a match; and, where a match-stick has more heads than one capable of being ignited by striking, each such head shall be deemed to be a match. (1) Matches, manufactured in a factory whose daily output exceeds one hundred gross of boxes, in boxes or booklets containing on an average — (i) not more than forty matches Two rupees ... (ii) more than forty, but not more than fifty matches Two rupees and eight annas. (iii) more than fifty, but not more than sixty matches ... Three rupees ... (iv) more than sixty, but not more than eighty matches ... Four rupees ... } Per gross of boxes or booklets. (2) Matches, manufactured in a factory whose daily output does not exceed one hundred gross of boxes, in boxes or booklets containing on an average — (i) not more than forty matches One rupee, fifteen annas and two pies. (vi) more than forty, but not more than fifty matches ... Two rupees and seven annas. (iii) more than fifty, but not more than sixty matches ... Two rupees, fourteen annas and nine pies. (iv) more than sixty, but not more than eighty matches ... Three rupees, fourteen annas and four pies. } Per gross of boxes or booklets. (3) Matches in boxes containing on an average not more than twelve matches of the type known as “Bengal Lights”. Ten annas per gross of boxes. (4) All other matches Eight annas for every 1,440 matches or fraction thereof.	
3.	MECHANICAL LIGHTERS — “Mechanical Lighter” means any mechanical or chemical contrivance for causing ignition which is portable and which operates by producing a spark or flame whether by itself or when brought into contact with gas, and includes a mechanical lighter issued from a factory in an incomplete state or requiring for its completion the addition of a flint	Three rupees per lighter.
4.	MOTOR SPIRIT — “Motor spirit” means — (a) any inflammable hydro-carbon (including any mixture of hydro-carbons or any liquid containing hydro-carbons) which is capable of being used for providing reasonably efficient motive power for any form of motor vehicle; and	

Schedule I — Note 1

[1] "No interference of any kind is made in any of the existing duties. These have been merely collected from the various Acts and reproduced in the Schedu1e; and the item relating to salt has been so worded as to preserve to the Central Legislature the right which it has long exercised of voting annually on the rate of

duty to be fixed."—*Statement of Objects and Reasons.*

[2] "The additions to and changes in items 8 and 9 of the First Schedule accurately confine the incidence of the excise duty on sugar and tobacco within the limits imposed by the existing Acts which are being superseded."—*Select Committee Report.*

Item No.	Description of goods.	Rate of duty.
	(b) power alcohol, that is, ethyl alcohol of any grade (including such alcohol when denatured or otherwise treated), which either by itself or in admixture with any such hydro-carbon, is capable of being used as aforesaid... ..	^a [Twelve] annas per imperial gallon.
[a]	Substituted for "Fifteen" by the Indian Finance Act, 1946 (7 [VII] of 1946), S. 8. [1-3-1946].	
5.	SALT — "Salt" includes swamp salt, spontaneous salt, and salt or saline solutions made or produced from any saline substance or from salt earth.	For the year ending the 31st day of March, 1944, the rate fixed by section 2 of the Indian Finance Act, 1943 (VIII of 1943), read with section 5 of the Indian Finance (Supplementary and Extending) Act, 1931, and thereafter the rate fixed annually by Act of the Central Legislature.
6.	SILVER	Three annas and seven and one-fifth pies per ounce Troy.
7.	STEEL INGOTS	Four rupees per ton.
8.	SUGAR, PRODUCED IN A FACTORY ORDINARILY USING POWER IN THE COURSE OF PRODUCTION OF SUGAR — "Sugar" means any form of sugar containing more than ninety per cent. of sucrose: — (1) Sugar other than Khandsari or Palmyra (2) Khandsari sugar— that is to say, sugar in the manufacture of which neither a vacuum pan nor a vacuum evaporator is employed. (3) Palmyra sugar— that is to say, sugar manufactured from jaggery obtained by boiling the juice of the palmyra palm.	Three rupees per cwt. Eight annas per cwt. Nil.
^a [9].	TOBACCO— "Tobacco" means any form of tobacco, whether cured or uncured, and whether manufactured or not, and includes the leaf, stalk and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth. I. Unmanufactured tobacco — (1) if flue-cured and intended for — (a) manufacture into cigarettes containing— Per lb. ^b [(i) more than 60 per cent. weight of imported tobacco (ii) more than 40 per cent. but not more than 60 per cent. weight of imported tobacco (iii) more than 20 per cent. but not more than 40 per cent. weight of imported tobacco (iv) 20 per cent. or less than 20 per cent. weight of imported tobacco (v) no imported tobacco (b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b) (2) if other than flue-cured and intended for— (a) manufacture into cigarettes (b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b) (3) whether flue-cured or not, if intended for— (a) manufacture into— (i) biris (ii) snuff (iii) cigars and cheroots (iv) hookah tobacco (b) sale as chewing tobacco, whether manufactured or merely cured (c) agricultural purposes (4) Stalks d[*] and other refuse of tobacco intended for use in the preparation of any form of manufactured tobacco	Seven rupees and eight annas. Five rupees. Three rupees and eight annas. Two rupees and eight annas. One rupee.] — ^c [Seven rupees and eight annas.] Nine annas. Nine annas. Three annas. Three annas. Three annas. Nil. One anna.

Item No.	Description of goods.	Rate of duty.
II. Manufactured tobacco—		
Cigars and cheroots of which the value—		
		Per hundred.
(i) exceeds Rs. 30 a hundred	Twelve rupees.
(ii) exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred	Ten rupees.
(iii) exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred	Eight rupees.
(iv) exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred	Six rupees.
(v) exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred	Four rupees.
(vi) exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred	Two rupees.
(vii) exceeds Rs. 2-8 a hundred but does not exceed Rs. 5 a hundred	One rupee.
(viii) exceeds Rs. 1-4 a hundred but does not exceed Rs. 2-8 a hundred	Eight annas.
(ix) exceeds Annas 12 a hundred but does not exceed Rs. 1-4 a hundred	Four annas.]
[a] Substituted by the Indian Finance Act, 1944, S. 5 and Sch. I. [b] Substituted by the Indian Finance Act, 1945, S. 6, for the original (a) (i) (ii) (iii) entries. [c] Substituted by S. 6, <i>ibid.</i> , for "Three rupees and eight annas." [d] The word "stems" was omitted by S. 6, <i>ibid.</i>		
10. TYRES—		
"Tyre" means a pneumatic tyre in the manufacture of which rubber is used and includes the inner tube and the outer cover of such a tyre.		Ten per cent. <i>ad valorem</i> .
11. VEGETABLE PRODUCT—		
"Vegetable product" means any vegetable oil or fat which whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption.		Five rupees per cwt.
^a [12. BETEL-NUTS, cured—		
"Betel-nut" means the fruit of the areca-palm (<i>areca catechu</i>), whether with or without husk, whether cured or uncured, but does not include the fruit while still attached to the tree	^b [One anna] per lb.
13. COFFEE, cured—		
"Coffee" means the seed of the coffee tree (<i>coffea</i>), whether with or without husk, whether cured or uncured, but does not include the seed while still attached to the tree	Two annas per lb.
14. TEA—		
"Tea" means the commodity known as tea made from the leaves of the plant <i>Camellia Thea</i> (Linn) and includes green tea	Two annas per lb.]
[a] Added by the Indian Finance Act, 1944, S. 5 and Sch. I. [b] Substituted for "Two annas" by the Indian Finance Act, 1946 (7 [VII] of 1946), S. 9. [30-3-1946].		

THE SECOND SCHEDULE

(See sections 6 and 8)

PART A

Excisable goods specified for the purposes of section 6—

1. Tobacco.

^a[2. Betel-nuts } When supplied by a curer to a whole-sale dealer, whether directly or through a broker or commission agent.]

3. Coffee }

[a] Added by the Indian Finance Act, 1944, S. 5 and Sch. I.

PART B

Excisable goods specified for the purposes of section 8—

1. Tobacco.

THIRD SCHEDULE

(See section 39)

Year.	No.	Short title.	Extent of repeal.
1879	XVI	... The Transport of Salt Act, 1879	... The whole.
1882	XII	... The Indian Salt Act, 1882...	... The whole.

Year.	No.	Short title.	Extent of repeal.
1889	IV (Madras) ...	The Madras Salt Act, 1889 ... ..	... The whole.
1890	II (Bombay)	The Bombay Salt Act, 1890 ... ..	... The whole.
1908	X	The Indian Salt Duties Act, 1908 ... ..	... The whole.
1917	II	The Motor Spirit (Duties) Act, 1917 ... ..	... The whole.
1922	XII	The Indian Finance Act, 1922 ... ..	... The whole.
1930	XVIII	The Silver (Excise Duty) Act, 1930 ... ..	... The whole.
1931	...	The Indian Finance (Supplementary and Extending) Act, 1931 ... ..	... The whole.
1934	XIV	The Sugar (Excise Duty) Act, 1934 ... ..	... The whole.
1934	XVI	The Matches (Excise Duty) Act, 1934 ... ..	... The whole.
1934	XXIII	The Mechanical Lighters (Excise Duty) Act, 1934 ... ..	... The whole.
1934	XXXI	The Iron and Steel Duties Act, 1934 ... ..	... The whole.
1938	XIII	The Sind Salt Law Amendment Act, 1938 ... ..	... The whole.
1941	X	The Tyres (Excise Duty) Act, 1941 ... ..	... The whole.
1943	X	The Tobacco (Excise Duty) Act, 1943 ... ..	... The whole.
1943	XI	The Vegetable Product (Excise Duty) Act, 1943 ... ..	... The whole.

THE CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920 (ACT XIV OF 1920)

CONTENTS.

SECTIONS.

1. Short title and extent.
2. Interpretation.
3. Power to apply to the Court in respect of trusts of a charitable or religious nature.
4. Contents and verification of petition.
5. Procedure on petition.
6. Failure of trustee to comply with order under section 5.

SECTIONS.

7. Powers of trustee to apply for directions.
8. Costs of petition under this Act.
9. Savings.
10. Power of Courts as to costs in certain suits against trustees of charitable and religious trusts.
11. Provisions of the Code of Civil Procedure to apply.
12. Barring of appeals.

STATEMENT OF OBJECTS AND REASONS.

"The Religious Endowments Act, 1863 (XX of 1863), was the result of the decision of the Government to divest its officers of all direct superintendence and control of religious and charitable endowments in India, transferring their functions to manager or managing committees, and merely making provision for intervention by the Civil Courts on application made by any person interested in a particular institution. This policy, however, did not long remain unchallenged, and since 1866 there have been constant complaints, especially in the Madras Presidency, as to the inefficacy of the Act to prevent the squandering or misappropriation of the funds of such endowments, and suggestions for its amendment have from time to time been made to the Government of India. Mr. Ananda Charlu in 1897, Mr. Srinivasa Rao in 1903 and Dr. (now Sir) Rash Bihari Ghosh in 1908, for example, promoted amending Bills, but none of them became law. More recently in 1911, a private Bill was introduced in Bombay Legislative Council by the Hon'ble Sir Ibrahim Rahimtoola, to provide for the registration of all charitable trusts exceeding a certain value and for the annual audit of the accounts of such trusts by auditors approved by Government. Endowments of a purely religious nature were not included but the contents of the Bill made it clear that the ultimate object was to press for legislation for religious as well as secular trusts. About the same time a private Bill was promoted by two non-official members of the Madras Legislative Council to provide for the regular publication of the accounts of all religious endowments above a certain value and for their audit by an officer to be appointed by the District Judge. These proposals led the Government of India to

reconsider the policy in force since 1863. In March 1914, the whole subject was discussed at a mixed conference of official and non-official gentlemen representing the Hindu, Muhammadan, Sikh and Buddhist communities. The present Bill, which is the outcome of the deliberations of that conference, has as its objects the simplification and cheapening of the legal processes by which persons interested can obtain information regarding the working of both religious and charitable trusts, and the exercise of a more efficient control over the action of trustees. The Bill provides that any person interested in a trust may apply by petition to the District Judge for an order directing the trustee to furnish him with information as to the nature and objects of the trust and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and also directing that the accounts of the trust shall be examined and audited. Failure to comply with such an order of the Court would be deemed a breach of trust. In order, however, that such applications should not lead to protracted and contentious litigation, the Court is debarred from trying any question of title between the petitioner and any person claiming title to the trust, or any question as to the existence or extent of any trust. Under the Bill, it will be left to those interested to move in the matter; the initiative will not rest with Government, nor will anything be done where no one is sufficiently interested to take action. When the Court is moved the proceedings will be simple and expeditious; they will be held in the presence of all parties, and the order passed will be a judicial order of the Court. Further, in order to meet

the objection that recourse to S. 14 of the Act of 1863 or S. 92 of the Code of Civil Procedure 1908, involves expensive litigation the Court is authorised, on the application of the plaintiff and after the defendant is heard, to direct the defendant either to furnish security for the expenditure incurred or likely to be incurred in bringing and maintaining the suit or to deposit in Court an amount sufficient to meet such expenditure.

It will be observed that the draft Bill only embodies

general principles. It is intended that such details as the institution of some public record of the facts regarding these trusts, the publication of audited accounts, and the relaxation of some of the conditions governing committees constituted under the Act of 1863, e. g., the tenure of the membership of such committees, should be left to Provincial Legislatures."

—Gazette of India, 1919, Part V, page 88.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act XLI of 1923.

—Adapted by A. O.

—Amended in Bengal by Bengal Act, XIII of 1934.

COGNATE ACTS AND PROVISIONS

1. Charitable Endowments Act, VI of 1890.

2. Civil Procedure Code, S. 92.

THE CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920.

(ACT XIV OF 1920.)^a

[20th March, 1920.]

An Act to provide more effectual control over the administration of Charitable and Religious Trusts.

WHEREAS it is expedient to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature, and to enable the trustees of such trusts to obtain the directions of a Court on certain matters, and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts; It is hereby enacted as follows:—

[a] For Report of Select Committee, see Gazette of India, 1920, Pt. V, p. 85, and for Proceedings in Council, see *ibid.*, 1919, Pt. VI, p. 879, and *ibid.*, 1920, Pt. VI, pp. 49 and 787.

The provisions of this Act, in so far as they are inconsistent with the provisions of the Bengal Wakf Act, 1934 (Ben. 13 [XIII] of 1934), do not apply to any Wakf property in Bengal: see that Act, S. 81.

Short title and extent.

1. (1) This Act may be called the CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920.

(2) It extends^a to the whole of British India:

Provided that the ^b[Government of any Province] may, by notification in the ^c[Official Gazette] direct that this Act, or any specified part thereof, shall ^dnot extend to ^e[that Province or any specified area therein] or to any specified trust or class of trusts.

[a] This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch. [b] Substituted by A. O. for "Governor-General in Council". [c] Substituted by A. O. for "Gazette of India". [d] For notification directing that this Act shall not extend to the N.-W. F. P., see General Rules and Orders, Vol. IV, p. 563. [e] Substituted by A. O. for "any specified Province or area".

Preamble — Note 1

[1] This Act is intended to provide more effectual control over the administration of charitable and religious trusts. (Vol 14) 1927 Pat. 189 (190).

[2] The Charitable and Religious Trusts Act of 1920 applies only to trusts of a charitable and religious nature and not to private trusts. (Vol 30) 1943 Pat. 135 (137): 21 Pat. 815.

Section 1 — Note 1

[1] "We have added a proviso to sub-clause (2) of clause 1 which will enable any Province or a part of a Province to be excluded from the operation of the Act if it is found to be unsuited to special local conditions. As it appears that there are certain trusts within the scope of the Act which are subject to a satisfactory system of management and control, we have at the same time provided that the operation of the Act may be barred in the case of any particular trust or class of trusts."—*Select Committee Report*.

[2] The provisions of this Act are not repealed by the Madras Religious Endowments Act (2 [II] of 1927). (Vol 22) 1935 Mad 56 (56).

[3] The Charitable and Religious Trusts Act was passed earlier than Mussalman Wakf Act of 1923 and is applicable to persons of all creed, unlike the latter Act. The Act is not to be interpreted in the light of the Mussalman Wakf Act. (Vol 24) 1937 All 786 (789): I L R (1938) All 1.

[4] The mere fact that this Act and the Mussalman Wakf Act, 1923, contain substantial provisions overlapping each other can in no way derogate from the provisions of this Act. Nor are the two Acts mutually exclusive or superfluous. (Vol 24) 1937 All 786 (789): I L R (1938) All 1.

[5] Provisions under this Act are wider than those of the Mussalman Wakf Act, 1923. (Vol 31) 1944 Nag 190 (191): I L R (1944) Nag 775.

[6] Whereas the Mussalman Wakf Act, 1923, deals with a trust by a Muhammadan whatever its purpose, public or private or partly public and partly private, the Charitable and Religious Trusts Act, 1920, covers such trusts as are created or exist for a public purpose only. (Vol 16) 1929 Oudh 225 (228): 4 Luck 429 (F B).

2. In this Act, unless there is anything repugnant in the subject or context, "the Court" *Interpretation.* means the Court of the District Judge ^a[or any other Court empowered in that behalf by the ^b[Provincial Government]] and includes the High Court in the exercise of its ordinary original civil jurisdiction.

[a] *Inserted by the Charitable and Religious Trusts (Amendment) Act, 1923* (41 [XLI] of 1923), S. 2.

[b] *Substituted by A. O. for "Local Government".*

3. Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely :—

(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and

(2) directing that the accounts of the trust shall be examined and audited :

Provided that no person shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition.

Section 2 — Note 1.

[1] Under this Act District Judge acts as a Court of law and not as a "persona designata" : District Judge's Court is a Court subordinate to the High Court. (Vol 16) 1929 All 581 (588) : 51 All 957.

SECTION 3 — SYNOPSIS.

1. Appeal or revision — See Section 12.
2. Applicability and scope.
3. Essentials of trust.
4. "Examined and audited."
5. Jurisdiction of Court.
6. Nature of proceeding — See Section 5.
7. "Person having an interest."
8. Proper party — See Section 5.
9. Proviso.
10. "Public purpose."
11. Res judicata. — See Section 5.

1. Appeal or revision. — See Section 12.

2. Applicability and scope. — [1] A trust partly for public and charitable purposes and partly for private purposes falls under the Act and S. 3 can be applied to it. (Vol 28) 1936 All 411 (412) ; (Vol 24) 1937 All 786 (789) : I L R (1938) All 1 ; (Vol 24) 1937 Cal 313 (314). (Under a wakf certain properties were dedicated for the benefit of the heirs of the wakif and others were dedicated in the name of god in order that poor relations and helpless widows in the neighbourhood may get something : *Held* S. 3 would apply to the wakf.)

[See however (Vol 16) 1929 Oudh 225 (229) : 4 Luck 429 (F. B.). (The Act of 1920 applies to those cases where the benefit under the entire "wakf" or trust is allotted for public purposes.)]

[2] Trust (Wakf) partly private and partly public — Interested person can apply under S. 4, Mussalman Wakf Act, 1923, and not under S. 3, Charitable and Religious Trusts Act. (Vol 16) 1929 Oudh 225 (229) : 4 Luck 429 (F. B.).

[3] Land given to a Mahant and his heirs as occupancy tenants under a settlement decree without a right of transfer with condition that the grant to last so long as temple would be in existence — No condition of income being devoted to expenses of the temple — Grant is not for temple but is personal — Land covered by settlement decree is not wakf property — This Act does not apply. (Vol 15) 1928 Oudh 241 (244-246) : 3 Luck 892.

[4] Remedy of a mutwalli against a person claiming adversely to trust is to sue for ejectment. He cannot apply under the Act. (Vol 31) 1944 Nag 190 (191) : I L R (1944) Nag 775.

3. Essentials of trust. — [1] The term "trust" as used in S. 3 must be taken in a wider sense than the strict meaning of it under English law and must be deemed to include wakfs created for public purposes of a charitable or religious nature. (Vol 18) 1931 Pat 354 (355) : 10 Pat 506.

[2] The trust to which the Act applies need not be an express trust. The Act applies also to a trust which on the construction of the deed may be held to be created for a public purpose of a charitable or religious nature. (Vol 23) 1936 All 411 (412).

[3] Per *Wazir Hasan J.* — The essence of a trust for a public or a religious purpose lies in its characteristic of permanency. So where a tenure can come to an end on default or even on the volition of the trustee the possibility of such a trust cannot be conceived. (Vol 15) 1928 Oudh 241 (246) : 3 Luck 892.

[4] To constitute a trust "created or existing for a public purpose of a charitable or religious nature" the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. (Vol 25) 1938 P C 195 (198) : 65 Ind App 252 : I L R (1938) Lah 453 : 32 Sind L R 821 (P C) ; (Vol 22) 1935 P C 97 (102) : 62 Ind App 146 : 57 All 330 (P C).

[5] The substance of a trust must be looked into to determine its character. Therefore, where a trust is in substance a public one the fact that a part of the income has been allotted for a private purpose cannot alter its character. Similarly, where it is private the fact that a negligible portion of the income is dedicated to public purposes cannot make it a public trust. (Vol 24) 1937 All 786 (789) : I L R (1938) All 1.

Proof. — [6] Before a private grant can be treated as public endowment very strong evidence is necessary to prove it. Unfettered and unrestricted user by the public must be proved. (Vol 17) 1930 Oudh 96 (106).

[7] If the public were concerned in the election of a new mahant it would be evidence that the public were intimately concerned with the trust and would suggest that the trust was for public purposes. (Vol 30) 1943 Pat 135 (141) : 21 Pat 815.

4. (1) The petition shall show in what way the petitioner claims to be interested in the trust, *Contents and verification of petition.* and shall specify, as far as may be, the particulars and the audit which he seeks to obtain.

(2) The petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

5. (1) If the Court on receipt of a petition under section 3, after taking such evidence and *Procedure on petition.* making such inquiry, if any, as it may consider necessary, is of opinion that the trust to which the petition relates is a trust to which this Act applies, and that the petitioner has an interest therein, it shall fix a date for the hearing of the petition, and shall cause a copy thereof, together with notice of the date so fixed, to be served on the trustee and upon any other person to whom in its opinion notice of the petition should be given.

Section 3 (contd.)

[8] The public nature of a trust must not be too readily inferred from the fact that worship by the public has not been interfered with or discouraged and offerings by the public even accepted. But that is also one of the factors to be considered. (Vol 30) 1943 Pat 135 (141): 21 Pat 815

[9] To constitute a valid public trust or endowment there must be proof of a grant with the intention that profits should be utilised for the services of the idol, and that the members of the family of the founder had not treated the property as their own personal property. (Vol 22) 1935 Oudh 96 (103, 104).

[10] There is nothing in the word 'Bishnuprit' to indicate that the property referred to as such is gifted to the idol for public purposes. (Vol 30) 1943 Pat 135 (139): 21 Pat 815.

[11] Performance of the ceremony known as 'prasad utarga' betokens the relinquishment of private property rights of the founder of the endowment and the dedication of the property to the idol in whose favour the property is given up. (Vol 22) 1935 Oudh 96 (106).

[12] By mere acquisition by a mahant, a property does not lose its secular character and assume a religious character. The descent from guru to chela does not warrant the presumption that it is religious property. (Vol 30) 1943 Pat 135 (138): 21 Pat 815.

4. "Examined and audited."—[1] Under S. 3 cl. (2), the Court is enabled to direct the examination and audit of the accounts in whosever's hands the funds or the properties may be. (Vol 25) 1938 Pat 280 (281).

5. Jurisdiction of Court.—[1] The existence of a public trust is the foundation for all proceedings authorized by S. 3 of the Act. (Vol 27) 1940 P C 7 (9): 67 Ind App 1: 15 Luck 1: 1 I L R (1940) Kar P C 25 (P C).

[2] The District Judge has jurisdiction in respect of a wakf the bulk of the income of which is devoted to public and charitable purposes. (Vol 18) 1931 Pat 354 (356): 10 Pat 506.

[3] Mere denial of trust by a non-applicant or the setting up of an adverse title cannot oust the jurisdiction of the Court. (Vol 31) 1944 Nag 190 (191): 1 I L R (1944) Nag 775.

[4] The Madras Hindu Religious Endowments Act of 1927 does not oust the jurisdiction of the District Judge to take action under this Act in respect of a religious endowment. The failure of the Hindu Religious Endowments Board is a good reason for his taking action (Vol 22) 1935 Mad 56 (56).

6 Nature of proceeding.—See section 5.

7. "Person having an interest."—[1] "We have considered a number of suggestions that the word 'interest' in this clause should be defined, but as the expression is not defined in section 92 of the Code of Civil Procedure, 1908, to which this Bill is merely ancillary, we have decided not to attempt a definition."—*Select Committee Report.*

[2] The words "having an interest in trust" must in each case depend upon the nature of the trust. (Vol 15) 1928 All 758 (759): 50 All 880.

[3] Members of the general public who worship at religious institutions are interested in the public trust for purposes of the Act. (Vol 21) 1934 Lah 949 (958).

[4] Secretary of another public institution is, as such and as one entitled to stay in Dharmasala, created by trust, interested in such trust (Vol 15) 1928 All 758 (759): 50 All 880.

8. Proper party.—See section 5.

9. Proviso.—[1] "We consider that no claim for accounts should be allowed to relate back for more than three years from the date of the presentation of the petition and have provided accordingly."—*Select Committee Report.*

10. "Public purpose."—[1] The substance of the trust and primary intention of creator must be seen. (Vol 16) 1929 Oudh 225 (228): 4 Luck 429.

[2] Benefit of specified person or class of persons such as kindreds, dependants and others is not a public purpose. (Vol 16) 1929 Oudh 225 (227): 4 Luck 429.

[3] A gift which benefits only a small section of the public may be a public trust. (Vol 30) 1943 Pat 135 (140): 21 Pat 815.

[4] Where a substantial portion of the profits of the endowed property is earmarked for the support of relations of settlor and remaining portion for public of Shia community, the wakf is not wholly for public purposes. (Vol 17) 1930 Oudh 53 (54).

[5] A trust providing for "sadarabat" and for contribution towards marriages and education of Brahmin children is a public trust though the duty to which the property was endowed may be installed in a private temple which is open to public. (Vol 16) 1929 Pat 723 (728).

[6] Dedication of property to idol is a trust of religious nature which this Act is intended to cover. (Vol 28) 1941 Nag 317 (319): 1 I L R (1942) Nag 469.

[7] A mosque built with public subscriptions and used by Muhammadan public for offering prayers was held a "religious trust" within the meaning of S. 3. (Vol 23) 1936 Lah 695 (696): 17 Lah 768.

[8] Where a grant by the disciple is described as 'Gurudakshina' and the grant is to be held by the grantee generation after generation, the gift is to the Mahant personally. (Vol 30) 1943 Pat 135 (139): 21 Pat 815.

11. Res judicata.—See Section 5.

Section 5 — Note 1

Death of trustee — [1] Cause of action against trustee terminates on his death and does not survive against his widow or daughter. (Vol 31) 1944 Nag 190 (192): 1 I L R (1944) Nag 775.

"Further inquiries." — [2] Before passing an order under S. 5 the Court to which an application is presented under S. 3 must determine whether there is a trust to which the Act applies and also whether the petitioner is a person interested in the trust. It cannot

(2) On the date fixed for the hearing of the petition, or on any subsequent date to which the hearing may be adjourned, the Court shall proceed to hear the petitioner and the trustee, if he appears, and any other person who has appeared in consequence of the notice, or who it considers ought to be heard, and shall make such further inquiries, if any, as it thinks fit. The trustee may and, if so required by the Court, shall, at the time of the first hearing or within such time as the Court may permit, present a written statement of his case. If he does present a written statement, the statement shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying pleadings.

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such suit is so instituted, shall continue the stay, until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit :

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the Court which conflicts with the final decision therein.

(6) Save as provided in this section, the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General.

Section 5 (contd.)

pass an order without enquiry. (1934) 1934 M W N 205 (206).

[3] Where on an application the other party objects on the ground that recourse to the Act was barred by an award in arbitration, the District Judge has jurisdiction to decide whether the trust was one to which the Act applies. (Vol 29) 1942 Oudh 387 (387).

"If no such undertaking is given." — [4] Where no undertaking required by S. 5 (3) is given, the District Judge himself can decide whether the trust is one to which the Act applies. (Vol 25) 1938 Oudh 262 (262,263).

Nature of proceeding. — [5] The decision of the Court under this Act, a decision from which by S. 12 there is no appeal, is a decision in a summary proceeding which is not a suit nor of the same character as a suit. (Vol 27) 1940 P C 7 (9) : 67 Ind App 1 : 15 Luck 1 : I L R (1940) Kar P C 25 (P C). (Doctrine of *res judicata* does not apply.) (Vol 31) 1944 Nag 190 (191) : I L R (1944) Nag 775.

Proper party. — [6] Application under S. 3 — All the trustees of a temple should be made parties and given notice. (Vol 12) 1925 Mad 135 (136).

[7] A person who has claims adverse to the trust and who is not liable under S. 3 is not proper party. (Vol 12) 1925 Cal 537 (538).

"Question of title." — [8] The Court while deciding the question as to the existence of the trust cannot try or determine any question of title as between the petitioner and any person claiming adverse to the trust. (Vol 21) 1934 Bom 343 (344) : 58 Bom 623.

Res judicata. — [9] A person aggrieved with an order passed under this Act holding a trust as public can institute a separate suit to have it declared otherwise. The order passed being one in a summary pro-

ceeding does not operate as *res judicata* even though he was a party to the proceedings. (Vol 27) 1940 P C 7 (9) : 67 Ind App 1 : 15 Luck 1 : I L R (1940) Kar P C 25 (P C); (Vol 16) 1929 All 506 (508) : 51 All 805; (Per Niamatullah J.); (Vol 21) 1934 Bom 343 (345) : 58 Bom 623; (Vol 21) 1934 Lah 771 (773) : 16 Lah 85; (Vol 31) 1944 Nag 190 (191) : I L R (1944) Nag 775; (Vol 22) 1935 Oudh 96 (106).

Suit for declaration. — [10] In a suit by a trustee under S. 5 (3) of the Act that the trust is not a public trust and the Act does not apply thereto, the onus is on the party who alleges that the property is trust property held for public purpose. (Vol 30) 1943 Pat 135 (137) : 21 Pat 815.

[11] As to whether an appeal or revision lies from an order passed under this section, see section 12.

Section 6 — Note 1

[1] Under S. 6 once the breach is committed by disobedience of orders to produce accounts a suit under S. 92, Civil P. C., can be filed without sanction from the Advocate-General. (Vol 20) 1933 Mad 854 (854, 855) : 57 Mad 153.

[2] Once a breach of trust has been committed by a trustee by his refusal to produce the accounts, any person (who need not be the person who obtained permission from the Court) can institute the suit under S. 92, Civil P. C., though he may not be interested in the trust. (Vol 20) 1933 Mad 854 (854) : 57 Mad 153.

[3] A suit under S. 92, Civil P. C., for a breach of trust under S. 6 of this Act, can be prosecuted by the remaining plaintiffs though some of the plaintiffs happen to drop out and even though they happen to be the persons who obtained the permission to file the suit. (Vol 20) 1933 Mad 854 (855) : 57 Mad 153.

[4] In a suit under S. 92, Civil P. C., for breach of trust by virtue of S. 6, the reliefs claimed must be con-

7. (1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for public purpose of a charitable or religious nature *Powers of trustee to apply for directions.* may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon :

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner, as it thinks fit.

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction, shall afford a reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made.

8. The costs, charges and expenses of and incidental to any petition, and all proceedings in connection therewith, under the foregoing provisions of this Act, shall be in the *Costs of petition under this Act.* discretion of the Court, which may direct the whole or any part of any such costs, charges and expenses to be met from the property or income of the trust in respect of which the petition is made, or to be borne and paid in such manner and by such persons as it thinks fit :

Provided that no such order shall be made against any person (other than the petitioner) who has not received notice of the petition and had a reasonable opportunity of being heard thereon.

9. No petition under the foregoing provisions of this Act in relation to any trust shall be *Savings.* entertained in any of the following circumstances, namely :—

(a) if a suit instituted in accordance with the provisions of section 92 of the Code of Civil Procedure, 1908, is pending in respect of the trust in question ;

Section 6 (contd.)

fined to those which arise out of the failure to produce the accounts and are connected with it. (Vol 20) 1933 Mad 554 (855) : 57 Mad 153.

[See however (Vol 17) 1930 All 582 (583) : 52 All 863. (The District Judge can grant any relief under S. 92 (1), Civil P. C.)]

[5] The terms of S. 6 are intended to define the consequences of the orders made by the District Judge. But the words "if a trustee without reasonable cause fails to comply" in the section cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under S. 92, Civil P. C. (Vol 27) 1940 P C 7 (9) : 67 Ind App 1 : 15 Luck 1 : I L R (1940) Kar P C 25 (P C).

[6] In a suit under S. 92, Civil P. C., instituted on the basis of S. 6 of this Act, a wholesale enquiry into the general misconduct of the defendant or his negligence cannot be made. (Vol 17) 1930 All 582 (584) : 52 All 863.

[7] Suit on basis of S. 6, filed — Accounts for whole period of trusteeship can be ordered. (Vol 17) 1930 All 582 (584) : 52 All 863.

Section 7—Note 1.

[1] A trustee can apply to the Civil Court, within whose jurisdiction a substantial part of the subject-matter of the trust is situate, for advice, opinion or direction, with respect to administration or management of the trust property. (Vol 22) 1935 All 360 (361).

[2] A trustee is entitled to seek advice for his own protection and if he follows that advice he is protected, but if he does not choose to follow it he cannot be compelled to do so although failure to follow will be at his own risk. (Vol 23) 1936 All 801 (802).

[3] The District Judge should not express an opinion without allowing the parties to produce evidence and without going into the points in controversy and where he does so it constitutes material irregularity in the exercise of jurisdiction. (Vol 22) 1935 All 147 (147).

[4] When a trustee makes an application to the District Judge to obtain his advice or opinion, a case is presented before him for decision. (Vol 16) 1929 All 581 (583) : 51 All 957.

[See also (Vol 4) 1917 P C 71 (74) : 44 Ind App 261 : 40 Mad 793 (P C). (The word 'case' cannot be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief as damages or otherwise against a defendant who is before the Court. It includes an *ex parte* application also and the matter adjudicated upon is a case — Case under the Bengal and Madras Native Religious Endowments Act, 1863.)]

[5] Order of District Judge on an application under S. 7 cannot be treated as a decree nor can it be regarded as an appealable order. (Vol 22) 1935 All 147 (148).

[6] Where there has been a material irregularity in the exercise of jurisdiction and the case has been decided the High Court has powers to interfere in revision. (Vol 22) 1935 All 147 (148).

- (b) if the trust property is vested in the Treasurer of Charitable Endowments, the Administrator-General, the Official Trustee, or any Society registered under the Societies Registration Act, 1860 ; or
- (c) if a scheme for the administration of the trust property has been settled or approved by any Court of competent jurisdiction, or by any other authority acting under the provisions of any enactment.

10. (1) In any suit instituted under section 14 of the Religious Endowments Act, 1863, or *Power of Courts as to costs under section 92 of the Code of Civil Procedure, 1908, the Court in certain suits against trustees of charitable and religious trusts.* trying such suit may, if, on application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustees of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part.

(2) When any money has been deposited in accordance with an order made under subsection (1), the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit. Before making over any sum to the plaintiff, the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Provisions of the Code of Civil Procedure to apply. **11. (1)** The provisions of the Code of Civil Procedure, 1908, relating to —

- (a) the proof of facts by affidavit,
- (b) the enforcing of the attendance of any person and his examination on oath,
- (c) the enforcing of the production of documents, and
- (d) the issuing of commissions,

shall apply to all proceedings under this Act, and the provisions relating to the service of summonses shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall, so far as they are applicable, apply to the execution of orders under this Act.

12. No appeal shall lie from any order passed or against any opinion, advice or direction *Barring of appeals.* given under this Act.

PROVINCIAL AMENDMENT.

Bengal — After section 12 the following section shall be *added.* —

This Act not to apply to wakf property in Bengal. **"13.** The provisions of this Act, shall not, so far as they are inconsistent with the provisions of the Bengal Wakf Act, 1934, apply, to any wakf property in Bengal."
— BENGAL ACT 8 [VIII] of 1934, S. 81.

Section 10—Note 1.

[1] Defendant may either furnish security or deposit money and the Court cannot specify which he is to do. (Vol 11) 1924 Lah 408 (409).

[2] An order asking defendant to deposit money in Court under S. 10 is a 'case' within S. 115, Civil P. C. (Vol 11) 1924 Lah 408 (408).

Section 12—Note 1.

[1] The decision of the District Judge under the Act is one from which there is no appeal. (Vol 27) 1940 P O 7 (9) : 67 Ind App 1 : 15 Luck 1 : 1 L R (1940) Kar P O 25 (PC).

[2] Order under S. 3 is revisable. (Vol 25) 1938 Oudh 262 (262, 263); (Vol 23) 1936 Lah 695 (696) : 17 Lah 768.

[But see (Vol 29) 1942 Oudh 387 (387, 388). (Decision under S. 3 is a decision in a summary proceeding and is not revisable.)]

[3] Revision lies against an order passed under S. 5. (Vol 23) 1936 All 411 (411); (Vol 16) 1929 All 581 (583, 584) : 51 All 957.

[4] Where the District Judge decides under subsection (4) of S. 5 and there is no illegality or material irregularity, a revision will not lie against his order. (Vol 25) 1938 Oudh 262 (262).

THE CHARITABLE ENDOWMENTS ACT, 1890

(ACT VI OF 1890)

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STATEMENT OF OBJECTS AND REASONS.

"On many occasions the want has been felt in India of an official capable of discharging the functions which are discharged in England by the Official Trustees of Charity Lands and the Official Trustees of Charitable Funds. The object of this Bill is to meet that want.

2. Much property has from time to time in different parts of India been vested by founders in public servants, such as the Collector, Director of Public Instruction, Accountant-General and Divisional Commissioner. With respect to a case in which an Accountant-General and a Divisional Commissioner had been named as trustees, the Officiating Advocate-General of Bengal and the Officiating Standing-Counsel stated in a joint opinion in 1885 that persons cannot, as holders of certain posts, be appointed trustees "unless these posts are corporate ones". "Neither the office of the Accountant-General nor that of the Commissioner," they observed, "is a corporate office; and even if appointed by the designation of their office only, and not by name, the trust-fund would vest in them as individuals, and they would remain trustees until they themselves appointed others to succeed them or until they died."

3. There is a difficulty in India in finding any corporation capable of acting as a trustee in such cases as this Bill is designed to meet. The Secretary of State for India in Council and the Governor-General in Council are incapable of being trustees (L. R. 15 Ch. D. 9). It has also been held that Anglican Bishops and Archdeacons in India, who have been constituted by Letters Patent to be perpetual corporations, with power to take and hold property under grant or licence from the Crown, are not capable of acting as trustees in some of the cases for which this Bill is intended to provide. To the question whether the Lord Bishop of Calcutta in his

corporate capacity might not, under the Letters Patent for the Bishopric of Calcutta, bearing date the 14th May 1814, hold land upon trust for a Diocesan School so that, upon his ceasing to be Bishop, it would devolve without a deed upon his successor in the Bishopric, an eminent counsel in England, to whom the question was referred, has replied in the negative. "It is quite true," he remarks, "that the Bishop is a corporation sole, and in that capacity can hold the lands belonging to his See. He may, however, only hold such lands as by grant or licence from the Company (Now Her Majesty) he is authorized to take, hold and enjoy. I think it is clear that the Letters Patent only refer to lands belonging to, or purchased out of moneys belonging to, the Bishopric. . . . on the whole. I am of opinion that, if the land in question was conveyed to the Bishop as a trustee, it would pass on his death not to his successor but to his executors."

4. The Bill, it will be observed, is of a purely permissive character. The Government will be unable to make a vesting order or frame a scheme except on application for that purpose, and may, if it sees fit, refuse to act. The corporation sole in whom as Treasurer of Charitable Endowments property may be vested is, except as regards the disposal of any property by direction of the Government, to have nothing to do with the administration of the property. He is to be a bare trustee, the object of vesting the property in him by his name of office as a corporation sole being to secure the holding of the property by some one always present, and to avoid the difficulty and expense of appointing a new trustee on the retirement or death of any incumbent of the trust."

—Gazette of India, 1889, Part V, Page 137.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

- Adapted by A. O.
- Amended in Bengal by Bengal Act, XIII of 1934.
- Repealed in part and amended by Act, XXXVIII of 1920.

COGNATE ACTS AND PROVISIONS.

1. CHARITABLE AND RELIGIOUS TRUSTS ACT, XIV OF 1920.

THE CHARITABLE ENDOWMENTS ACT, 1890

(ACT VI OF 1890)^a

[7th March, 1890.]

An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.

WHEREAS it is expedient to provide for the vesting and administration of property held in trust for charitable purposes ; It is hereby enacted as follows :—

[a] For Report of the Select Committee, *see* Gazette of India, 1890, p. 65 ; and for Proceedings in Council, *see* *ibid.*, 1889, Pt. VI, pp. 117 and 190, and *ibid.*, 1890, Pt. VI, p. 37.

This Act has been declared to be in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 [III] of 1872), S. 3 ; in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch. ; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch.

This Act has been amended in its application to Bengal by the Bengal Wakf Act, 1934 (Ben. 13 [XIII] of 1934).

Title, extent and commencement. 1. (1) This Act may be called the CHARITABLE ENDOWMENTS ACT, 1890.

(2) It extends to the whole of British India, inclusive of [* * * *] British Baluchistan ; and

(3) It shall come into force on the first day of October, 1890.

[a] The words "Upper Burma and" were repealed by the Burma Laws Act, 1898 (13 [XIII] of 1898), S. 18 and Sch. V.

2. In this Act "charitable purpose" includes relief of the poor, education, medical relief and *Definition.* the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

3. ^a[(1) The Central Government may appoint an officer of the Government by the name of *Appointment and incorporation of Treasurer of Charitable Endowments.* his office to be Treasurer of Charitable Endowments for India, and the Government of any Province may appoint an officer of the Government by the name of his office to be Treasurer of Charitable Endowments for the Province.]

(2) Such Treasurer shall, for the purposes of taking, holding and transferring moveable or immoveable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for ^b[India or, as the case may be, the Province], and, as such Treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

[a] Substituted by A. O. for the original sub-section (1). [b] Substituted by A. O. for "the territories subject to the Local Government".

^a[3A. In the subsequent provisions of this Act, "the appropriate Government" means, as *Definition of "appropriate Government," etc.* respects a charitable endowment, the objects of which do not extend beyond a single Province and are not objects to which the executive authority of the Central Government extends, the Government of the Province, and as respects any other charitable endowment the Central Government.]

[a] Inserted by A. O.

4. (1) Where any property is held or is to be applied in trust for a charitable purpose, the *Orders vesting property in Treasurer.* ^a[appropriate Government], if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order, by ^bnotification in the Official Gazette, that the property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the ^a[appropriate Government] and the person or persons making the application, and the property shall thereupon so vest accordingly.

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

* [* * * * *]

(4) An order under this section vesting property in a Treasurer of Charitable Endowments

Section 4 — Note 1

[1] "We have made it clear that a Treasurer of Charitable Endowments is not to be an administering trustee of property vested in him as such Treasurer."—*Select Committee Report.*

shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

[a] *Substituted* by A. O. for "Local Government". [b] For notifications issued under this section in conjunction with S. 5, see different local Rules and Orders. [c] Sub-section (3) was *repealed* by A. O.

5. (1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the ^{Schemes for administration of property vested in the Treasurer.} [appropriate Government], if it thinks fit, may settle a scheme for the administration of any property which has been or is to be vested in the Treasurer of Charitable Endowments, and may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the [appropriate Government] may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the [appropriate Government] in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto, a decree or direction regarding the administration of the property to which the scheme relates:

^b[Provided that nothing in this sub-section shall be construed as precluding a Court from inquiring whether the Government by which a scheme was made was the appropriate Government.]

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the [appropriate Government], effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of property not already vested in the Treasurer of Charitable Endowments, it shall not come into operation until the property has become so vested.

[a] *Substituted* by A. O. for "Local Government". [b] *Inserted* by A. O.

PROVINCIAL AMENDMENT.

Bengal. — To section 5 the following proviso shall be *added*, namely:—

"Provided that the powers of the Provincial Government under this section for the settlement, modification or substitution of a scheme for the administration of any property shall, in respect of any wakf property in Bengal, be exercised, subject to the approval of the Provincial Government, by the Board of Wakfs appointed under the Bengal Wakf Act, 1934."

— Bengal Act 13 [XIII] of 1934, S. 79.

Mode of applying for vesting orders and schemes.

6. (1) The application referred to in the two last foregoing sections must be made,—

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2) For the purposes of this section the executor or administrator of a deceased trustee of property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust.

PROVINCIAL AMENDMENT.

Bengal. — After section 6 the following sub-section shall be *added*, namely:—

"(3) An application for the vesting of any property of the nature specified in sub-section (3) of section 4 may, notwithstanding anything contained in this section, be made by the Commissioner of Wakfs appointed under the Bengal Wakf Act, 1934, where such property is under the administration of an official mutwalli or of a mutwalli appointed under section 40 of that Act."

— Bengal Act 13 [XIII] of 1934, S. 80.

Section 5 — Note 1

[1] "We have provided more fully here for the ap- sion and protection of schemes settled under the pointment of administrating trustees, and the revi- section."—*Select Committee Report.*

7. [Exercise by Governor-General in Council of powers of Local Government.] *Repealed by A. O.*

8. (1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, *Bare trusteeship as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.*

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with the provision made in that behalf in the vesting order under section 4 or in the scheme, if any, under section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such Treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.

9. A Treasurer of Charitable Endowments shall cause to be published annually in the ^a[Official Gazette], at such time as the ^b[appropriate Government] may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

[a] *Substituted by A. O. for "local official Gazette".* [b] *Substituted by A. O. for "Local Government".*

10. (1) A Treasurer of Charitable Endowments shall always be a sole trustee, and shall not, *Limitation of functions and powers of Treasurer.* as such Treasurer, take or hold any property otherwise than under the provisions of this Act, or subject to those provisions, transfer any property vested in him except in obedience to a decree divesting him of the property, or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is ^a[specified in the direction], or in the purchase of immoveable property.

(3) When a Treasurer of Charitable Endowments is divested, by a direction of ^b[the appropriate Government] under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trusts as those on which it was held by such Treasurer.

[a] *Substituted by A. O. for "mentioned in section 4, sub-section (3), clause (a), (b), (c), (d) or (e)".* [b] *Substituted by A. O. for "the Local Government or the Governor-General in Council".*

11. If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the ^a[appropriate Government] may appoint the same or another officer of the Government by the name of his office to be such Treasurer, and thereupon the holder of the latter office shall be deemed for the purposes of this Act to be the successor in office of the holder of the former office.

[a] *Substituted by A. O. for "Local Government" which had been substituted for "Governor-General in Council" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.*

^a[12. If by reason of any alteration of areas or by reason of the appointment of a Treasurer of Charitable Endowments for India or for any Province for which such a Treasurer has not previously been appointed or for any other reason it appears to the Central Government that any property vested in a Treasurer of Charitable Endowments should be vested in another such Treasurer, that Government may direct that the property shall be so vested and thereupon it shall vest in that other Treasurer and his successors as fully and effectually for the purposes of this Act as if it had been originally vested in him under this Act.]

[a] *Substituted by A. O. for the original S. 12.*

Section 10 — Note 1

[1] "We have provided for the vesting in administering trustees of property of which a Treasurer of Charitable Endowments has been divested by a direction of the Government." — *Select Committee Report.*

a[13.

b:

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Power to frame forms
and make rules.

(2) The [appropriate Government] may make rules consistent with this Act for—

- (a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments;
- (b) regulating the cases and the mode in which schemes or any modification thereof are to be published before they are settled or made under section 5;
- (c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments and the mode in which such accounts are to be audited; and
- (d) generally carrying into effect the purposes of this Act.]

[a] Substituted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, for the original section.

[b] Sub-section (1) was repealed by A. O. [c] Substituted by A. O. for "Local Government."

14. No suit shall be instituted against the [Crown] in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereof, where the loss or misapplication has been occasioned by or through his wilful neglect or default.

[a] Substituted by A. O. for "Government."

15. Nothing in this Act shall be construed to impair the operation of section 111 of the Statute 53, George III, Chapter 155, or of any other enactment for the time being in force, respecting the authority of an Advocate General at a presidency to act with respect to any charity, or of sections 8, 9, 10 and 11 of Act No. XVII of 1864 (an Act to constitute an Office of Official Trustee) respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

[a] The East India Company Act, 1813, was repealed by the Government of India Act, 1915 (5 & 6 Geo. V, c. 61). [b] The Official Trustees Act, 1864, was repealed by the Official Trustees Act, 1913 (2 [II] of 1913).

16. [General controlling authority of Governor-General in Council.] Repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, Pt. I.

THE CHILD MARRIAGE RESTRAINT ACT, 1929.

(ACT XIX of 1929.)

CONTENTS.

SECTIONS.

1. Short title, extent and commencement.
2. Definitions.
3. Punishment for male adult below twenty-one years of age marrying a child.
4. Punishment for male adult above twenty-one years of age marrying a child.
5. Punishment for solemnising a child marriage.
6. Punishment for parent or guardian concerned in a child marriage.

SECTIONS.

7. Imprisonment not to be awarded for offences under section 3.
8. Jurisdiction under this Act.
9. Mode of taking cognizance of offences.
10. Preliminary inquiries into offences under this Act.
11. Power to take security from complainant.
12. Power to issue injunction prohibiting marriage in contravention of this Act.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Amended by Acts VIII of 1930; VII of 1938; XIX of 1938.

Section 14 — Note 1

[1] "In settling this section we have had regard to the expression of section 226 of the Municipal Corpora-

tions Act, 1882 (45 & 46 Vict., Ch. 50) to which, and to the cases on which that section was based, our attention was directed . . ."—*Select Committee Report.*

(ACT XIX OF 1929).^a

[1st October, 1929.]

An Act to restrain the solemnisation of child marriages.

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1927, Pt. V, p. 28 ; for Reports of Select Committees, see *ibid.*, 1928, Pt. V, pp. 111 and 165.

Short title, extent and commencement. 1. (1) This Act may be called the CHILD MARRIAGE RESTRAINT ACT, [1929].

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas ^b[and applies also to :

(a) all British subjects and servants of the Crown in any part of India; and

(b) all British subjects who are domiciled in any part of India wherever they may be].

(3) It shall come into force on the 1st day of April, 1930.

[a] Substituted by the Repealing and Amending Act, 1930 (8 [VIII] of 1930), S. 2 and Sch. I, for "1928". [b] Added to S. 1 (2) by the Child Marriage Restraint (Amendment) Act, 1938 (7 [VII] of 1938), S. 2. [12-3-1938].

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age ;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is ^a[or is about to be] thereby solemnised; and

(d) "minor" means a person of either sex who is under eighteen years of age.

[a] Inserted by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 [XIX] of 1938), S. 2. [9-4-1938].

The Child Marriage Restraint Act

Preamble — Note 1

[1] This Act aims at the restraint of performance of certain marriages. The question of validity of the marriages is beyond the scope of this Act. (Vol 23) 1936 All 11 (12) : 36 Cri L Jour 1483 : 58 All 402; (Vol 26) 1939 All 340 (340); (Vol 23) 1936 All 852 (853) : 38 Cri L Jour 301.

[2] An intention to give a child in marriage in contravention of this Act is an "unlawful purpose" within the meaning of S. 361, Penal Code. (Vol 20) 1933 Rang 98 (100) : 11 Rang 213 : 34 Cri L Jour 696 (F B).

[3] Though this Act does not mention the offence of abetting, yet there can be a prosecution under the provisions of the Penal Code for abetting an offence under this Act. (Vol 22) 1935 Pat 474 (475) : 37 Cri L Jour 227.

[4] Husband's obtaining possession of wife below 14 years is against policy of this Act. His right to possession may be enforced by recourse to the Court but not by use of force. (Vol 22) 1935 All 916 (917) : 37 Cri L Jour 35.

[5] There is no rule of Hindu law sanctioning early marriage. Sanction by usage also is disapproved by the Act. (1937) 1 L R (1937) 2 Cal 764 (766).

[6] Where mother of a Rajput girl of seven, bridegroom and priest were convicted under Ss. 6, 4 and 5, respectively and in revision it was urged that this Act was *ultra vires* as previous sanction of the Governor-General in Council was not given to the Bill as passed, it was held that the contracting parties being Hindus came within the scope of the original Bill; and that changes made by the Select Committee did not render inadequate the "previous sanction" accorded. (Vol 20) 1933 Pat 471 (472) : 35 Cri L Jour 20.

[7] In a case under this Act the Court should not apply strictly the principles with regard to setting aside of acquittals. It should derogate from the usual practice

of not setting aside acquittals except in exceptional cases. (Vol 22) 1935 Pat 474 (476) : 37 Cri L Jour 227.

Section 1 — Note 1

[1] Clauses (a) and (b) were added to sub-s. (2) by Act 7 [VII] of 1938. This addition has the effect of making this Act applicable to the persons mentioned therein irrespective of the place where the marriage is celebrated. There was a conflict of decisions as to the applicability of this Act in such a case prior to the above amendment for which see the following cases : (Vol 24) 1937 Mad 273 (274) : 38 Cri L Jour 587. (Act applies to marriages celebrated outside British India.); (Vol 25) 1938 Nag 235 (237) : 39 Cri L Jour 651: ILR (1939) Nag 241. (Solemnization of a child marriage outside British India is not an offence.); (Vol 22) 1935 Bom 437 (438) : 37 Cri L Jour 211 : 59 Bom 745. (Marriage of a minor contracted outside British India does not give rise to an offence.)

[2] Minor's estate in hands of Receiver—Marriage in contravention of Act to be performed at place where it is not prohibited—Court cannot sanction expenditure. (Vol 24) 1937 Cal 257 (258, 259) : 63 Cal 1153.

[3] An application in an administration suit for liberty to spend certain sum for a marriage in contravention of this Act but outside India, where it is not prohibited, cannot be granted. (Vol 28) 1941 Cal 244 (245).

[4] Mortgage effected by a manager of a joint Hindu family for the performance of the marriage of a minor in contravention of the provisions of this Act cannot be said to be for a necessary purpose and hence is not binding on the minor. (1941) 1941 Nag L Jour 282 (283).

[5] Held that the presumption was that the accused were British subjects and the place of birth being within their special knowledge, it was for them to rebut this presumption. (Vol 27) 1940 Nag 245 (246) : 41 Cri L Jour 645.

Section 2 — Note 1

[1] Certificate of birth of a person is conclusive evidence of his age so long as it is not disproved by evidence of the party denying its correctness. (Vol 22) 1935 Pat 474 (476) : 37 Cri L Jour 227.

Punishment for male adult below twenty-one years of age marrying a child.

3. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.

Punishment for male adult above twenty-one years of age marrying a child.

4. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both :

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

Section 3 — Note 1

[1] A Court sentencing an offender under S. 3 cannot direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment. See S. 7.

SECTION 5—SYNOPSIS

(1) Section 5.

(2) Sections 5 and 6.

1. Section 5.—[1] The words 'perform, conduct or direct' mean completing union and indicate solemnization of marriage. Mere participation by parents in ceremony of *kanyadan* is not penal. (Vol 27) 1940 Bom. 363 (364); 42 Cri L Jour 62; I L R (1940) Bom. 709.

[2] Performance of marriage is complete as soon as ceremony of marriage is performed. Consummation or *Gauna* is not part of marriage ceremony. The marriage being complete before the consummation, a person may be convicted under this Act though consummation has not taken place. (Vol 23) 1936 All 11 (11, 12); 36 Cri L Jour 1483; 58 All. 402.

[3] Section 5 takes account only of performing, conducting or directing actual marriage ceremony itself, and not of negotiation, preparation or any other preliminary acts. (Vol 25) 1938 Nag. 235 (236); 39 Cri L Jour 651; I L R (1939) Nag. 241.

[4] Merely applying for permission for conducting festivities on occasion of marriage does not amount to "performing, conducting or directing a child marriage," and clearly is no offence under S. 5: (Vol 28) 1936 Oudh 311 (312); 37 Cri L Jour 616; 12 Luck 363. (Permission asked was for holding *nach* with music and fire-works.)

[5] Merely advancing money to enable infant to marry in violation of the Act is not by itself punishable: (1937) I L R (1937) 2 Cal 764 (767).

[6] Where the person conducting the marriage of a minor has acted upon the certificate about the age from a person of qualifications lower than that of a Civil Surgeon, it cannot be said that the person has acted in good faith. The fact may however be taken into consideration when fixing the punishment. (Vol 21) 1934 All 331 (332); 35 Cri L Jour 677.

[7] Section 5 contemplates that purohit who solemnises marriage must make some reasonable enquiry as to the ages and satisfy himself that neither of the participants is a child. (Vol 24) 1937 Mad 490 (492); I L R 854; 38 Cri L Jour 594.

[8] Sentence upon the priest or other celebrant should be deterrent. (Vol 20) 1933 Pat 471 (472); 33 Cri L Jour 20.

[9] This Act is a penal statute and is applicable to all crimes committed under it in British India. The fact that the accused are foreigners makes no difference even if such an act is not an offence in the foreign place. This matter can be considered in mitigation of punishment. (1936) 37 Cri L Jour 757 (757) (Cal).

[10] Section 5 is wide enough to cover a case of fathers of both bridegroom and bride. (Vol 23) 1936 All 11 (12); 58 All 402; 36 Cri L Jour 1483.

[11] For fixing up the place of trial for the offence under S. 5, it is immaterial where the *tilak* ceremony took place. It is the place where the marriage ceremony was solemnized that fixes the place of trial. (Vol 21) 1934 All 829 (829); 57 All 83; 35 Cri L Jour 1175.

2. Sections 5 and 6. — [1] Sections 5 and 6 deal with different offences. For an offence under S. 5 the marriage is *not contracted* by the minor and is performed, conducted or directed by the accused, while for an offence under S. 6 the marriage is contracted by the minor and the accused being one of the persons mentioned therein promotes it or fails to prevent it. (Vol 23) 1936 All 11 (12); 58 All 402; 36 Cri L Jour 1483.

[2] Where a Hindu parent or guardian takes part in a child marriage, he is liable to punishment only under S. 6 and not for two offences under Ss. 5 and 6 respectively. Section 5 does not include bridegroom and parent or guardian of minor contracting party. That section applies to others. (Vol 19) 1932 Nag 174 (177); 28 Nag L R 302; 34 Cri L Jour 311.

[3] Section 5 applies only to solemnisation of marriage by others than parents and hence S. 6 alone applies to parents who participate in child marriage. (Vol 24) 1937 Mad 490 (491); 38 Cr L J 594; I L R (1937) Mad 854.

[4] In the case of complaints under Ss. 5 and 6 it is essential that the trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants, that is, the bridegroom was under the age of 18 or that the bride was under the age of 14. (Vol 26) 1939 Cal 288 (288); 40 Cri L Jour 605.

Section 6 — Note 1

[1] Application of section is not confined only to cases where the minor child directly enters into agreement

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under Imprisonment not to be awarded for offences under section 3. section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

8. Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, Jurisdiction under no Court other than that of a Presidency Magistrate or a ^a[Magistrate of the first class] shall take cognizance of, or try, any offence under this Act.

[a] The words "Magistrate of the first class" were substituted for the words "District Magistrate" by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 [XIX] of 1938), S. 3. [9-4-1938].

^a[9. No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.] Mode of taking cognizance of offences.

[a] Section 9 was substituted for the original section by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 [XIX] of 1938), S. 4. [9-4-1938].

10. The Court taking cognizance of an offence under this Act shall, unless it dismisses the Preliminary inquiries into offences under this Act. complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

Section 6 (contd.)

for marriage. The parent or guardian will be liable for the marriage of the minor, by whomsoever the agreement and arrangement may be made. (Vol 32) 1945 All 306 (306) : 1 L R (1945) All 272 : 47 Cri L Jour 43.

[2] Expression "when a minor contracts a child marriage" in S. 6 is wide enough to cover a case of marriage to which both parties are minors as well as to one to which one party is minor. (Vol 19) 1932 Nag 174 (177) : 34 Cri L Jour 311 : 28 Nag L R 302.

[3] This Act does not mention the offence of abetting but under the Penal Code there may be a prosecution for the abetment of an offence under this Act. A person may be convicted of abetting an accused who is not the father of a minor who is married, so long as the other party to the marriage is a minor. (Vol 22) 1935 Pat 474 (475) : 37 Cri L Jour 227.

[4] Section 5 applies only to other persons than parents and hence S. 6 alone applies to parents who promote child marriage or permit it or negligently fail to prevent it. Parents of bridegroom cannot be convicted under S. 6 merely because bride was under 14 years. (Vol 24) 1937 Mad 490 (491) : 1 L R (1937) Mad 854 : 38 Cri L Jour 594.

[5] When the father is alive and is in charge of minor daughter, the grandfather cannot be convicted for her marriage. (Vol 32) 1945 All 306 (307) : 1 L R (1945) All 272 : 47 Cri L Jour 43.

[6] The mother of a minor bridegroom not in actual charge of the minor and not able to prevent the marriage commits no offence by mere participation. (Vol 24) 1937 Mad 490 (492) : 1 L R (1937) Mad 854 : 38 Cri L Jour 594.

[7] The argument that though under certain circumstances the marriage of a minor may not be an offence under this Act, permitting such a marriage is punishable is not tenable. Section 6 aims at permitting or failing to prevent a marriage which is penal under the earlier sections. When the marriage is not penal, permitting such a marriage is not punishable. (Vol 22) 1935 Bom 437 (438) : 59 Bom 745 : 37 Cri L Jour 211.

[8] Section 6 has reference only to promotion of prohibited marriage referred to in Ss. 4 and 5. (Vol 25) 1938 Nag 235 (237) : 39 Cri L Jour 651 : 1 L R (1938) Nag 241.

[9] See also Section 5 Note 2.

Section 8 — Note 1

[1] A trial under this Act may be summary. The fact that the offences are to be tried only by the Magistrates mentioned therein does not bar a summary trial. (Vol 21) 1934 All 331 (332) : 35 Cri L Jour 677.

[2] Additional District Magistrate with powers of District Magistrate is empowered to try case under the Act. (Vol 24) 1937 Mad 637 (638) : 38 Cri L Jour 664 : 1 L R (1937) Mad 1034. (Case before amendment of section in 1938.)

[3] A report by Magistrate conducting local investigation, recommending prosecution of complainant also under S. 6, constitutes a complaint under, S. 4 (1) (h), Criminal P. C. (Vol 20) 1933 Pat 87 (88) : 34 Cri L Jour 237.

Section 9 — Note 1

[1] In the absence of a certificate of the Political Agent or sanction of the Local Government a charge of an offence under this Act committed in the French territory cannot be inquired into in British India as there is nothing to the contrary in this Act. (Vol 26) 1939 Mad 577 (577).

[2] A Magistrate can take cognizance under S. 9 in respect of a marriage performed in an Indian State before certificate is obtained under S. 188, Criminal P. C., but cannot enquire into the charge before that. (Vol 27) 1940 Nag 245 (247) : 41 Cri L Jour 645.

[3] Offence under S. 5 is not cognizable. So when such a case is forwarded to an Assistant Superintendent of Police for investigation a letter from him to the District Magistrate is a "Police report" and not a "complaint". (Vol 25) 1938 Rang 257 (258) : 39 Cri L Jour 776 : 1938 Rang L R 150.

[4] Where a complaint to one Court is made prior to the expiry of one year from the date of the marriage and another complaint is made to a different Court after the expiry of the period of one year, the latter complaint is barred by time. Section 14, Limitation Act, which applies to civil proceedings only, cannot validate the latter complaint on the strength of the former complaint made in time. (Vol 26) 1939 Mad 512 (513) : 40 Cri L Jour 816.

Section 10 — Note 1

[1] A preliminary inquiry under this section is absolutely essential before the Court can take cognizance of an offence under this Act. (Vol 26) 1939 Mad 530 (531) : 40 Cri L Jour 818 : (Vol 21) 1934 Lah 155 (155) : 15 Lah 63 : 35 Cri L Jour 1436 : (Vol 18) 1931 Lah 56 (56) : 32 Cri L Jour 616 : 12 Lah 383.

[See also (Vol 26) 1939 Mad 294 (295) : 40 Cri L Jour 514 (2). (Transfer of a case under S. 10 to a Sub-Divisional Magistrate without an inquiry under S. 202, Criminal P. C., is illegal.)]

[2] Omission to hold preliminary inquiry under S. 202, Criminal P. C., vitiates later proceedings. (Vol 27) 1940

11. ^a[(1) When the Court takes cognizance of any offence under this Act upon a complaint made to it, it may, for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898, and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.]

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

[a] This sub-s. (1) was substituted for original sub-s. (1) by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 [XIX of 1938], S. 5. [9-4-1938].

^a[12. (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.]

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both;

Provided that no woman shall be punishable with imprisonment.]

[a] This section was inserted after S. 11 by the Child Marriage Restraint (Second Amendment) Act, 1938 (19 [XIX] of 1938), S. 6. [9-4-1938].

Section 10 (contd.)

Sind 213 (214) : I L R (1940) Kar 442 : 42 Cri L Jour 83 ; (1937) 20 Nag L Jour 115 (116). (Section 537, Criminal P. C., does not cure the defect.)

[3] It is proper in revision to send a case back for correction of illegality such as omission to hold preliminary enquiry provided under S. 10, when that can be done before the case is tried, but after judgment, the case should not be remanded, unless there is a failure of justice. Where the Court had decided the case without objection, mere omission to comply with S. 10 is irregularity curable under S. 537, Criminal P. C. High Court will not in such a case interfere under S. 439, Criminal P. C. (Vol 27) 1940 Nag 375 (377) : 42 Cri L Jour 37 : I L R (1940) Nag 488.

[4] Object of the preliminary enquiry is to inquire whether there is a *prima facie* case or not. If the accused objects to his trial without an inquiry and the Magistrate proceeds in disregard of the objection of the accused, his order would be set aside. But where the accused makes no objection to the trial, he cannot raise it subsequently if there was a substantive case against him. (Vol 26) 1939 Pat 525 (525, 526) : 40 Cri L Jour 887.

Section 11 — Note 1

[1] A complainant should not be exempted from giving a security bond except for reasons to be recorded in writing. Giving security bond without assigning reasons is an irregularity which cannot be cured by S. 537,

Criminal P. C. (1937) 20 Nag L Jour 115 (116); (Vol 20) 1933 Cal 433 (433) : 34 Cri L Jour 554.

[2] Ordinarily, the Magistrate ought, under S. 11, to record his reasons for exempting complainant from executing bond, but if complaint is by Judicial officer, omission to record reasons for not requiring him to execute bond cannot vitiate proceedings. (Vol 20) 1933 Pat 87 (88) : 34 Cri L Jour 237; (Vol 23) 1936 Oudh 311 (312) : 12 Luck 263 : 37 Cri L Jour 616.

[3] The mere fact that the security bond furnished by the complainant was defective will not vitiate the trial. (Vol 23) 1936 Oudh 311 (312) : 12 Luck 263 : 37 Cri L Jour 616.

[4] In a prosecution under this Act the prosecution has to prove that the marriage was of a minor. But for compensation under S. 250, Criminal P. C., the position is the reverse. It must be proved that the complainant's allegation regarding the minority was false. Where there is merely lack of evidence as regards the age of the party alleged to be a minor, it does not necessarily follow that the allegation was false. (Vol 23) 1936 All 363 (364) : 37 Cri L Jour 424 (2).

Section 12 — Note 1

[1] Where a father gives his minor daughter in marriage after an injunction of the Court against him was passed, he is entitled to an opportunity to show that he had no notice of the injunction before he is punished. (Vol 19) 1932 Cal 719 (720).

THE CHILDREN (PLEDGING OF LABOUR) ACT, 1933.
(ACT II OF 1933.)
CONTENTS.

Sections.

1. Short title, extent and commencement.
2. Definitions.
3. Agreements contrary to the Act to be void.
4. Penalty for parent or guardian making agreement to pledge the labour of a child.

Sections.

5. Penalty for making with a parent or guardian an agreement to pledge the labour of a child.
6. Penalty for employing a child whose labour has been pledged.

STATEMENT OF OBJECTS AND REASONS.

"The Royal Commission of Labour found evidence in such widely separated areas as Amritsar, Ahmedabad and Madras of the practice of pledging child labour, that is, the taking of advances by parents or guardians on agreements, written or oral, pledging the labour of their children. In some cases, the children so pledged were subjected to particularly unsatisfactory working con-

ditions. The Commission considered that the State would be justified in adopting strong measures to eradicate the evil, and the Bill seeks to do so by imposing penalties on parents by agreements pledging the labour of children and on persons knowingly employing children whose labour has been pledged."

—Gazette of India, 1932, Part V, page 195.

THE CHILDREN (PLEDGING OF LABOUR) ACT, 1933.
(ACT II OF 1933)

[24th February, 1933.]

An Act to prohibit the pledging of the labour of children.

WHEREAS it is expedient to prohibit the making of agreements to pledge the labour of children, and the employment of children whose labour has been pledged; It is hereby enacted as follows :—

Short title, extent and commencement.

1. (1) This Act may be called the CHILDREN (PLEDGING OF LABOUR) ACT, 1933.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) This section and sections 2 and 3 shall come into force at once, and the remaining sections of this Act shall come into force on the first day of July, 1933.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

"an agreement to pledge the labour of a child" means an agreement, written or oral, express or implied, whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of the child to be utilised in any employment :

Provided that an agreement made without detriment to a child, and not made in consideration of any benefit other than reasonable wages to be paid for the child's services, and terminable at not more than a week's notice, is not an agreement within the meaning of this definition ;

"child" means a person who is under the age of fifteen years ; and

"guardian" includes any person having legal custody of or control over a child.

Agreements contrary to the Act to be void.

3. An agreement to pledge the labour of a child shall be void.

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(ACT XV of 1872)

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STATEMENT OF OBJECTS AND REASONS.

"The law relating to solemnization in India of marriages of persons professing the Christian religion is at present distributed over two English Acts of Parliament and three Acts of the Indian Legislature.

The object of this Bill is to reduce into a smaller compass and simplify the existing law on this subject by the consolidation of the different enactments referred to, and at the same time to amend the law in those matters in which it has been shown to be defective.

For example, by Act V of 1865 it is provided that marriages between Native Christians shall be valid where the ages of the contracting parties are not less than sixteen and thirteen years, respectively, and where they do not stand in relation to each other within the prohibited degrees of consanguinity or affinity.

It has been very forcibly represented by the President and several members of the Bengal Christian Association that this provision of the law works injuriously by freeing the children of Native Christian parents from the control which all other parents can legally exercise over their sons and daughters ere the latter have attained their majority.

The Bill requires the consent of the parents or guardians of Native Christians to a marriage between them, where the age of either of the parties about to contract such marriage is less than eighteen years, except in cases in which the minors have been altogether separated from their parents or natural guardians, and by reason of such separation are not properly subject to their control.

There is also some ambiguity in regard to the provisions of the law respecting the submission of returns, and the disposal of the records of the registration of marriages solemnized between Native Christians.

The Bill lays down distinctly how such marriages are to be recorded in all cases, and provides for the disposal of the record. It also substitutes for the fixed rates of fees in respect of marriages solemnized by or before Marriage Registrars, a power to the Local Government to regulate such fees and their remission; and lastly, extends the Marriage law to all places within the territories of Native Princes in alliance with Her Majesty, in respect of marriages between British subjects professing the Christian religion."

— Gazette of India, 1871, Part V, page 473.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

— Amended by Acts VI of 1886; II of 1891; I of 1903; XIII of 1911; XXXVIII of 1920; XVIII of 1928.

— Adapted by A. O.

— Repealed in part by Acts XVI of 1874; I of 1938.

— Repealed in part and amended by Act XII of 1891.

COGNATE ACTS AND PROVISIONS.

1. BANGALORE MARRIAGES VALIDATING ACT, XVI OF 1936.

2. FOREIGN MARRIAGE ACT, XIV OF 1903.

3. MARRIAGES VALIDATION ACT, II OF 1892.

THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

(ACT XV OF 1872)^a

[18th July, 1872].

An Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians.

WHEREAS it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion; It is hereby enacted as follows:—

[a] For Proceedings in Council, see Gazette of India, 1870, Supplement, p. 1077; *ibid.*, 1871, Supplement, pp. 1426, 1643; *ibid.*, 1872, Supplement, pp. 257, 728, 742, 805, 813 and 858. This Act is based on 14 and 15 Vict., C. 40 and 58 Geo. III, C. 84 (both Statutes relate to marriages in India and are now no longer in force), and Acts 5 [V] of 1852 and 5 [V] of 1865; the last two Acts were repealed by this Act.

PRELIMINARY.

Short title. 1. This Act may be called the INDIAN CHRISTIAN MARRIAGE ACT, 1872.

It extends to the whole of British India,^a and, so far only as regards Christian subjects of Her Majesty, to ^b[the Indian States].

Extent. c[*] * * * *

[a] This Act has been declared to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (2 [II] of 1913), S. 3; the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 [III] of 1872), S. 3; in the Chittagong Hill-tracts by notification under the Chittagong Hill-tracts Regulation 1900 (1 [I] of 1900), S. 4 (2); see Notification No 10851-E. A., dated 7th October 1926, Calcutta Gazette, 1926,

The Indian Christian Marriage Act
Preamble—Note 1

[1] The object of this Act is not to prevent people from marrying as they wish but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. (Vol 5) 1918 All 168 (172): 40 All 393: 19 Cri L Jour 615.

[2] This Act has to be so construed that no case is made to fall within its scope which does not fall both

within the reasonable meaning of its terms and within the scope and spirit of the Act. Care must be taken to see that no case is brought under it which is not within its express language. (Vol 5) 1918 All 168 (169, 170): 40 All 393: 19 Cri L Jour 615.

[3] There is nothing in this Act as regards the age of consent. The age of consent for a Christian marriage is determined according to the law in England at the time of the marriage. (Vol 20) 1933 All 135 (136): 55 All 243.

Pt. I, p. 1555; also by notification under the Scheduled Districts Act, 1874 (14 [XIV] of 1874), S. 3 in the following Scheduled Districts, namely:— The Districts of Hazaribagh, Lohardaga and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singhbhum [see Gazette of India, 1881, Pt. I, p. 504]; and the North-Western Provinces Tarai [see *ibid.*, 1876 Pt. I, p. 505]. It has also been extended by notification under the same Act, S. 5 to the Sadiya Frontier Tract, see Assam Gazette, 1920, Pt. II, p. 1938.

The District of Lohardaga now called the Ranchi District (see, Calcutta Gazette, 1899, Pt. I, p. 44), included at this time the Palamau District, which was separated in 1894.

[b] Substituted by A. O. for "the territories of Native Princes and States in alliance with Her Majesty". For the definition of the expression "Indian State," see the General Clauses Act, 1897 (10 [X] of 1897), S. 3 (27b). [c] The commencement clause was repealed by the Repealing Act, 1874 (16 [XVI] of 1874).

2. [Enactments repealed]. *Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and Schedule.*

Interpretation-clause. 3. In this Act, unless there is something repugnant in the subject or context,—

"Church of England" and "Anglican" mean and apply to the Church of England as by law established;

"Church of Scotland" means the Church of Scotland as by law established;

"Church of Rome" and "Roman Catholic" mean and apply to the Church which regards the Pope of Rome as its spiritual head;

"Church" includes any chapel or other building generally used for public Christian worship;

"Minor" means a person who has not completed the age of twenty-one years, and who is not a widower or a widow;

* * * * *

The expression "Christians" means persons professing the Christian religion;

And the expression "Native Christians" includes the Christian descendants of Natives of India converted to Christianity, as well as such converts.

^b["Registrar General of Births, Deaths and Marriages" means a Registrar General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886]:

[a] The definition of Native State which read "Native State means the territories of any Native Prince or State in alliance with Her Majesty" was repealed by A. O. [b] Inserted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30.

PART I.

THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

4. Every marriage between persons, one or both of whom is ^a[or are] a Christian or Christians, *Marriages to be solemnized* shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

[a] Inserted by the Amending Act, 1891 (12 [XII] of 1891), S. 2 and Sch. II.

Section 3—Note 1

[1] The word "means" used in the definition of "Christians" is an inclusive term. (Vol 5) 1918 All 168 (170): 40 All 393: 19 Cri L Jour 615. (See notes on S. 68.)

[2] *Per Knox J.*—Mere baptism as infant or attendance in a Christian school or dressing as a Christian is not sufficient to treat a person as one professing the Christian religion. One who performs *Devi ka puja* at the time of his marriage cannot be said to be a person professing the Christian religion. (Vol 5) 1918 All 168 (171): 19 Cri L Jour 615: 40 All 393.

[3] *Per Walsh J.*—A person, who on the eve of his marriage resists all persuasion and pressure to be married as a Christian by the Christian ceremony and who having by birth and connexion other religious associations deliberately decides to marry a sweeper according to the sweeper rites and publicly worships Hindu Gods, is not "a person professing the Christian religion." (Vol 5) 1918 All 168 (172): 40 All 393: 19 Cri L Jour 615.

[4] The words "person who professes the Christian

religion" mean not only adults who profess that religion but also their children, who are presumed in law to follow their father's religion; and where the evidence is that the married child in question was baptized, this Act would apply. (1894) 18 Mad 230 (232).

[5] A child in India is presumed to have its father's religion. (Vol 3) 1916 Lah 438 (439).

Section 4 — Note 1

[1] The High Court has jurisdiction to decide whether there has been a valid marriage under this Act. Section 4 of the Divorce Act does not stand in the way of this jurisdiction. (Vol 20) 1933 All 122 (123, 124): 55 All 185.

[2] This Act is intended to apply to the marriages of all Christians in India, including the marriages where one of the parties is a Christian. (Vol 5) 1918 Mad 601 (603): 18 Cri L Jour 840: 40 Mad 1030 (FB).

[3] Divorced Jewess can marry a Christian. (1912) 16 Cal W N 417 (418).

[4] As to when certain irregularities shall not render void a marriage solemnized in accordance with this section, see S. 77.

5. Marriages may be solemnized in India —

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of which he is a Minister;
Persons by whom marriages may be solemnized.

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of Scotland;

(3) by any Minister of Religion licensed under this Act to solemnize marriages;

(4) by, or in the presence of, a Marriage Registrar appointed under this Act;

(5) by any person licensed under this Act to grant certificates of marriage between Native Christians.

^a[6. The ^b[Provincial Government], so far as regards the territories under its administration, and the ^c[Central Government], so far as regards any ^d[Indian State], may, by notification in the ^e[Official Gazette] ^f[* * *], grant licences^g to Ministers of Religion to solemnize marriages within such territories and State respectively, and may, by a like notification, revoke such licences.]

[a] Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 1, for original S. 6. [b] Substituted by A. O. for "Local Government". [c] Substituted by A. O. for "Governor-General in Council". [d] Substituted by A. O. for "Native State". [e] Substituted by A. O. for "local Official Gazette". [f] The words "or in the Gazette of India, as the case may be," were repealed by A. O. [g] As to validation of licences granted under former Acts, see the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 1 (2) and (3).

7. The ^a[Provincial Government] may appoint one or more Christians, either by name or as Marriage Registrars, holding any office for the time being, to be the Marriage Registrar or Marriage Registrars for any district subject to its administration.

Where there are more Marriage Registrars than one in any district, the ^a[Provincial Government] shall appoint one of them to be the Senior Marriage Registrar.

When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness, or temporary vacancy.

[a] Substituted by A. O. for "Local Government".

8. The ^a[Central Government] may, by notification in the ^b[Official Gazette], appoint any Christian, either by name or as holding

Section 5 — Note 1

[1] "Solemnized" in S. 5 means "celebrated" and refers to ceremonies only. (Vol 5) 1918 Low Bur 83 (85).

[2] Section 5, deals only with the necessary preliminaries to the ceremony, the ceremony itself, and the person who performs it. It has nothing to do with Canon law. (Vol 20) 1933 All 122 (128) : 55 All 185.

[3] Section 5 deals only with ceremony and the person who may perform it and not with the capacity of persons on whom it is performed or with the capacity of the person who performs it, save that he should have received episcopal ordination. (Vol 5) 1918 Low Bur 83 (85, 86).

[4] If the Church lays down that the non-observance of some of its rules will not render the marriage void, there is nothing in S. 5 which invalidates a marriage in which such rules have not been observed. (Vol 21) 1934 All 273 (277) : 56 All 428.

[5] As to when certain irregularities shall not render void a marriage solemnized in accordance with S. 5, see S. 77. As to registration of marriages between Native Christians by such persons as are mentioned in clauses (1), (2) or (3) of this section, see S. 37; and for punishment for solemnizing marriage without due authority, see section 68.

Section 6 — Note 1

[1] Section 2 of the Secunderabad Marriage Validating Ordinance, 1945 (No. 30 [XXX] of 1945), [1-9-1945], runs as follows :—

"2. Validation of a certain irregular marriage and the records thereof.—(1) The marriage solemnized in St. Andrew's Church at Secunderabad on the 20th day of April 1944 between persons being Christian but not Indian Christian, subjects of His Majesty by the Reverend Harold William Sibree Page, a Minister of the Methodist Church, shall be, and shall be deemed to have been with effect on and from the said date, as good and valid in law as if it had been solemnized under a licence granted under S. 6 of the Indian Christian Marriage Act, 1872, authorising the solemnization of marriages between persons being Christian, but not necessarily Indian Christian, subjects of His Majesty in the Hyderabad State.

(2) Certificates of the marriage declared by sub-s. (1) to be good and valid in law, and register-books and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the provisions of the Indian Christian Marriage Act, 1872, in so far as the register-books and extracts relate to the said marriage, shall be received as evidence of the marriage as if it had been duly solemnized under Part I of the said Act."

[2] As to the powers and functions exercisable by the Central Government as regards the Indian States, see S. 86.

Section 8 — Note 1

[1] As to the powers and functions exercisable by the Central Government as regards the Indian States, see S. 86.

any office for the time being, to be a Marriage Registrar in respect of any district or place within ^a[any Indian State].

The ^a[Central Government] may, by like notification, revoke any such appointment.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India". [c] *Substituted* by A. O. for the words "the territories of any Native Prince or State in alliance with Her Majesty".

9. The ^a[Provincial Government] or (so far as regards any ^b[Indian State]) the ^c[Central Government] may grant a licence to any Christian, either by *Licensing of persons to grant certificates of marriage between Native Christians.* name or as holding any office for the time being, authorizing him to grant certificate of marriage between Native Christians.

Any such licence may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the Official Gazette.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A.O. for "Native State". [c] *Substituted* by A. O. for "Governor-General in Council".

PART II.

TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED.

Time for solemnizing marriage. 10. Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening :

Exceptions. Provided that nothing in this section shall apply to —

(1) a Clergyman of the Church of England solemnizing a marriage under a special licence permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such licence ^a[or

(3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies, and customs of the Church of Scotland].

[a] *Inserted* by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 2.

11. No Clergyman of the Church of England shall solemnize a marriage in any place other than a church, ^a[where worship is generally held according to the forms of the Church of England],

unless there is no ^a[such] church within five miles distance by the shortest road from such place, or

unless he has received a special license authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

For such special licence, the Registrar of the Diocese may charge such additional fee as the *Fee for special licence.* said Bishop from time to time authorizes.

[a] *Inserted* by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 3.

PART III.

MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT.

Notice of intended marriage. 12. Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act—

Section 9 — Note 1

[1] The presence of a person licensed under this section is one of the conditions that has to be fulfilled for the validity of the marriage between Native Christians: see S. 60. As to the duties of a person licensed under this section with respect to the marriages solemnized under Part VI, see Ss. 61 and 62. As to the powers and functions exercisable by the Central Government as regards the Indian States, see S. 86.

[2] For penalty for solemnizing an irregular marriage by a person licensed under this section, see Marriage Validation Act, 1892, S. 6.

Section 10 — Note 1

[1] As to what persons solemnizing marriage under the provisions of this section are exempt from punishment for solemnizing marriage out of proper time or without witnesses, see S. 69.

Section 12 — Note 1

[1] Part III of this Act applies only to Ministers of religion licensed under this Act and not to episcopally ordained persons. Hence the provisions with respect to notice of marriages or their publication would not apply in their case. (1896) 19 Mad 273 (281).

[2] As to notice of intended marriage private dwelling, see section 14.

one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein

- (a) the name and surname, and the profession or condition, of each of the persons intending marriage,
- (b) the dwelling place of each of them,
- (c) the time during which each has dwelt there, and
- (d) the church or private dwelling in which the marriage is to be solemnized :

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

13. If the persons intending marriage desire it to be solemnized in a particular church, and *Publication of such notice.* if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

But if he is not entitled to officiate as a Minister in such church, he shall, at his option, *Return or transfer of notice.* either return the notice to the person who delivered it to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

14. If it be intended that the marriage shall be solemnized in a private dwelling, the Minister *Notice of intended marriage in private dwelling.* of Religion, on receiving the notice prescribed in section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

15. When one of the persons intending marriage is a minor, every Minister receiving such *Sending copy of notice to Marriage Registrar when one party is a minor.* notice shall, unless within twenty-four hours after its receipt he returns the same under the provisions of section 13, send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

16 The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any *Procedure on receipt of notice.* such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

17. Any Minister of Religion consenting or intending to solemnize any such marriage as *Issue of certificate of notice given and declaration made.* aforesaid, shall, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter required, issue under his hand a certificate of such notice having been given and of such declaration having been made :

Proviso. Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister ;

(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue ; and

(3) that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf.

18. The certificate mentioned in section 17 shall not be issued until one of the persons intending *Declaration before issue of certificate.* marriage has appeared personally before the Minister and made a solemn declaration—

- (a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance to the said marriage,
- and, when either or both of the parties is or are a minor or minors,

Section 18 — Note 1

[1] Section 18 imposes a declaration of *belief* only. It is sufficient if the declarer believes that there is no im-

pediment though there may be one under the law. The maxim *ignorantia juris non excusat* is inapplicable in such cases. (1834) 16 All 212 (216).

(b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be.

19. The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage,

and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

20. Every person whose consent to a marriage is required under section 19 is hereby authorized to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorized with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

21. If any such notice be received by such Minister, he shall not issue his certificate, and shall not solemnize the said marriage, until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition, or until the said notice is withdrawn by the person who gave it.

22. When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required by section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

23. When any Native Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Native Christian into some language which he understands.

24. The certificate to be issued by such Minister shall be in the form contained in the second schedule thereto annexed, or to the like effect.

25. After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt :

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister.

26. Whenever a marriage is not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any) thereon shall be void,

and no person shall proceed to solemnize the said marriage until new notice has been given, and a certificate thereof issued in manner aforesaid.

Section 19 — Note 1

[1] On a proper construction of the provisions of S. 19 and S. 42 (c), where the father of the minor is dead or where the guardian of the person of such minor, either testamentary or otherwise, appointed by the father or by any competent authority, is not in existence or where, in the absence of any such guardian, the mother of the minor also is dead, it cannot be stated that there is any person authorised to give the consent to such marriage of the minor. It is only when any person

answering any of the three categories above-mentioned is in existence and happens to be "not resident" in India that the latter part of S. 19 comes into operation and the consent of such guardian is dispensed with. It does not, therefore, follow that if any of the persons answering any of the three categories above-mentioned is not in existence, a guardian has to be appointed for the purpose of giving such consent to the marriage of the minor. There is no provision in the Act for the appointment of such guardian. (Vol 33) 1946 Bom 129 (131).

PART IV.

REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION.

27. All marriages hereafter solemnized in India between persons one or both of whom profess or profess the Christian religion, except marriages solemnized under Part V or Part VI, of this Act, shall be registered^a in manner hereinafter prescribed.

[a] As to the establishment of general registry offices of births, deaths and marriages, see the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), Chapter II.

28. Every Clergyman of the Church of England shall keep a register of marriages, and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act.

29. Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified.

The said Registrar, upon receiving the said returns, shall send one copy thereof to the ^a[Registrar-General of Births, Deaths and Marriages].

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for "Secretary to the Local Government".

30. Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

and such person shall forward quarterly to the ^a[Registrar-General of Births, Deaths, and Marriages] returns of the entries of all marriages registered by him during the three months next preceding.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for the words "Secretary to the Local Government".

31. Every Clergyman of the Church of Scotland shall keep a register of marriages,

and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act,

and shall forward quarterly to the ^a[Registrar-General of Births, Deaths and Marriages], through the Senior Chaplain of the Church of Scotland, returns, similar to those prescribed in section 29, of all such marriages.

[a] Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for the words "Secretary to the Local Government".

32. Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall, immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same; (that is to say) in a marriage-register book to be kept by him for that purpose, according to the form contained in the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register book as a counterfoil.

33. The entry of such marriage in both the certificate and marriage-register book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register book.

34. The person solemnizing the marriage shall forthwith separate the certificate from the marriage-register book, and send it, within one month from the time of the solemnization, to the Marriage Registrar of the District in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar,

Certificate to be forwarded to Marriage Registrar, copied and sent to Registrar General.

who shall cause such certificate to be copied into a book to be kept by him for that purpose, and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the ^a[Registrar-General of Births, Deaths, and Marriages].

[a] *Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for the words "Secretary to the Local Government".*

35. Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate.

Copies of certificates to be entered and numbered.

36. The Marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of every month, send the same to the ^a[Registrar-General of Births, Deaths, and Marriages].

Registrar to add number of entry to certificate, and send to Registrar General.

[a] *Substituted by S. 30 (b) of the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), for the words "Secretary to the Local Government".*

Registration of marriages between Native Christians by persons referred to in clauses (1), (2) and (3) of section 5.

provided by sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or, if he leave the district in which he solemnized the

Custody and disposal of register-book.

37. When any marriage between Native Christians is solemnized ^a[by any such person, Clergyman, or Minister of Religion as is referred to in clause (1), clause (2) or clause (3) of section 5], the person solemnizing the same shall, instead of proceeding in the manner provided by sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or, if he leave the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

Whoever has the control of the book at the time when it is filled, shall send it to the Marriage Registrar of the District, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the ^b[Registrar-General of Births, Deaths, and Marriages], to be kept by him with the records of his office.

[a] *Substituted by the Repealing and Amending Act, 1928 (18 [XVIII] of 1928), S. 2 and Sch. I, for "under Part I or Part III of this Act".* [b] *Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for "Secretary to the Local Government".*

PART V.

MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE REGISTRAR.

38. When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing, in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the District within which the parties have dwelt,

or, if the parties dwell in different districts, shall give the like notice to a Marriage Registrar of each district,

Section 37 — Note 1

[1] The registration of marriages between Native Christians is to be in conformity with the rules laid down by this section so far as they are applicable, see section 59. As to the books in which marriages of Native Christians are to be registered, see section 64.

Section 38 — Note 1

[1] Section 38 governs the schedule and the space left for age need not be filled because no such provision is made in the section. (Vol 22) 1935 Cal 678 (678): 36 Cr. L J 1462.

and shall state therein the name and surname, and the profession or condition, of each of the parties intending marriage, the dwelling-place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized :

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

39. Every Marriage Registrar shall, on receiving any such notice, cause a copy thereof to be *Publication of notice.* affixed in some conspicuous place in his office.

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same district, who shall likewise affix the copy in some conspicuous place in his own office.

Notice to be filed, and copy entered in Marriage Notice Book. **40.** The Marriage Registrar shall file all such notices, and keep them with the records of his office,

and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the ^a[Provincial Government] and to be called the "Marriage Notice Book";

and the Marriage Notice Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

[a] *Substituted by A. O. for "Local Government".*

41. If the party by whom the notice was given requests the Marriage Registrar to issue the *Certificate of notice given, and oath made.* certificate next hereinafter mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the Marriage Registrar shall issue under his hand a certificate of such notice having been given, and of such oath having been made :

Proviso. Provided—

that no lawful impediment be shown to his satisfaction why such certificate should not issue ;
that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf by this Act ;

that four days after the receipt of the notice have expired, and further,

that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

42. The certificate mentioned in section 41 shall not be issued by any Marriage Registrar, *Oath before issue of certificate.* until one of the parties intending marriage appears personally before such Marriage Registrar, and makes oath^a

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his, or her usual place of abode within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,—

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

[a] As to meaning of "oath", see the General Clauses Act, 1897 (10 [X] of 1897), S. 3 (36) and S. 4.

43. When one of the parties intending marriage is a minor, and both such parties are at the *Petition to High Court to order certificate in less than fourteen days.* time resident in any of the towns of Calcutta, Madras, and Bombay, and are desirous of being married in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the High Court, for an order upon the Marriage Registrar to whom the notice of

Section 40 — Note 1

[1] As to the effect of not solemnizing the marriage within two months of the notice required by this section, see section 52; and as to the punishment for solemnizing a marriage after the expiration of two months, see section 71.

Section 42 — Note 1

[1] False declaration by the bridegroom as to the age and residence of the bride does not make the marriage void under S. 4. (Vol 24) 1937 Mad 895 (897); I L R (1938) Mad 113.

marriage has been given, directing him to issue his certificate before the expiration of the said fourteen days required by section 41.

And on sufficient cause being shown, the said Judge may, in his discretion, make an order *Order on petition.* upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

Consent of father or guardian. **44.** The provisions of section 19 apply to every marriage under this Part, either of the parties to which is a minor ;

and any person whose consent to such marriage would be required thereunder may enter a *Protest against issue of certificate.* protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the Marriage Notice Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.

When such protest has been entered, no certificate shall issue until the Marriage Registrar *Effect of protest.* has examined into matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate for the said marriage, or until the protest be withdrawn by the person who entered it.

Petition where person whose consent is necessary is insane, or unjustly withholds consent. **45.** If any person whose consent is necessary to any marriage under this Part is of unsound mind, or if any such person (other than the father) without just cause withholds his consent to the marriage,

the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras, and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns then to the District Judge :

And the said Judge of the High Court, or District Judge, as the case may be, may examine *Procedure on petition.* the allegations of the petition in a summary way :

And, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be, shall declare the marriage to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage ;

and, if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued, and the like proceedings may be had under this Part in relation to the marriage as if the issue of such certificate had not been forbidden.

46. Whenever a Marriage Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras, and Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge :

The said Judge of the High Court, or District Judge, as the case may be, may examine the *Procedure on petition.* allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance therewith.

Petition when Marriage Registrar in Indian State refuses certificate. **47.** Whenever a Marriage Registrar resident in any ^a[Indian State] refuses to issue his certificate, either of the parties intending marriage may apply by petition to the ^b[Central Government] who shall decide thereon.

Such decision shall be final, and the Marriage Registrar to whom the application was originally made shall proceed in accordance therewith.

[a] Substituted by A. O. for "Native State". [b] Substituted by A. O. for "Governor-General in Council".

48. Whenever a Marriage Registrar, acting under the provisions of section 41, is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras, and Bombay, to a Judge of the High Court, or if such district be not within any of the said towns, then to the District Judge :

Petition when Registrar doubts authority of person forbidding. The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same, and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case,

and if, upon such examination, it appears that the person forbidding the issue of such certificate is not authorized by law so to do, such Judge of the High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage, as if the issue had not been forbidden.

Whenever a Marriage Registrar appointed under section 8 to act within any ^a[Indian State] is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall send a statement of all the circumstances of the case, together with all documents relating thereto, to the ^b[Central Government].

Reference when Marriage Registrar in Indian State doubts authority of person forbidding. If it appears to the ^b[Central Government] that the person forbidding the issue of such certificate is not authorized by law so to do, the ^b[Central Government] shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage, as if the issue of the certificate had not been forbidden.

[a] Substituted by A. O. for "Native State". [b] Substituted by A. O. for "Governor-General in Council".

49. Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on grounds which such Marriage Registrar, under section 44, or a Judge of the High Court or the District Judge, under section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for the costs of all proceedings in relation thereto and for damages, to be recovered by suit by the person against whose marriage such protest was entered.

50. The certificate to be issued by the Marriage Registrar under the provisions of section 41 shall be in the form contained in the second schedule to this Act annexed or to the like effect,

and the ^a[Provincial Government] shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

[a] Substituted by A. O. for "Local Government".

Solemnization of marriage after issue of certificate.

51. After the issue of the certificate of the Marriage Registrar,

or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid), and of two or more credible witnesses besides the Marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect:—

Section 48 — Note 1
[1] As to the powers and functions exercisable by the

Central Government as regards the Indian States, see section 86.

"I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D."

And each of the parties shall say to the other as follows, or to the like effect — "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband]."

52. Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage Registrar, as required by section 40, the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void ;

and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time, and in the manner aforesaid.

Marriage Registrar may ask for particulars to be registered.

53. A Marriage Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage.

54. After the solemnization of any marriage under this Part, the Marriage Registrar present at such solemnization shall forthwith register the marriage in duplicate; that is to say, in a marriage-register book, according to the form of the fourth schedule hereto annexed, and also in a certificate attached to the marriage register book as a counterfoil.

The entry of such marriage in both the certificate and the marriage-register book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register book.

Certificates to be sent monthly to Registrar General.

55. The Marriage Registrar shall forthwith separate the certificate from the marriage-register book and send it, at the end of every month, to the ^a[Registrar General of Births, Deaths, and Marriages].

The Marriage Registrar shall keep safely the said register-book until it is filled, and shall then send it to the ^a[Registrar General of Births, Deaths, and Marriages], to be kept by him with the records of his office.

[a] *Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for the words "Secretary to the Local Government".*

56. The Marriage Registrars in ^a[Indian States] shall send the certificates mentioned in section 54 to such officers as the ^b[Central Government] from time to time, by notification in the ^c[Official Gazette] appoints in this behalf.^d

[a] *Substituted by A. O. for "Native States".* [b] *Substituted by A. O. for "Governor-General in Council".* [c] *Substituted by A. O. for "Gazette of India".* [d] *Cf. the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 24 (2).*

The Commissioner of Ajmer-Merwara has been appointed under this section for the Rajputana States, see Ajmer Rules and Orders; the Resident for the Central India States, for States in Central India, see British Enactments in force in Indian States, Vol III; the Registrar General of Births, Deaths and Marriages, Madras, for the Mysore State, see *ibid*, Vol. VI, page 47; the First Assistant to the Resident for the Hyderabad State, see *ibid*, Vol. V, page 26.

57. When any Native Christian about to be married gives a notice of marriage, or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said Native Christian understands the English language, and, if he does not, the Marriage Registrar shall translate, or cause to be translated, such notice or certificate, or both of them, as the case may be, to such Native Christian into a language which he understands;

or the Marriage Registrar shall otherwise ascertain whether the Native Christian is cognizant of the purport and effect of the said notice and certificate.

Section 56 — Note 1

[a] As to the forwarding of certificates of certain marriages to the Secretary of State for India, see sec-

tion 81; and as to the powers and functions exercisable by the Central Government as regards the Indian States, see section 86.

58. When any Native Christian is married under the provisions of this Part, the person solemnizing the marriage shall ascertain whether such Native Christian understands the English language, and, if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such Native Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act.

59. The registration of marriages between Native Christians under this Part shall be made in conformity with the rules laid down in section 37 (so far as they are applicable), and not otherwise.

PART VI.^a

MARRIAGE OF NATIVE CHRISTIANS.

60. Every marriage between Native Christians applying for a certificate shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise :—

(1) the age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years;

(2) neither of the persons intending to be married shall have a wife or husband still living ;

(3) in the presence of a person licensed under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other —

"I call upon these persons here present to witness that I, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife [or husband]," or words to the like effect:

Provided that no marriage shall be certified under this part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section 19 has been given to the intended marriage, or unless it appears that there is no person living authorized to give such consent.

[a] As to validation of past marriages solemnized under Part VI, between persons of whom one only was a Native Christian, and penalty for solemnizing such marriages under Part VI in future, see the Marriage Validation Act, 1892 (2 [II] of 1892).

61. When, in respect of any marriage solemnized under this Part, the conditions prescribed in section 60 have been fulfilled, the person licensed as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and, on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licensed person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

^a[**62.** (1) Every person licensed under section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the ^b[Provincial Government] by which he was licensed may from time to time prescribe^c a register-book of all marriages solemnized under this Part in his presence, and shall deposit in the office of the Registrar-General of Births, Deaths, and Marriages for the territories under the administration of the said ^b[Provincial Government] in such form and at such intervals as that Government may prescribe, true and duly authenticated extracts from his register-book of all entries made therein since the last of those intervals.

(2) Where the person keeping the register-book was licensed as regards ^d[an Indian State] by the ^e[Central Government] references in sub-section (1) to the ^b[Provincial Government] therein mentioned shall be read as references to the ^b[Provincial Government], to whose Registrar-General of Births, Deaths, and Marriages certified copies of entries in registers of births and deaths are for the time being required to be sent under section 24, sub-section (2), of the Births, Deaths, and Marriages Registration Act, 1886.]

[a] Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 4, for the original S. 62. [b] Substituted by A. O. for "Local Government". [c] For notifications issued by different Governments, see the different Local Rules and Orders. [d] Substituted by A. O. for "a Native State". [e] Substituted by A. O. for "Governor-General in Council".

63. Every person licensed under this Act to grant certificates of marriage, and keeping a marriage-register-book under section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of any entry therein.

Searches in register-book and copies of entries. **64.** The provisions of sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept under section 37.

Books in which marriages of Native Christians under Part I or III are registered. **65.** This Part of this Act, except so much of sections 62 and 63 as are referred to in section 64, shall not apply to marriages between Roman Catholics.

Part VI not to apply to Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. XXV of 1864,^a previous to the twenty-third day of February 1865.

[a] Act 25 [XXV] of 1864 was repealed by Act 5 [V] of 1865 which was repealed by this Act.

PART VII.

PENALTIES.

False oath, declaration, notice or certificate for procuring marriage. **[66.]** Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rites and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath or declaration, or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate, shall be deemed to have committed the offence punishable under section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine.]

[a] Substituted by the Indian Christian Marriage Act (1872) Amendment Act, 1891 (2 [II] of 1891), S. 5 for original section 66.

Forbidding, by false personation, issue of certificate by Marriage Registrar. **67.** Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in section 205 of the Indian Penal Code.

Solemnizing marriage without due authority. **[68.]** Whoever, not being authorized by section 5 of this Act to solemnize marriages, solemnizes or professes to solemnize, in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

Part VII — Note 1

[1] Sections 66 to 76 apply to all persons, who are not authorized to do so, solemnizing a marriage between Christians and do not apply simply to marriages that take place before the Marriage Registrar. (1871) 14 Mad 342 (351).

Section 66 — Note 1

[1] The making of a false oath under S. 66 must be intentional. Hence, when a declaration is made under S. 18 that the deponent believed that there was no impediment, it must be satisfactorily proved that the deponent was conscious that he was making a false declaration. (1894) 16 All 212 (216).

Section 68 — Note 1

[1] The word "means" in S. 3 is an inclusive term and hence no person except one who professes Christian

religion comes within the purview of S. 68. (Vol 5) 1918 All 168 (170) : 40 All 993 : 19 Cri L Jour 615.

[2] There is no express prohibition preventing a person professing Christianity from marrying a non-Christian, by non-Christian ceremony. Section 68 does not make it penal for a professing Christian to marry by a ceremony which is void under S. 4. It refers to a class of persons who solemnize or profess to solemnize a Christian marriage under the Act not being authorized by S. 5 to do so. (Vol 5) 1918 All 168 (171): 19 Cri L Jour 615: 40 All 993.

[3] A Hindu performing a marriage according to the Hindu rites between two persons one of whom is a Christian is guilty under S. 68. (Vol 5) 1918 Mad 601 (603): 18 Cr. L. J. 840: 40 Mad 1030 (FB). (20 Mad 12, 6 Mad. H. C. R. App 20 and 17 Mad 391, Approved.)

or, if the offender is an European or American, with penal servitude according to the provisions of Act XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts* ^b[* * *]),

and shall be liable to fine.]

[a] *Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 6, for the original section 68. [b] The words "and to amend the law relating to the removal of such convicts" were repealed by the Amending Act 1891 (12 [XII] of 1891).*

69. Whoever knowingly and wilfully solemnizes a marriage between persons, one or both of whom is or are a Christian or Christians, at any time other than the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Solemnizing marriage out of proper time, or without witnesses. This section does not apply to marriages solemnized under special licences granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special licence in that behalf mentioned in section 10.

^a[Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.]

[a] *Inserted by the Indian Christian Marriage Act (1872) Amendment Act, 1891 (2 [II] of 1891), S. 7.*

70. Any Minister of Religion licensed to solemnize marriages under this Act, who, without a notice in writing, or, when one of the parties to the marriage is a minor, and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Issuing certificate, or marrying without publication of notice;

71. A Marriage Registrar under this Act, who commits any of the following offences :—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act ;

^a[(2) after the expiration of two months after the copy of the notice has been entered as required by section 40 in respect of any marriage, solemnizes such marriage;]

(3) solemnizes, without any order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrars of the district than one, and if he himself be not the Senior Marriage Registrar;

issuing certificate against authorized prohibition. (4) issues any certificate the issue of which has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof;

shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

[a] *Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 8 (1) for the original cl. (2).*

Issuing certificate after expiry of notice, or, in case of minor, within fourteen days after notice, or against authorized prohibition. —

72. Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of ^a[two months] after the notice has been entered by him as aforesaid,

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before

Section 68 (contd.)
[4] The presence of the Registrar at a marriage must be in his capacity of a Registrar and not in his private capacity. (1891) 14 Mad 342 (351).

[5] The present section was substituted by Act 2 [II]

of 1891 for the old section under which the words "knowingly solemnizes" were used. In the present section the word "knowingly" has been dropped. (1891) 14 Mad 342 (355).

the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under section 166 of the Indian Penal Code.

[a] *Substituted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 8 (2) for "three months".*

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland, or Rome);

73. Whoever, being authorized under this Act to solemnize a marriage,

and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a licence from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that Church,

or not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that Church,

knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him;

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district;

issuing certificate for, or solemnizing, marriage without publishing notice, or after expiry of certificate; or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue;

solemnizing marriage authoritatively forbidden. or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same;

shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

74. Whoever, not being licensed to grant a certificate of marriage under Part VI of this Act, grants such certificate, intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

^a[Whoever, being licensed to grant certificates of marriage under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part, shall be punished with fine which may extend to one hundred rupees.]

[a] *Inserted by the Indian Christian Marriage Act (1872), Amendment Act, 1891 (2 [II] of 1891), S. 9.*

75. Whoever, by himself or another, wilfully destroys or injures any register-book or the counterfoil certificates thereof, or any part thereof, or any authenticated extract therefrom,

or falsely makes or counterfeits any part of such register-book or counterfoil certificates,

or wilfully inserts any false entry in any such register-book or counterfoil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Limitation of prosecutions under Act.

76. The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

PART VIII.

MISCELLANEOUS.

What matters need not be proved in respect of marriage in accordance with Act.

77. Whenever any marriage has been solemnized in accordance with the provisions of sections 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely :—

(1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law :

(2) the notice of the marriage :

(3) the certificate or translation thereof :

(4) the time and place at which the marriage has been solemnized :

(5) the registration of the marriage.

78. Every person charged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry, may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And in case such certificate has been already sent to the ^a[Registrar General of Births, Deaths and Marriages], such person shall make and send in like manner a separate certificate of the original erroneous entry, and of the marginal correction therein made.

[a] *Substituted by the Births, Deaths, and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30(b), for the words "Secretary to the Local Government".*

Searches and copies of entries.

79. Every person solemnizing a marriage under this Act, and hereby required to register the same,

and every Marriage Registrar or ^a[Registrar General of Births, Deaths, and Marriages] having the custody for the time being of any register of marriages, or of any certificate or duplicate or copies of certificate, under this Act,

shall, on payment of the proper fees, at all reasonable times, allow searches to be made in such register, or for such certificate, or duplicate, or copies, and give a copy under his hand of any entry in the same.

[a] *Substituted by the Births, Deaths and Marriages Registration Act, 1886 (6 [VI] of 1886), S. 30 (b), for the words "Secretary to the Local Government".*

80. Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate, required to be kept or delivered under this Act, of an entry of a marriage in such register or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate or duplicate, or of any entry therein, respectively, or of such copy.

Certified copy of entry in marriage-register, &c., to be evidence.

^a[81. The Registrar General of Births, Deaths and Marriages and the officers appointed under section 56 shall, at the end of every quarter in each year, select from the certificates of marriages forwarded to them, respectively, during such quarter, the certificates of the marriages of which ^b[the Government by whom he was appointed] may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by them respectively, to the Secretary of State for India.]

[a] *Substituted by the Indian Christian Marriage (Amendment) Act, 1911 (13 [XIII of 1911), S. 2, for original section 81.* [b] *Substituted by A. O. for "the Governor-General in Council".*

Provincial Government to prescribe fees.

82. Fees shall be chargeable under this Act for —

receiving and publishing notices of marriages ;

issuing ^a[Certificates for marriage] by Marriage Registrars, and registering marriages by the same ;

entering protests against, or prohibitions of, the issue of ^b[certificates for marriage] by the said Registrars ;

searching register-books or certificates or duplicates of copies thereof ;

giving copies of entries in the same under sections 63 and 79.

The ^c[Provincial Government] shall fix the amount of such fees respectively, and may from time to time vary or remit them, either generally or in special cases, as to it may seem fit.

[a] *Substituted* by the Repealing and Amending Act, 1903 (1 [I] of 1903), S. 3 and Sch. II for "certificate of marriages". [b] *Substituted* for "marriage certificates" *ibid.* [c] *Substituted* by A. O. for "Local Government".

83. The ^a[Provincial Government] may make ^brules in regard to the disposal of the fees *Power to make rules.* mentioned in section 82, the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act.

[a] *Substituted* by A. O. for "Local Government". [b] For rules made under S. 83 by different Governments, *see* the different Local Rules and Orders.

84. The powers conferred on the ^a[Provincial Government] by sections 82 and 83 ^b[shall], *Power to prescribe fees and rules for Indian States.* so far as regards ^c[Indian States] be exercised by the ^d[Central Government].

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "may". [c] *Substituted* by A. O. for "Native States". [d] *Substituted* by A. O. for "Governor-General in Council".

Power to declare who shall be District Judge. **85.** The ^a[Provincial Government] may, by notification in the Official Gazette, declare who shall, in any place to which this Act applies, be deemed to be the District Judge.

[a] *Substituted* by A. O. for "Local Government".

^a**86. (1)** The powers and functions exercisable by the ^b[Central Government] under *Powers and functions exercisable as regards Indian States.* sections 6, 8, 9, 47, 56 and 84 shall so far as regards any ^c[Indian State] which is within the political charge of a ^d[Provincial Government] be ^e[exercisable] by that ^d[Provincial Government]. The exercise under this section by any ^d[Provincial Government] of powers and functions under sections 6, 8, 9 and 56 shall be by notification in the Local Official Gazette.

(2) The powers and functions exercisable under this Act by the ^b[Central Government] may be delegated to and exercised by such officers as ^f[it] may from time to time appoint in this behalf.]

[a] *Substituted* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, for the original section 86. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Native State". [d] *Substituted* by A. O. for "Local Government". [e] *Substituted* by A. O. for "exercised". [f] *Substituted* by A. O. for "he".

87. Nothing in this Act applies to any marriage performed by any Minister, Consul, or *Saving of Consular marriages.* Consular Agent between subjects of the State which he represents and according to the laws of such State.

Non-validation of marriages within prohibited degrees. **88.** Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

Section 84 — Note 1

[1] As to the powers and functions exercisable by the Central Government as regards the Indian States, *see* Section 86.

Section 88 — Note 1

[1] Section 88 relates to impediments to marriages but does not cover all impediments enumerated in Canon law. (Vol 32) 1945 Mad 516 (518, 519): ILR (1946) Mad 367.

[2] To attract the provisions of this section, the marriage must be a nullity according to the personal law of the parties. Hence, only that part of the personal law is contemplated by this section as relates to the absolute impediments to any marriage at all between the parties, even marriage according to the rites of their own Churches, for instance, such impediments as

prohibited degrees of consanguinity or affinity. (Vol 32) 1945 Mad 516 (518, 519): ILR (1946) Mad 367.

[3] The Act is only concerned with the forms of solemnization and not with objections to the validity of the marriage. "Personal law" includes any personal law, apart from any personal law as to the form of the marriage forbidding any of the parties to enter into contract of marriage with one another. (Vol 17) 1930 Bom 105 (111): 54 Bom 288.

[4] The words "the personal law applicable to either parties" refer to the personal law of the religious community to which either of the parties belong. (Vol 17) 1930 Bom 105 (110): 54 Bom 288.

[5] Section 88 does not validate a marriage which would be invalid elsewhere as being against the personal law. (Vol 24) 1937 Mad 565 (567, 568).

SCHEDULE I.

(See Sections 12 and 38.)

NOTICE OF MARRIAGE.

To

a Minister [or Registrar] of

I hereby give you notice that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :—

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church, Chapel, or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green.</i>	<i>Spinster.</i>	<i>.....</i>	<i>Minor.</i>	<i>20, Hastings' Street.</i>	<i>More than a month.</i>		

Witness my hand, this

day of

seventy-two.

(Signed)

JAMES SMITH.

[The *italics* in this schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

SCHEDULE II.

(See Sections 24 and 50.)

CERTIFICATE OF RECEIPT OF NOTICE.

I,
do hereby certify that, on the day of , notice was duly entered in my Marriage Notice Book
of the marriage intended between the parties therein named and described, delivered under the hand
of one of the parties (that is to say) :—

Names.	Condition.	Rank or profes- sion.	Age.	Dwelling place.	Length of residence.	Church, Chapel, or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Olive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martina Green.</i>	<i>Spinster.</i>	<i>.....</i>	<i>Minor.</i>	<i>20, Hastings' Street.</i>	<i>More than a month.</i>		

and that the declaration ^a[or oath] required by section 17 or 41 of the Indian Christian Marriage Act, 1872, has been duly made by the said (*James Smith*).

Date of notice entered } The issue of this certificate has not been prohibited by any person authorized to
Date of certificate given } forbid the issue thereof,

Witness my hand, this day *seventy-two.*

(Signed).

This certificate will be void, unless the marriage is solemnized on or before the day of

[The *italics* in the schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

[a] Inserted by the Repealing and Amending Act (1 [I] of 1903), S. 3.

SCHEDULE III.

(See Sections 28 and 31).^a

FORM OF REGISTER OF MARRIAGES.

Quarterly Returns

of

MARRIAGES.

for

The Archdeaconry of

... { *Calcutta.*
Madras.
Bombay.

I, ———, Registrar of the Archdeaconry of { *Calcutta,* } do hereby certify that the annexed are correct
copies of the originals and Official Quarterly Returns of Marriage within the Archdeaconry of { *Madras,* }
as made and transmitted to me for the quarter commencing the { *Bombay,* }

day of ending the day of in the year of Our Lord

[Signature of Registrar.]

Registrar of the Archdeaconry of { Calcutta.
Madras.
Bombay.

MARRIAGES solemnized at { *Allahabad.*
Barrackpore.
Bareilly.
Calcutta, &c., &c.

[illegible]

[a] *Substituted* by the Amending Act, 1891 (12 [XII] of 1891), Sch. II for the original reference.

SCHEDULE IV.

(See Sections 32 and 54.)

MARRIAGE REGISTER BOOK.

Number.	WHEN MARRIED.			NAMES OF PARTIES.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and Surname.
				Christian name.	Surname.					
	Day.	Month	Year.							
1				James ...	White ...	26 years...	Widower,	Carpenter	Agra ...	William White.
				Martha ...	Duncan...	17 years...	Spinster ..	.....	Agra ...	John Duncan.

Married in the

This marriage was solemnized between us { James White, } in the presence of us { John Smith. }

{ Martha Duncan, } { John Green. }

CERTIFICATE OF MARRIAGE.

Number.	WHEN MARRIED.			NAMES OF PARTIES.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Surname.					
	Day.	Month	Year.							
1	...	...	...	James ...	White ...	26 years..	Widower..	Carpenter ..	Agra ...	William White.
				Martha..	Duncan..	17 years..	Spinster...	.....	Agra ...	John Duncan.

Married in the

This marriage was solemnized between us { James White. } in the presence of us { John Smith. }

{ Martha Duncan. } { John Green. }

SCHEDULE V. — [Enactments Repealed.] Repealed by the Repealing Act, 1938, (1 [I] of 1938), S. 2 and Schedule.

THE CINEMATOGRAPH ACT, 1918

(ACT II OF 1918)

CONTENTS.

SECTIONS.

1. Short title, extent and commencement.
2. Definition.
3. Cinematograph exhibitions to be licensed.
4. Licensing authority.
5. Restrictions on powers of licensing authority.

SECTIONS.

6. Punishment for contravention of this Act and rules made thereunder.
7. Certification of films.
8. Power to make rules.
9. Power to exempt.

STATEMENT OF OBJECTS AND REASONS.

"The Bill is designed to ensure proper control of cinematograph exhibitions with particular regard to the safety of those attending them; and to prevent the presentation to the public of improper or objectionable films. The existing law of the country contains certain scattered provisions, affecting such exhibitions and certain local enactments also bear on the subject; but the rapid growth in the popularity of cinematograph and increasing number of such exhibitions in India have rendered these provisions inadequate for the protection of the public from indecent or otherwise objectionable representations. Further, the special danger from fire which attends cinematograph exhibitions, as has been illustrated by terrible catastrophes due to this cause in other countries, rendered it important to secure, in the interest of safety of spectators, a proper regard to the structural conditions of the premises utilised.

The Bill accordingly provides that no exhibition shall

be given except in accordance with the conditions of a license granted by the prescribed authority. The license is intended to ensure that the intentions of the Act are complied with and that adequate precautions are taken for the safety of persons attending the exhibition which it covers. The Bill also provides for the constitution of an authority which will be required to pass all films intended for exhibition in this country and which will have power to refuse the necessary certificate in the case of any film. The production of which in public is open to objection for the reasons already given. The Bill includes the ordinary rule-making provision and enables the Local Governments to exempt any cinematograph exhibition or class of cinematograph exhibitions from any provisions of law. Finally it makes provision for the punishment of offences against the Act or the rules made thereunder."

—Gazette of India, 1917, Part V, page 74.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act XXIII of 1919.
—Adapted by A. O.

—Amended in U. P. by U. P. Act, VII of 1942.
—Repealed in part and amended by Act, XXXVIII of 1920.

THE CINEMATOGRAPH ACT, 1918

(ACT II OF 1918.)^a

[6th March, 1918.]

An Act to make provision for regulating exhibitions by means of Cinematographs.

WHEREAS it is expedient to make provision for regulating exhibitions by means of cinematographs; It is hereby enacted as follows :—

[a] For Report of Select Committee, see Gazette of India, 1918, Pt. V. p. 11; and for Proceedings in Council, see *ibid.*, 1917, Pt. VI, p. 703, and *ibid.*, 1918, Pt. VI, pp. 38, 94 and 275.

Short title, 1. (1) This Act may be called the CINEMATOGRAPH ACT, 1918.
extent and commencement. (2) It extends to the whole of British India, including British Baluchistan.

^a[(3) The ^b[Provincial Government] may, by notification in the ^c[Official Gazette], direct that the whole or any of its provisions shall come into force in any Province or part of a Province on such date as may be specified in the notification.^d]

[a] *Substituted* by the Cinematograph (Amendment) Act, 1919 (23 [XXIII] of 1919), S. 2, for the original sub-section. [b] *Substituted* by A. O. for the words "Local Government", which had been *substituted* for the words "Governor-General in Council" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [c] *Substituted* by A. O. for the words "local official Gazette," which had been *substituted* for the words "Gazette of India" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [d] For notifications by the Governor-General in Council bringing S. 2, sub-sections (1), (2) and (3) of S. 7 and S. 8 into force in the whole of British India, including British Baluchistan, from the 1st February, 1920, and the other provisions of the Act from the 1st August 1920, see General Rules and Orders, Vol. IV, p. 527. For notification declaring the Act to be in force in British Baluchistan from the 1st September, 1930, see Gazette of India, 1930, Pt. II-A, p. 415.

Definition. 2. In this Act, unless there is anything repugnant in the subject or context,—
"cinematograph" includes any apparatus for the representation of moving pictures or series of pictures ;

"place" includes also a house, building, tent or vessel ; and

"prescribed" means prescribed by rules made under this Act.

3. Save as otherwise provided in this Act, no person shall give an exhibition by means of a cinematograph elsewhere than in a place licensed under this Act, or otherwise than in compliance with any conditions and restrictions imposed by such licence.

4. The authority having power to grant licences under this Act (hereinafter referred to as the Licensing authority. "licensing authority") shall be the District Magistrate, or, in a presidency town a* * * the Commissioner of Police :

Provided that the ^b[Provincial Government] may, by notification in the ^c[Official Gazette], constitute for the whole or any part of a Province such other authority as it may specify in the notification to be the licensing authority for the purposes of this Act.

— [a] The words "or in the town of Rangoon" were repealed by A. O. [b] Substituted by A. O. for "Local Government". [c] Substituted by A. O. for "local official Gazette".

Restrictions on powers of licensing authority. 5. (1) The licensing authority shall not grant a licence under this Act, unless it is satisfied that—

- (a) the rules made under the Act have been substantially complied with; and
- (b) adequate precautions have been taken in the place in respect of which the licence is to be given to provide for the safety of persons attending exhibitions therein.

(2) A condition shall be inserted in every licence that the licensee will not exhibit, or permit to be exhibited, in such place any film other than a film which has been certified as suitable for public exhibition by ^a[an authority constituted under section 7], and which, when exhibited, displays the prescribed mark of that authority, and has not been altered or tampered with in any way since such mark was affixed thereto.

(3) Subject to the foregoing provisions of this section, and to the control of the ^b[Provincial Government], the licensing authority may grant licences under this Act to such persons as it thinks fit, and on such terms and conditions, and subject to such restrictions as it may determine.

[a] Substituted by the Cinematograph (Amendment) Act, 1919 (23 [XXIII] of 1919), S. 3, for "the prescribed authority". [b] Substituted by A. O. for "Local Government".

6. (1) If the owner or person in charge of a cinematograph uses the same or allows it to be used, or if the owner or occupier of any place permits that place to be used, in contravention of the provisions of this Act or the rules made thereunder, or of the conditions and restrictions upon, or subject to which, any licence has been granted under this Act, he shall be punishable with fine which may extend to one thousand rupees and, in the case of a continuing offence, with a further fine which may extend to one hundred rupees for each day during which the offence continues, and his licence (if any) shall be liable to be revoked by the licensing authority.

(2) If any person is convicted of an offence punishable under this Act committed by him in respect of any film, the convicting Court may further direct that the film shall be forfeited to His Majesty.

^a[7. (1) Any ^b[Provincial Government] ^c* * *] may, by notification in the ^d[Official Certification of films. Gazette], constitute as many authorities as it may think fit for the purposes of examining and certifying films as suitable for public exhibition, and declare the area (hereinafter referred to as the 'local area') within which each such authority shall exercise the powers conferred on it by this Act. Where an authority so constituted consists of a Board of two or more persons, not more than one-half of the members thereof shall be persons ^e[in the service of the Crown].

(2) If any such authority after examination considers that a film is suitable for public exhibition, it shall grant a certificate to that effect to the person applying for the same, and shall

The Cinematograph Act, 1918

Section 6 — Note 1

[1] "In cl. 6 we have, in addition to the owner made the person in charge of a cinematograph liable for using it or allowing it to be used in contravention of the Act. We have substituted for the word "allows" in the second place where that word occurs, the word "permits" as we wish to make it clear that the authorised use and not unauthorised use that determines the liability of the owner of the place where the exhibition is given."—*Select Committee Report.*

Section 7 — Note 1

[1] "We understand that the authorities to be constituted under cl. 7 will, as a rule, be authorities whose certificates will be valid throughout British India. It has been pointed out to us that cases may well arise where a film the exhibition of which might not be objectionable in many parts of India would, owing to local conditions, stand on a different footing in other parts, and we have therefore inserted a provision enabling any certificate to be restricted by the Local Government either generally in its Province or any part thereof."—*Select Committee Report.*

cause the film to be marked in the prescribed manner. The certificate of any such authority shall, save as hereinafter provided, be valid throughout the territories in which this Act is in force.

(3) (a) If the authority is of opinion that a film is not suitable for public exhibition in the local area, it shall inform the person applying for the certificate of its decision, and such person may, within thirty days from the date of such decision, appeal for a reconsideration of the matter by the ^b[Provincial Government] by which the authority was constituted.

(b) If the ^b[Provincial Government] rejects the appeal it shall, by notification in the ^d[Official Gazette], direct that the film shall be deemed to be an uncertified film in that local area, and such direction shall have effect notwithstanding the subsequent grant of a certificate in respect of the film by any other such authority.

(4) Any such authority may demand the exhibition before itself of any certified film which it has reason to believe is about to be publicly exhibited in its local area, and may by order suspend the certificate of any such film pending the orders of the ^b[Provincial Government], and during such suspension the film shall be deemed to be an uncertified film in that area.

(5) The District Magistrate, or, in a Presidency-town ^f[* * *] the Commissioner of Police, may by order suspend the certificate of any film pending the orders of the ^b[Provincial Government], and during such suspension the film shall be deemed to be an uncertified film in that district or town.

(6) A copy of any order of suspension made under sub-section (4) or (5), together with a statement of reasons therefor, shall forthwith be forwarded by the authority or the officer making the same to the ^b[Provincial Government] by which the authority was constituted or to which the officer is subordinate, as the case may be, and such ^b[Provincial Government] may ^e[* * *] either discharge the order or, by notification in the ^d[Official Gazette], direct that the film shall be deemed to be an uncertified film in the whole or any part of the Province.

(7) A ^b[Provincial Government] may, of its own motion, by notification in the ^d[Official Gazette], direct that a certified film shall be deemed to be an uncertified film in the whole or any part of the Province.

(8) The exhibition of a film to which any order or direction under clause (b) of sub-section (3) or sub-section (4), (5), (6) or (7) is for the time being applicable shall, in the area to which such order or direction relates, be deemed to be a contravention of the condition mentioned in sub-section (2) of section 5.]

[a] *Substituted by the Cinematograph (Amendment) Act, 1919 (28 [XXIII] of 1919), S. 4, for the original section.*

[b] *Substituted by A. O. for "Local Government".* [c] *The word "authorised in this behalf by the Governor-General in Council" were repealed by A. O.* [d] *Substituted by A. O. for "local official Gazette".* [e] *Substituted by A. O. for "in the service of Government".* [f] *The words "or in the town of Rangoon" were repealed by A. O.* [g] *The words "in its discretion" were repealed by A. O.*

8. (1) The ^a[Provincial Government] may make rules for the purpose of carrying into effect Power to make rules. the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, rules under this section may provide for —

- (a) the regulation of cinematograph exhibitions for securing the public safety ;
- (b) the procedure of the authorities constituted for examining and certifying films as suitable for public exhibition, and all matters ancillary thereto, and the fees to be levied by those authorities ; ^b[*]

^c[(bb) the appointment of officers subordinate to authorities constituted under section 7 and the regulation of the powers and duties of such officers ; and]

(c) any other matter which by this Act is to be prescribed.

^d[* * * *]

(4) All rules made under this Act shall be published in ^e[* * *] the ^f[Official Gazette], ^g[* * *] and, on such publication, shall have effect as if enacted in this Act.

[a] *Substituted by A. O. for the words "Local Government", which had been substituted for the words "Governor-General in Council" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.*

[b] *The word "and" was repealed by the Cinematograph (Amendment) Act, 1919 (28 [XXIII] of 1919), S. 5.*

[c] *Clause (bb) was inserted, ibid.* [d] *Sub-section (3) was repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.* [e] *The words "Gazette of India or" were repealed, ibid.* [f] *Substituted by A. O. for "local official Gazette".* [g] *The words "as the case may be" were repealed by Act 38 [XXXVIII] of 1920.*

PROVINCIAL AMENDMENT.

United Provinces.—In clause (a) of sub-section (2) of section 8, *after* the word 'safety' the following words shall be *added*, namely :—

"and the fees to be levied for licensing buildings for cinematograph exhibitions and for inspection of electric installations in such buildings."

—U. P. Act 7 [VII] of 1942, S. 2. [This Act shall be deemed to have had effect as from 3-8-1931.]

Note.—Section 3 of the U. P. Act 7 [VII] of 1942 runs as follows: "Any rule made before the commencement of this Act in purported exercise of any such power as is mentioned in section 2 of this Act, and which would have been lawful if this Act had come into operation on the third day of August, 1931, shall be deemed to have been lawfully made."

9. The ^a[Provincial Government] may, by order in writing, exempt, subject to such conditions *Power to exempt.* and restrictions as it may impose, any cinematograph exhibition or class of cinematograph exhibitions from any of the provisions of this Act or of any rule made thereunder.

[a] *Substituted by A. O. for "Local Government".*

THE CODE OF CIVIL PROCEDURE, 1908.

(ACT V OF 1908).

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STATEMENT OF OBJECTS AND REASONS.

"The Bill is sufficiently explained in the Report of the Special Committee printed below."

—H. ERLE RICHARDS.

Simla, 3rd September, 1907.

Report of the Special Committee appointed to consider the amendment
of the Civil Procedure Code.

We have the honour to present this report on the proposals to amend the Code of Civil Procedure which have been submitted for our consideration by the Government of India and, annexed to it, a draft Bill amended by us. A detailed account of the alterations introduced in the Bill will be found in the Notes on Clauses which form the second part of this Report, but we desire by way of preface to make some observations of a general character on the defects in the existing law which appear to us to call for reform and on the more important of those alterations.

1. The Code of Civil Procedure of 1882 has been in force for 25 years and the experience of those years has shown that the general lines on which it proceeds are sound. The matters in which it has proved defective are, for the most part, matters of detail, and they arise, as it seems to us, mainly from the fact that it is impossible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. In our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation. We propose to make provision for these purposes by a re-arrangement of the Code. We recommend that matters of mere machinery should be relegated to Rules capable of alteration by each High Court, subject to certain checks, and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable. This re-arrangement is in accordance with precedent and possesses advantages so obvious that it is needless to enlarge upon them.

2. The objection—and as it appears to us the only objection of substance—that can be urged against this proposal is that until the scheme of distribution had become familiar to those who have to administer the

Act, the change may cause some confusion and the familiar numerical references to the present Sections will no longer apply. We are sensible that some inconvenience must arise from this cause in the first instance, but this is but a small disadvantage in comparison with the advantages to be obtained by the change, and we cannot think that any one will seriously contend that such a slight and temporary drawback should stand in the way of a reform which appears to us in other respects to be wholly beneficial.

3. The adoption of this principle has necessarily involved a departure from the arrangement of the present Code, but in other respects, we have advisedly adhered as closely as possible to the existing language, the meaning of which is now well understood by Courts and by practitioners. Speaking generally, it may be said, that we have only departed from the phraseology of the Code where experience has suggested improvements or competent authority has called for some change. We have refrained from altering the wording, merely, because it might be capable of improvement; for in any change, even of a verbal character, there is a risk of opening a door to fresh litigation. In the amendments that we have introduced, we have endeavoured to state general rules of procedure rather than to provide in detail for every possible contingency; for, we hold it to be a sound view that excessive elaboration of details of procedure tends to cramp the actions of the Court and in consequence, to encourage technicalities. For this reason, we have made no attempt to embody in the Code a digest of the very numerous decisions on the existing Sections; we have made amendments to meet case-law only on points on which there is a conflict of authority. And in this connexion we desire to point out that at the present time there is even less justification for the enactment of elaborate provisions in regard to procedure than at the time when the Code of 1882 was passed. Since then, the standard of legal efficiency in the mofussil has been materially raised, and the principles of procedure are now so well under-

stood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms.

But although we have made the present Code the basis of our draft, we have carefully examined the Bill settled by the Select Committee in 1903, and we desire to express our acknowledgments to that Committee for the store of information it contains, and for the materials collected in their report.

Apart from the re-arrangement to which reference has been made, we have not introduced many changes of a radical character in the Code.

4. The general nature of some of the amendments we recommend, may be conveniently illustrated by a brief examination of the extent to which the various stages of a suit will be affected by them.

A. To begin with, it is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensiveness of a suit, and by the wider powers of amendment vested in the Courts under the Bill. An adequate check is provided by the power of a Court to interfere where embarrassment is likely to result.

B. Increased facilities have been given for the service of process to which further reference is made in the Notes on Clauses. It is hoped that in the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system.

C. In our opinion, it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose, we think that the present system of pleadings in the *mofussil* which is notoriously lax, should be improved, and we have incorporated in the rules an order on pleadings, which, it is hoped, will lead to sounder and fairer methods of arriving at the real points in dispute. The forms have been revised and we hope that they will be brought into more general use in the *mofussil*.

We have not been able, within the time at our disposal, to make these forms, or the other forms in the Appendix to Schedule I complete; but this is a matter of detail which can be further considered before the Bill is passed into law.

D. It is not possible to secure expedition in the disposal of suits, unless the questions of fact on which there is a real contest are narrowed down as far as possible. As a step towards this, we have incorporated in the rules an order in which provision is made for the admission not only of documents but also of facts. It must be left to litigants and their advisers to make adequate use of this order, but it is hoped that the Courts will encourage the use of it, since it certainly affords a means whereby the two principal evils of litigation, delay and expense, can be materially diminished.

E. We attach much importance to a proper use being made by Courts in the *mofussil* of the procedure prescribed for the first hearing. The Code as it stands makes provision for the examination of parties by the Court, and we have altered the language so as to compel the production of documents at the first hearing. In our opinion, this will act as a substantial check on the fabrication of documentary evidence.

F. The provisions relating to the hearing of suits do not call for material alteration, but we have thought it well to provide expressly for the cases where a party dies between conclusion of the hearing and delivery of judgment. It would obviously be wrong that such an accident should in any way interfere with the disposal

of the case, and we have therefore inserted a provision to enable judgment to be pronounced notwithstanding the death.

G. A change of importance has been made in regard to decrees. In the first place, we have inserted an express provision recognizing the distinction between preliminary and final decrees. We hope, in this way, to afford facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution questions which should be decided by the decree. This change should ensure the more expeditious disposal of a class of suits which at present are conspicuous for the delay to which they give rise. Another amendment of importance which we have introduced is in regard to mortgage-suits. These are very numerous and involve complicated questions of law. Hitherto some confusion has been occasioned by the co-existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage-suits. We think that the provisions regulating this matter should be dealt with in their entirety in the Code, and we have therefore introduced rules in Order XXXIV to give effect to our view. We propose that the sections of the Transfer of Property Act affected by this change should be repealed. We desire to call the attention of those Provinces to which that Act does not apply to the effect of these changes.

In our opinion, it is expedient to give greater assistance to the Courts in the framing of decrees. The importance of this branch of procedure cannot be overrated; it is surrounded by difficulties which are a fruitful source of error and consequently of litigation. We have amplified the provisions of the Code to meet this defect, and have introduced some forms which can be adopted to meet the requirements of individual cases. We think that further forms might be added with advantage before the Bill becomes law.

H. Amongst other matters, we have removed limitations which at present exist on the power of appointing Receivers, and have conferred a power to appoint Receivers on Subordinate Courts.

5. *Execution.*—The subject of execution is, perhaps, one of the most difficult with which we have had to deal. The present system, in the *mofussil* at any rate, tends to excessive delay and affords facilities for defeating the claims of creditors. At the same time the creditor often has only himself to blame, owing to his own laches in prosecuting his rights. In the Presidency towns the same objections cannot be fairly raised; the system works well; whilst, in the *mofussil*, the difficulties arise not so much from the machinery itself, as from the defective manner in which it is worked. One of the most fruitful sources of litigation is the setting aside of execution sales, on the ground of irregularity in the publication of the sale proclamation. It is notorious that in many of these cases the Court's officer either through negligence or dishonesty has not duly published the proclamation, but it is impossible to deal with such cases by any provision in a Code. After a most careful consideration of the subject, we have not seen our way to any very drastic changes in the present system. We have found ourselves unable to accept the somewhat far-reaching proposal of the Committee of 1902 in relation to the execution of decrees by precept; but we are so far in accord with the view expressed by that Committee as to have been able to insert in the Bill a clause which enables the Court which passed the decree to issue a precept to any other Court to attach property of the judgment-debtor pending execution in the ordinary course. Beyond this we have felt, we could not safely go.

We anticipate that there will be a substantial saving of time, and consequent expense, from the provision

requiring that mesne profits shall be ascertained by the Court under the decree itself, and not as now in execution proceedings.

Clause 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion, as to whether or not questions as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed, can be determined under Cl. 47 of the present Bill, corresponding with S. 244 of the existing Code. We think they should be.

Other amendments deserving notice relate to (1) the power to break open the outer door of the judgment-debtor's dwelling-house; (2) the date from which the purchaser's title accrues; (3) oral application for immediate execution; (4) the discretion of the Court in the execution of decrees for the restitution of conjugal rights; (5) the execution against partnership property; (6) extended facilities for attaching salaries; and (7) powers to decree-holders to carry decrees into effect at the expense of the judgment-debtor.

We regard the changes made in relation to execution as calculated to materially assist the judgment-creditor in recovering the fruits of his judgment.

6. *Arbitration.*—Two questions of importance have arisen in connexion with this subject: (1) Should any of the Sections of the Arbitration Act of 1899 be incorporated into the Code? (2) Should the right of appeal as now existing be altered, and if so, in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are, perhaps, difficulties as to this at present. We have determined, therefore, to leave the arbitration clauses much as they are in the present Code; but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act.

In regard to appeals, some change has been made. Upon this question, adopting the view of the Judicial Committee as expressed in *Ghulam's case* (I. L. R. 29 Calcutta 167), we are strongly in favour of finality in cases of arbitration. If rights of appeal be given, the disappointed party will take advantage of every such right. To meet the difficulty expressed in the case reported in I. L. R. 25 Calcutta 141 (which followed many other cases in the Calcutta High Court), we have inserted the words "or being otherwise invalid" in subsection (c) of Section 521 of the present Code. If, therefore, either party considers the award as invalid on any ground, he can apply to have it set aside. We have thought it right to give one appeal from the opinion expressed by the Court on a special case under Section 517, and to allow one appeal as from order under Sections 521, 523 and 526. And having regard to the rather wide language of the Judicial Committee in *Ghulam's case* we have further thought it advisable to make it clear that an order granting an application either under Section 523 or Section 526 is not to be deemed a decree within the meaning of the Code, otherwise there would be a wider right of appeal from orders under these Sections than from a decree under Section 522. The other alterations deal with the text, rather than with any question of policy or principle.

7. *Suits relating to public matters.*—We have inserted a clause to enable actions for public nuisances to be brought, with the consent of the Advocate-General, irrespective of special damage. It has been represented to us that such a power is needed and we concur in that view.

8. *Public Charities.*—The suggestion has been made on high authority that some express reference should

be made in the Code to the power of the Court to apply Cypres doctrine in the settling of schemes. But this power would appear to exist already within its proper limits (*Mayor of Lyons' case* L. R. 3 I. A. 32) and we do not think it necessary to make express reference to it.

It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of public charities should be made more extensive. The clause, as it stands, gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted, but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit, at least in the first instance. We are told that revenues derived from charitable trusts are in some cases very large in amount, that no accounts of their expenditure are ordinarily rendered, and that there is good ground for believing that a considerable portion is mis-spent or squandered on useless objects.

The Hon'ble Dr. Rashbehary Ghose supports these views and has submitted a clause to give effect to them. It is in the following terms:

"93-A (1). The Court may also, upon an application by any two or more persons having the like interest and having obtained the like consent, direct any trustee of such charity to cause to be prepared and filed in the Court, within such time as may be specified in the order, a detailed account of the receipts and disbursements in connection with the trust property for a period not exceeding three years next preceding the date of the application.

(2) Such accounts, when filed in Court, shall be open to inspection by the public.

(3) A trustee who fails to comply with any such direction shall be removed if a suit for that purpose be instituted, unless he can show good cause for such failure."

We have given to the subject our best consideration and desire to record our sympathy with the motives of the proposers. But we have not inserted the clause in the Bill because we think that the question is one of policy on which the public opinion of the communities interested should first be obtained. It affects primarily, as we understand, the Hindu and, to a less extent, the Mahomedan community. And we should not feel justified in recommending an amendment of the law on such a subject as this, unless the leaders of those communities were to express their support of the proposal in unequivocal terms. If it is eventually decided to adopt the amendment, then we think that the clause proposed by Dr. Ghose may be accepted.

9. *Suits by or against firms.*—Attention is directed to the new provision in regard to suits by or against firms (O. XXX), which will, we hope, prove acceptable to the commercial community.

10. *New procedure.*—We have given power to provide by Rules for Counter-claims, Third Party Procedure, Summary Procedure in suits for debt or liquidated demands, as, for instance, rent, or any other definite sum payable under a contract and originating summons. We are of opinion that these forms of proceeding may usefully be adopted in some areas but that this is a matter which should be left for each High Court to decide.

11. *Appeals.*—As regards appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction to the view that no appeal shall lie from a consent decree, or as to costs, except by leave of the

Court; but the most important change is that incorporated in Clause 97, which renders it obligatory upon a party, who considers himself aggrieved by a preliminary decree, to appeal from that decree, at the risk of being precluded from disputing its correctness on an appeal from the final decree. We feel strongly that this is a most useful provision, as tending to that which is so desirable, *viz.*, finality in litigation.

As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of Cl. 103. Experience has shown the desirability of this clause, the effect of which will be to avoid remands, with their consequent delay and expense.

As regards appeals from orders a comparison of Cl. 104 of the Bill with S. 588 of the existing Code would support a *prima facie* inference that the right of appeal from orders has been materially curtailed. But this inference is dispelled on looking at sub-clause (h) of Cl. 104 which allows an appeal from any order made under Rules from which an appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these orders and our conclusion is expressed in the Rules themselves.

12. *Rules.*—The distribution of the provisions of the Code between the body of the Bill and the Rules is a matter on which opinions may well differ. The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to us to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill, stating in general terms the powers of the Court, and of leaving the details to Rules; in matters of less importance the provisions have been relegated altogether to Rules. The result of this re-arrangement is to reduce the Act, as distinct from Schedules, to 155 clauses. The existing order of sequence has, speaking generally, been maintained, but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into chapters.

It is proposed to vest the power of making Rules in High Courts, subject to the control of Local Governments, (or, in the case of the Calcutta High Court, of the Government of India), but we think it most desirable that in exercising this power, the Courts should have the advice of representatives of the various branches of the legal profession, and we have accordingly provided that, in the case of Chartered High Courts and of Chief Courts, Rules shall only be made after

[Notes on Clauses are omitted as these are inserted under the appropriate sections or rules of the Civil Procedure Code in this Manual.]

those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar, of Vakeels or Pleaders and, in Presidency-towns, of Attorneys. In the case of other High Courts power has been given to establish such Rule Committees as the Governor-General in Council may determine. It is believed that Standing Committees of this kind will be of great value. We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861, in order that the rule-making power should correspond with the power conferred under that Act; but we are of opinion that, in the interest of uniformity, it is expedient that all amendments of Rules should be communicated to the Government of India and to other High Courts before sanction is given to them. This, we understand, can be effected by executive order.

If our proposal is adopted, it will probably be useful to publish annually in every Province some manual corresponding to the English "Annual Practice" containing—

- (1) the Act;
- (2) all Rules of procedure made under it or under other Acts in the Province;
- (3) notes of decisions on the Act and Rules.

13. We are sensible that there may be defects and flaws in the Bill which we append to this Report. The subject is complicated and technical and the time at our disposal has been limited. We do not doubt therefore that much improvement may be made in the Bill before it is finally passed into law. But, in our opinion, it is framed on the right lines. We believe for the reasons we have stated that in any reform of Civil Procedure it is essential to introduce some elasticity; to give wider powers of control to the High Courts, and to invest them with a larger discretion in regard to the conduct of cases which come before them. Mr. Dikshit, Subordinate Judge from Bombay, has been present throughout our deliberations, and we take this opportunity of acknowledging the help we have derived from his experience of the working of the Code in the mofussil. We desire also to record our acknowledgments of the services of Mr. Law, of the Legislative Department, who has attended to the clerical and press-work to our entire satisfaction.

(Signed) H. ERLE RICHARDS.
(") FRANCIS MACLEAN.
(") LAWRENCE JENKINS.
(") S. ISMAY.
(") RASHBEHARY GHOSE.

Simla, August 31st, 1907.

—Gazette of India, 1907, Part V, page 179.

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" 4	534	534	" 34	576	576	...	359
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" 6	536	536	" 36	580	580	...	360
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" 11	490	490	" 6	601	601
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" 7	513	513	...	317	"	"	115	...	123
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ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

Year.	No. of Act.	Short Title.	Particulars.
1908	V	THE CODE OF CIVIL PROCEDURE	
1909	III	Presidency Towns Insolvency Act	
1914	I	The Code of Civil Procedure (Amendment) Act	Amending S. 8 and S. 67.
1914	IV	The Decentralisation Act	Amending S. 133.
1914	X	The Repealing and Amending Act	Amending S. 60 and Form No. 7 in Appendix E.
1914	XVII	The Second Repealing and Amending Act	1. Amending O. 5, R. 26. 2. Repealing S. 156 and the Fifth Schedule.
1916	XIII	The Amending Act	Amending Ss. 111, 116, 122, 123, 126, 129 and 130.

Year.	No. of Act.	Short Title.	Particulars.
1917	XXIV	The Repealing and Amending Act	Amending S. 127 and S. 130.
1919	XVIII	The Repealing and Amending Act	Amending S. 122 and S. 123.
1920	XXIV	The Code of Civil Procedure (Amendment) Act	Amending O. 9, R. 5.
1920	XXVI	The Indian Limitation and Code of Civil Procedure (Amendment) Act	1. Amending O. 45, R. 7. 2. Inserting new R. 9-A in O. 45. 3. Adding new sub-rule (4) to R. 15 of O. 45.
1920	XXXVIII	The Devolution Act	Amending Ss. 5, 61, 67, 68, 125 and 143.
1921	III	The Code of Civil Procedure (Amendment) Act	Amending S. 55.
1922	IX	The Civil Procedure (Amendment) Act	1. Inserting new S. 35-A. 2. Amending S. 104 and O. 41, R. 33.
1923	XI	The Repealing and Amending Act	Amending S. 122 and S. 123.
1923	XXVI	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
1923	XXIX	The Code of Civil Procedure (Amendment) Act	Amending O. 21, R. 32 and R. 33.
1925	XX	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
1925	XXIII	The Legislative Members Exemption Act	Inserting new S. 135-A.
1925	XXXII	The Oudh Courts (Supplementary) Act	Amending S. 122 and S. 123.
1926	I	The Small Cause Courts (Attachment of immoveable property) Act	1. Amending S. 7. 2. Inserting new R. 13 in O. 38.
1926	VI	The Code of Civil Procedure (Amendment) Act	Amending S. 103.
1926	XXII	The Code of Civil Procedure (Second Amendment) Act	Amending O. 3, R. 1 and R. 4.
1926	XXX	The Negotiable Instruments (Interest) Act	Amending O. 37, R. 2 and Form No. 4 in Appendix B.
1926	XXXIV	The Sind Courts (Supplementary) Act	Amending S. 122 and S. 123.
1927	X	The Repealing and Amending Act	Amending — i. O. 5, R. 27 and R. 28. ii. Heading of O. 28. iii. O. 28, R. 1, R. 2 and R. 3.
1928	XVIII	The Repealing and Amending Act	Adding new sub-section (3) to S. 98.
1929	XXI	The Transfer of Property (Amendment) Supplementary Act	1. Substituting new Rules 2 to 8, 10, 11 and 15 for the old Rules in O. 34. 2. Substituting new Forms 3 to 11 in Appendix D for the old Forms. 3. Inserting new Rule 8-A in O. 34.
1930	XVI	The Transfer of Property (Amendment) Supplementary Act	Amending O. 43, R. 1.
1932	X	The Code of Civil Procedure (Amendment) Act	1. Amending S. 78. 2. Inserting new Rules 19, 20, 21 and 22 in O. 26 with heading.

Year.	No. of Act.	Short Title.	Particulars.
1934	XXXV	The Amending Act	Amending S. 2, cl. (17), S. 60, sub-s. (1), clause (j), O. 5, R. 27 and R. 28 and O. 28.
1936	XXI	The Code of Civil Procedure (Amendment) Act	1. Amending S. 51 and O. 21, R. 37. 2. Substituting new R. 40 in O. 21 in place of the old Rule.
1937	VIII	The Code of Civil Procedure (Amendment) Act	1. Inserting new S. 44-A. 2. Amending O. 21, R. 22.
1937	IX	The Code of Civil Procedure (Second Amendment) Act	Amending S. 60.
1937	XVI	The Code of Civil Procedure (Third Amendment) Act	Amending O. 32, R. 3.
1937		The Government of India (Adaptation of Indian Laws) Order	
1939	XXVI	The Code of Civil Procedure (Amendment) Act	Amending O. 21, R. 48.
1940	X	The Arbitration Act	Repealing S. 89, clauses (a) to (f) (both inclusive) of sub-s. (1) of S. 104 and the Second Schedule.
1940	XXXIV	The Code of Civil Procedure (Amendment) Act	Amending Ss. 29 and 48.
1941	IV	The Berar Laws Act	Amending S. 7 and O. 50, R. 1.
1941	XXI	The Federal Court Act	Repealing S. 111-A and O. 45, R. 17.
1942	XXIII	The Code of Civil Procedure (Amendment) Act	Adding new O. 27-A.
1942	XXIV	The Code of Civil Procedure (Second Amendment) Act	1. Inserting new R. 11A in O. 33. 2. Amending O. 33, Rr. 12 and 13. 3. Substituting new R. 14 in O. 33 for the original.
1942	XXV	The Repealing and Amending Act	Amending O. 21, R. 48.
1943	V	The Code of Civil Procedure (Amendment) Act	Amending S. 60 and O. 21, R. 48.

COGNATE ACTS AND PROVISIONS.

1. Appellate Jurisdiction Act, 1908 (8 Edw. VII, c. 51).
2. Appellate Jurisdiction Act, 1929 (19 Geo. V, c. 8).
3. Court-fees Act, VII of 1870.
4. Decrees and Orders Validating Act, V of 1936.
5. Federal Court Act, XXV of 1937.
6. Judicial Committee Act, 1833 (3 & 4 Will. IV, c. 41).
7. Judicial Committee Act, 1844 (7 & 8 Vict., c. 69).
8. Limitation Act, IX of 1908.
9. Presidency Magistrates (Court-fees) Act, IV of 1877.
10. Public Suits Validation Act, XI of 1932.
11. Suits Valuation Act, VII of 1887.
12. Unclaimed Deposits Act, XXV of 1866.
13. Unclaimed Deposits Act, V of 1870.

THE CODE OF CIVIL PROCEDURE, 1908

(ACT V OF 1908)^a.

[21st March, 1908]

An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows :—

[a] For Report of the Select Committee, see Gazette of India, 1908, Pt. V, p. 35; and for Proceedings in Council, see *ibid.*, 1907, Pt. VI, p. 135 and *ibid.*, 1908, pp. 8, 12 and 212.

This Act has been extended by notification under Ss. 5 and 5A of the Scheduled Districts Act, 1874 (14 [XIV] of 1874), to the following Scheduled Districts :

(1) The Districts of Jalpaiguri, Cachar (excluding the North Cachar Hills), Sylhet, Goalpara (including the Eastern Duars), Kamrup, Darrang, Nowgong (excluding the Mikir Hill Tracts), Sibsagar (excluding the Mikir Hill Tracts) and Lakhimpur (excluding the Dibrugarh Frontier Tracts) : Gazette of India, 1909, Pt. I, p. 5 and *ibid.*, 1914, Pt. I, p. 1690. (2) The Province of Sind : Bombay Government Gazette, Extraordinary, 1909, Pt. I and Gazette of India, 1909, Pt. I, p. 32. (3) The District of Darjeeling and the Districts of Hazaribagh, Ranchi,

PREAMBLE — SYNOPSIS

1. Applicability and scope.
2. Acts in *pari materia*.
3. Body, schedule and forms.
4. Exercise of discretion.
- 4a. Interpretation of statutes.
5. Reference to previous law.
6. Retrospective effect.

1. Applicability and scope. — [1] The Civil P. C. cannot of itself establish a right which does not exist under the ordinary law. It is a Code of procedure only and not of substantive law. (Vol 17) 1930 Rang 317 (319); 9 Rang 7; (Vol 19) 1932 Lah 401 (407); 13 Lah 618 (F B); (Vol 23) 1936 Mad 50 (52); 59 Mad 202 (F B). (It may recognize them or take them away.)

[2] The Civil P. C. is a Code conferring powers on a Court and is not a Code restricting and delimiting its unlimited powers. (Vol 16) 1929 Mad 757 (763); 52 Mad 399 (F B).

[3] The essence of a Code is to be exhaustive on the matters in respect of which it declares the law. In respect of such matters, the Court cannot disregard or go outside the letter of the enactment according to its true construction. The Code, therefore, binds Court so far as it goes. (1906) 33 Cal 927 (931); (1909) 36 Cal 193 (203); (1909) 10 C L J 527 (531). (29 Cal 707 (715); 29 I A 196 (P C) followed.); (Vol 13) 1926 Cal 568 (574); (1913) 24 Mad L Jour 235 (239).

[4] The Code of Civil Procedure is not exhaustive and it does not affect the power and duty of the Court in cases where no specific rule exists. (1909) 36 Cal 193 (203, 204); (1906) 33 Cal 927 (931); (Vol 7) 1920 Lah 304 (304); 1 Lah 339; (Vol 4) 1917 Pat 495 (497); 2 Pat L Jour 361. (Court has inherent power to set aside order made by it.); (Vol 8) 1921 Pat 409 (410). (Power to release property from illegal attachment.)

[5] Where no specific rule exists the Court can act according to equity, justice and good conscience, though in the exercise of such powers it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. (1906) 33 Cal 927 (931); (1909) 36 Cal 193 (203, 204); (Vol 7) 1920 Lah 304 (304); 1 Lah 339; (Vol 4) 1917 Pat 375 (377); 2 Pat L Jour 306.

[6] A provision of the Code of Civil Procedure cannot be made applicable to proceedings under an Act if that provision is inconsistent with the procedure prescribed by that Act. (Vol 25) 1938 Lah 658 (663).

[7] The Code applies to proceedings under Arbitration Act. (Vol 12) 1925 All 154 (155); 47 All 179.

[8] Hindu law does not override express provisions as regards procedure laid down in Civil P. C. (Vol 5) 1918 Cal 987 (988).

[9] Suit barred under terms of Provincial Insolvency Act—No recourse can be taken to Civil P. C. (Vol 17) 1930 Rang 317 (319); 9 Rang 7.

[10] The provisions of the Civil P. C. do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act. (Vol 5) 1918 Oudh 217 (220); 21 Oudh Cas 220. (A *bona fide* compromise on behalf of a minor in mutation proceedings without leave of Court is not bad.); (1894) 21 Cal 428 (429, 436).

[11] The Civil P. C. does not apply to proceedings before Village Courts. (Vol 17) 1930 Mad 795 (795).

[12] The Civil Procedure Code, 1908, does not apply to Village Munsiffs' Courts. (Vol 3) 1916 Mad 544 (546).

[13] The Civil P. C. is not applicable to proceedings before the Controller of Patents under the Patents and Designs Act. (Vol 21) 1934 Cal 725 (729); 61 Cal 450. (Principles underlying Code, in so far as they are principles of natural justice, must be observed by him.)

[14] The provisions of the Code of Civil Procedure have no bearing on the right of Letters Patent Appeal. (Vol 26) 1939 All 618 (619); 1 L R (1939) All 750 (F B).

[15] The provisions of Bombay High Court Rules (Original Side) supersede and override those of the Civil P. C., Sch. I. (Vol 17) 1930 Bom 216 (216, 217). (Provision for counter-claim.)

[16] The tribunal under the Madras District Municipal Election Rules should be guided wherever possible in its procedure by the provisions of Civil P. C. (Vol 13) 1926 Mad 1043 (1043).

[17] No procedure is prescribed by S. 202 of the Bengal Municipal Act (1884). A Magistrate exercising his power under that section would not be wrong in following, so far as they seem applicable, the provisions of the Code of Civil P. C. (Vol 12) 1925 Cal 934 (935); 52 Cal 670; 26 Cri L Jour 1246.

[18] Foreigners are not excepted from jurisdiction of British Indian Courts. (Vol 14) 1927 All 413 (414); 49 All 669.

2. Acts in *pari materia*. — [1] The Civil P. C. and the Limitation Act are Acts in *pari materia* and must be treated as complementary to each other. (Vol 26) 1939 All 403 (405, 412); 1 L R (1939) All 647 (F B); (Vol 12) 1925 Pat 1 (-); 3 Pat 371 (F B); (Vol 18) 1931 Pat 241 (246); 10 Pat 670 (F B).

3. Body, schedule and forms. — [1] Rules have force of law and must be observed. (Vol 24) 1937 Pat 307 (310).

[2] The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. The body of the Code must therefore be read in con-

Palnau and Manbhumi in Chota Nagpur : Calcutta Gazette, 1909, Pt. I, p. 25 and Gazette of India, 1909, Pt. I, p. 33. (4) The Province of Kumaon and Garhwal and the Tarai Parganas (with modifications) : U. P. Gazette, 1909, Pt. I, p. 3 and Gazette of India, 1909, Pt. I, p. 31. (5) The Pargana of Jaunsar-Bawar in Dehra Dun and the Scheduled portion of the Mirzapur District : U. P. Gazette, 1909, Pt. I, p. 4 and Gazette of India, 1909, Pt. I, p. 32. (6) Coorg : Gazette of India, 1909, Pt. I, p. 33. (7) Scheduled Districts in the Punjab : Gazette of India, 1909, Pt. I, p. 33. (8) The Districts of Peshawar, Hazara, Kohat, Bannu and Dera Ismail Khan composing the N. W. F. P. : Gazette of India, 1909, Pt. II, p. 80. (9) Sections 36 to 43 to all the Scheduled Districts in Madras : Gazette of India, 1909, Pt. I, p. 152. (10) Scheduled Districts in the C. P., except so much as is already in force and so much as authorizes the attachment and sale of immovable property in execution of a decree, not being a decree directing the sale of such property : Gazette of India, 1909, Pt. I, p. 239. (11) Ajmer-Merwara, except Ss. 1 and 155 to 158 : Gazette of India, 1909, Pt. II, p. 480. (12) Pargana Dhalbhum, the Municipality of Chaibasa in the Kolhan and the Porahat Estate in the District of Singbhum : Calcutta Gazette, 1909, Pt. I, p. 453 and Gazette of India, 1909, Pt. I, p. 443.

Under S. 3 (3) (a) of the Sonthal Parganas Settlement Regulation (3 [III] of 1872), Ss. 38 to 42 and 156 and Rr. 4 to 9 in O. 21 in Sch. I have been declared to be in force in the Sonthal Parganas and the rest of the Code for the trial of suits referred to in S. 10 of the Sonthal Parganas Justice Regulation, 1893 (5 [V] of 1893) : see Calcutta Gazette, 1909, Pt. I, p. 45.

It has been declared to be in force in British Baluchistan by the British Baluchistan Laws Regulation, 1913 (3 [II] of 1913), S. 3 and Sch. I; in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (1 [I] of 1929), S. 2; in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch.

PRELIMINARY.

Short title, commencement and extent.

1. (1) This Act may be cited as the THE CODE OF CIVIL PROCEDURE, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 153 to 158 extend to the whole of British India : the rest of the Code extends to the whole of British India, except the Scheduled Districts. [1882—S. 1]

Preamble (contd.)

junction with the rules. (Vol 4) 1917 Cal 44 (46) : 44 Cal 929 (F B); (Vol 4) 1917 Cal 657 (658) : 43 Cal 148.

[3] Neither the alterations in the rules of Sch. I nor those rules themselves should be inconsistent with body of Code. (Vol 29) 1942 All 387 (389); I.L.R. (1942) All 862.

[4] When there is a conflict between the body of the Code and its schedule, the Code must prevail. (Vol 1) 1914 Cal 581 (582); (Vol 26) 1939 Nag 186 (190) : I L R (1939) Nag 250 (F B).

[5] The forms given in the schedule cannot control the clear words of the Code itself. (Vol 5) 1918 Cal 631 (632).

[6] Also see Section 121 and O. 48, R. 3.

4. Exercise of discretion. — [1] Discretion, when applied to a Court of law, means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful, but legal and regular. (1880) 5 Cal 259 (264, 265); (Vol 8) 1921 Pat 467 (468).

[2] If the Court rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion. (1903) 13 Mad L Jour 15 (19).

4a. Interpretation of statutes. See "Interpretation of Statutes" in last Volume.

5. Reference to previous law. — [1] It is not right to interpret the Code of 1908 with reference to the Codes of 1859 and 1882. (Vol 17) 1930 Oudh 148 (159) : 5 Luck 552 (F B).

6. Retrospective effect. — [1] The new Code applies, so far as procedure is concerned, to all cases which were pending or about to be instituted at the time it came into force. (1911) 9 I C 815 (816) (Cal); (1913) 40 Cal 704 (709); (Vol 17) 1930 Cal 422 (423) : 57 Cal 148; (Vol 20) 1933 Oudh 274 (275) : 8 Luck 504; (1910) 7 I C 11 (14, 15) (All); (1895) 19 Bom 204 (206).

[2] The Code is not retrospective so as to affect vested rights. (1910) 7 Mad L Tim 296 (299) (F B); (Vol 1) 1914 P C 66 (67) : 36 All 350 (P C).

[3] Where a suit was filed when the Civil Procedure Code of 1882 was in force the course of appeal was held to be regulated by that Code. (1912) 1912 Pun L R No. 169, page 543 (544).

[4] An appellate Court cannot reverse an order of the lower Court passed under an old Code on the ground that since then a different rule has been enacted by the new Code. (1911) 2 M W N 386 (386).

SECTION 1 — SYNOPSIS.

1. British India.

2. Scheduled Districts.

1. British India. — [1] Cantonment of Wadhwan is not included in "British India." (1913) 37 Bom 152 (156) : 13 Cri L Jour 790. (Dissenting from 9 Bom 244.)

[2] The tributary mahals of Orissa, of which Mayoornunj is one, do not form part of British India. (1902) 29 Cal 400 (400, 402).

[3] Vizagapatam Court has no jurisdiction to attach land situated in Agency tract. (Vol 12) 1925 Mad 1100 (1101).

[4] The notification No. 949—I. B. of 26th March 1909 makes the whole Civil Procedure Code of 1908 applicable to Berar so far as may be applicable. (1910) 6 Nag L R 49 (50).

2. Scheduled Districts. — [1] Property in scheduled districts — Order for sale under mortgage-decree is without jurisdiction. (Vol 6) 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (P C).

[2] By a notification in 1867 the Civil Procedure Code, 1859, as amended by Civil Procedure Code, 1861, was applied to the Sonthal Parganas subject to certain provisions, restrictions and exceptions (Vol 1, 1914 P C 140 (144); 42 Cal 116 : 41 Ind App 197 (P C)).

[3] Under the provisions of S. 2, Act XXXVII of 1855, and of S. 3 of Reg. III of 1872, the Code of Civil Procedure was in force in the Sonthal Parganas as regards suits of a value exceeding Rs. 1000, without any qualification. (1891) 18 Cal 133 (136, 137).

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules :

(2) "decree" means the formal expression¹¹ of an adjudication which, so far as regards the Court expressing it, conclusively determines⁵ the rights of the parties with regard to all or any of the matters in controversy in the suit¹² and may be either preliminary or final. It shall be deemed to include the rejection of a plaint¹⁸ and the determination of any question within section 47¹⁵ or section 144,¹⁶ but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.¹³

Explanation.—A decree is preliminary⁶ when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final :

Objects and Reasons.

"Decree. — The importance of the definition of the word 'decree' rests on the fact that by reference to it the right of appeal is determined. The Committee have in the main adhered to the existing definition; but they have modified it in two respects, and this has involved a slight re-casting of the language. The principal modification aims at permitting an appeal from an adjudication which purports to settle the rights of the parties, though it does not completely dispose of the suit. Such an adjudication the Committee describe as a preliminary decree.

The *explanation* is intended to make it clear that a decree may be partly final and partly preliminary. Thus

a decree for the recovery of possession of immovable property and for mesne profits would be of this mixed character.

The word 'within' has been substituted for 'mentioned' or 'referred to in' with a view to bring within the definition of decree orders against sureties (see Cl. 142) and orders as to court-fees in pauper suits (see O. XXXIII, R. 13) and thus providing for appeals therefrom.

The only other modification is for the purpose of excluding a right of appeal from an order of dismissal for default."—S. O. R.

SECTION 2 (2)—SYNOPSIS.

1. Appealable orders.
2. Applicability and scope.
3. "Conclusively determines."
4. Decree—What is.
5. Distinction between decree and order.
6. Explanation — Preliminary decree (General).
7. Final decrees.
8. What are not preliminary decrees.
9. What are preliminary decrees.
10. Final orders.
11. "Formal expression."
12. "Matters in controversy in the suit."
13. Orders of dismissal for default.
14. Orders in execution.
15. Orders under S. 47.
16. Orders under S. 144.
17. "Parties."
18. Rejection of plaint or memorandum of appeal.
19. Rights of parties.
20. Interlocutory orders.
21. Miscellaneous orders.
22. Orders as to abatement of suit or appeal.
23. Orders as to costs.
24. Orders as to jurisdiction.
25. Orders as to legal representatives.
26. Orders as to limitation.
27. Orders as to maintainability of suit.
28. Orders as to res judicata.
29. Orders as to right to sue.
30. Orders of dismissal of suit or appeal.

31. Orders of remand.

32. Orders of withdrawal of suit or appeal.

32a. Orders on applications.

33. Order striking off parties.

34. Suit, meaning of.

1. Appealable orders. — [1] Orders appealable under O. 43, R. 1 are not decrees, though coming under S. 47 or the definition of decree in S. 2. (1912) 8 Nag L R 177 (178).

[2] An order rejecting application under O. 21, R. 90 is an appealable order and not a decree. (Vol 23) 1936 All 763 (764); 58 All 1003.

2. Applicability and scope. — [1] Section 2 (2) does not apply to partial dismissals. (Vol 4) 1917 Mad 732 (734).

[2] Decision in reference under Land Acquisition Act, S. 30, is a decree. (Vol 16) 1929 Mad 223 (225).

[3] An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. (Vol 4) 1917 Pat 596 (596); 2 Pat L Jour 197.

[4] Decisions of the 'Authority' deciding disputes under the Payment of Wages Act (1936) are not 'judgments' and 'decrees'. (Vol 31) 1944 Nag 288 (288, 289); I L R (1944) Nag 531.

[5] "Decree" includes Revenue Court decree. (Vol 12) 1925 All 264 (265).

[6] Order passed in revision from a decree is a decree as much as an appellate decree. (Vol 21) 1934 All 134 (135); 56 All 608.

[7] Finding in itself is not a decree. (Vol 32) 1945 All 268 (270); I L R (1945) All 798.

3. "Conclusively determines." — [1] An order to be a decree must *conclusively* determine rights of parties. (Vol 1) 1914 Cal 149 (149); 41 Cal 160; (Vol 4) 1917 Pat 126 (128); 3 Pat L Jour 339.

[2] Adjudication not putting end to suit is not a decree. (Vol 28) 1941 Oudh 590 (592).

Section 2 (2) (contd.)

[3] Findings conclusively determining rights is not necessarily decree — Redemption suit — Direction as to account does not amount to preliminary decree. (Vol 21) 1934 Pat 97 (99).

[4] Lower Appellate Court conclusively determining some of cardinal issues and remanding suit for fresh trial — Decision amounts to decree and is appealable. (Vol 27) 1940 Nag 349 (353); 1 L R (1940) Nag 538.

[5] Suit for damages—Agreement by parties to determine damages themselves — Judgment given before ascertaining damages—Case is not finally and completely disposed of — Appeal against decree is premature. (Vol 15) 1928 Lah 841 (843).

[6] Order reversing trial Court's decree is not a decree unless it decides any point for determination. (Vol 13) 1926 Pat 457 (459); 6 Pat 160.

[7] Order returning plaint is not decree nor adjudication of appellate Court on appeal from such order — No second appeal is competent — No failure of justice — Revision should not be entertained. (Vol 22) 1935 Mad 574 (575).

[8] Order negating right to mesne profits is a decree. (Vol 10) 1923 Cal 308 (309).

4. Decree—What is.—[1] A compromise or consent decree is within the definition. (Vol 9) 1922 Cal 358 (362); 49 Cal 220.

[2] Decree is based on determination which is arrived at after contest by Court or by consent of parties—In both cases Court has to pass order—Adjudication may be declaratory. (Vol 20) 1933 Pat 806 (401); 12 Pat 359.

[3] The word "decree" in O. 9, R. 8 is governed by the definition given in S. 2 (2). Therefore, a decree passed on the admission of the defendant is appealable by a person aggrieved thereby. (Vol 7) 1920 Nag 216 (218).

[4] Decree is something separate and distinct from a judgment. (1912) 12 Mad L Tim 309 (310).

[5] Decree containing adjudications regarding several items—Each such adjudication is decree. (Vol 20) 1933 All 473 (474); 55 All 672.

[6] A finding not a decree strictly according to law does not become so merely by being put in a printed form. (Vol 8) 1921 Nag 108 (108); 17 Nag L R 66.

[7] Decree includes determination of question under S. 47. (Vol 5) 1918 Upp Bur 30 (31); 2 Upp Bur Rul 139.

[8] Record of some findings in a suit and a remark by the Judge that he should not pass a final decree, does not amount to a "decree." (1912) 12 Mad L Tim 309 (310).

[9] A decision on a preliminary issue merely enabling the plaintiff to go on with the suit, is not a decree as defined in S. 2 (2) as it does not decide any of the matters in controversy in the suit. (Vol 3) 1916 Low Bur 44 (45).

[10] Suit for recovery of money on account of price of goods — Claim for set-off and agreement to refer dispute to arbitration advanced—Decision on preliminary issues is not decree. (Vol 4) 1917 Lah 261 (265); 1917 Pun Re No. 62.

5. Distinction between decree and order.—[1] Distinction between decree and order — Nature of decision is distinguishing feature between the two—Manner of expression is immaterial. (Vol 24) 1937 Pat 349 (350).

[2] An adjudication must be either a decree or an order; it cannot be both. Order cannot be separated into elements some of which are orders and others decrees. (Vol 2) 1915 P C 116 (117, 118); 42 Cal 914; 42 Ind App 91 (P C).

[3] Order granting application to set aside *ex parte* decree passed with costs—Document called *rubkar* sub-

sequently drawn up specifying amount of costs—*Rubkar* held to be not decree but order. (Vol 7) 1920 Cal 644 (644).

6. Explanation—Preliminary decree (General).—[1] A preliminary decree can only be drawn up in those cases for which express provision is made in the Code. (Vol 6) 1919 Cal 361 (362).

[2] The Code provides for the passing of preliminary decrees in the following cases: (a) O 20 R 12; (b) O 20 R 13; (c) O 20 R 14; (d) O 20 R 15; (e) O 20 R 16; (f) O 20 R 18; (g) O 34 Rr 2 and 3; (h) O 34 Rr 4 and 5; (i) O 34 Rr 7 and 8.

[3] A preliminary decree ascertains what is to be done while the final decree states the results achieved by means of the preliminary decree. (Vol 2) 1915 Cal 272 (274).

[4] Preliminary decree is passed when the Court after adjudication of rights of parties has to stay for a time to pass final order thereon. (1911) 1911 Pun L R No. 115, page 436 (440); 1911 Pun Re No. 41.

[5] Preliminary decree — Rights must be defined though not finally disposed of. (Vol 8) 1921 Nag 108 (108); 17 Nag L R 66.

[6] "Decree" in S. 2 (2) does not include preliminary decree. (Vol 22) 1935 Pat 385 (389); 14 Pat 448.

[7] Preliminary decree is conclusive as regards Court passing it. (Vol 18) 1931 All 386 (386); 53 All 283 (FB)

[8] The preliminary decree is not dependent on the final one but the latter is really dependent and subordinate to the former, which is not extinguished by the passing of the final decree but on the contrary is given effect to, by the final one. (Vol 3) 1916 Pat 370 (371); 1 Pat L Jour 406 (F B).

[9] Mere omission to style an order as preliminary decree or to embody it as such does not negative the party's right to appeal. (Vol 2) 1915 Cal 272 (274).

[10] Preliminary decree must not deal with matters proper only for final decree. (Vol 12) 1925 Pat 433 (433).

[11] Appeal against preliminary decree withdrawn and dismissed — Time for applying for final decree is three years from such order of dismissal. (Vol 20) 1933 Mad 442 (446); 56 Mad 520.

[12] There cannot be two preliminary decrees in the same case. (1913) 35 All 159 (162).

[13] It is not itself an impossibility that there should be a second preliminary decree passed in a suit for partition, if such second decree is based upon facts or circumstances alleged to have come into existence after the passing of the first preliminary decree. (1913) 11 All L Jour 120 (122).

7. Final decrees.—[1] Mere use by Court of form of final decree does not make it final decree. (Vol 17) 1930 Nag 206 (207); 26 Nag L R 166.

[2] Decree directing delivery of possession and awarding mesne profits without directing enquiry is final and not preliminary. (Vol 12) 1925 Mad 1276 (1276).

[3] An absolute decree for redemption, sale or foreclosure is a final decree within Sec. 2 (2). (1911) 7 Nag L R 41 (42).

[4] Decree declaring amount found due to plaintiff and laying down in what manner it would be paid is final decree and not merely preliminary decree. (Vol 29) 1942 Oudh I (5); 17 Luck 249.

[5] A decree for accounts is not a mere direction to report but is one determining the rights of the party entitled to it and such a decree is a final one. (1911) 14 Cal L Jour 603 (605).

[6] Decree modified on review — Modified decree is final decree from which appeal lies. (Vol 18) 1931 Cal 323 (325, 326).

Section 2 (2) (*contd.*)

[7] Order limiting right to recover mesne profits for a certain period is a final decree. (Vol 15) 1928 Cal 804 (804).

[8] Direction in final decree leaving distribution of assets undisposed of is essence of preliminary decree and decree is partly final and partly preliminary. (Vol 17) 1930 Mad 528 (530, 531); 53 Mad 378.

[9] Court can pass supplementary final decree with regard to matter not already dealt with by the final decree. (Vol 5) 1918 Cal 9 (10).

[10] Decision is not final until time for last appeal allowed has expired. (Vol 4) 1917 All 323 (324). (As to whether this is a final decree for the purpose of S. 2 (2), see A. I. R. Commentaries on the Code of Civil Procedure, 4th (1944) Edition, N 11.)

[11] Expiry of time for appeal without appeal being filed makes decree final. (Vol 12) 1925 All 291 (292); 47 All 533.

8. What are not preliminary decrees.—[1] Court making order that accounts should be taken up to certain date—Such order is not decree and, therefore, is not appealable. (Vol 16) 1929 Lah 699 (700).

[2] Preliminary decree for partition—Directions given to official commissioner are not decrees and hence not appealable. (Vol 15) 1928 Sind 100 (101); 23 Sind L R 87.

[3] Partition suit between A and B — Preliminary decree declaring B as entitled to half share in items of family properties which had been allotted to B's father C in partition—After preliminary decree application by A asking Court to allot to C certain items which C had sold to A during pendency of suit—Order rejecting application held not decree and therefore not appealable. (Vol 26) 1939 Mad 897 (898, 899); I L R (1940) Mad 394.

[4] Decision on one of several issues unless it amounts to preliminary decree of nature contemplated by O. 20, Rr. 12 to 18 is not preliminary decree. (Vol 3) 1916 Low Bur 44 (45).

[5] Preliminary decree for partition passed — Subsequent order directing actual partition in certain manner is not appealable as a preliminary decree. (1913) 35 All 159 (162).

[6] Decision on preliminary defence that matters in dispute were caste questions and hence outside civil Court's jurisdiction is not preliminary decree within the meaning of S. 97. (Vol 1) 1914 Bom 149 (152); 39 Bom 339 (F B).

[7] Suit for redemption and accounts under Dekkhan Agriculturists' Relief Act—Court referring taking of accounts to Commissioner under O. 26, R 11 — Issue of commission held not to constitute preliminary decree. (Vol 1) 1914 Bom 36 (38); 38 Bom 392.

[8] Decision that plaintiff is an agriculturist is not a preliminary decree. (Vol 9) 1922 Bom 336 (337).

[9] A decree in a suit for specific performance of a contract, though conditional in form, is not a preliminary decree. (Vol 6) 1919 Cal 361 (361, 362).

[10] An order on an objection as to part of the suit being based upon terms of the Pensions Act is not a 'preliminary decree.' (1911) 1911 Pun Re No. 82.

[11] An order on a question as to how that portion of a claim dealing with profits is to be determined is not a 'preliminary decree.' (1911) 1911 Pun Re No. 82.

[12] An order on a demand by the defendant that security should be taken from the plaintiff before the case proceeds further, is not a 'preliminary decree.' (1911) 1911 Pun Re No. 82.

[13] An order on an allegation that the stamp fee required from the plaintiff was largely deficient is not a 'preliminary decree.' (1911) 1911 Pun Re No. 82.

[14] A finding by the first Court on the issue as to limitation in favour of the plaintiff when there is another issue to be decided does not amount to a "decree." It is not a preliminary decree in the ordinarily accepted technical sense and as such does not debar an appeal against the decree in the suit because the defendant did not appeal against it. (Vol 4) 1917 Lah 153 (153); 1917 Pun Re No. 7.

9. What are preliminary decrees. — [1] Order defining mode and period of taking accounts is a preliminary decree (Vol 11) 1924 Cal 160 (162).

[2] Case falling under O. 20, R. 12—Appellate Court holding party entitled to possession, but remanding case—Order of remand must be taken to be a preliminary decree. (Vol 9) 1922 Mad 112 (114); 45 Mad 449.

[3] Decree in a suit for possession and mesne profits is partly final, partly preliminary. (Vol 16) 1929 Cal 383 (383); (Vol 1) 1914 Cal 804 (804); (1910) 1910 Pun L R No. 44, page 105 (106); (Vol 29) 1942 Sind 60 (61); I L R (1941) Kar 563.

[4] Decree under O. 34, R. 4 is a preliminary decree. (Vol 3) 1916 Bom 305 (307); 40 Bom 321.

[5] In a suit for taking accounts of a partnership, an order declaring the partnership as dissolved from a particular date and directing that an enquiry be made by the referee as to who were the partners and as to the dealings of the partners with the assets of the partnership is a preliminary decree. (Vol 2) 1915 P C 116 (117, 118); 42 Cal 914. 42 Ind App 91 (P C).

[6] Decision on preliminary issue in a redemption suit that plaintiff is an agriculturist is a preliminary decree. (1910) 12 Bom L R 762 (765).

[7] Plaintiff's suit claiming contribution from taluqdari estate of defendant—Finding in favour of plaintiff but amount not determined is preliminary decree and appeal lies. (Vol 21) 1934 Oudh 307 (309).

[8] In a compromise decree in partition suit, one of the clauses provided that an eight anna share would remain in possession of a lady for her life, and another provided that a house occupied by plaintiff was to be partitioned; it was held that it was only a preliminary decree. (Vol 25) 1938 Oudh 229 (230); 14 Luck 223.

[9] Where a plaint is rejected by the Court to which it is presented as being void and that no proceedings could be had on it as the decree on the plaint was set aside for fraud, the decision amounts to a preliminary decree. (Vol 4) 1917 Pat 497 (498).

[10] A finding that a party is or is not an agriculturist is not a judgment. A decree based upon such a finding is not a legal decree. But if the finding necessarily involves a direction that an account be taken between the parties in the manner provided by S. 13, Dekkhan Agriculturists' Relief Act, it amounts to a preliminary decree and is appealable. (Vol 2) 1915 Bom 42 (44); 39 Bom 422.

[11] Suit under S. 36, Bengal Money-lenders' Act—Mortgage decree re-opened and new decree passed—Rights between parties adjudicated by new decree—Only taking of accounts left to Commissioner—Decree containing all requirements of O. 34, Rr. 2 and 4, Civil P. C., and S. 34, Bengal Money-lenders' Act—Decree is proper preliminary decree and appeal therefrom is competent. (Vol 38) 1946 Cal 323 (325, 326).

10. Final orders. — [1] Application for appraisal of crops — Order of revenue Court is final if it affords all data for ascertainment of liability of each tenant to his landlord. (Vol 14) 1927 Pat 171 (172).

[2] Order granting compensation for three years from date of final decree of High Court is a final order and is appealable. (Vol 15) 1928 Pat 565 (566); 7 Pat 491.

Section 2 (2) (contd.)

11. "Formal expression".—[1] 'Formal expression' of an adjudication do not cover interlocutory orders which do not finally settle the suit and which cannot at that time be formally drawn up in the form of decrees. (Vol 30) 1943 Nag 204 (207); I L R (1943) Nag 241 (F B).

[2] Drawing up of a decree being the conscious and formal act, notifying the Court's disposal of the case according to its adjudication of the matter in dispute, no right of appeal accrues until it is drawn up. (1912) 8 Nag L R 92 (95, 96).

[3] Court finally decided controversial matter in issue—Decision misnamed as "decretal order"—Decision forms decree over which remedy is appeal and not revision. (Vol 18) 1931 Mad 471 (473, 474); 54 Mad 837.

[4] Refusal to grant any relief to plaintiff implies that suit is dismissed. Adjudication amounts to a decree even if no formal decree is drawn up. (Vol 19) 1932 All 614 (616); 54 All 482; (Vol 17) 1930 Nag 122 (123); 26 Nag L R 24.

[5] An order is not a decree unless it is drawn as such or could be drawn as such. (1911) 1911 Pun L R No. 115, page 486 (489); 1911 Pun Re No. 41.

[6] Preliminary point decided first but no formal preliminary decree drawn up—No appeal lies. (Vol 11) 1921 Bom 33 (34); (1910) 34 Bom 152 (187, 188); (1913) 37 Bom 480 (483).

[7] Omission or delay in drawing up decree—Right of appeal is not affected. (Vol 6) 1919 Lah 53 (54); 1919 Pun Re No. 66.

[8] Dismissal of appeal under O. 41, R. 11 (1) is a decree within S. 2 (2) though not pronounced in form prescribed under O. 41, R. 31. (Vol 13) 1926 Cal 638 (639).

12. "Matters in controversy in the suit".—[1] The "matters in controversy in the suit" in S. 2 (2) refers to the subject-matter of the litigation and should not be understood in its wider sense so as to include a decision in plaintiff's favour on the issue of his *locus standi* to sue. (Vol 2) 1915 Cal 272 (274).

[2] The word 'matter' means the actual subject-matter of the suit with reference to which some relief is sought. (Vol 11) 1924 Cal 160 (162).

[3] Matters which must have been decided had they not been common ground are 'matters in controversy.' (Vol 2) 1915 P C 116 (118); 42 Cal 914; 42 Ind App 91 (P C).

[4] The expression "matters in controversy" does not include proceedings preliminary to institution of suit e. g. an application for leave to sue as a pauper and proceedings passed in execution in regard to such orders as well as orders granting day costs. (Vol 2) 1915 Mad 1222 (1222, 1223); (1899) 21 All 133 (136).

[5] "Matters in controversy" can be matters arising subsequent to institution of suit. (Vol 15) 1928 Oudh 362 (364); 3 Luck 628 (F B).

[6] An adjudication which determines only some of the matters in controversy in the suit will not be a decree unless it is sufficient to dispose of the suit. Except in cases where the Court provides for preliminary decrees under O. 12, R. 6 or O. 15, R. 2, a decision which is not sufficient for disposal of suit is not a decree. (Vol 30) 1943 Nag 204 (208, 209); I L R (1943) Nag 241 (F B). [(Vol 28) 1941 Nag 84; I L R (1941) Nag 90, overruled.]

13. Orders of dismissal for default.—[1] Every order of dismissal for default is not excluded from "decree". (Vol 11) 1924 Cal 830 (834); 51 Cal 715.

[2] Order of dismissal for default refers to applications in execution also. (Vol 13) 1926 All 401 (401); (Vol 16) 1929 All 123 (123, 124). (Order striking off objection of judgment-debtor for default is not appealable.)

[3] Decree in respect of admitted part of claim—Dismissal of other part under O. 9, R. 8—Entire adjudication is "decree." (Vol 4) 1917 Mad 732 (734); (1912) 16 Cal L Jour 559 (560).

[4] Where a decree declared that on default of payment of the amount specified therein within a particular time the suit shall stand dismissed with costs, it is a decree for dismissal in such event and is at once appealable. (Vol 1) 1914 Oudh 147 (148); 17 Oudh Cas 14.

[5] Order dismissing suit or appeal for non-payment of additional court-fee is not "order of dismissal for default" within S. 2 (2) (b) but decision under Court-fees Act and is appealable as decree. (Vol 29) 1942 Cal 539 (541); I L R (1942) 2 Cal 253; (Vol 6) 1919 Oudh 98 (101); 22 Oudh Cas 289. (Dismissal of suit for deficit court-fee.)

[6] Order dismissing suit for default of appearance is not a decree and is not appealable. (1902) 29 Cal 60 (62); (Vol 1) 1914 Cal 157 (158); (1902) 12 Mad L Jour 473 (475); (Vol 12) 1925 Oudh 485 (485); 28 Oudh Cas 124.

[7] Order directing execution to be dismissed for non-prosecution is neither decree nor appealable order. (Vol 23) 1936 Cal 267 (268).

[8] Application by appellant's pleader for postponement on ground of inability to argue—Appeal dismissed for want of prosecution—Disposal of appeal amounts to decree. (Vol 24) 1937 All 234 (235).

[9] Dismissal of appeal for default is not decree. (Vol 4) 1917 All 392 (393); 39 All 393; (1896) 23 Cal 115 (116, 117); (1912) 39 Cal 341 (343); (Vol 5) 1918 Oudh 446 (448); (Vol 10) 1923 Pat 514 (514, 515); 2 Pat 739.

14. Orders in execution. — [1] Whether order in execution is decree depends upon its nature. (Vol 7) 1920 Lah 443 (444).

[2] Every order in execution is not decree. (Vol 30) 1943 Lah 140 (144, 146). (Test to determine whether order under S. 47 appealable laid down); (Vol 13) 1926 All 401 (401); (Vol 28) 1941 Cal 618 (621); (Vol 7) 1920 Lah 117 (118).

[3] Proceedings in appeal from any decree or order against execution proceedings, are proceedings in appeal and not proceedings in execution. (Vol 21) 1934 Oudh 337 (340).

[4] Order merely deciding mode of execution is not appealable as a decree. (Vol 18) 1931 All 129 (131).

[5] Order dismissing an application for execution in default is not a decree. (Vol 19) 1932 Nag 14 (15); 27 Nag L R 339.

[6] Order allowing amendment to execution petition is not a decree. (Vol 23) 1936 Mad 623 (624).

[7] Decree declaring defendant's right to enjoy property yielding certain income—Execution of this decree—Decision whether decree executable or not is appealable decree. (Vol 2) 1915 Mad 197 (198); 37 Mad 29.

[8] Order for arrest passed under O. 21, R. 22 though one under S. 47 not being final, is not decree under S. 2 (2). (Vol 16) 1929 Mad 718 (720).

[9] *Ex parte* order granting leave to apply for execution does not have the force of decree. (Vol 16) 1929 All 330 (331, 332).

[10] Application by assignee decree-holder under O. 21, R. 16 and O. 34, R. 6 for recognition of assignment and personal decree against defendant allowed—Appeal by defendant—Order on application under O. 34, R. 6 being decree, regular appeal and not miscellaneous appeal should be filed and *ad valorem* court-fee must be paid. (Vol 32) 1945 Mad 425 (425, 428); I L R (1946) Mad 299; (Vol 4) 1917 Mad 293 (294); 40 Mad 299.

[11] An order under O. 21, R. 50 (2) granting leave to execute decree against partner is not decree. (Vol 16) 1929 Bom 336 (338); 53 Bom 339.

Section 2 (2) (*contd.*)

[12] Decree creating a charge—Property brought to sale in execution—Order under S. 52, Provincial Insolvency Act, stopping sale is not appealable. (Vol 20) 1933 Mad 152 (153) : 56 Mad 453.

[13] An order deciding question between judgment-debtor and stranger auction-purchaser is a 'decree' and appealable. (Vol 29) 1942 Mad 406 (406).

[14] Sale proclamation—Order fixing upset price is not decree and no appeal lies from it. (Vol 5) 1918 Mad 1264 (1264.)

[15] Order rejecting objection to mis-statement of value of property is not appealable. (Vol 17) 1930 Oudh 81 (82.) : 5 Luck 481; (Vol 3) 1916 Pat 90 (90) : 2 Pat L Jour 13; (Vol 7) 1920 Pat 249 (249, 250) : 5 Pat L Jour 270; (Vol 7) 1920 Pat 636 (636).

[16] Order passed under O. 21, R. 71 is a decree. (Vol 14) 1927 Nag 112 (112) : 23 Nag L R 79.

[17] Order refusing leave to bid under O. 21, R. 72 is not decree. (1911) 38 Cal 717 (720) : 38 Ind App 126 : 6 Low Bur Rul 26 (P C).

[18] Order refusing to set aside sale — Order made appealable under O. 43, Rule 1 (j) — Such order is not decree even if passed between parties to proceedings in execution. (Vol 25) 1938 Nag 107 (107, 108) : ILR (1938) Nag 436; (Vol 5) 1918 Upp Bur 28 (28) : 2 Upp Bur Rul 139; (Vol 5) 1918 Upp Bur 30 (31) : 2 Upp Bur Rul 133.

[19] Order granting or refusing stay of execution is not a decree. (Vol 17) 1930 All 121 (121); (Vol 11) 1924 All 808 (808) : 46 All 733.

[But see (Vol 17) 1930 Lah 187 (189) : 11 Lah 204.]

[20] Order passed on an application under O. 21, R. 71 for recovery of deficiency in prices from defaulting auction-purchaser is appealable as a decree. (Vol 9) 1922 All 200 (202) : 44 All 266.

[21] An order made in the course of execution proceedings determining the period for which mesne profits are recoverable is a decree. (1901) 23 All 152 (156) : 27 Ind App 209 (PC).

[22] Application to record adjustment of a decree—Order of refusal is a decree. (Vol 14) 1927 Lah 809 (810).

[23] An order accepting security for stay of execution proceedings is not a decree as it does not determine conclusively rights of the parties. (Vol 1) 1914 Cal 149 (149) : 41 Cal 160.

[24] Decree-holder ordered to furnish security—Order accepting security and directing delivery of possession is appealable—Order is final and not interlocutory. (Vol 6) 1919 Cal 471 (472).

[25] Order under O. 21, R. 93 directing judgment-creditor to refund money to auction-purchaser is not a decree. (Vol 27) 1940 Bom 210 (214) : I. L. R. (1940) Bom 370.

15. Orders under S. 47. — [1] Order under S. 47 to be a decree must in some way determine rights of parties with regard to any matter in controversy in suit. (Vol 7) 1920 Pat 249 (250) : 5 Pat L Jour 270; (Vol 16) 1929 Lah 815 (816) : (Vol 11) 1924 Pat 633 (635).

[2] Every order made in proceedings under S. 47 of the Civil Procedure Code is not necessarily a decree. (Vol 11) 1924 Pat 633 (635) : (Vol 22) 1935 Rang 500 (501).

[3] Order under S. 47 must be a decree within S. 2 (2) in order to be appealable. (Vol 14) 1927 All 208 (209).

[4] Order that executing Court had jurisdiction to hear objection application of judgment-debtor under S. 47 is appealable. (Vol 26) 1939 Lah 177 (178).

[5] Decision that judgment-debtors are not debtors within the meaning of Bengal Agricultural Debtors Act

falls under S. 47 and is decree. (Vol 27) 1940 Cal 257 (258, 259) : I L R (1940) 1 Cal 893.

[6] An order extending time for payment of mortgage money under a decree is not a decree under S. 2, nor does it determine any question within S. 47, Civil P. C. and is not appealable. (Vol 3) 1916 Mad 694 (695) : 39 Mad 876.

[7] Order of Appellate Court refusing to stay execution is not appealable as a decree. (Vol 26) 1939 Bom 65 (65); (Vol 6) 1919 Pat 383 (383) : 4 Pat L Jour 461.

[8] Order relating to stay of execution is not appealable. (Vol 20) 1933 Nag 84 (85) : 29 Nag L R 121.

[9] Order rejecting application for stay of sale is not order under S. 47 conclusively determining rights of parties and hence is not appealable. (Vol 16) 1929 All 85 (85).

[10] Order under S. 47, that costs paid into Court should not be paid unless the party furnishes security, is not appealable. (Vol 14) 1927 Rang 317 (317) : 5 Rang 534 and 641.

[11] The definition of "decree" in S. 2 (2), Civil P. C., which includes the determination of any question under S. 47, Civil P. C., does not apply to the Agra Tenancy Act. (Vol 25) 1938 All 124 (125).

[12] Decree in favour of pre-emptor for possession on payment of sale price to vendee before fixed date, falling which suit to stand dismissed — Application for deposit of lesser amount filed before fixed date dismissed — Subsequent order of Court dismissing suit for non-payment of full amount is not appealable as decree or under S. 47, as previous conditional decree for pre-emption was complete in itself. (Vol 26) 1939 Lah 376 (377, 378).

[13] Mortgage decree — Dismissal of application for final decree for sale is decree—Order is not under S. 47, but is appealable under S. 96. (Vol 6) 1919 Mad 709 (709) : 42 Mad 52.

[14] Arrest in execution—Order deciding legality of arrest falls under S. 47. (Vol 4) 1917 Mad 187 (187).

[15] Case of judgment-debtor fighting with decree-holder auction-purchaser falls under S. 47 — Order passed against judgment-debtor is decree. (Vol 25) 1938 Nag 212 (216) : I L R (1938) Nag 533.

[16] Admission of execution application — Order is appealable. (Vol 9) 1922 Pat 59 (60).

[17] Question if execution is time-barred is under S. 47 and its decision is "decree" and is appealable. (Vol 11) 1924 Pat 683 (685).

[18] Parties' right to do certain thing depending on direction of Court — Order giving such direction is decree when passed under S. 47. (Vol 19) 1932 All 85 (89) : 53 All 391.

[19] After decree for sale of several properties one property mortgaged by conditional sale—On foreclosure by second mortgagee first mortgagee bringing properties to sale — Second mortgagee's prayer for marshalling allowed—Mortgagor alone appealing—Order held to be one under S. 47 and therefore a decree. (Vol 1) 1914 Cal 828 (829, 830) : 41 Cal 418.

[20] Order accepting or refusing security is not appealable as a decree or under S. 47. (Vol 19) 1932 Lah 120 (121).

16. Orders under S. 144. — [1] Order under S. 144 is decree. (Vol 22) 1935 All 873 (875) : (Vol 19) 1932 Pat 317 (319) : 11 Pat 553.

[2] Order on appeal setting aside sale of judgment-debtor's property is decree — S. 144 covers such order. (Vol 25) 1938 Lah 456 (456).

[3] *Bona fide* auction-purchaser is not a party — Order refusing restitution against him is not decree. (Vol 12) 1925 Lah 176 (177).

[4] Order rejecting application for restitution under

Section 2 (2) (*contd.*)

S. 144 on ground of limitation amounts to decree and is appealable. (Vol 23) 1936 Cal 812 (812).

[1a] Application under S. 144 — Objection as to limitation overruled by District Judge — Order was held to be not decree within S. 2 (2) and hence not appealable. (Vol 1) 1914 Lah 415 (416); 1913 Pun Re No. 110.

[5] Order for mesne profits by way of restitution consequent upon setting aside of sale even though sum has not been worked out is decree. (Vol 17) 1930 Cal 89 (91) : 56 Cal 550.

[6] Application for restitution of property—Subsequent application for ascertainment of mesne profits—Order that latter application is not barred by limitation—No appeal lies from such order. (Vol 20) 1933 Pat 498 (499).

[7] Application by surety for cancellation of surety bond — Order passed thereon is not appealable as a decree. (Vol 20) 1933 All 332 (333, 384) : 55 All 548.

17. "Parties."—[1] The word 'parties' in S. 2 (2) means the same thing as the expression 'parties to the suit' in S. 47 and includes only those that are joined on either side as plaintiffs, or defendants. (1913) 16 Oudh Cas 350 (352, 353).

18. Rejection of plaint or memorandum of appeal.—[1]—Order of rejection of plaint falls under S. 2 (2) and is appealable (*Obiter*). (Vol 23) 1941 Pat 383 (389); 20 Pat 417; 42 Cri L Jour 375; (Vol 25) 1938 All 150 (151); (Vol 21) 1934 Cal 623 (624); (Vol 22) 1935 Cal 336 (337) : 62 Cal 61. (For non-payment of requisite court-fee within time.); (Vol 8) 1921 Lah 43 (43). (Non-payment of extra court-fee.); (Vol 2) 1915 Mad 483 (484); (Vol 22) 1935 Nag 83 (86, 89).

[2] Order rejecting memo for non-payment of deficit court-fee is decree and is appealable as such. (Vol 29) 1942 Lah 64 (65) ; (1893) 16 Mad 285 (285, 286); (Vol 9) 1922 Nag 62 (63, 64) : 18 Nag L R 15; (Vol 9) 1922 Pat 281 (282) : 6 Pat L Jour 625; (Vol 28) 1941 Pat 108 (109). (As being out of time.)

[But see (Vol 25) 1938 Nag 122 (124) : I L R (1938) Nag 106 (FB); (Vol 19) 1932 Cal 482 (484) : 59 Cal 388; (Vol 6) 1919 Pat 527 (527); (Vol 23) 1936 Pesh 140 (141).]

[3] Order passed by a District Judge setting aside the rejection of a plaint is not a decree and is not appealable. (Vol 21) 1934 Pesh 88 (89).

[4] Order of appellate Court dismissing appeal for appellant's failure to pay Government costs on dismissal of his pauper suit does not amount to decree. (Vol 24) 1937 All 280 (281) : I L R (1937) All 484.

See also O. 7, R. 11.

19. Rights of parties. — [1] "Rights of parties" mean general rights, such as those relating to status, jurisdiction, limitation, framing suits, accounts etc., which, if decided, must have a general effect upon the proceedings in the suit. (Vol 1) 1914 Bom 36 (37) : 36 Bom 392.

[2] The word 'rights' means substantive rights of the parties which directly affect the relief to be granted. (Vol 11) 1924 Cal 160 (162).

[3] The 'rights of the parties' referred to by the definition must be taken to be the rights of the parties *inter se* in regard to the subject-matter of the suit. (1911) 13 Ind Cas 800 (800, 801) : (1911) Pun Re No. 82 (D B).

20. Interlocutory orders.—[1] "Decree" does not include interlocutory decision in ordinary suits on every controversial point, though such a decision is embodied in a separate order during the pendency of proceedings. (1911) 1911 Pun L R No. 115, page 436 (440) : 1911 Pun Re No. 41.

[2] A party adversely affected by the disallowance of interrogatories has a right to appeal from the original decree, and hence he cannot prefer an appeal from an order disallowing interrogatories which is not a decree, nor can apply for revision. (Vol 7) 1920 Sind 1 (1, 5) : 14 Sind L R 28.

[3] An order directing assessment of mesne profits is an interlocutory order and does not determine the rights of the parties, and is not appealable. (1912) 15 I C 573 (574) (Cal).

21. Miscellaneous orders. — [1] Order setting aside award is not appealable. (Vol 1) 1914 Sind 122 (122) : 8 Sind L R 260.

[2] The Civil Procedure Code provides no appeal against an order refusing to remit an award under R. 14, Sch. II. (1912) 1912 Mad W N 901 (902).

[3] An order overruling objections to an award is not a decree. (1911) 1911 Pun L R No. 1, page 1 (2).

[4] The decision on an application to file a private award, part of it being on a matter outside the scope of the arbitration, is an order and not a decree. (Vol 2) 1915 Lah 105 (105) : 1915 Pun Re No. 66.

[5] Scheme under S. 92 providing for appointment of new trustee by committee with approval of District Judge—Order of District Judge approving of appointment is not an order under S. 47 and is not appealable as a decree. (Vol 18) 1931 All 765 (765).

[6] Order simply referring to an Official Referee to take accounts is not a decree. (Vol 11) 1924 Mad 406 (407).

[7] An order in an administration suit directing Commissioner to take accounts of the debts and assets of the testator is a decree. (1909) 11 Bom L R 250 (254).

[8] Order on preliminary issue as to sufficiency of court-fee is not decree. (Vol 23) 1936 Cal 784 (785).

[9] Order referring question under S. 75 (3), C. P. Land Revenue Act is not appealable. (Vol 30) 1943 Nag 94 (95).

[10] An order under Ss. 151 and 152, Civil P. C., for amendment of decree does not itself amount to a decree. (Vol 26) 1939 Bom 389 (390).

[11] An order granting leave to bring a suit for the purpose of having the accounts of a certain religious endowment is not a decree. (1907) 34 Cal 584 (585).

[12] Order dismissing an application for removal of a trustee is not a decree. (1897) 19 All 131 (132).

[13] An order passed by a Court in its proceedings, in the exercise of its inherent power to punish for contempt, does not come within the definition of decree. (1905) 27 All 380 (381).

[14] An order under S. 148 of the Civil P. C. extending time is neither a decree nor an appealable order. (1913) 35 All 582 (586).

[15] Order rejecting application under Ss. 5 and 7 of U. P. Regn. V of 1799—Not appealable as a decree. (1911) 10 Ind Cas 414 (415) (All).

[16] Order under S. 73 of the Civil Procedure Code is not a decree. (Vol 8) 1921 Pat 401 (402) : 5 Pat L Jour 415.

[17] An order returning plaint for amendment is not a decree. (1911) 1911 Pun L R No. 216, page 826 (829); (1911) Pun Re No. 96.

[18] Scheme of election of trustees framed by Court—Court reserving right to confirm them — Application for confirmation made and opposed—Order thereon is decree. (Vol 15) 1928 Rang 168 (171) : 6 Rang 97.

[19] Order appointing committee to draw up scheme of management regarding wakf is decree and is appealable. (Vol 17) 1930 Lah 476 (476).

[20] Order disposing claim to legal set off is not decree. (Vol 4) 1917 Lah 261 (265) : 1917 Pun Re No. 62.

Section 2 (2) (contd.)

[21] Order refusing to allow interest is appealable. (Vol 20) 1933 Pat 207 (207).

[22] Interpleader suit—Adjudication on defence set up in suit held decree. (1910) 33 Mad 220 (222).

[23] The determination of the right of one party to an account for certain years and dismissing the claim for certain other years is a decree. (Vol 4) 1917 Pat 79 (79) : 3 Pat L Jour 67.

[24] Order directing accounts to be taken in precise terms is a decree. (1909) 36 Cal 493 (500).

22. Orders as to abatement of suit or appeal.—[1] An order of abatement of a suit is a decree. (Vol 4) 1917 P C 156 (160) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 (P C) ; (Vol 7) 1920 Lah 8 (9) : 1 Lah 493. (Failure to implead plaintiff's legal representative within time.) ; (Vol 3) 1916 Mad 1068 (1069). (Order of abatement owing to the cause of action not surviving.) ; (Vol 4) 1917 Mad 285 (286) ; (Vol 7) 1920 Mad 580 (581).

[But see (Vol 1) 1914 All 402 (402). (Of doubtful authority in view of (Vol 4) 1917 P C 156 : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 (P C).)]

[2] An order of abatement, which is the result of an adjudication upon the rights of the parties with respect to a matter in controversy and not passed upon an application for the revival of the suit, made under O. 22, R. 9, Civil P. C. amounts to a decree and is appealable. (Vol 3) 1916 Lah 245 (246, 247) : 1916 Pun Re No. 128 (F B).

[3] Order that appeal or cross-objection abates is appealable. (Vol 26) 1939 Nag 39 (40) : I L R (1939) Nag 324 ; (Vol 7) 1920 Lah 338 (340) : 1 Lah 582.

[But see (Vol 9) 1922 All 113 (114).]

[4] Suit abating against one of the defendants — Application for setting aside abatement—Court dismissing application for setting aside abatement and holding that consequently suit abated *in toto* in special circumstances of case—Former adjudication is appealable under O. 43, R. 1 (k) and latter adjudication is appealable as a decree. (Vol 12) 1925 Lah 456 (456, 437).

[5] For full discussion, see O. 22.

23. Orders as to costs. — [1] A right to costs is not a vested right and there is a very limited right of appeal. An order for costs is not a decree; it has to be included in a decree or may be part of a decree. (Vol 7) 1920 Pat 622 (624) : 5 Pat L Jour 472 (F B) ; (Vol 5) 1918 Upp Bur 14 (14) : 3 Upp Bur 61.

[2] An order passed under S. 24, Civil P. C., read with S. 15, Upper Burma Civil Courts Regulation, is not a decree. (Vol 5) 1918 Upp Bur 14 (14) : 3 Upp Bur 61.

24. Orders as to jurisdiction. — [1] The decision of a District Court on appeal holding that the Revenue Court had no jurisdiction to decide the validity of the resumption claimed by the plaintiff in a suit for rent is a decree. (Vol 7) 1920 Mad 143 (143).

[2] In a suit an interlocutory order overruling the pleas of want of jurisdiction and limitation would not be a decree and the position is not different in execution proceedings. (Vol 30) 1948 Lah 140 (144) ; (Vol 8) 1921 Bom 220 (222) : 45 Bom 627.

[3] Order returning memorandum of appeal for want of jurisdiction is decree. (1891) 13 All 320 (321).

25. Orders as to legal representatives. — [1] An order dismissing an application by the legal representative to be brought on record is not a decree. (Vol 7) 1920 Lah 8 (8, 9) : 1 Lah 493 ; (Vol 13) 1926 Mad 586 (591) : 49 Mad 450 (F B). (Even when there is no rival claimant to be brought on record — (Vol 7) 1920 Mad 424 : 43 Mad 812, Overruled.) ; (1912) 13 Ind Cas 70 (71) (Cal) ; (Vol 11) 1924 Mad 622 (628) ; (Vol 11) 1924 Mad 813 (814) ; (Vol 3) 1916 Nag 89 (90) : 13 Nag L R 32 ; (Vol 8) 1921 Nag 23 (24) : 17 Nag L R 45.

[But see (Vol 22) 1935 Lah 47 (48). (Order rejecting application by legal representative to be brought on record on ground that right to sue does not survive is appealable as it amounts to decree.)]

[2] See also O. 22, R. 9 and 10.

26. Orders as to limitation. — [1] Preliminary issue of limitation—Decision not decree. (1913) 18 Cal L Jour 78 (80) ; (Vol 4) 1917 Lah 153 (153) : 1917 Pun Re No. 7.

27. Orders as to maintainability of suit. — [1] Order on the preliminary issue that the suit is not maintainable as against some of the defendants is a decree, as it conclusively determines the rights of parties. (1941) 1941 Pat W N 25 (32).

[But see (Vol 3) 1916 Low Bur 80 (81) : 8 Low Bur 213. (An order overruling a plea against the maintainability of a suit is not a decree.)]

28. Orders as to *res judicata*. — [1] A decision that a matter is not *res judicata* and that therefore the trial can proceed, is not a preliminary decree and hence not appealable. (Vol 2) 1915 Bom 21 (21) : 39 Bom 421 ; (1912) 10 All L Jour 78 (79) ; (1913) 18 Cal L Jour 78 (80) ; (1912) 1912 Pun L R No. 191, p. 604 (606) : 1913 Pun Re No. 16.

29. Orders as to right to sue. — [1] Decision on preliminary issue as to plaintiff's right to sue is not preliminary decree and is not appealable. (Vol 2) 1915 Cal 272 (274).

30. Orders of dismissal of suit or appeal. — [1] Adjudication on preliminary point resulting in dismissal of a suit is a decree. (Vol 28) 1941 Oudh 590 (592).

[2] Application for adjournment opposed—Court refusing adjournment and dismissing suit — Order is a decree and not an order under O. 17, R. 3. (Vol 14) 1927 Rang 148 (148, 149) : 5 Rang 838.

[3] An order rejecting the application to make the mortgage decree under O. 34, R. 4 absolute has the effect of finally dismissing the suit and is a decree. (Vol 8) 1921 Cal 551 (552), (Vol 19) 1932 Lah 214 (215).

[4] Order discharging defendants as there was no cause of action against them supported by reasons, is a decree. (Vol 28) 1941 Nag 166 (166, 167) ; (Vol 25) 1938 Nag 233 (234) ; (Vol 28) 1941 Nag. 223 (224) : I L R (1942) Nag. 423.

[5] Order of dismissal for non-prosecution is not decree — Mere fact that Court has prepared decree does not convert order into decree. (Vol 29) 1942 Oudh 362 (364, 365).

[6] Order of dismissal in presence of one of several plaintiffs amounts to decree. (Vol 5) 1918 Pat 376 (376).

[7] Suit dismissed for plaintiff's failure to produce evidence is decree. (Vol 6) 1919 Cal 1052 (1053).

[8] Suit dismissed against some defendants on account of non-representation—Plaintiff not responsible for non-representation — Dismissal is not decree. (Vol 16) 1929 Cal 669 (670).

[9] Pre-emption decree on default of payment on due date becomes a decree for dismissal. (Vol 1) 1914 Oudh 147 (148) : 17 Oudh Cas 14.

[10] Application under O. 34, R. 6 held not maintainable—Order is decree. (Vol 20) 1933 All 429 (431) ; (Vol 5) 1918 All 97 (97) : 40 All 553.

[11] Rejection of an appeal for a preliminary defect is a decree. (Vol 23) 1936 Mad 101 (101) : 59 Mad 805.

[12] Order dismissing appeal as time-barred before it is admitted or registered is decree (*Obiter*). (Vol 24) 1937 Cal 732 (734, 735) ; (1913) 17 Cal W N 807 (808) ; (Vol 13) 1926 Cal 1105 (1105). (Non-admission of appeal as time-barred.) ; (Vol 25) 1938 Nag 322 (323).

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

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[13] Order dismissing appeal for deficiency of court-fee is appealable. (Vol 14) 1927 Nag 100 (100).

[14] Order of appellate Court dismissing appeal for appellant's failure to pay Government costs on dismissal of his pauper suit does not amount to decree. (Vol 24) 1937 All 280 (281) : 1 L R (1937) All 484.

[15] Order dismissing cross-objections is decree. (Vol 20) 1933 Lah 961 (961).

31. Orders of remand. — [1] Remand order is appealable only if it amounts to a decree. (Vol 13) 1926 Pat 457 (459) : 6 Pat 160.

[2] Remand order adjudicating rights of parties on certain matters in controversy is a decree and appealable. (Vol 15) 1928 Nag 68 (68) * (Vol 4) 1917 Pat 100 (101) : 3 Pat L Jour 99. (Decree for possession and remand for inquiry into mesne profits.)

[3] Appeal in execution matter — Appellate Court's order quashing plaintiff's decree and remanding case for fresh decree — Appellate Court's order is decree and appealable. (Vol 9) 1921 Sind 102(103):16 Sind L R 260.

[4] Order of remand containing determination of principle on which assessment of rent is to be made is a decree. (Vol 20) 1933 Cal 416 (416).

[5] Order of remand setting aside decree is not necessarily a decree. (Vol 21) 1934 Pat 97 (98).

[6] Trial Court deciding all issues—Lower appellate Court framing more issues and ordering remand—Order of remand is not a decree. (Vol 14) 1927 Pat 296 (297) : 6 Pat 380 ; (Vol 14) 1927 Cal 850 (851) : 55 Cal 219.

[7] Conditional order of remand held not to be decree as there was no conclusive determination. (Vol 20) 1933 All 261 (262).

32. Orders of withdrawal of suit or appeal.—[1] An order permitting the withdrawal of a suit or appeal is not a decree. (Vol 15) 1928 Mad 416 (418) : 51 Mad 664 ; (1895) 17 All 97 (99) ; (1891) 15 Bom 370 (373, 374, 375) ; (1891) 18 Cal 323 (323, 324). (Order under O. 23, R. 1 permitting withdrawal, with liberty to bring fresh suit) ; (1900) 27 Cal 362 (363) ; (1911) 1911 Pun L R No. 248, page 917 (919) ; (Vol 6) 1919 Lah 318 (314) ; (Vol 9) 1922 Lah 267 (268) ; (Vol 6) 1919 Oudh 116 (116).

[2] Order allowing withdrawal of partition suit after preliminary decree is a decree. (1912) 11 Mad L Tim 390 (391).

[3] See also O. 23, R. 1.

32a. Orders on applications.—[1] Order passed subsequent to the preliminary decree and before the final decree, refusing to take accounts from particular year, is not appealable. (Vol 32) 1945 Oudh 312 (313) : 20 Luck 557.

[2] Order suspending passing of final decree till disposal of appeal from preliminary decree is not a decree. (Vol 21) 1934 Pat 225 (226) : 13 Pat 379.

[3] Order allowing petition for passing of final decree is neither decree nor appealable. (Vol 21) 1934 Mad 198 (198) : 57 Mad 437.

[4] Order rejecting application for final decree on ground that Court has no jurisdiction is decree and appeal must be stamped *ad valorem*. (Vol 32) 1945 Nag 68 (68, 69).

33. Orders striking off parties.—[1] Order striking off defendants against whom suit held not maintainable is decree. (Vol 28) 1941 Pat 385 (387) : 20 Pat 417 : 42 Cri L Jour 375 ; (Vol 6) 1919 Mad 871 (872) : 42 Mad 219 ; (1910) 8 Ind Cas 409 (409) (Oudh).

[2] An order striking out name of a party is not necessarily a decree. But where a cause of action is specifically pleaded and a distinct relief is claimed

against a defendant who is not impleaded merely for the sake of convenience, an order directing removal of such defendant from the array of parties is a decree. (Vol 18) 1931 All 333 (336) : 53 All 466.

[3] Order under O. 1, R. 10 is not a decree and is not appealable—Partition—Suit by sons against father — Impleading of creditors as defendants is not bad for misjoinder. (Vol 9) 1922 Mad 332 (332, 334) : 45 Mad 194 ; (1886) 13 Cal 100 (101) ; (Vol 13) 1926 Nag 75 (75).

[4] Order refusing to strike off name of a co-respondent to a petition for dissolution of marriage and damages is not decree. (1909) 1909 Pun Re No. 98, p. 486 (489).

[5] See also O. 1, R. 10.

34. Suit, meaning of. — [1] Suit is proceeding instituted by presentation of plaint. (Vol 21) 1934 Mad 103 (106, 107) : 57 Mad 271 (F B).

[2] The decree in appeal is decree in the suit, for an appeal is a continuation of the suit. (Vol 4) 1917 Mad 597 (598).

[3] After preliminary decree the suit is continued until the stage of final decree is reached. (Vol 3) 1916 Mad 523 (523) : 39 Mad 488 ; (Vol 21) 1934 All 465 (467) ; (Vol 6) 1919 Pat 430 (433) : 4 Pat L Jour 240 (F B).

[4] Suit cannot be dismissed after preliminary decree. (Vol 12) 1925 Pat 433 (434).

[5] The term "suit" does not include an application under S. 73, Civil P. C. and an order under the section is not a decree. (Vol 8) 1921 Pat 401 (402) : 5 Pat L Jour 415.

[6] An order under S. 4, Bengal Regulation V of 1799 is not a decree. (1911) 13 Cal L Jour 677 (678).

[7] Proceedings before a manager under the Chota Nagpur Encumbered Estates Act is not a suit and the orders he passes are not decrees. (Vol 22) 1935 Pat 515 (518) : 15 Pat 69 : 36 Cri L Jour 1354.

[8] Madras Hindu Religious Endowments Act (2 [II] of 1927), S. 44—Application commencing proceedings under S. 44 is not plaint and order thereon is not decree. (Vol 22) 1935 Mad 373 (377).

[9] Order of District Judge under S. 84 (2), Madras Hindu Religious Endowments Act on application to set aside decision of Board under S. 84 (1) is not appealable—Such order is not decree within S. 2 (2). (Vol 21) 1934 Mad 103 (110) : 57 Mad 271 (F B).

[10] Application under S. 4 (2), Madras Agency Tracts Interest and Land Transfer Act (1 [I] of 1917), is not suit and order refusing it is not decree. (Vol 20) 1933 Mad 695 (696) : 56 Mad 984.

[11] Order dismissing petition under S. 34, Trusts Act, is not appealable. (Vol 22) 1935 Oudh 72 (73).

[12] An order of District Judge made under S. 10 of Act 20 [XX] of 1863 (Religious Endowments), appointing a person to fill a vacancy in the Committee is not decree. (1888) 11 Mad 26 (35) : 14 Ind App 160 (P C).

[13] Collector or other revenue officer being competent to institute inquiries and to record his judgment in *robakari* as to the liability of lands or otherwise in manner directed by S. 20, Regulation 12 [XII] of 1819—Such decision has force and effect of decree. (Vol 17) 1930 Cal 411 (416).

[14] Partition Act (4 [IV] of 1893), S. 4—Order under, in course of partition suit is a decree and is appealable. (Vol 6) 1919 Cal 1055 (1055) : 45 Cal 878.

[15] Insolvency proceedings under special provisions of Punjab Laws Act do not amount to suit — Order releasing from attachment insolvent's residential house is not decree. (1921) 3 Lah L Jour 338 (340).

Section 2 (3) — Note 1

[1] "Decree-holder" under S. 2 (3) can mean only the person in whose favour the decree is passed, even

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court :

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by ^a[the Central Government or the Crown Representative] :

[a] Substituted by A. O. for "Governor-General in Council".

(6) "foreign judgment" means the judgment of a foreign Court :

(7) "Government Pleader" includes any officer appointed by the ^a[Provincial Government] to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader :

[a] Substituted by A. O. for "Local Government".

(8) "Judge" means the presiding officer of a Civil Court :

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order :

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if he is a benamidar for another. Therefore the person for whom he is a benamidar is not a decree-holder within the meaning of the section. (Vol 27) 1940 Pat 472 (472, 473).

[2] "Decree-holder" within the meaning of S. 2 (3) does not include a transferee whose rights have not been recognised by Court. (Vol 31) 1944 Mad 363 (365); (Vol 24) 1937 Mad 605 (606).

[3] Description of decree-holder as the firm tantamounts to a decree being given in the names of those who are partners of the firm. (Vol 21) 1934 Mad 330 (331); 57 Mad 696.

[4] Defendant in a decree for specific performance to sell can enforce the decree and compel the plaintiff to pay the consideration and take the sale-deed. Therefore he is a decree-holder within the meaning of S. 2 (3). (Vol 10) 1923 Bom 26 (27); 46 Bom 990; (Vol 19) 1932 Cal 579 (583); 59 Cal 501.

[5] In case of decree for sale of immovable property, decree-holder need not necessarily have been plaintiff in the case. (Vol 16) 1929 Lah 492 (494).

[6] 'Decree-holder' does not include an attaching creditor. (Vol 12) 1925 All 123 (124).

[7] There is no difference between the holder of a decree and a decree-holder for the purposes of O. 21, R. 10. (Vol 27) 1940 Pat 472 (473).

Section 2 (4) — Note 1

[1] Though the word "District" in the Civil P. C. includes the local limits of a High Court in its ordinary original jurisdiction it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court in its ordinary original jurisdiction. (Vol 14) 1927 Cal 290 (290).

Section 2 (5) — Note 1

[1] The definition of "foreign Court" in the Code is for the purposes of the Code only, and no further. (1909) 36 Cal 233 (236).

[2] As the Privy Council has authority in British India it is not a foreign Court.

[3] Definition of foreign Court is inapplicable to Provincial Insolvency Act. (Vol 16) 1929 Mad. 900 (902).

[4] An order passed by the District Court at Secunderabad is an order of a foreign Court. (Vol 20) 1933 P C 134 (135); 60 Ind App 167; 56 Mad 405 (P O).

[5] The Ceylon Court is a foreign Court. (1909) 32 Mad 469 (471).

[6] The English Courts are, with regard to the Courts in India, foreign Courts. (1884) 8 Bom 571 (574).

[7] The Court of Faridkot is a foreign Court. (1888) 1888 Pun Re No. 191, page 491 (500).

[8] Courts in Berar which have been established or continued by the authority of the Governor-General are not "foreign Courts" within the meaning of Civil Procedure Code in British India and *vice versa*. (Vol 28) 1941 Nag 36 (44, 45); ILR (1941) Nag 1 (FB).

Section 2 (6) — Note 1

[1] Judgment in the expression 'foreign judgment' has the English meaning and not the meaning as regards the word given by S. 2 (9), Civil P. C. The term foreign judgment means the decree or order of a foreign Court as defined in S. 2 (5) of the Code. (Vol 19) 1932 Mad 661 (662).

[2] Judgments of the Courts of Native States having independent civil, criminal and fiscal jurisdiction must be regarded as foreign judgments. (1895) 22 Cal 222 (237); 21 Ind App 171; 1898 Pun Re No. 112 (PC). (Judgments of Faridkot Courts are foreign judgments.)

[3] Decree of native State coming within the purview of S. 44, Civil P. C., is not removed from the category of foreign judgments, as that section merely alters the procedure by which they can be given effect to. (Vol 3) 1916 Bom 307 (308); 40 Bom 551.

[4] An order obtained in the High Court of England enforcing an award under S. 12, English Arbitration Act (52 and 53, Vict. c. 49), does not operate as a judgment, on which an action can be brought as on a foreign judgment. (1904) 31 Cal 274 (282).

Section 2 (8) — Note 1

[1] See also the definitions of "Court" in S. 3, Evidence Act, 1872, and of "Court of justice" in S. 20, Penal Code, 1860.

[2] A Registrar or Sub-Registrar appointed under the Registration Act, 1908, is not a Court for purposes of Criminal Procedure Code, S. 195: See sub-s. (2) of that section.

[3] Powers exercised by Judge are not delegated by Provincial Government — His powers are conferred by Civil Procedure Code. (Vol 27) 1940 Pesh 41 (43); 42 Cri L Jour 68.

Section 2 (9) — Note 1

[1] As to the meaning of the word 'judgment' in Letters Patent, see under Cl. 15, Letters Patent.

[2] What is commonly called "order" is judgment as defined in Civil P. C., though a document may be so drawn up as to contain not only the reasons for the decision so as to fulfil the requirements of a "judgment" but also the formal expression of the decision so as to fulfil most of the requirements of an "order" as defined in S. 2 (14). (Vol 20) 1933 All 762 (763); 56 All 27.

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

Objects and Reasons.

"Legal representative. — We have inserted a definition of 'legal representative'—an expression which has been variously interpreted by the High Courts as would appear from the reported cases which are not easily reconcilable with one another. See 8 Cal W N 843, in

which almost all the earlier cases are reviewed.

The Committee trust that the definition which has been added by them will set at rest what, owing to the absence of any such definition from the present Code, is a somewhat debatable point."—S. O. R.

Section 2 (9) (contd.)

[3] Order that a Court will proceed to hear a suit on merits is not one which should be immediately followed by a decree. The finding that party is or is not agriculturist unless involving taking of accounts is not judgment as is intended by O. 20, Civil P. C. (Vol 2) 1915 Bom 42 (43) : 39 Bom 422.

[4] Short-hand notes not approved by the Judge are not part of judgment. (Vol 14) 1927 Bom 113 (115) : 51 Bom 267.

[5] Order setting aside ex parte decree is judgment and cannot be set aside save under S. 152 or on review. (Vol 20) 1933 Oudh 385 (386).

[6] Decree-holder filing application for final decree and judgment-debtor filing application for extension of time — Court making diary note rejecting prayer for extension and ordering final decree to be drawn up — Diary note held amounted to judgment. (Vol 26) 1939 Rang 294 (296) : 1940 Rang L R 472.

[7] 'Judgment' pronounced under O. 8, R. 10, is not a 'judgment' within this clause. (1912) 15 Oudh Cas 78 (79).

[8] Where the trial Judge decides some issues and his successor decides the remaining issues and gives judgment only in respect of issues tried by him, the decision of the first Judge on the issues tried by him is a judgment which must be filed with the memo of appeal along with the judgment of the second Judge to make the appeal competent. (Vol 13) 1926 Lah 638 (1) (638).

Section 2 (10) — Note 1

[1] The definition of judgment-debtor does not include the assignee of the judgment-debtor. (1912) 1912 Mad W N 176 (177).

[2] Surety for costs—Decree for costs against surety — Surety is judgment-debtor and can apply for stay of execution. (Vol 21) 1934 Bom 252 (254) : 58 Bom 485.

[3] The definition of judgment-debtor in the section applies to Madras Agriculturists' Relief Act, 4 [IV] of 1938 also. (Vol 27) 1940 Mad 944 (945).

SECTION 2 (11) — SYNOPSIS

1. Applicability and scope.
2. Intermeddlers.
3. Joint Hindu family.
4. Representative suits.
5. Representing the estate.

1. Applicability and scope.—[1] The term "legal representative" is wider than executor or administrator — Term includes heirs of deceased plaintiff or defendant : (Vol 33) 1946 Cal 299 (302).

[2] The definition of legal representative is meant only for the purposes of the Code. It is not a general statement of a substantive rule of law. (Vol 21) 1934 All 474 (476).

[3] The definition of legal representative in S. 2 (11) is very wide. (Vol 21) 1934 Lah 1 (3).

[4] The definition of legal representative in S. 2 (11) has not altered the rule of Muhammadan Law by which the heirs of a deceased Muhammadan inheriting his estate are liable for the debt due to the estate in proportion to the shares taken by them. (Vol 19) 1932 All 591 (593) : 54 All 796.

Obiter.—The term "next of kin" is peculiar to English Law of Inheritance and is not the same thing as "legal representative" under the Civil P. C. (Vol 23) 1936 Lah 578 (579).

[5] The expression "legal representative" means and includes one person as well as several persons according as they represent the whole interest of the deceased. (Vol 20) 1933 Lah 356 (359) : 14 Lah 543.

[6] See also Notes on Ss. 50, 52, 53 and O. 22, R. 3.

2. Intermeddlers. — [1] Legal representative includes any person who intermeddles with estate of deceased and the fact that this definition is not found in old Code does not make it any the less applicable, based as it is on sound legal principles. (Vol 3) 1916 Mad 1022 (1024).

[2] Person possessing judgment-debtor's property is his legal representative. (Vol 11) 1924 Cal 362 (362); (Vol 4) 1917 Mad 979 (980).

[3] Mere intermeddling with the estate does not make the intermeddler a legal representative unless he has come into possession of the estate lawfully. (Vol 25) 1938 Nag 298 (299) : 1 L R (1939) Nag 526.

[4] A person to become legal representative must retain possession of the property belonging to the estate with intention to represent the estate. (Vol 20) 1933 Cal 865 (869).

[5] The fact that the legal representative has not taken possession does not help another who also is not in possession but claims to be the legal representative. If he is the legal representative it is his duty to take possession and it is no answer to the proposition that the legal representative has not taken possession of the property. (Vol 26) 1939 Pat 47 (48).

[6] Person intermeddling with estate of deceased cannot be brought on record when another person is found to be true legal representative of deceased's property. (Vol 26) 1939 Pat 117 (118).

[7] A mere taking away of a portion of the property of the deceased does not make him an executor de son tort while a legal representative exists. (Vol 13) 1926 Cal 825 (825).

[See also (Vol 26) 1939 Lah 321 (321). (Decree-holder dying leaving lawful heir — Unlawful possession of property of deceased cannot entitle him to execute decree on strength of such possession.)]

[8] It is the object of the Legislature to include even executors de son tort and intermeddlers with the estate to provide an effective representation once for all for the purposes of litigation (*Obiter*). (Vol 13) 1926 Nag 476 (479).

[See also (Vol 26) 1939 Lah 321 (321). (A person who intermeddles with property has been probably included

Section 2 (11) (*contd.*)

in the definition of a legal representative merely to enable the persons who wish to obtain relief against the property to proceed against it in the hands of a person, who has obtained unlawful possession of property.]

[9] The Civil Procedure Code makes no provision for the representation of a person who is alive by a person who intermeddles with his estate. (Vol 32) 1945 All 45 (46) : I L R (1945) All 18.

[10] Heirs of intestate Parsi who intermeddle with his estate are his legal representatives. (Vol 14) 1927 Bom 474 (477) : 51 Bom 771.

[11] A person performing 'puja' of a deity does not become an intermeddler of the estate of the deity. (Vol 26) 1939 Pat 47 (48).

[12] Burden of proof is on person alleging that the other has intermeddled with estate of deceased and therefore is a legal representative of the deceased. (Vol 21) 1934 Rang 196 (197).

3. Joint Hindu family. — [1] Coparcener getting property by survivorship on the death of a coparcener who sues or is sued in a representative character is a legal representative of the deceased coparcener. (Vol 25) 1938 All 163 (164) ; (Vol 13) 1926 All 157 (158) : 48 All 4. (Undivided father and son—Decree against son—Son's share attached—Son dying—Father is legal representative.) ; (Vol 28) 1941 Bom 23 (25) : I L R (1941) Bom 177. (Son is liable for debts of deceased father only to extent of assets come to his hands.) ; (Vol 22) 1935 All 390 (391). (The surviving brothers of a deceased are his legal representatives.) ; (Vol 28) 1941 Lah. 447 (450). (Father, son, brother and widow of deceased member are his legal representatives within S. 2 (11).)

[See however (Vol 8) 1921 Lah 34 (35) : 2 Lah 114. (Surviving coparceners are not legal representatives.) ; (Vol 24) 1937 Oudh 327 (328) : 13 Luck 241. (Personal money decree against B—On death of B, decree-holder A trying to execute it against sons of B and against C, brother of B, contending that B and C were joint and hence C was legal representative of B—Held, C could not be legal representative of B in presence of B's sons and C's property could not be proceeded against.) ; (Vol 22) 1935 Pat 275 (288) : 14 Pat 732]

[2] The combined effect of Hindu law and Civil P. C., S. 53 is that son must be regarded as the legal representative, irrespective of the fact whether the father has left any private property or not. (Vol 31) 1944 Lah 473 (476, 477).

[3] Decree for permanent injunction obtained against father in joint Hindu family can be executed against son. (Vol 18) 1931 Bom 484 (489) : 55 Bom 709.

[See however (Vol 5) 1918 Bom 165 (166) : 42 Bom 504. (Held no longer good law so far as son is concerned in.) ; (Vol 28) 1941 Bom 23 : I L R (1941) Bom 177.]

[4] Hindu joint family—Manager dying—Succeeding manager is legal representative. (Vol 12) 1925 Mad 456 (457).

[5] Joint Hindu family firm—Death of manager—No new manager appointed—All members of family are his legal representatives. (Vol 28) 1941 Pat 596 (599) : 20 Pat 755.

[6] Pronote in favour of manager of Hindu joint family—Holder dying—Heir obtaining succession certificate may recover upon the pronote as his legal representative. (Vol 25) 1938 Bom 451 (453).

[7] Before deciding whether a member of a Hindu joint family is the legal representative of another against whom there is a suit on a pronote it must be shown that the deceased had an estate. (Vol 17) 1930 Mad 575 (576).

4. Representative suits. — [1] On the death of the widow, the reversioners become the legal representa-

tives. (Vol 28) 1941 Cal 347 (349, 351) : I L R (1941) 1 Cal 187 ; (1911) 33 All 15 (17) ; (Vol 3) 1916 Mad 611 (612, 618) : 39 Mad 882.

[2] In a suit for a declaration of the invalidity of an adoption or alienation by a Hindu widow instituted by the presumptive reversioner, if the plaintiff dies the next presumptive reversioner has a right to continue the suit as legal representative. (Vol 2) 1915 P C 124 (125, 126) : 42 Ind App 125 : 38 Mad 406 (P C). (On appeal from 22 M L J 395.) ; (Vol 6) 1919 Mad 479 (480).

[3] One legatee applied for probate. When the litigation was in appeal stage the legatee died but he transferred his legacy to some others: Held those some others were the legal representatives of the deceased. (Vol 19) 1932 Cal 206 (207).

[4] Suit by ward with Court of Wards as next friend—Ward dying—Court of Wards continuing suit is in position of legal representative. (Vol 20) 1933 Nag 85 (86) : 29 Nag L R 118.

[5] Suit against mahant not in his representative capacity—Succeeding mahant is not his legal representative. (Vol 11) 1924 Lah 251 (252).

[6] Where the widow of a person asserted in defence to a suit that her husband had dedicated the property in dispute to religious purposes: Held she acted in a representative capacity and that on her death her husband's step-mother for whose maintenance also a provision was made by his will became her legal representative inasmuch as all the male heirs refused to recognise the dedication. (Vol 12) 1925 Lah 2 (4).

[7] Within S. 2 (11) trustees are not legal representatives of their predecessors in office. (Vol 13) 1926 Mad 540 (541).

[8] Suit by A and a mutwalli for declaration that certain mosque was wakf—During pendency of appeal mutwalli dying—A managing mosque since death of deceased—A held could be treated as legal representative. (Vol 23) 1941 Lah 36 (38).

5. Representing the estate. — [1] In cases governed by the Succession Act, 1925, S. 211, the executor or administrator alone can represent the estate of a deceased person and as such they alone are his legal representatives. See also the following cases : (Vol 33) 1946 Cal 299 (302) ; (Vol 25) 1938 Bom 6 (9) : I L R (1938) Bom 64. (An heir of a Parsi is not his legal representative : 18 Bom 337, foll)

[2] The term 'legal representative' only denotes the class of persons on whom the status of a representative is fastened by reason of the death of a person whose estate they are held to represent. (Vol 16) 1929 Oudh 353 (354).

[3] A widow takes an interest which devolves upon her as a person representing the estate and interest of her deceased husband whether it is regarded as a statutory devolution or succession and hence she is a legal representative. (Vol 33) 1946 Mad 283 (285).

[4] An heir of the deceased who obtains possession of his estate as a result of an administration suit is his legal representative. (Vol 21) 1934 Rang 93 (94).

[5] "Legal representative" means a person who in law represents the estate of the deceased, and need not necessarily be the beneficial owner of that estate. (Vol 6) 1919 Mad 510 (513) : 42 Mad 76.

[6] A person who obtains property of the testator as universal legatee under his will is also a legal representative within the meaning of the section. (Vol 23) 1936 Oudh 7 (9) : 12 Luck 1.

[7] The zamindar to whom the grove and the abadi house escheated on the death of a person who was a judgment-debtor is not his legal representative as the

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

Objects and Reasons.

"*Mesne profits.* — The Committee have altered the definition of 'mesne profits' so as to exclude from the calculation any increased rents and profits due to improvements made by the persons in wrongful possession

for which he cannot at present claim compensation from the rightful owner either by way of mitigation of damages or otherwise." — S. O. R.

(13) "moveable property" includes growing crops :

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree :

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :

Section 2 (11) (contd.)

escheat operated in his favour because of his right as the owner of the soil. (Vol 1) 1914 Oudh 208 (208).

[8] Death of benamidar pending suit for rent—Real owner applying to be impleaded was held not a legal representative within S. 2 (11) on the ground that although he was interested in the rent, he did not represent the estate of the deceased. (Vol 31) 1944 Mad 27 (27).

[9] The Official Assignee or Receiver of an insolvent is not a legal representative for purposes of O. 21, R. 22. (Vol 22) 1935 Mad 151 (152) : 58 Mad 403.

[10] The son who succeeds to an impartible estate is the legal representative of his deceased father against whom there is a decree for compensation. (Vol 27) 1940 Nag 278 (282) : 1 L R (1941) Nag 632.

Section 2 (12)—Note 1

[1] In English law the distinction between 'damages' and 'account of profits' is maintained, but in India it is often forgotten. The expression 'mesne profits' may be used to denote compensation recoverable from a person who has been in wrongful possession. (Vol 22) 1935 Pat 80 (81).

[2] "Mesne profits" means the sum awarded not on the basis of what the plaintiff has lost by exclusion, but on what the defendant has made, or with ordinary diligence might have made during his wrongful possession. (Vol 30) 1943 Pat 69 (70) : 21 Pat 735.

[3] The "term mesne profits" does not exclude arrears for previous years which may be claimed and recovered at later years. (Vol 17) 1930 Oudh 51 (52).

[4] The term "wrongful" is used in special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it is in wrongful possession for purpose of mesne profits. (Vol 26) 1939 Nag 23 (26).

[5] It is not necessary that possession in order to be wrongful must have been obtained in consequence of some improper act. (Vol 26) 1939 All 529 (533).

[6] Possession of purchaser of portion of joint family property or of the interest of coparcener in specific property is not wrongful — Coparcener's acquiescence in such purchaser's possession disentitles him to mesne profits. (Vol 11) 1924 Bom 433 (433, 434).

[7] The person in possession is not liable for failure to realise the highest possible rate of rent and premium from the tenants. It is enough if a fair return has been realised from the land. (Vol 22) 1935 P C 49 (50) : 62 Ind App 53 : 62 Cal 499 (P C).

[8] The word 'profits' includes both rent and profit. (Vol 22) 1935 P C 49 (50) : 62 Ind App 53 : 62 Cal 499 (P C).

[9] See also O. 20, R. 12.

Section 2 (13)—Note 1

[1] This definition of movable property does not apply to Limitation Act. Standing crops are not movable property for purposes of Limitation Act. (Vol 3) 1916 Mad 1142 (1142) ; (Vol 2) 1915 Nag 69 (69, 70) : 11 Nag L R 18.

[2] See also S. 3 (25) of the General Clauses Act, 1897.

Section 2 (14)—Note 1

[1] "Order" as defined in the Code is analogous to "decree" and does not imply what is popularly understood, namely, the views expressed by a Judge on the merits of the case and his decision thereon. What is ordinarily called an "order" is in fact a "judgment." (Vol 20) 1933 All 762 (763) : 56 All 27.

[2] Where an order contains not only the grounds of the decision but also the "formal" expression and the decision itself, it should be taken to be of a dual character being both the "judgment" and the "order" as defined in the Code. (Vol 20) 1933 All 762 (763) : 56 All 27.

[3] Order on notice of motion is order within S. 2 (14) and can be executed under S. 36. (Vol 21) 1934 Bom 452 (457) : 59 Bom 10.

[4] Orders passed under Ss. 55 and 7, Divorce Act, 1869, are orders within the meaning of S. 2 (14), Civil P. C. (Vol 15) 1928 Cal 513 (514).

[5] "Order" in S. 2 (14) does not cover orders passed under S. 30 (e), Guardians and Wards Act, 1890. (Vol 5) 1918 Mad 889 (390) : 41 Mad 241.

[6] See also Note 5 on S. 2 (2) and S. 2 (9).

SECTION 2 (15) — SYNOPSIS

1. Pleader.
2. Power to abandon issue or claim.
3. Power to compromise suit.
4. Power to make admissions.
5. Power to refer to arbitration.
6. Power to withdraw suit.
7. Professional misconduct of pleader.

1. Pleader. — [1] Pleader means every one entitled to appear and plead for another in Court. (1884) 8 Bom 105 (132) (FB).

[2] Pleader in India is both solicitor and counsel. (1912) 23 Mad L Jour 381 (381).

[3] The status of an advocate of Calcutta High Court does not differ from that of a barrister in England. (Vol 12) 1925 Cal 696 (698) : 52 Cal 386.

[4] High Court pleader is not entitled, under Ss. 2 and 3 of Rules of 31st March 1871, to practise as agent in Privy Council. (1889) 16 Cal 636 (637, 638) : 16 Ind App 163 (P C).

[5] See also Notes on O. 3, R. 4.

(16) "prescribed" means prescribed by rules :

(17) "public officer" means a person falling under any of the following descriptions, namely :—

(a) every Judge ;

(b) every member of the Indian Civil Service ;

Section 2 (15) (contd.)

2. Power to abandon issue or claim. — [1] Pleador's general powers in conduct of suit include power to abandon issue which, in his discretion, he thinks it inadvisable to press. (Vol 4) 1917 Oudh 375 (377) ; 20 Oudh Cas 49 ; (1902) 25 Mad 367 (377).

[2] Pleador cannot give up any portion of his client's claim without his express authority. (1869) 12 Suth W R 279 (280) ; (1872) 18 Suth W R 438 (436) ; (1869) 3 Beng L R (App) 15 (16).

[3] A pleader has no power to bring the suit to a close by offering to be bound by oath of opposite party, unless authorised to do so. If a party specially authorises his pleader, or an agent, to make an offer to be bound by a particular oath, he might be estopped from retracting the step he had taken if his offer was acted upon. (1890) 14 Bom 455 (457).

[4] Opinion expressed by vakil in course of argument adversely to a claim which he undertook to advocate is not binding on his client when it is not in accordance with the law applicable to the case. (1895) 18 Mad 73 (83).

3. Power to compromise suit.—[1] Pleador cannot enter into compromise without specific authority. But if his client acquiesces in such compromise, it is binding on latter. (Vol 3) 1916 Sind 64 (64) ; 9 Sind L R 218.

[2] Vakalat empowering pleader to compromise suit — Second vakalat is unnecessary though first vakalat empowers pleader to do other things also. (1912) 23 Mad L Jour 381 (381).

[3] Vakalatnama empowering filing of compromise does not empower to enter into compromise or sign it. (Vol 17) 1930 Oudh 112 (113) ; (Vol 20) 1933 Pat 104 (111) ; 12 Pat 117.

[4] Authority to compromise does not necessarily give pleader authority to negotiate terms of compromise without reference to his client. (Vol 5) 1918 Mad 656 (657) ; 41 Mad 233.

[5] Counsel has implied authority to compromise—Position is same as in England. (Vol 17) 1930 P C 158 (161) ; 57 Ind App 138 ; 57 Cal 1311 (P C).

[6] Counsel's general authority to compromise suit continues until notice of its determination is given to other side. (1900) 27 Cal 428 (438) ; (1891) 13 All 272 (275).

[7] Compromise arrived at in Court by counsel on either side under their general authority to compromise is not vitiated merely because they considered the matter in the corridor of Court or in bar library. (Vol 14) 1927 Cal 714 (716) ; 55 Cal 113.

[8] Counsel's general authority to compromise does not extend to collateral matters. (Vol 14) 1927 Cal 714 (717) ; 55 Cal 113 ; (1900) 27 Cal 428 (438, 448).

[9] Counsel cannot compromise a case against the express prohibition of the client. (1886) 13 Cal 115 (119, 120) ; (Vol 17) 1930 P C 158 (161) ; 57 Ind App 138 ; 57 Cal 1311 (P C) ; (Vol 12) 1925 Cal 866 (869).

[10] Compromise by advocate under misapprehension — Client is not bound. (Vol 12) 1925 Rang 314 (316) ; 3 Rang 261 ; (1900) 27 Cal 428 (449).

[11] Decree in terms of compromise made upon consent of duly instructed counsel—Decree is binding on defendant though his attorney had no authority to compromise. (1870) 7 Bom H C R (O C) 79 (89).

4. Power to make admissions. — [1] Verbal admissions made by a pleader on behalf of his client must be received with caution, must be taken as a whole, and must not be unduly pressed. (1884) 6 All 406 (415).

[2] Admission by pleader on question of fact binds his client. (1913) 17 Cal W N 156 (159). (Provided such question falls within scope of suit in which he has been retained.) ; (1839) 2 Moo Ind App 253 (259) (P C) ; (1868) 9 Suth W R 375 (376). (Admission itself is legal evidence which the Court is bound to consider.) ; (1863) 10 Suth W R 322 (323) ; (1874) 21 Suth W R 332 (332) ; (Vol 3) 1916 Lah 338 (338).

[3] When a duly authorised pleader makes a statement of fact on behalf of his client, mere allegation to the contrary by that party is not material sufficient to contradict his pleader. (Vol 18) 1931 All 415 (416).

[4] Admission of pleader until satisfactorily explained away is cogent evidence against his client. (Vol 4) 1917 Cal 39 (42).

[5] Court is not bound by an admission made by pleader of a party where evidence on record clearly shows that the admission was made wrongly. (Vol 3) 1916 Lah 301 (302).

[6] Party who wants to repudiate an admission of fact made by his counsel should do so at the earliest opportunity. (Vol 4) 1917 Oudh 375 (377) ; 20 Oudh Cas 49.

[7] Erroneous admission by pleader on point of law does not bind his client. (Vol 19) 1932 Bom 291 (298) ; 56 Bom 324 ; (1900) 24 Bom 360 (363) ; (Vol 18) 1931 Bom 295 (296). (Pleader for party conceding that compromise decree includes matters not relating to suit—Concession is one of law not binding on party in second appeal.) ; (1900) 27 Cal 156 (163) ; 26 Ind App 216 (P C) ; (Vol 6) 1919 Cal 972 (973) ; (Vol 19) 1932 Mad 409 (410). (Admission by counsel on point of law — Client is not estopped from questioning it in appeal or revision.) ; (Vol 1) 1914 Sind 36 (39) ; 8 Sind L R 156.

[8] Admission by legal practitioner is sufficient in a quasi-civil proceeding like the one under S. 145, Cr. P. C. to support an order in favour of other party. (1902) 7 Cal W N 351 (352).

5. Power to refer to arbitration. — [1] Pleador has authority to make application for reference to arbitration. (Vol 3) 1916 Sind 79 (81) ; 9 Sind L R 183.

6. Power to withdraw suit.—[1] A vakalatnama in general terms is *prima facie* sufficient authority to pleader to apply for permission to withdraw from suit, and in the absence of fraud or misconduct on his part or contrary instructions, the client is bound by acts of his pleader. (1866) 5 Suth W R 80 (81).

7. Professional misconduct of pleader. — See Notes on S. 10, Bar Councils Act, 1926 and S. 14, Legal Practitioners Act, 1879.

SECTION 2 (17) — SYNOPSIS.

1. Clause (c).
2. Clause (d).
3. Clause (e).
4. Clause (f).
5. Clause (g).
6. Clause (h).

1. Clause (c). — [1] "Serving under Government" means serving actively under the Government whether

(c) every commissioned or gazetted officer in the military, ^a[naval or air] forces of His Majesty ^b[* * *] while serving under ^c[the Crown];

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

(f) every officer of ^c[the Crown] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of ^c[the Crown], or to make any survey, assessment or contract on behalf of ^c[the Crown], or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of ^c[the Crown], or to make, authenticate or keep any document relating to the pecuniary interests of ^c[the Crown], or to prevent the infraction of any law for the protection of the pecuniary interests of ^c[the Crown]; and

(h) every officer in the service or pay of ^c[the Crown], or remunerated by fees or commission for the performance of any public duty:

[a] *Substituted* by the Amending Act, 1934 (35 [XXV] of 1934), S. 2 and Sch., for "or naval". [b] The words "including His Majesty's Indian Marine Service" were *repealed* by S. 2 and Sch. I, *ibid.* [c] *Substituted* by A. O. for "the Government".

Section 2 (17) (contd.)

in the Civil or Military employ of the Government. (Vol 1) 1914 Oudh 199 (199): 17 Oudh Cas 99.

[2] Military officer in Indian Staff Corps is a 'public officer'. (1897) 24 Cal 102 (106).

[3] Officers holding commissioned rank in the Indian Subordinate Medical Service are 'public officers'. (Vol 1) 1914 Oudh 199 (201): 17 Oudh Cas 99.

[4] Military officers acting as members of Court-martial are "public officers". (Vol 33) 1946 Lah 247 (254) (SB).

[5] A British Officer in Indian army is "public officer" within S. 2 (17). (Vol 5) 1918 Bom 32 (33): 43 Bom 716.

[6] An Assistant Surgeon of a station hospital in Military employ is not 'gazetted officer'. (1910) Pun L R No. 65, p. 172 (175): 1910 Pun Re No. 10.

2. Clause (d). — [1] Receiver appointed under O. 40, R. 1, Civil P. C., is a public officer. (Vol 17) 1930 Cal 737 (738); (Vol 18) 1931 Cal 175 (176); (Vol 13) 1931 Cal 503 (503): 58 Cal 850; (Vol 27) 1940 Cal 1 (2, 3); (Vol 20) 1933 Mad 105 (106).

[2] Official Receiver of Calcutta High Court is public officer. (Vol 18) 1931 Cal 61 (62): 57 Cal 1127.

[3] A Receiver appointed under the Provincial Insolvency Act is a public officer within S. 2 (17). (Vol 7) 1920 Bom 50 (50): 44 Bom 895; (Vol 12) 1925 All 241 (242, 243): 47 All 291. (Official Receiver.)

[4] Official Liquidator is a public officer. (Vol 21) 1934 Oudh 158 (162): 9 Luck 577.

[5] Official Assignee is a public officer within S. 2 (17). (Vol 12) 1925 Bom 344 (344): 49 Bom 638.

[6] The Naib Nazir is a public servant under S. 409 of the Indian Penal Code. (1870) 2 N W P H C R 298 (299).

[7] A common manager appointed under S. 95, Bengal Tenancy Act is a public officer. (Vol 7) 1920 Cal 575 (579); (Vol 19) 1932 Cal 275 (281, 282): 59 Cal 961.

3. Clause (e). — [1] Railway Agent having power of arrest under S. 131, Railways Act, is not public officer. (Vol 26) 1939 Cal 386 (387): 1 L R (1939) 2 Cal 46.

4. Clause (i). — [1] A village sanitation panchayat is not a public officer. (Vol 16) 1929 Nag 70 (70).

[2] Municipality constituted under Madras District Municipalities Act is not a public officer. (Vol 17) 1930 Mad 844 (853, 854).

5. Clause (g). — [1] The Administrator-General of Bengal was held to be a public officer. (1904) 8 C W N 913 (915).

[2] A Cantonment Committee formed under the Cantonments Act is a public officer. (1910) 34 Bom 583 (588).

[3] Village headman is a public officer. (Vol 10) 1923 Rang 250 (251).

[4] Engineer who receives and disburses municipal moneys is a public servant under the Indian Penal Code. (1869) 6 Bom H C R (Crown Cases) 64 (68).

[5] A Patwari, who prepares 'Teis khana' register under rules framed by the Board of Revenue is not a public servant. (1891) 18 Cal 534 (538).

[6] Adhikari receiving money towards arrears of revenue comes within the definition of a "public officer". (Vol 29) 1942 Mad 288 (288).

[7] Head of Government department (Sheriff of Bombay) is not liable for wrongful acts of his subordinates (bailiff of the Sheriff) unless it can be shown that the act complained of was substantially the act of the head of the department himself (*Obiter*). (Vol 14) 1927 Bom 521 (524): 51 Bom 749.

6. Clause (h). — [1] The word 'public' may include any class of the public or any community. (Vol 31) 1944 Cal 206 (210).

[2] The word 'public duty' refers to duty concerning the affairs or service of the public. (Vol 31) 1944 Cal 206 (210).

[3] The word 'service' must necessarily mean something more than being merely subject to the orders of the Government or to control by Government. (Vol 27) 1940 Mad 831 (833): ILR (1940) Mad 929.

[4] Person paid out of commission charged to private person for services is a public servant if he performs public duty. (Vol 15) 1928 Sind 76 (78): 22 Sind L R 63.

[5] Manager appointed under Bengal Court of Wards Act is a public officer under S. 2 (17) (h). (Vol 26) 1939 Cal 720 (721, 722): ILR (1940) 1 Cal 73.

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125 :

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds : and

(20) "signed," save in the case of a judgment or decree, includes stamped.

3. For the purposes of this Code, the District Court is subordinate to the High Court, and *Subordination of Courts.* every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

[1882—S. 2.]

4. (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

Section 2 (17) (contd.)

[But see (Vol 7) 1920 Cal 167 (168).]

[6] Officer discharging the duties of a Court of Wards under Bombay Court of Wards Act, 1905, is a public officer. (Vol 15) 1928 Sind 76 (79) : 22 Sind L R 63.

[7] Members of provincial legislative assembly are not public officers because they are not officers in the service or pay of the Crown. (Vol 26) 1939 Cal 428 (429, 430) : ILR (1939) 1 Cal 523.

[8] Liquidator appointed by the Registrar under S. 42 of the Co-operative Societies Act (1912) is a public officer. (Vol 29) 1942 Lah 287 (288) : I L R (1942) Lah 389; (Vol 21) 1934 Nag 201 (202) : 30 Nag L R 240. (Note : There is no reference to any particular clause of S. 2 (17).) ; (Vol 26) 1939 Nag 232 (233).

[But see (Vol 27) 1940 Mad 831 (833) : I L R (1940) Mad 929.]

[9] The Collector, when appointed to take charge of the estate of a minor, is an officer of Government and a public officer. (1875-77) 1 Bom 318 (320).

[10] Collector, managing the estate of a disqualified proprietor, under S. 204 of the N. W. P. Land Revenue Act, as agent of the Court of Wards, is a public officer. (1881) 3 All 20 (22) (FB).

[11] Official Trustee is a public officer within the meaning of this section. (1889) 12 Mad 250 (252) ; (1881) 7 Cal 499 (502).

[12] Advocate engaged by Government to conduct civil suit on behalf of Government on daily fees is a public officer. (Vol 26) 1939 Pat 77 (79, 80) : 17 Pat 706.

[13] A person who has ceased to be in Government employ is not a 'public officer'. (Vol 29) 1942 Mad 288 (288).

[14] Railway servants are public servants and they must act within the four corners of their statutory powers. (Vol 4) 1917 Cal 105 (106) : 44 Cal 279 : 18 Cri L Jour 647.

Section 2 (20) — Note 1

[1] Use of stamp bearing name of party is sufficient even in cases where he is able to sign. (Vol 15) 1928 Mad 175 (175, 176) : 51 Mad 242.

[2] It is not a condition precedent that a person to be able to use a stamp should be unable to write his name. (1881) 3 All 575 (576).

[3] "Signed" includes the initialling of the name also. (1886) 8 All 293 (294).

[4] A parwana or notice with the seal of the Court and without the signature of the District Judge, contained some hieroglyphics which could not be traced to the Judge : *Held* there was no official signature of the Judge. (1889) Pun Re No. 185, page 655 (658) (FB).

SECTION 3 — SYNOPSIS.

1. High Court.

2. Judicial precedents.

3. Subordinate Court.

1. High Court. — [1] Chief Court of Oudh is a High Court. (Vol 15) 1928 Oudh 89 (89).

[2] See also S. 3 (24), General Clauses Act, 1897, and S. 219, Government of India Act, 1935.

2. Judicial precedents. — [1] A Court which is subordinate to a High Court is bound to follow the decision of a Bench of that High Court. (Vol 2) 1915 P C 15 (17) : 37 All 359 : 42 Ind App 155 (P C) ; (1891) 15 Bom 419 (422) ; (1884) 10 Cal 82 (84) ; (1883) 6 Mad 424 (426) ; (1893) 17 Bom 555 (558).

[2] A Privy Council decision is binding on Indian Courts though not given in an appeal from an Indian tribunal. (Vol 2) 1915 Mad 833 (835) : 88 Mad 941.

3 Subordinate Court. — [1] The list of Subordinate Courts in S. 3 is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. (1913) 37 Bom 114 (116).

[2] The declaration of the relative subordination of Civil Courts in S. 3 must be taken to cover Revenue Courts as well in the absence of any saving of such Courts. (Vol 31) 1944 Mad 139 (142) : I L R (1944) Mad 595.

[3] The Court of a Sub-Collector acting under S. 15 (4), Madras Agriculturists' Relief Act, 1938, and the Court of the Collector revising the Sub-Collector's order under S. 205, Madras Estates Land Act, 1908, are Civil Courts. (Vol 31) 1944 Mad 139 (141) : I L R (1944) Mad 595.

[4] Revenue Courts under Orissa Tenancy Act are not Civil Courts within S. 3. (Vol 29) 1942 Pat 1 (29) : 21 Pat 1 (F B). (*Meredith J.*, contra.)

[5] Section 3, which defines which Courts are subordinate to the High Court, does not include the High Court in the exercise of its original civil jurisdiction. (Vol 15) 1928 Mad 1091 (1091) : 52 Mad 57.

SECTION 4 — SYNOPSIS.

1. Scope.

2. Special or local law.

1. Scope. — [1] Section 4 exempts any special form of procedure prescribed by or under any other law for the time being in force from the purview of the Code. (Vol 20) 1933 Nag 211 (214) ; (Vol 24) 1937 All 365 (366).

[2] Conflict between special law and general law — Special law prevails. (Vol 19) 1932 Oudh 163 (164).

[3] In the absence of specific provision to the contrary, ordinary rules of procedure apply. (Vol 19) 1932 Oudh 210 (213) : 7 Luck 601 (F B).

[4] Section 4 gives local Act local validity and special procedure validity in its own sphere. (Vol 17) 1930 Cal 53 (54) : 56 Cal 704. (U. P. Court of Wards Act, 1912, cannot be enforced beyond jurisdiction of U. P. Legislature.)

2. Special or local law. — [1] Electricity Act is a special law and prevails over provisions of Civil Pro-

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

[1882—S. 4.]

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the ^a[Provincial Government] ^b[* * *] may, by notification in the ^c[Official Gazette], declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the ^a[Provincial Government] ^d[* * *] may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

[1882—S. 4A.]

[a] Substituted for the words "Local Government" by A. O. [b] The words "with the previous sanction of the Governor-General in Council" were repealed by the Devolution Act, 38 [XXXVIII] of 1920, S. 2 and Sch. I, Part I. [c] Substituted by A. O. for "local Official Gazette". [d] The words "with the sanction aforesaid" were repealed by the Devolution Act, 38 [XXXVIII] of 1920, S. 2 and Sch. I, Part I.

6. Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

[1892—S. 6 last para; 1877—Ss. 6, 7; 1859—Ss. 383, 384.]

Objects and Reasons

In the Note appended in the Statement of Objects and Reasons on Clause 6 a statement appeared as follows:—"The words 'or proceedings in suits' have been introduced in this clause to negative the view that a Court to which a decree is sent for execution has

jurisdiction to execute the decree though the amount exceeds the limits of the pecuniary jurisdiction of the Court, a point on which there is a conflict of opinion. (I L R 17 Mad 309; I L R 16 Cal 465, 467.)" It will be noticed that the words 'or proceedings in suits' do not appear in the section as finally enacted.

Section 4 (contd.)

cedure Code. (Vol 27) 1940 All 24 (27) : I L R (1939) All 901.

[2] Co-operative Societies Act, 1912, operates to the exclusion of the Code. (Vol 20) 1933 Nag 211 (214).

[3] The newly added sub-s. (3) in 1928 makes S. 98 subject to the provisions of the Letters Patent. (Vol 20) 1933 All 861 (875) : 56 All 89 (S B).

[4] Appeal to Privy Council—Special provisions in S. 12, Oudh Courts Act, 1925, prevail over S. 109, Civil P. C. (Vol 19) 1932 Oudh 163 (164).

[5] Section 90, (English) Army Act, 1881, overrides S. 60, C.P.C. (Vol 6) 1919 Bom 133 (134) : 43 Bom 368.

[6] Evidence by witness given in Urdu recorded by Judge in English and not interpreted to him—O. 18, R. 6 held inapplicable—Case held to be governed by Oudh Laws Act (1876), S. 19. (Vol 18) 1931 Oudh 385 (385) : 32 Ori L Jour 851.

[7] Suit in Civil Court to challenge election otherwise than on grounds in S. 19, U. P. Municipalities Act, is barred. (Vol 24) 1937 All 365 (366, 367).

Section 5—Note 1

[1] Deputy Collector trying cases under Orissa Tenancy Act, 1913, and Collector hearing appeals thereunder—Their Courts are Revenue Courts. (Vol 29) 1942 Pat 1 (29) : 21 Pat 1 (FB).

SECTION 6—SYNOPSIS.

1. Applicability and scope.
2. Decree for mesne profits or accounts.
3. Jurisdiction of executing Courts.

1. Applicability and scope.—[1] Section 6 contains a prohibition which is absolute in terms, except in so far

as there is express provision to the contrary. Therefore where it is disregarded, the defect cannot be cured. (1940) 1940 Nag L Jour 244 (251).

[2] Jurisdiction depends on nature of suits and also upon pecuniary value. (Vol 7) 1920 Pat 29 (30) : 5 Pat L Jour 588.

[3] The pecuniary jurisdiction of a Civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated in the plaint and if a suit having regard to the valuation is within the jurisdiction, such jurisdiction is not ousted by the Court on the ground that a decree for a sum exceeding the limits of its pecuniary jurisdiction is given to the plaintiff. (1911) 33 All 97 (99); (1894) 16 All 236 (238).

[4] Where the valuation of the suit is made bona fide in the belief that it is correct and in law that valuation determined the grade of Court which had jurisdiction to entertain and try that suit and the suit was legally seized by the Court a revision of that valuation cannot be permitted so as to oust the jurisdiction of such Court. (1902) 25 Mad 543 (544); (Vol 5) 1918 Mad 998 (1002) : 40 Mad 1 (FB). (Except where plaint is allowed to be amended.)

[5] Court to which appeal lies should be determined by value given in plaint. (Vol 5) 1918 Mad 998 (1002) : 40 Mad 1 (FB).

[6] Incidental issue in suit as to property of value exceeding pecuniary jurisdiction of Court—S. 6 applies to suits and not to incidental issue—Such incidental issue can be tried by Court though exceeding its pecuniary limits. (Vol 24) 1937 Rang 219 (220).

[7] Section 6 governs the whole Code. The position which the section occupies in the Code appearing under the part headed 'preliminary' is among a set of sections

7. The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, ^aor under the Berar Small Cause Courts Law, 1905] *Provincial Small Cause Courts.* or to Courts exercising the jurisdiction of a Court of Small Causes ^b[under the said Act or law], that is to say,—

(a) so much of the body of the Code as relates to —

- (i) suits excepted from the cognizance of a Court of Small Causes;
- (ii) the execution of decrees in such suits;
- (iii) the execution of decrees against immoveable property; and

Section 6 (contd.)

which are clearly designed to govern the whole Code. (1940) 1940 Nag L Jour 244 (249, 250).

[8] The word 'suits' in S. 6 means not only proceedings up to the stage of decree but includes proceedings in execution. (1940) 1940 Nag L Jour 244 (249).

[9] Section 6 does not apply to an order in proceedings before President of Calcutta Improvement Tribunal. (Vol 13) 1926 Cal 533 (534).

[10] Order of remand cannot confer jurisdiction which the Court would not have had but for the remand. (Vol 16) 1929 Lah 534 (535).

2. Decree for mesne profits or accounts. — [1] Court's jurisdiction is not ousted where mesne profits allowable under O. 20, R. 12 (2) exceed its jurisdiction. (Vol 12) 1925 Cal 1076 (1081) (FB); (Vol 5) 1918 Mad 998 (1002) : 40 Mad 1 (FB). (Decree for amount exceeding pecuniary jurisdiction can be passed in suits for accounts also.); (Vol 19) 1932 Bom 111 (112) : 56 Bom 23. (Decree exceeding pecuniary jurisdiction can be passed in suit for accounts also.); (Vol 8) 1921 Pat 118 (119) : 6 Pat L Jour 54; (Vol 4) 1917 Pat 334 (335) : 2 Pat L Jour 394.

3. Jurisdiction of executing Courts. — [1] Under the present Code, as under the Code of 1882, the Civil Court to which a decree might be sent for execution is the Court which under the provisions of the present Code is competent to deal with it. (1910) 37 Cal 574 (577).

[2] Section 6 operates to limit the jurisdiction conferred on Courts under S. 223 of the Code of 1882 (corresponding to S. 38 of the present Code). Hence, the Court executing the decree should also possess the pecuniary jurisdiction to execute it. (1889) 16 Cal 457 (464).

[3] It is decretal amount which determines pecuniary jurisdiction of transferee Court—It is not necessary that transferee Court should have pecuniary jurisdiction which would include original valuation of suit. (Vol 27) 1940 All 331 (334) : 1 L R (1940) All 318.

[4] Application for transfer of decree for execution—Decree cannot be transferred to Court having no pecuniary jurisdiction over the value of the suit. (Vol 9) 1922 Pat. 188 (189) : 1 Pat 651.

[5] By virtue of the absence of the words "competent to try in respect of the nature and the amount or value of its subject-matter" from S. 223 of the Code of 1882 (now S. 39 (1)), a Court can transfer a decree for execution to a Court which has no pecuniary jurisdiction with respect to the same. (1894) 17 Mad 309 (311); (1884) 7 Mad 397 (399).

[6] Suit for possession and mesne profits—Court decreeing amount beyond pecuniary jurisdiction—Execution by another Court of equal pecuniary jurisdiction held incompetent. (Vol 7) 1920 Cal 275 (276).

[7] Decree on a claim of pecuniary value of Rs. 5000 was passed by the first class Subordinate Judge. Under S. 23 of 1869 Code another Subordinate Judge was appointed to assist him who had only second place. The decree was transferred for execution to him : Held that the assistance of the additional Judge could be availed of only to the extent of the limits of his jurisdiction and

therefore the claim itself being beyond his jurisdiction, the decree could not be transferred to him for execution. (1888) 12 Bom 155 (156).

[8] See also Notes on Sections 38, 39 and 42.

Section 7 — Note 1

[1] Orders excluded from jurisdiction of Small Cause Court are only those specifically mentioned in S. 94 (e) or (e). (Vol 6) 1919 Cal 6 (6, 7) : 46 Cal 717.

[2] The words 'injunctions and interlocutory orders' in S. 7 refer only to the orders under O. 39 and these words read together can mean only applications for injunctions and interlocutory orders on such applications. (Vol 2) 1915 Mad 1072 (1072).

[3] Section 7 and O. 51 must not be interpreted to mean that no small cause decree can be executed against immovable property. (Vol 28) 1941 Lah 109 (112) : 1 L R (1941) Lah 670.

[4] A Small Cause Court though also an ordinary Court cannot attach immovable property in execution unless the decree is transferred to its ordinary side. (Vol 16) 1929 Lah 398 (398).

[5] Same Judge holding office both of Judge, Small Cause Court, and as Judge on regular side—He can on decree-holder's application or otherwise transfer Small Cause Court decree to regular side for attachment and sale of immovable property. (Vol 28) 1941 Lah 109 (113) : 1 L R (1941) Lah 670.

[6] A Court of Small Causes acting as such cannot attach immovable property in execution of its decree. (1931) 132 I C 208 (208) (Lah).

[7] A Small Cause Court can attach immovable property before judgment. (Vol 12) 1925 Mad 589 (591) : 48 Mad 488.

[8] An order for attachment before judgment is not one of the orders mentioned under S. 94 (e) or (e). Therefore, a Provincial Small Cause Court has power to attach movables before judgment. (Vol 6) 1919 Cal 6 (7) : 46 Cal 717.

[9] A Small Cause Court can attach and sell a preliminary decree for foreclosure for immovable property. (Vol 6) 1919 Nag 19 (20) : 16 Nag L R 72.

[10] A Small Cause Court cannot attach a half share of joint family property, part of which at least is immovable property. (Vol 1) 1914 Nag 13 (13) : 10 Nag L R 17.

[11] A Small Cause Court has power to award compensation when it issues an interim attachment, and dismisses it after hearing. (Vol 2) 1915 Mad 1072 (1072).

[12] A debt secured on a hypothecation bond is not immovable property for purposes of attachment and Small Cause Court can attach it. (1912) 16 I C 816 (816) (Mad).

[13] Where a decree of the Madras Small Cause Court is transferred to a Mofussal District Munsif's Court for execution, the executing Court acts as a Court of original jurisdiction and the District Judge can hear appeals from an order passed in execution. (Vol 12) 1925 Mad 1179 (1180).

[14] A Small Cause Court has jurisdiction to create a charge upon immovable property. (Vol 24) 1937 All 194 (195) : 1 L R (1937) All 418.

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they authorize or relate to —

(i) orders for the attachment of immoveable property,

(ii) injunctions,

(iii) the appointment of a receiver of immoveable property, or

(iv) the interlocutory orders referred to in clause (e) of section 94 and

sections 96 to 112 and 115.

[1882 — S. 5; 1877 — S. 7; 1859 — S. 384.]

[a] *Inserted* by the Berar Laws Act, 1941 (4 [IV] of 1941), S. 2 and Sch. III. [b] *Substituted, ibid*, for "under that Act". [c] *Substituted* by the Small Cause Courts (Attachment of Immoveable Property) Act, 1926 (1 [I] of 1926), S. 3 for "so far as they relate to injunctions and interlocutory orders".

8. Save as provided in sections 24, 33 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 155, *Presidency Small Cause Courts* and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay :

^a[Provided that —

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the ^b[Official Gazette], direct^c that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court :

(2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.]

[1882 — S. 8; 1877 — S. 8 & Sch.; 1859 — S. 382.]

[a] Proviso was *inserted* by the Code of Civil Procedure (Amendment) Act, 1914 (1 [I] of 1914), S. 2. [b] *Substituted* by A. O. for "local Official Gazette". [c] For instance of such direction, *see* Calcutta Gazette, 1910, Pt. I, p. 814.

PART I.

SUITS IN GENERAL.

Jurisdiction of the Courts and res judicata.

9. The Courts shall (subject to the provisions herein contained) have jurisdiction⁹ to try all *Courts to try all civil suits of a civil nature*²⁴ excepting suits of which their cognizance is either *suits unless barred.* expressly or impliedly barred.

Explanation — A suit in which the right to property³¹ or to an office²⁰ is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites¹⁴ or ceremonies.¹⁹

[1882 — S. 11; 1877 — S. 11; 1859 — S. 1.]

Section 7 (contd.)

[See however (Vol 26) 1939 Nag 118 (120). (Has no such power.)]

Section 8 — Note 1

[1] Presidency Small Cause Court has power to execute decree transmitted under S. 44. (Vol 5) 1918 Mad 645 (647).

[2] Section 8 of the Civil Procedure Code will not apply to a case where a District Munsif's Court executes a decree of the Presidency Small Cause Court transferred to it for the purpose. The Munsif's Court is a Court of original jurisdiction and can attach and sell immoveable property and O. 21 of the Code would only apply. (Vol 12) 1925 Mad 1179 (1180).

SECTION 9 — SYNOPSIS.

1. Act of State.
2. Award.
3. Birt Jajmani.

4. Caste question.
5. Civil rights.
6. Election disputes—See Note 5.
7. Excommunication—See Note 4.
8. Honour.
9. Jurisdiction.
10. Jurisdiction—Local.
11. Jurisdiction—Personal.
12. Jurisdiction—Special law.
13. Jurisdiction—Special Tribunal.
14. Religious questions.
15. Ecclesiastical matters.
16. Religious office.
17. Religious processions.
18. Right to worship.

Section 9 (contd.)

19. Rituals and ceremonies.

20. Right to office.

21. Right to property.

22. Scope.

23. Statutory body.

23a. Municipalities.

24. Suits of civil nature.

25. Voluntary offerings.

1. Act of State.—[1] Suit is not maintainable in connection with acts done by the Governments in the exercise of sovereign powers. (1875-76) 1 Cal 11 (26, 27).

[2] A resumption by the Sovereign of an *inam* is an act of State which cannot be questioned in the Municipal Courts. (Vol 3) 1916 Mad 116 (117).

[See however (1883) 6 Mad 361 (364). (Government wanting to resume an *inam* granted for the support of the chattram and for feeding Brahmins—An action by the grantees to contest their right is maintainable.)]

[3] Commandeering order is an act of State — Secretary of State cannot be sued in respect of it. (Vol 15) 1928 Cal 74 (81) : 54 Cal 969.

[4] In 1864 the British Government declared that the status of the non-feudatory chiefs in the Central Provinces, whose territory had become British by conquest, cession or lapse, was that of ordinary British subjects to whom certain judicial and administrative powers had been entrusted as a matter of convenience or for economy of administration. Sanads recognising their property and rights were granted in 1874. The Government gradually withdrew from them the administration of police, excise and cattle pounds giving compensation for the consequent loss of revenue. In the settlement of 1903 the Government obtained the execution under protest of *wajib-ul-aracs* from the zamindars consenting to the resumption of these functions by Government. The zamindars sued for annulment of these provisions and for the restoration of the rights which they alleged had been theirs from time immemorial of which they had been wrongfully deprived : *Held*, that the rights alleged had existed only by sufferance or delegation and the resumption of these functions by Government was a thing legitimately done in the exercise of its sovereign powers. Consequently no action was maintainable in a Civil Court with regard to such resumption. (1912) 39 Cal 615 (661, 662, 663) : 39 I A 31 (PC).

[5] Resolution of Bombay Government holding plaintiff guilty of misconduct reflecting on his honesty and reliability — Suit for damages against the Secretary of State not maintainable. (1903) 27 Bom 1-9 (212, 220).

[6] Act performed in the exercise of powers vested by municipal law, and under its sanction and authority — Performer a sovereign power, yet the Court's jurisdiction is not ousted — That the act could not be done by an ordinary individual is immaterial. (1882) 5 Mad 273 (280, 281).

2. Award.—[1] Award made by arbitrators appointed under Bombay Co-operative Societies Act, cannot be set aside by Civil Court. (Vol 22) 1935 Bom 91 (93).

[2] Suit to set aside proceedings under Sch. 2, Civil P. C., lies if proceedings are fraudulent, fictitious and vexatious and not to set aside award made on agreement to refer. (Vol 17) 1930 Bom 431 (437) : 54 Bom 696.

3. Birt Jajmani.—[1] Birt Jajmani right and manbirt — Distinction — Right to Birt Jajmani is right in property.—Suit by legal heir of Panda for declaration of his right of inheritance of Birt Jajmani right and for injunction restraining defendant from interfering with that right and for return of bahis is suit of civil nature — Scope of injunction in such case indicated. (Vol 29) 1942 All 320 (323) : I L R (1942) All 821.

[2] A pragwal used a particular kind of flag to attract the notice of pilgrims. The defendant who acted as his agent put up a similar flag so as to mislead pilgrims into the belief that he was the pragwal : *Held*, that the action of the defendant was unlawful and the plaintiff had a right to maintain a suit to restrain the defendant from making the use of the emblem or flag. (Vol 8) 1921 All 316 (318) : 43 All 20.

[3] Whether a Gayawal gaddi is an office or a business, the person entitled to it can sue for possession of the gaddi and its books and for a declaration that he is the lawful holder of the gaddi. (Vol 4) 1917 Pat 37 (39) : 2 Pat L Jour 705.

4. Caste question.—[1] Caste question relates to matters affecting its internal autonomy and social relations. (Vol 19) 1932 Bom 122 (126) : 56 Bom 242 (F B).

[2] Civil Courts may discuss and deal even with a caste question where the membership and character of a member are injuriously affected. (Vol 2) 1915 Mad 908 (909).

[See however (1886) 10 Bom 661 (663). (Funeral presents were distributed by the defendant's father — Plaintiff was entitled to a share, as a member of the caste — Plaintiff being omitted, sued for injury to his character and reputation—No suit for damages lies.)]

[3] Court has jurisdiction over a matter not relating to internal administration of caste but to the property of the caste though there has been a division of opinion in the caste. (Vol 13) 1926 Bom 69 (70) : 50 Bom 124.

[4] Court can decide that rights to the user of property in accordance with caste usage exist but cannot decide whether a particular user is sanctioned by custom of caste. (Vol 11) 1924 Bom 522 (522, 523).

[5] Where the question in dispute is in reality one between the caste and a section of the caste, it is outside the Court's jurisdiction. The test whether a question is a caste question is to see whether the taking cognizance of the matter in dispute would be an interference with the autonomy of the caste. (1910) 34 Bom 467 (482, 483) ; (1880-81) 5 Bom 83 (84). (A claim for the recovery of half of a certain vessel belonging to the caste or its value was made by certain members of one division of a caste against members of other division—*Held* purely a caste question.) ; (1891) 15 Bom 599 (606, 607). (Deprivation of a person's *man-pan* invitations—No civil suit lies.) ; (1912) 1912 Mad W N 1220 (1221). (Refusal to invite the plaintiff on auspicious occasions does not give him a cause of action unless his rights as a member of the caste are violated.)

[6] Majority of *oswel* caste of Hindus deciding not to feast Brahmins in the *oart* and passing a resolution accordingly—Defendants attempting to do it—Plaintiff's suit for declaration that the above resolution was validly passed and for injunction is maintainable. (1895) 19 Bom 507 (527, 528).

[7] Every member of caste of Hindus is entitled to inspection of account books regarding management of caste property by its manager—Suit for declaration of such right in Civil Courts is not barred — Such suit is representative suit within the meaning of Civil P. C., S 9 and O. 1, R. 8. (Vol 19) 1932 Bom. 122 (125) : 50 Bom 242 ; (1909) 11 Bom L R 1267 (1274).

[8] A claim to be a caste officer and to be entitled to the right of performing duties and enjoying privileges and honours attached to such office, is a caste question and is not cognizable by a Civil Court; in the absence of any allegation of any specific damage the mere assumption of a patronymic of a family is a grievance for which law affords no redress. (1910) 34 Bom 455 (457, 458).

[9] Plaintiff at his child's death requested help for funeral and other incidental ceremonies from his fellow caste men. They refusing, he sued for declaration that

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the defendants' acts were unlawful and that he was legally entitled to exercise all his customary privileges. Held no action lies. (1894) 18 Bom 115 (119).

[10] The recognition by Courts of Hindu castes as distinct corporations with exclusive legal rights for certain purposes ought not to be extended to Christian communities as it would lead to complications and anomalies of a far-reaching character. (Vol 4) 1917 Mad 431 (440) : 39 Mad 1056.

[11] Member of panchayat breaking its rule not to marry second wife during lifetime of first — Dispute referred to arbitration and award made—Member consenting to award—Dispute involves purely caste question and no suit would lie — Award cannot be enforced as it relates to questions for which no suit lies — Consent of parties not to challenge award cannot enable Court to enforce it if otherwise unenforceable. (Vol 16) 1939 Sind 1 (3, 4) : 23 Sind L R 299.

[12] A man may be excommunicated or otherwise punished for a caste offence but that jurisdiction must only be exercised by the caste and with due care and caution and conformity to the usage of the caste. The caste may delegate its powers in respect of caste offences to its nominees. (1910) 33 Mad 67 (69, 70); (Vol 22) 1935 Bom 367 (370); (1887) 10 Mad 133 (144).

[13] Temporary exclusion from social intercourse with other families is not contrary to natural justice. (Vol 1) 1914 All 27 (41); (1899) 23 Bom 122 (130, 131). (Excommunication by the Swami ex parte and unjustified—Civil Courts can inquire into the justification of the order of excommunication.); (1900) 24 Bom 13 (22, 23). (Excommunication for bad conduct—No suit for damages lies.); (1902) 26 Bom 174 (179). (Expulsion for attending dinner given by a *lohana* — No civil suit lies to declare it illegal.); (1894) 17 Mad 222 (225); (Vol 17) 1930 Mad 100 (102); (Vol 19) 1932 Mad 445 (450, 451) : 55 Mad 727 (741, 742, 747). (Wrongful excommunication without giving plaintiff opportunity for defence—Claim for damages is maintainable.); (Vol 17) 1930 Sind 204 (206). (Excommunication—Decision of Jamait not in consonance with principles of justice—Court can interfere.)

[14] Right of conscience cannot be adjudicated upon in Civil Court — But right to remain in community or to exercise certain rights is a civil one—Members openly defying authority of chief priest in pursuance of former right—Chief priest has power to excommunicate them. (Vol 22) 1935 Nag 156 (162).

[15] Membership of caste involving rights to property — Civil Court has jurisdiction to inquire into wrongful expulsion. (Vol 21) 1934 Bom 431 (433).

5. Civil rights.—[1] Infringement of a legal right is a cause of action for civil suit. (Vol 22) 1935 Oudh 96 (106).

[2] "Right of burial" is a civil right. (Vol 17) 1930 Oudh 54 (54) : 5 Luck 489.

[3] A Mahomedan's right to slaughter cattle is a common law right which he enjoys in accordance with the principle *sic uteri tuo ut alienum non laedas*. (Vol 1) 1914 Oudh 286 (288) : 17 Oudh Cas 354; (Vol 17) 1930 All 753 (756).

[4] Owner of motor bus has no common law right to use highway subject to compliance with some formalities — Such right, if at all existed, is taken away by Local Boards Act—Owner of bus not having authority to use road causing damage to road — Suit by District Board for damages is maintainable. (Vol 25) 1938 Mad 227 (230, 231).

[5] Setting aside of decree by minor on ground of fraud — Right is substantive — S. 11, Civil P. C., or S. 44, Evidence Act, do not operate as bar. (Vol 19) 1932 All 293 (306, 308) : 54 All 646 (F B).

[6] Per *Krishnan J.* — Right to perform particular

ceremony and to take certain honours not depending on choice of trustees is one of civil nature. (Vol 4) 1917 Mad 905 (905).

[7] Where a person claims merely the common law right to hoist the flag of a particular saint and get offerings for it without claiming any exclusive privilege in it for himself, the Civil Courts are competent to entertain a suit to establish this right. An injunction would be a more appropriate relief than a declaration. (1910) 7 All L Jour 830 (832).

[8] Where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. Hence, the orders passed by the revising committee or the District Magistrate under the election rules framed by the Local Government under S. 39 of the U. P. Municipalities Act are final and cannot be impugned in a Civil Court. (1935) 1935 All L Jour 1111 (1112, 1113).

[9] Local Government can create forums for deciding election disputes and then Civil Court's jurisdiction is barred. (Vol 20) 1933 Nag 193 (195) : 29 Nag L R 278 (F B).

[10] Jurisdiction of Civil Court to try suit challenging election of Chairman of District Board is impliedly barred. (Vol 20) 1933 All 358 (361, 363) : 55 All 406.

[11] Suit in Civil Court to challenge election otherwise than on grounds in S. 19, U. P. Municipalities Act, is barred. (Vol 24) 1937 All 365 (366, 367).

[12] Election — Validity of an election cannot be questioned on grounds in S. 15, U. P. District Boards Act (9 [IX] of 1922) otherwise than by means of election petition to be decided by election tribunal—Civil Court has no jurisdiction. (Vol 20) 1933 Oudh 423 (424).

[13] A Civil Court cannot interfere with the order of the Collector passed in substantial conformity with the rules for Municipal Councillors' election. A suit will probably lie to set aside an order as *ultra vires* if passed by the Collector without inquiry or on grounds other than those set forth in Rule 35 of the Election Rules. No fresh inquiry can be made by the Civil Court to nullify an order of the Collector passed against a candidate. (1913) 36 Mad 120 (122).

[14] A suit by one of two rival candidates for an election to have an election of the other declared void as being contrary to law is one of a civil nature and maintainable in a Civil Court. (1912) 35 All 308 (310, 311).

[15] Election of Municipal Commissioner under Bengal Municipal Act — Candidate declared elected — District Magistrate setting aside election — Suit by the candidate for declaration of his right to vote and stand as candidate and also for declaration that he was properly elected—Suit being of civil nature, action was maintainable. (1897) 24 Cal 107 (111, 112).

[16] Civil Courts are not debarred from trying a suit to contest the validity of an election by reason of S. 51 of the Bengal Village Self-Government Act (5 [V] of 1919) (Vol 13) 1926 Cal 279 (281) : 52 Cal 943.

6. Election disputes. — See Note 5.

7. Excommunication. — See Note 4.

8. Honour. — [1] Suit for mere "honours" does not lie. (Vol 20) 1933 Mad 264 (265); (Vol 6) 1919 Lah 193 (194). (Malice is not essential.)

[2] Suit to vindicate person's rights not to office but to mere dignity unconnected with any profits or emoluments is not maintainable. (Vol 18) 1931 Bom 273 (274); (1912) 14 Bom L R 573 (576). (Suits to claim the profits arising out of voluntary offerings made to the chief priest of a community by the worshippers of saints or by votaries, partake of the nature of those for mere

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dignity.; (1877-78) 2 Bom 476 (478); (1886) 10 Bom 233 (237, 238); (Vol 6) 1919 Lah 193 (194); (1921) 41 Mad L Jour 287 (287). (No suit lies for mere temple honours to be shown to a person.); (1911) 1 Mad WN 353 (353, 354). (A suit for a declaration that the plaintiff has a right to a *stanom* without mentioning the property is a suit for mere dignity.); (Vol 16) 1929 Mad 493 (494). (No suit lies for declaration of right to religious honours.); (Vol 25) 1938 Mad 334 (335). (Right to first honours on occasion of festival is not right of civil nature unless it is attached to office.); (Vol 26) 1939 Mad 886 (886) : I L R (1940) Mad 40. (Person claiming right to lead horse on particular festival day without corresponding obligation to perform that duty — Claim is merely to honour.); (Vol 8) 1921 Bom 140 (140) : 45 Bom 590. (Plaintiff claiming to be carried in a palanquin in public street as Jagadguru—Suit is not of civil nature.)

[3] If the honours are shown to persons only as marks of pure grace of the Deity they cannot be legally claimed by anybody as receivable by him in a temple. (1913) 13 Mad L Tim 340 (341, 342); (1909) 32 Mad 291 (297, 298, 300). (In cases of hereditary office involving duties of different kinds, secular and religious, all inseparable from the office and remunerated by certain honours, Civil Courts can protect the holder of the office in the enjoyment of the office and declare the honour to which he is entitled.); (Vol 6) 1919 Mad 1026 (1028). (The existence of the office and the connection between the office and the honour must be established.)

[4] Civil Courts have jurisdiction to determine the order of precedence in the distribution of honours in a temple and to protect by an injunction persons having a right to the first honours from such right being infringed by others who are entitled to the same honours subsequently. (1912) 15 I C 409 (411) (Mad). (Rights of particular persons to receive the first *thirihams*.)

[5] Courts are not bound to enter into detailed considerations and decide the rights of *Sanyasis* to receive honours in temples unless they are mixed up with matters of a civil nature in civil suits. (Vol 7) 1920 Mad 847 (849) : 20 Cri L Jour 755.

[6] "Neota" is not legal, but social obligation. (Vol 20) 1933 Lah 317 (317).

[7] Suit for declaration that proceedings of Religious Endowments Board deciding that plaintiff is not entitled to enjoy certain honours are not binding on the plaintiff does not lie. (Vol 22) 1935 Mad 621 (623).

9. Jurisdiction.—[1] The nature and not the merits of the claim determine the question of jurisdiction. (Vol 27) 1940 Nag 402 (403) : I L R (1941) Nag 107 ; (Vol 15) 1928 Nag 221 (222).

[2] Every presumption should be made in favour of the jurisdiction of a Civil Court, which can be taken away only by express words or necessary implication. (1913) 17 Cal L Jour 239 (243) ; (Vol 12) 1925 Cal 373 (375). (High Court can decide questions as to proceedings of Local Legislature — Court can take cognizance of matters not expressly excluded.); (Vol 19) 1932 Bom 456 (458).

[3] The jurisdiction of a Civil Court is not excluded unless the cognizance of the entire suit as brought is barred. (Vol 22) 1935 Oudh 96 (106).

[4] The words "expressly barred" in S. 9 mean barred by any enactment in force, for the time being. (Vol 22) 1935 Oudh 96 (106).

[5] Statute interfering with such jurisdiction must be strictly construed. (Vol 22) 1935 Lah 613 (615) ; (Vol 25) 1938 Lah 14 (15, 16) ; (Vol 20) 1933 Rang 124 (127) : 11 Rang 124. (Should be carefully examined.)

[6] Rule regarding exclusion of jurisdiction must be explicit. (Vol 15) 1928 All 511 (513) ; (Vol 6) 1919 Bom. 30 (31) : 43 Bom 221. (*Held*, there had been no legal

adjudication of the matter by the Collector of Customs in accordance with the provisions of the Sea Customs Act and the jurisdiction of the Civil Court to take cognizance of the suit was not ousted.); (Vol 23) 1936 Cal 786 (787, 788). (Landlord's right to recover transfer fee under S. 26E, Bengal Tenancy Act — Bengal Tenancy Act not providing remedy to recover — Civil suit is maintainable.); (Vol 22) 1935 Lah 613 (615) ; (Vol 25) 1938 Lah 14 (15, 16). (*Held*, jurisdiction of Civil Courts was neither expressly barred by S. 21 of Punjab Relief of Indebtedness Act, 1934, nor impliedly barred under provisions of the Act.); (Vol 25) 1938 Oudh 62 (64). (Rules under S. 70, U. P. Manual of Revenue Department, Vol 1, Rr. 998 and 1011 — Commissioner setting aside sale on grounds not provided for in R. 998—Civil Court has jurisdiction to entertain suit against such order.)

[7] It is for the party who seeks to oust the jurisdiction of the ordinary Civil Courts to establish his contention. (Vol 15) 1928 Lah 121 (121) : 9 Lah 504 (F B) ; (Vol 21) 1934 P C 84 (86) : 61 Ind App 177 : 57 Mad 443 (P C) ; (Vol 13) 1926 Cal 1064 (1064) : 53 Cal 561. (Proceedings of Revenue authorities may be subject to being quashed by ordinary Courts of law if they are tainted by fundamental irregularity.)

[8] No civil suit lies for a mere declaration that a decree of a Revenue Court was invalid for want of jurisdiction. (Vol 26) 1939 All 446 (447).

[9] Inferior Court has jurisdiction to set aside decree of superior Court obtained by manifest fraud — Decree — Setting aside. (Vol 5) 1918 Mad 711 (712) : 41 Mad 213.

[10] No suit for defamation lies against a party returning answers to questions put by Court, even if the answers are untrue and not given in good faith. (1907) 30 Mad 222 (223) ; (1888) 15 Cal 264 (268) ; (1888) 11 Mad 477 (480).

[See also (1887) 10 Mad 87 (89).]

[11] The general power vested in the Courts in India under Civil P. C. to entertain all suits of the civil nature excepting suits of which cognizance is barred by any enactment for the time being in force does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute. (1910) 34 Bom 676 (680).

10. Jurisdiction—Local.—[1] Courts in British India cannot try a suit regarding any right to or interest in immovable property situate in a foreign State, nor can they try an action brought to enforce the revenue laws of another country. (1909) 33 Bom 373 (376).

[2] See also S. 16, Civil P. C.

11. Jurisdiction—Personal.—[1] British Indian Court has jurisdiction over foreign subjects if subject-matter is in British India. (Vol 2) 1915 Mad 116 (116).

[2] Suit against alien enemy maintainable during continuance of war — Cause of action whether accrued before or after war matters not — Internment liability not affected. (Vol 4) 1917 Cal 838 (841) : 43 Cal 1140.

See also S. 20, Civil P. C.

12. Jurisdiction—Special law.—[1] Where there is a special or local law, the Civil Courts would not have jurisdiction under S. 9 to entertain a claim merely because it is of civil nature. A special law overrides the general jurisdiction conferred on Civil Courts to entertain suits of a civil nature. (Vol 24) 1937 All 365 (366) ; (Vol 21) 1934 All 795 (796, 798). (There is no right of civil suit for recovering octroi dues—It can be recovered only by special remedy provided by the Act.); (Vol 15) 1928 Lah 562 (564) : 10 Lah 338.

[2] Section 9, Civil P. C., itself postulates the barring of jurisdiction of Civil Courts by a competent Legislature with respect to particular class of suits of a civil nature. It is therefore open to the Provincial Legislature to bar the jurisdiction of Civil Courts with respect to a particular

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class of suits, provided in doing so it keeps it-elf within the field of legislation confided to its charge and does not contravene any provision of the Constitution Act. Hence, the U. P. Regularization of Remissions Act, even if it makes provision about jurisdiction of Civil Courts, far from being repugnant, is in consonance with the provision of S. 9, Civil P. C. Its validity therefore cannot be assailed on the ground of repugnancy with an existing Indian law. (Vol 27) 1940 All 272 (277) : I L R (1940) All 455 (F B).

[3] In a suit for foreclosure, the defendant pleaded that he came under a special Act and that the Civil Court could not take cognizance of the case. When the case was referred by the Court to the Collector the latter held that the parties did not come under the special Act and returned the record. *Held*, that the Civil Court must continue the proceedings and pass a decree for foreclosure. (Vol 1) 1914 All 177 (178) : 36 All 376.

[4] Plaintiff sues for lands as emoluments of office—Defendant objecting that land is not office emolument—Section 21, Madras Hereditary Village Officers Act, bars Civil Court's jurisdiction. (1907) 30 Mad 126 (133, 134) (F B) ; (1896) 19 Mad 62 (64) ; (1910) 33 Mad 205 (210).

[5] Co-operative Societies Act (1912), S. 43 — Rules framed under — Suit filed under Act referred to arbitration — Subsequent suit questioning reference to arbitration, appointment and procedure adopted by arbitrator and for declaring award as invalid is entertainable by Civil Court. (Vol 21) 1934 Cal 23 (24) : 60 Cal 1207.

[6] Jurisdiction of Civil Court may be ousted by necessary implication — Person not choosing remedy provided by rules under Madras Co-operative Societies Act to set aside sale — Remedy under those rules time-barred — Civil Court's jurisdiction to entertain suit to set aside sale is barred. (Vol 26) 1939 Mad 967 (968).

[7] Application for execution of order of liquidator under Burma Co-operative Societies Act (1927), in Civil Court — Civil Court is bound and entitled to see the legality of the order. (Vol 20) 1933 Rang 124 (127) : 11 Rang 125.

[8] A civil suit for the custody of a minor will not lie in the ordinary Civil Courts ; to obtain such custody proceedings under the Guardians and Wards Act are the only remedy. (Vol 7) 1920 Mad 937 (939) : 42 Mad 647 (F B).

[9] Suit for appointment of guardian does not lie. (Vol 15) 1923 Nag 297 (297).

[10] Suit by minor with next friend for possession—Defendant claiming to be in possession as minor's guardian—Suit is barred, proper procedure being under the Guardians and Wards Act. (Vol 12) 1925 Nag 328 (329) : 21 Nag L R 75.

[11] A civil suit for restoration of property sold under Ss. 87 and 88, Criminal P. C., is barred even though there had been irregularities in sale. (Vol 15) 1928 Lah 562 (566) : 10 Lah 338.

[12] Order of maintenance under S. 488, Criminal P. C. — Jagir money of person against whom order is made can be taken and attached for realization of amount due under order — Provisions of Civil P. C. as to exemption from attachment do not apply — Civil Court has no jurisdiction to go into the matter. (Vol 24) 1937 Lah 367 (367).

[13] Proceedings before Collector without jurisdiction — Civil Court can determine rights of parties—Question of title can be decided by Civil Court only and not by Revenue Court—Suit raising question of title — Jurisdiction of Civil Court is not barred by Bengal Land Revenue Sales Act. (Vol 16) 1929 Pat 22 (26, 27) : 8 Pat 95.

[14] Revenue law of N. W. Frontier — Civil Court has jurisdiction to partition only agricultural land and not buildings. (Vol 20) 1933 Pesh 101 (108).

[15] Chota Nagpur Tenancy Act, 1908 (6 [VI] of 1908), applies only when relationship of landlord and tenant is established — Civil Court has jurisdiction to decide whether such relationship exists. (Vol 20) 1933 Pat 695 (696).

[16] Section 158, Bengal Tenancy Act, does not oust the general jurisdiction of Court under S. 9 to entertain a suit for settlement of fair rent — Hence suit by some only of the co-sharers is competent. (Vol 12) 1925 Pat 517 (519).

[17] Agra Tenancy Act '3 III' of 1936, Ss. 84, 85, 120 and 230 — Suit against fixed rate tenant for demolition of building and injunction—Civil Court's jurisdiction is not barred by S. 230 read with S. 120, merely because question of improvement is involved — Civil Court is competent to try such a suit by virtue of S. 9. (Vol 28) 1941 All 61 (62, 63) : I L R (1941) All 250 (F B).

[18] Declaratory suit that defendant is not under-proprietor — Civil Court will not exercise discretion until plaintiff exhausts remedy by applying for ejectment to rent Court — It cannot be said that plaintiff has no cause of action until rent Court passes adverse order. (Vol 5) 1918 Oudh 118 (119).

13. Jurisdiction—Special Tribunal.—[1] Tribunal appointed by Act to try questions as to rights created by that Act — Jurisdiction of that tribunal is exclusive. (Vol 25) 1933 Cal 359 (361) ; (Vol 22) 1933 Cal 10 (12) : 61 Cal 980 ; (Vol 25) 1938 Rang 392 (393) : 1939 Rang L R 50 (F B).

[2] Statute creating right and providing for constitution of special tribunal for determining questions as to that right — Jurisdiction of Civil Court ousted except where the provisions of the statute concerning the special tribunal have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. (Vol 33) 1946 Lah 85 (90, 91).

[3] Where the duty of deciding disputes between subjects and the Crown is cast upon a special tribunal by the Legislature, the tribunal so constituted must act in good faith. The decision must be arrived at in the spirit and with the sense of responsibility of tribunals whose duty it is to mete out justice. If the tribunal comes to a conclusion after due inquiry then the jurisdiction of the ordinary Civil Courts is barred and its decision is final. But if the conclusion is come to without any sort of enquiry and without an opportunity being given to the parties to be heard, the jurisdiction of the ordinary Civil Courts is not to be taken away. (Vol 6) 1919 Bom 30 (31) ; 43 Bom 703.

[4] Legislature creating right and liability—Appointment of tribunal to try such liability left to another authority — Failure of such authority to appoint the tribunal — Ordinary Civil Courts have jurisdiction. (Vol 21) 1934 Pat 670 (675) : 14 Pat 24 (F B).

14. Religious questions.—[1] Deciding disputes between purely religious functionaries is not a part of a Civil Court's business and no injunction restraining another from receiving prospective offerings can be given. (1909) 33 Bom 278 (291, 292).

[2] Instances of religious questions which Civil Courts cannot decide :—Whether particular cult is within vedic religion or not. (Vol 22) 1935 Bom 361 (362) ; Right to precedence at a religious function. (1884) 7 Mad 91 (92) ; Right to observe Kappu Kattu and Diparathana. (Vol 26) 1939 Mad 494 (494, 495) ; Question of orthodoxy (Vol 4) 1917 Low Bur 43 (51).

[3] Suit for declaration by a body of Brahmins that they have a right to recite Vedas etc., in a temple is maintainable. (Vol 14) 1927 Mad 131 (134).

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[4] Suit for declaration that plaintiffs alone have right to recite vedam and are entitled to certain incomes and honours comes within S. 9. (Vol 26) 1939 Mad 757 (759).

[5] A suit by a religious sect to establish the right to recite *mantras* at a religious procession is a suit of civil nature (1910) 20 Mad L Jour 530 (533).

[6] The right of a person to exclusively conduct a *mandagappadi* on the first day of a festival in a temple paying all the expenses himself, and receiving all the honours and emoluments of that right, is a civil right. A suit to establish such right is cognizable by Civil Courts as also a suit to enforce the claim for honours and perquisites where they have to be given as a matter of right to the *mandapamdar*. (Vol 4) 1917 Mad 903 (904).

[7] Religious marks or names in a temple changed or altered—This affects the character of a temple—Ground for action in a civil suit. (1907) 30 Mad 158 (162, 166).

[8] Certain Bhaktas of a *satra* or religious fraternity were expelled by other members, and their entry to the *Kirtanagar* was prevented. They were thus deprived of the enjoyment of an honorarium and offerings. A suit for re-admission into fraternity is maintainable having regard to the honorarium and offerings though they are of a trifling nature. (1894) 21 Cal 463 (469).

[9] Suit between trustees *inter se* regarding *namam* to be put to idols, etc., is covered by S. 92 and is not barred by S. 9. (Vol 26) 1939 Mad 757 (760, 762).

15. Ecclesiastical matters. — [1] Buddhist Law (Burmese) — Ecclesiastical Law — Civil Courts have jurisdiction to decide suits involving points of ecclesiastical law—Such questions are to be decided according to *Vinaya*. (Vol 6) 1919 Low Bur 81 (91) : 9 Low Bur Rul 220 (FB) ; (Vol 1) 1914 Low Bur 178 (178) : 8 Low Bur Rul 145.

[2] Civil dispute between members of Burmese Buddhist priesthood—Civil Courts alone competent to decide disputes respecting civil rights. (Vol 22) 1935 Rang 376 (382, 385) : 13 Rang 648 (FE). ((Vol 16) 1929 Rang 77: 6 Rang 783, overruled.)

[3] The Government has not recognized the authority of the *Kathanabang* in Lower Burma as they have done in Upper Burma. A suit between two Buddhist priests to recover possession of certain lands and religious manuscripts is one of a civil nature triable by the Civil Courts. (Vol 1) 1914 Low Bur 178 (178) : 8 Low Bur Rul 145.

[4] Suit for possession of monastery is cognizable. (Vol 1) 1914 Upp Bur 6 (7) : 1 Upp Bur Rul 183.

16. Religious office.— [1] Suit for a right to religious office is of a civil nature though no emoluments are attached. (Vol 14) 1927 Cal 783 (785) : 54 Cal 614; (1910) 12 Cal L Jour 74 (78, 79) ; (Vol 27) 1940 P C 24 (30) : 67 I A 32 : I L R (1940) 1 Cal 266 : I L R (1940) Kar (P C) 47 (P C). (Spiritual functions of the office of a *mahant* intimately connected with the exercise of rights to property—Suit is one under S. 9.)

[2] Defendant prohibiting friends and castemen from allowing plaintiff, a Hindu priest to officiate — Suit for injunction lies. (Vol 8) 1921 Bom 209 (210) : 45 Bom 234.

[3] The right to officiate in a *vritti* as *Upadhyaya* of a caste and to receive the perquisites of the *vritti* is immovable property and the holder of the office is entitled to restrain intermeddlers by an injunction from interfering with the office. Acquiescence for ten years in the interference would disentitle the plaintiff to the injunction. (Vol 8) 1921 Bom 209 (210) : 45 Bom 234.

[4] Plaintiff claiming right to officiate as priest every alternate year and to get the offerings — Declaratory suit is maintainable. (1889) 13 Bom 548 (550, 551).

[5] Rights of *Acharajs inter se* can be adjudicated upon and enforced by Civil Courts but not of *Acharjs* against *Jajmans*. (Vol 15) 1928 Lah 730 (731).

[6] Suit to establish claim to performance of *Uras* and management of offerings lies in a Civil Court. (Vol 13) 1926 Bom 161 (163) : 50 Bom 148.

[7] Right acquired for performing festivals negatived by *Dharmakarta* — It can be declared in Court. (Vol 4) 1917 Mad 868 (869).

[8] Suit by *Maha Brahmin* to compel person carrying out funeral to employ him is not maintainable. (Vol 4) 1917 All 115 (116) : 39 All 196.

[9] Suit to establish right of priest to perform ceremonies within certain *birt* does not lie. (Vol 3) 1916 Pat 215 (216) : 1 Pat L Jour 381.

[10] Power of *Dharmakarta* to fine an inferior spiritual dignitary should be strictly made out and proved and Civil Courts are competent to call in question the propriety of any such fine and to direct refund of the same. (1911) 21 Mad L Jour 730 (739, 740).

[11] A *swami* or chief priest of the *Smartava* sect of *Brahmins* in *Bombay* claimed, in virtue of a grant from the ruling power to a predecessor in office the exclusive right of *adavi palki* — being carried cross-wise in a palanquin — on ceremonial occasions. Action was maintainable by the law of *Bombay* in the Civil Court. (1841-46) 3 M I A 198 (216, 217) (P C).

17. Religious processions. — [1] The right to conduct religious processions in public streets is a right inherent in every person provided he does not invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. (Vol 7) 1920 Bom 15 (17) : 44 Bom 410 ; (Vol 3) 1916 Mad 593 (594). (Special damage to the individual citizen is unnecessary.)

[But see (Vol 33) 1946 Bom 353 (355, 356). (Right to take processions—There is no general right of public to take out processions whether religious or not—Procession whether religious is question of fact—Carrying of *Vyasantol* by *Lingayats* or *Veershaivas* in procession is not religious observance and no suit lies to establish right.) (1894) 18 Bom 693 (694). (No civil suit to enforce a right for the purpose of conducting, along a public road, a religious procession, is maintainable, unless there is some personal loss or damage to the plaintiff.)]

[2] An action lies in Civil Court for damages and for declaration of a right to carry through the village-streets religious emblems in a procession. (1897) 24 Cal 524 (525).

18. Right to worship.— [1] Right of individual to worship as in past is civil right. (Vol 32) 1945 Mad 234 (235, 236) ; (1883) 7 Bom 323 (327, 328, 329). (The rights of exclusive worship of an idol at a particular place.); (Vol 7) 1920 Bom 15 (17) : 44 Bom 410 ; (1909) 19 Mad L Jour 743 (745). (Right to worship in a temple should be exercised during hours of public worship); (1910) 7 Mad L Tim 190 (190) ; (Vol 4) 1917 Mad 868 (869) ; (Vol 4) 1917 Mad 903 (904). (A right to worship in a particular manner with particular incidents attached to it) ; (Vol 20) 1933 Mad 726 (727) ; (Vol 26) 1939 Mad 757 (762) ; (Vol 31) 1944 Mad 416 (416, 417). (Ritual in worship — Civil Court will not interfere.)

[2] A special kind of worship to which some dignity is attached but no emoluments of value are attached cannot be the subject of a suit in a Civil Court. (Vol 22) 1935 Mad 679 (680).

[3] A right to worship is a civil right with some emoluments to the worshipper and can be enforced in a Civil Court. The amount of emoluments is insignificant. A

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person who has acquired or exercised a right to perform certain festivals hereditarily can ask for a declaration of his right if it is negatived by anybody. A *dharmakarta*, cannot however, ask such a person to contribute for a festival on a grander scale than what that person is able to do. (Vol 4) 1917 Mad 868 (869).

[4] A right to stop the idol in front of a person's house is not cognizable by Civil Courts. A person, alleging an immemorial custom of the latter kind must prove that he has a particular right under that custom in order that he may claim the relief under the custom. (1909) 19 Mad L Jour 743 (745, 746).

[5] Exclusion of individual worshipper from particular position during worship in temple does not bar right of whole community to worship in that position, if right claimed is a civil right. (Vol 26) 1939 Mad 102 (106).

[6] Plaintiff married a widow and had vowed to make offerings in a certain temple — The temple committee obstructed him, arguing he was disqualified by that widow marriage—Suit for declaration that he was entitled to enter, and for damages is maintainable. (1890) 13 Mad 293 (297).

19. Rituals and ceremonies. — [1] Civil Courts have no jurisdiction to decide questions of ritual in temple except in so far as decision of such questions is incidental to decision of civil rights—Suit in which plaintiffs ask Court to prescribe set of rubrics to be followed at time of worship is not maintainable in Civil Courts. (Vol 26) 1939 Mad 102 (105); (Vol 8) 1921 Bom 338 (355). (Court will not decide mere questions of religious rites or ceremonies unless it is necessary to decide rights to property.); (1905) 32 Cal 1072 (1074); (Vol 16) 1929 Mad 526 (527); (Vol 26) 1939 Mad 757 (758).

[2] A claim to mere ritual or ceremony in a religious matter, unaccompanied by any claim to office or emolument is not cognizable by Civil Court. (1905) 28 Mad 23 (25).

20. Right to office. — [1] Suit for right to office with emoluments attached lies when existence is proved — Essential of office is existence of duty—Voluntary service does not constitute office. (Vol 6) 1919 Mad 1026 (1027, 1028).

[2] Specific duty of being present at the performance of religious ceremonies — Emoluments attached — It must be regarded as an office within S. 9. (Vol 15) 1928 Mad 377 (378).

[3] Plaintiff claims right to office—It involves right to do certain duties in connection with worship and also receiving emoluments—Declaratory suit is maintainable. (Vol 14) 1927 Mad 131 (134); (1892) 16 Bom 281 (283). (Plaintiff claiming to be the aya of a math and as such entitled to the receipt of certain fees on the occasion of marriage — The suit involved the rights to an office and is cognizable by Civil Court.)

[4] A suit for an office does lie even if no fees are attached to it. (1889) 13 Bom 429 (433); (1888) 15 Cal 159 (161, 162). (An action brought forward for declaration of the hereditary title of a musician in a *satra*, is maintainable irrespective of the fact that there are no profits attached to it); (Vol 24) 1937 Mad 408 (404). (Claim to lead horse and hold "kalasam" in certain festival—Claim held one for doing duties of an "office"—Suit held maintainable—Office held could be without emoluments having money value.)

[5] Suit by archakas for certain individual rights as office-holders is cognizable by Civil Court. (Vol 26) 1939 Mad 757 (760).

[6-7] Claim to office emoluments can be enforced in Court (*Obiter*). (Vol 4) 1917 Mad 868 (869).

[8] Plaintiff was not permitted to have the idol on

the specified day. He was thus prevented from performing his turn of worship. An action for damages is maintainable. (1577-78) 3 Cal 390 (391).

[9] The right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character so as to enable him to bring a suit to maintain such a right under S. 9, Civil P. C. But the right to enter a disciple's house when called by him is not a right to enter upon it as of right though not called and does not create any legal character to maintain a suit for a declaration of such a right. (Vol 3) 1916 Pat 215 (215, 216) : 1 Pat L Jour 381.

[10] The hereditary rights to appoint to the office of a Swamiyar is a possible legal right and for the enforcement of it a civil suit lies. (Vol 16) 1929 P C 53 (54) (PC); (1912) 36 Bom 94 (103).

[11] Watan—Office of hereditary Joshipana exists in Central Provinces — Watandar joshi can sue for his dues. (Vol 15) 1928 Nag 150 (151) : 30 Cri L Jour 791.

[12] The payments made to a vatandar barber for officiating at some ceremonies are not gratuities but are customary fees well recognized and therefore he can recover customary fees from another barber who without any right performs them. (Vol 7) 1920 Bom 98 (99) : 44 Bom 733.

[13] No right of property is conferred where a caste has appointed a man to a mere priestly office. His continuance or removal is exclusively in the power of the caste and it is a caste question. But it is difficult to apply the rule where the office of hereditary priest is created in certain families, for the performance of religious ceremonies. According to Hindu law either the caste or the families can create such an office and give it the character of immovable property. (1912) 36 Bom 94 (100).

[14] Funeral ceremonies — Lay rites performed by villager himself — Brahmanical ceremonies dispensed with—Suit by vatandar Joshi to recover fees — Defendant cannot be compelled to pay them. (Vol 5) 1918 Bom 208 (210) : 42 Bom 613.

[15] Suit for right to perform certain duties attached to alleged hereditary office but not relating to religious office held not of civil nature. (Vol 3) 1916 Mad 379 (380, 381).

[16] Certain family falling within the area allotted to the plaintiff, for the purposes of acting priest at the 10th day ceremony — Defendant officiated in that capacity — Suit for recovery of fees lies. (1942) 1942 Nag L Jour 443 (444).

[17] In the ordinary legal phraseology of religious institutions, the word 'Dharmakarta' means nothing more than a trustee; but it is sometimes used in a limited sense and the designation is, by force of immemorial custom, given to a particular functionary entrusted with certain rights and duties. Civil Courts are competent to give a declaration that a certain person is competent to perform the duties of an office. (1911) 21 Mad L Jour 730 (734, 735, 736).

[18] Per *Fletcher J.*—Appointment to the office of Ghatwal or Digwar is a matter for Government, i. e., executive authorities, so that Civil Courts cannot interfere to reinstate a ghatwal dismissed by police authorities nor in favour of one who has never been appointed as such. (Vol 1) 1914 Cal 508 (513).

[19] An honorary lectureship in a University is undoubtedly an office of consequence but the fact that no arrangements are being made by the University for the delivery of such lectures cannot be said to be an injury to the personal right of the lecturer. The fact of the lecturer having lectured during a part of a term

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does not establish a continuing right to lecture. (Vol 2) 1915 Cal 91 (95, 96) : 41 Cal 518. -

[20] Claim for honorary secretaryship where services voluntary and gratuitous is not one for office and so the action is not maintainable. (Vol 2) 1915 All 197 (197) : 37 All 313.

[21] Pujari of deity removed for misconduct by private tribunal duly constituted under previous agreement made by Pujari — Civil Court can determine if he was removed on valid grounds. (Vol 8) 1921 Cal 328 (329).

[22] If a *pujari* does not obey the customs and follow the practices of an institution which entail his exclusion from the temple by the Managing Committee, a suit by the *pujari* to establish his right to enter into the temple is cognizable by a civil Court. (1909) 4 I C 894 (895) (Lah).

21. Right to property. — [1] Right to deal with a Hindu idol is right to property and hence cognizable by Civil Court. (1882) 4 Mad 315 (316).

[2] Official Receiver taking possession of property as belonging to insolvent in fact claimed by stranger — Civil suit to establish right is maintainable. (Vol 4) 1917 Lah 75 (76, 77) : 1917 Pun Re No. 22.

[3] Auction-purchaser when obstructed in taking possession has a cause of action and a suit for recovery of possession lies in Civil Court. (Vol 18) 1931 Pat 241 (243) : 10 Pat 670 (F B).

[4] Suit between rival claimants of qabzadi lands is cognizable by Civil Courts. (Vol 15) 1928 Oudh 95 (97) : 3 Luck 273.

[5] Suit between tenants of adjoining holdings to determine to which holding certain piece of land appertains is cognisable by Civil Court. (Vol 4) 1917 All 210 (212) : 39 All 711.

[6] Right to place platforms on portions of the ghat for the purpose of helping pilgrims who come to Benares to bathe in the Ganges and to enable their owner to obtain remuneration for services which are rendered to the bathers is a right to property and to secure it a suit is maintainable. (Vol 8) 1921 All 235 (235) : 43 All 581.

[7] A suit between a layman and a Buddhist monk in regard to land on which a monastery stands is cognizable by Civil Courts. (Vol 1) 1914 Upp Bur 6 (7) : 1 Upp Bur Ral 183.

22. Scope. — [1] Section 9 of the Code deals with the Courts, not with the rights of parties in order to find what is the jurisdiction of the Court and what civil suit the Court may try. (Vol 1) 1914 Cal 152 (153) : 41 Cal 384.

[2] Applicability. — Civil Procedure Code is enactment of general application. (Vol 19) 1932 Oudh 199 (201) : 7 Luck 716 (F B).

[3] Suit to recover income-tax levied on income outside scope of Income-tax Act is maintainable. (Vol 16) 1929 Mad 179 (180) : 52 Mad 12.

[4] Purchaser at an execution-sale bringing suit for possession — No previous application for possession under S. 318 of Code of 1882 — Regular suit not barred, remedies being concurrent. (1887) 14 Cal 644 (648, 649).

23. Statutory body. — [1] Powers are given to a public body for acquiring property for purposes of an Act. The public body attempted to acquire land but not for the intended statutory purpose but for the purposes of exacting exemption. This is misuse of the powers given and is actionable in a Civil Court. (Vol 7) 1920 P C 51 (54, 55) : 47 Cal 500 : 47 Ind App 45 (P C). (Vol 4) 1927 Cal 445 : 44 Cal 219, affirmed.; (1911) 15 Cal W N 669 (671) (P C).

[2] The Civil Court can question the appointment of a trustee by the Devastanam Committee if it is not made reasonably and in good faith. (Vol 6) 1919 Mad 159 (159) : 42 Mad 668.

[3] Matters relating to valuation, assessment etc., by Cantonment Board are excluded from Civil Court's jurisdiction. (Vol 20) 1933 All 163 (165).

23a. Municipalities. — [1] Municipality acting *ultra vires* — Civil Court can interfere and grant relief to aggrieved party. (Vol 16) 1929 Cal 33 (34) : 56 Cal 280 ; (1888) 12 Bom 490 (495, 496) ; (Vol 24) 1937 Lah 252 (253) ; (Vol 13) 1926 Lah 461 (461, 462). (Mode of action is not, but power to take action is, open to examination by Civil Courts.); (Vol 9) 1922 Nag 10 (13) : 18 Nag L R 121. (Jurisdiction to be determined by the plaint allegation.); (Vol 16) 1929 Sind 69 (82) : 26 Sind L R 435. (Karachi Municipality Rules—Dismissal in accordance with rules and bye-laws—Court cannot enquire further.)

[2] Municipality by its conduct depriving citizen of the only remedy open to him under Municipal Act. Citizen has remedy under S. 9. (Vol 26) 1939 All 396 (397) : I L R (1939) All 345.

[3] Where the Corporation of Calcutta refuses to admit the owner's right to compensation on the ground that building was erected after 1863 and proceeds to demolish it, the civil Court has jurisdiction to entertain a suit for a declaration that the owner is entitled to compensation. (Vol 3) 1916 P C 123 (125, 126) : 44 Cal 87 : 43 Ind App 243 (P C).

[4] Suit for injunction against municipality restraining demolishing plaintiff's latrine is maintainable. (Vol 14) 1927 All 432 (432, 433).

[5] A Municipal Board will not be justified in refusing to grant a licence properly applied for, under the bye-laws relating to dangerous and offensive trades, in order to secure an advantage to itself in a dispute about a question of title with another person. The Civil Court can interfere in a suit in such a case. (Vol 6) 1919 All 155 (157) : 20 Cri L Jour 705.

[6] A suit for injunction by a voter against the Chairman of Municipality for his refusal to insert his name in the register of voters on a technical ground is maintainable under Civil P. C., S. 9; Specific Relief Act, S. 42 and Bengal Municipal Act, S. 15, Pro. 2. (Vol 8) 1921 Cal 85 (87) : 48 Cal 378.

[7] Leave to build chabutras in front of applicant's house refused by committee as title to land was with them—Suit for "injunction to restrain committee from preventing building on his land" — Relief claimed implies prayer for declaration of his title and Court should adjudicate upon question of title. (Vol 16) 1929 Lah 774 (775).

[8] Notice issued by municipality to plaintiffs to leave certain area alleging plaintiffs to be public prostitutes—Suit to restrain municipality from enforcing the notice lies in Civil Court. (Vol 14) 1927 Lah 358 (359).

[9] The Civil Courts have jurisdiction to entertain a suit against the President of the Madras Corporation for an injunction restraining him from demolishing a building under S. 287, cl. (2) of the Madras City Municipal Act. When a right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of such a suit the ordinary Civil Courts are bound to entertain the claim. (Vol 8) 1916 Mad 1119 (1120, 1121) : 38 Mad 41.

24. Suits of civil nature. — [1] Municipality by its conduct depriving citizen of the only remedy open to him under Municipal Act—Citizen has his remedy under S. 9. (Vol 26) 1939 All 394 (397) : I L R (1939) All 345.

[2] Suit for fixing liability of defendants regarding revenue for which plaintiff is liable is a civil suit. (Vol 11) 1924 Pat 795 (796).

10. No Court shall proceed with the trial of any suit in which the matter in issue⁷ is also *Stay of suit*. directly and substantially in issue in a previously instituted suit⁸ between the same parties¹¹ or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief² claimed, or in any Court beyond the limits of British India established or continued by the ^a[Central Government or the Crown Representative] and having like jurisdiction, or before His Majesty in Council.

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[3] Suit for recovery of penalty lawfully imposed is maintainable. (Vol 8) 1916 Cal 797 (799) : 43 Cal 230.

[4] Suit to recover balance of expenses ordered by criminal Court to be paid to a witness lies in civil Court. (Vol 13) 1926 Cal 289 (289, 290).

[5] Claim for profits by one co-sharer of occupancy holding against another is of civil nature and hence a suit is maintainable. (Vol 22) 1935 All 271 (272) : 57 All 852.

[6] Three sisters succeeding to residue of father's zamindari under will—Eldest sister appointed manager for collecting accounts and profits and distributing them between sisters and also for controlling household and paying household expenses — Suit by one sister against managing sister for accounts of profits received held cognizable by civil Court. (Vol 26) 1939 All 442 (443, 444) : ILR (1939) All 594.

[7] Suit for damages against licensee under Electricity Act for failure to supply energy on a proper requisition is not barred. (Vol 13) 1926 Lah 349 (350).

[8] Question as to validity of votes at a meeting is one within the jurisdiction of a Court of law to try. (Vol 10) 1923 Bom 305 (316) : 47 Bom 809.

[9] Political Agent appointed to manage State of minor Chief — Appointment cannot be questioned in Municipal Courts — Municipal Courts can, however, try suit by Chief for redress of breach of trust for embezzlement by Political Agent or his subordinates with regard to property in British India. (Vol 17) 1930 Pat 357 (368).

[10] The civil Court cannot entertain a suit by a *chamar* that he is entitled to the skins of animals dying in a private institution known as *goshala* but he can bring pressure on the manager through the proprietors to re-instate him or to get a fresh manager appointed. (1912) 1912 Pun W R No. 226, page 602 (603).

[11] Hindu law—Marriage—Civil Courts can declare a pat marriage to be invalid. (Vol 13) 1926 Nag 488 (489) : 22 Nag L R 134.

[12] Suit by relation of deceased for possession of corpse and declaration of right to bury it can be maintained. (Vol 17) 1930 Rang 143 (145) : 7 Rang 603.

[13] Suit for a declaration that the assessment of town-tax by Panchayat is illegal and *ultra vires* is not a suit of civil nature, as it is not a suit between subject and subject but between subject and a branch of Local Self-Government. Civil Courts have no jurisdiction in such cases. (Vol 23) 1936 All 117 (117, 118).

[14] Proceedings for removal of executor do not arise out of any legal right and are not suit of civil nature within the meaning of S. 9. (Vol 22) 1935 Lah 406 (407) : 16 Lah 975.

[15] A Court will interfere in a case of dismissal of an officer of a Trust Corporation where the relationship between the Corporation and the officer is one of Trustee and *cestui que trust*, but will not, where the relationship is a contractual one as that of master and servant and the question whether the relationship is of the former or the latter kind depends upon the statute or deed creating the foundation. (Vol 1) 1914 Cal 325 (327, 328) : 41 Cal 19.

[16] An injunction may be granted on the application of a director restraining the plaintiff's co-directors from wrongfully excluding him from acting as a director;

the jurisdiction of the Court continues in cases like this. (Vol 11) 1924 Cal 982 (983) : 51 Cal 916.

[17] Public servant acting *bona fide* yet illegally — Suit for damages lies. (1883) 9 Cal 341 (354).

25. Voluntary offerings.—[1] Offerings to temple or fund — Suit for sharing the offerings is maintainable. (Vol 10) 1923 All 425 (426) : 45 All 437. * (Vol 8) 1921 Bom 297 (298) : 45 Bom 638. (Offerings to deity — Suit for share in, is cognizable by civil Courts.) * (Vol 12) 1925 Bom 209 (209, 210). (Suit chiefly with respect to the right to receive offering and incidentally to the right to worship is maintainable.) * (1890) 17 Cal 906 (909, 910). (Regular offerings of a substantial nature were made one of the funds of a temple — Action for claiming a right to them is maintainable.) * (1896) 27 Cal 30 (33, 34). * (Vol 6) 1919 Lah 372 (372) : 1919 Pun Re No. 26. (A suit for definite amount due to plaintiff as a co-sharer of the offering of a temple (birt) realised by the defendant is maintainable in the civil Court.) * (1907) 17 Mad L Jour 493 (494). (A sharer in the archakam office of a temple kept out of office — Suit for his share of the voluntary offerings during his absence is maintainable.)

[See however (Vol 15) 1928 Mad 851 (852). (Suit to recover share of offerings made by disciples — Offerings not connected with any office—Suit is not maintainable in civil Court.) * (Vol 3) 1916 Pat 215 (216) : 1 Pat L Jour 381. (Unless there is an express contract to make a refund no suit lies for the recovery of a voluntary offering if that suit is based on mere custom.)]

[2] Suit lies for share of income earned as Hindu priest on the river banks. (Vol 11) 1924 Oudh 252 (255) : 27 Oudh Cas 114.

[3] No action lies for *wasilat* in connection with profits received from a turn of worship. (1899) 26 Cal 356 (358).

[4] A suit to establish a right to perform Ramlila, to receive offerings given on the occasion and to raise subscription to meet the Ramlila expenses, is not cognizable by civil Court. (1910) 32 All 527 (530).

[5] Where a donor makes a gift personally to the defendant, Maha brahmin on a day which belonged to the turn of the plaintiff. *Held*, the plaintiff could not recover the gift made to the defendant, as it was distinctly made to the latter in his individual capacity. (1913) 35 All 412 (416, 418). * (Vol 8) 1921 All 374 (375) : 43 All 159. (Right to receive *dan* by offering kusha grass to pilgrims on river bank cannot be declared.) * (Vol 16) 1929 Pat 103 (106, 107) : 8 Pat 677. (Suit by priest for voluntary gifts made to another by jajman is not tenable either against the jajman or the other priest in the Provinces of Bihar and Orissa.)

SECTION 10 — SYNOPSIS.

1. Applicability, scope and object.
2. Court having jurisdiction to grant relief.
3. Court to which application for stay is to be made.
4. Decree, contrary to S. 10.
5. Interlocutory orders.
6. Letters Patent Appeal.

Explanation. — The pendency of a suit in a foreign Court¹³ does not preclude the Courts in British India from trying a suit founded on the same cause of action.

[1882, S. 12; 1877, S. 12.]

[a] *Substituted by A. O. for "Governor-General in Council".*

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7. Matter in issue.
8. Previously instituted suit.
9. Previously instituted suit must be pending.
10. Revision.
11. Same parties.
12. Suit — Meaning of.
13. Suit pending in foreign Court.

1. Applicability, scope and object.—[1] The object of S. 10 is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action and the same subject-matter. (1889) 11 All 148 (155); (Vol 14) 1927 Bom 245 (246); (Vol 4) 1917 Cal 248 (249); (Vol 22) 1935 Sind 225 (226).

[2] Provisions of S. 10 are mandatory. (Vol 20) 1933 Sind 117(117); (Vol 19) 1932 Cal 751(752). (No discretion is left to Courts regarding stay of suits when circumstances are such as to invoke the operation of that section.); (Vol 29) 1942 Bom 314 (316); (Vol 27) 1940 Mad 7 (7); (Vol 4) 1917 Cal 248 (249).

[3] Direction in S. 10 for stay of suit is mere rule of procedure — It confers no legal right on any party. (Vol 24) 1937 Nag 132 (132); I L R (1937) Nag 6. (Direction can be waived with the consent of parties.); (Vol 9) 1922 Sind 6 (7); 16 Sind L R 79; (Vol 25) 1938 Rang 130 (134); 1938 Rang L R 176 (FB).

[4] Section requires that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit. (Vol 29) 1942 Bom 314 (315, 316).

[5] Section 10 does not bar the institution of suits but only their trial. (Vol 2) 1915 Mad 461 (462); (Vol 12) 1925 Pat 201 (207); (Vol 22) 1935 Lah 76 (78); (1898) 22 Bom 640 (645); (Vol 24) 1937 Nag 132 (132); I L R (1937) Nag 6.

[6] Whilst S. 10 bars only a suit, S. 11 bars the trial of both the suit and of issue involved in that suit. (Vol 16) 1929 Oudh 341 (345); 4 Luck 573.

[7] One of the tests for stay of a suit is whether the previous decision in a previously instituted suit would operate as *res judicata*. (Vol 33) 1946 Nag 5 (9); I L R (1945) Nag 634; (Vol 19) 1932 Cal 751 (752); (Vol 29) 1942 Bom 314 (315, 316); (Vol 22) 1935 Cal 1 (8); 61 Cal 670.

[8] Court is not competent to decide question of *res judicata* — It can only stop the proceedings. (Vol 3) 1916 Cal 318 (319); 42 Cal 926.

[9] Existence of agreement to litigate in particular Court does not control provisions of S. 10. (Vol 23) 1941 Cal 670 (672); I L R (1941) 1 Cal 490.

[10] Agreement between parties to bring suit at a particular place — A bringing suit in pursuance of contract—B bringing suit in another Court and asking for stay of A's suit — Such relief cannot be granted. (Vol 15) 1928 Bom 175 (176).

[11] Section 10 is not the only section applicable for staying of suits — Courts can order stay of suits under S. 151 to prevent an abuse of Courts and to render effective orders already passed. (Vol 16) 1929 Lah 12 (14); (Vol 16) 1929 Oudh 341 (346); 4 Luck 573; (Vol 17) 1930 Lah 527 (528).

[12] Stay of connected suit apart from question of *res judicata* is highly desirable on ground of con-

venience. (Vol 6) 1919 Low Bur 10 (10, 11); 10 Low Bur 154.

[13] Suit on same cause of action stayed pending decision of appeal on ground of balance of convenience. (Vol 18) 1931 Lah 65 (66).

[14] A and B agreeing to bring suit at particular place — Suit by A at place agreed — B instituting suit at other place — Court has power to issue injunction restraining B from proceeding with his suit, though filed prior to A's suit. (Vol 27) 1940 All 241 (241, 242); I L R (1940) All 232.

[15] Court has power to stay suit at any stage. (Vol 22) 1935 Cal 1 (10); 61 Cal 670.

[16] Defendant wishing to show that further trial of suit is barred must produce satisfactory evidence. (Vol 4) 1917 Pat 196 (198).

2. Court having jurisdiction to grant relief. — [1] Term "having jurisdiction to grant relief" does not refer to territorial jurisdiction but to nature and value of it. (Vol 6) 1919 Low Bur 10 (10); 10 Low Bur 154; (Vol 7) 1920 Low Bur 24 (25); 10 Low Bur 150.

[2] High Court (Original Side) can issue injunction on non-resident if suit in other Court is triable by former. (Vol 30) 1943 Bom 206 (208); I L R (1943) Bom 286.

[3] Jurisdiction does not depend upon actual facts but upon allegations made in plaint concerning them. (Vol 4) 1917 Cal 637 (637); 43 Cal 144.

[4] Suits pending in different Courts — Courts must be shown to be of concurrent jurisdiction. (Vol 6) 1919 Lah 3 (3); 1 Lah 21; (Vol 3) 1916 Nag 70 (71); 12 Nag L R 174.

[5] Court in which previous suit is pending must be competent to grant relief claimed in subsequent suit. (Vol 25) 1938 Mad 602 (602). (Words "relief claimed" apply to suit which is to be stayed and not to earlier suit); (Vol 1) 1914 Lah 47 (48); (Vol 30) 1943 Cal 19 (21); I L R (1942) 2 Cal 194. (Applications for letters of administration filed in two different Courts — Each Court must have jurisdiction to grant reliefs claimed in both applications.); (Vol 12) 1925 All 615 (616); 47 All 904. (Ejectment suit in revenue Court — Question of title raised in defence — Defendant directed to file suit in Civil Court—Section 10 does not apply.)

[6] Award made at K—Suit to set aside award in M Court—Subsequent application under S. 14, Arbitration Act, at K — Application to stay proceedings at K on account of the pendency of the suit at M is not competent, M Court having no jurisdiction to entertain application under S. 14, Arbitration Act. (Vol 15) 1928 Sind 169 (170); 23 Sind L R 427.

[7] Suit for accounts by mortgagee against mortgagee under S. 33, U. P. Agriculturists' Relief Act, 1934 — Subsequent suit by mortgagee against mortgagor for enforcement of mortgage — Section 10 does not apply. (Vol 27) 1940 Oudh 440 (440); 16 Luck 188.

[8] Proceedings before Calcutta Improvement Tribunal under S. 18, Land Acquisition Act, instituted subsequent to title suit — Civil Court cannot invoke S. 10. (Vol 20) 1933 Cal 887 (889); 60 Cal 1096.

[9] Suit for partition pending in Revenue Court—Suit in Civil Court for partition of house is not barred. (Vol 12) 1925 All 677 (678); 47 All 915.

[10] Suit for profits which is solely cognizable by a revenue Court cannot be stayed by prior suit for declaration of title pending in Civil Court. (Vol 16) 1929 Oudh 341 (346); 4 Luck 573.

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[11] Mortgage suit by insolvent's mortgagee—Application by receiver under S. 53, Provincial Insolvency Act, respecting mortgage — Court trying mortgage suit does not cease to have jurisdiction over suit — Proper course is to stay mortgage suit. (Vol 12) 1925 Mad 1051 (1051, 1052) : 48 Mad 750.

3. Court to which application for stay is to be made. — [1] Application for stay should be made to Court trying the suit or any other Court having power to stay. (Vol 12) 1925 Mad 1051 (1054) : 48 Mad 750.

[2] Appellate Court can grant stay order but original Court should be moved first. (Vol 28) 1941 All 27 (28) : ILR (1940) All 787; (Vol 18) 1931 Cal 779 (779).

[3] Same matter in issue in suit in another Court and in appeal in High Court between same parties—High Court can order stay. (Vol 13) 1926 Lah 692 (693).

[4] Rule issued by High Court calling upon party to show cause why suit should not be stayed pending appeal in previous suit—Appeal dismissed and second appeal preferred — Scope of Rule should be extended to cover second appeal. (Vol 19) 1932 Cal 751 (752).

[5] Stay of suit instituted on original side of High Court pending decision of previously instituted suit in mofussil Court—Application should be made on original side to Judge trying suit and not on appellate side. (Vol 28) 1941 Bom 160 (160) : ILR (1941) Bom 325.

4. Decree, contrary to S. 10. — [1] Decree contrary to S. 10 is not nullity—It cannot be disregarded in execution. (Vol 6) 1919 Lah 294 (295) : 1919 Pun Re No. 22.

5. Interlocutory orders. — [1] Stay of suit does not prevent passing of interlocutory orders. (Vol 9) 1922 Bom 276 (276) : 46 Bom 431.

[2] Suit stayed under Section 10—Court has no jurisdiction to fix a further date for appearance unless moved. (Vol 15) 1928 Lah 751 (752).

6. Letters Patent Appeal. — [1] Order refusing to stay suit is judgment within Cl. 15, Letters Patent, and is appealable. (Vol 22) 1935 Cal 1 (9) : 61 Cal 670; (Vol 20) 1933 Bom 85 (87) : 57 Bom 364.

[2] Order staying suit is not judgment—Letters Patent Appeal does not lie. (Vol 22) 1935 Rang 73 (73) : 12 Rang 687.

7. Matter in issue. — [1] Expression "matter in issue" refers to entire matter in controversy and not to one of several issues. (Vol 28) 1941 Cal 434 (435) : ILR (1941) 1 Cal 373; (Vol 27) 1940 Mad 7 (7); (Vol 22) 1935 Lah 816 (818) ; (Vol 22) 1935 Mad 112 (112) ; (Vol 25) 1938 Lah 502 (502) ; (1924) 82 Ind Cas 539 (540) (Sind) ; (Vol 4) 1917 Cal 248 (249) ; (Vol 16) 1929 All 805 (806) : 51 All 1017.

[2] In order to attract operation of S. 10, it is necessary that every matter in dispute should be directly and substantially in issue in the two suits. (1924) 82 Ind Cas 539 (540) (Sind) ; (Vol 18) 1931 Oudh 313 (314) ; (Vol 16) 1929 Oudh 341 (345) : 4 Luck 573 ; (Vol 10) 1923 Mad 88 (88) ; (Vol 7) 1920 Bom 296 (297) : 44 Bom 288 ; (Vol 30) 1943 Cal 19 (21) : ILR (1942) 2 Cal 194. (Applications for letters of administration filed in two different Courts — Matter in issue in both applications must be substantially same.)

[3] Suit for dissolution of partnership — Pending same, one of partners suing for recovery of deposit less his share of liabilities—Suit held barred by S. 10. (1912) 16 Cal W N 897 (900, 901).

[4] Decree against heirs of deceased—Appeal pending—Another suit by heir as creditor against decree-holder raising same questions — Stay of suit held justified. (Vol 7) 1920 All 70 (72) : 42 All 290.

[5] Application in subsequent suit for declaration that attachment made in previous suit is illegal and for

injunction does not change identity of suits. (Vol 22) 1935 Cal 1 (6) : 61 Cal 670.

[6] Subject-matter of two suits not same — Section will not apply. (Vol 14) 1927 Mad 1199 (1200) ; (1911) 13 Bom L R 109 (112) ; (Vol 9) 1923 Mad 304 (305) ; (Vol 14) 1927 Mad 1132 (1133) ; (Vol 10) 1923 Lah 69 (69).

[7] Subsequent suit for mesne profits accruing subsequent to institution of prior suit is not barred by S. 10. (Vol 16) 1924 Rang 67 (69) : 6 Rang 775.

[8] Rent suits—Amount claimed in both suits not for same period—Section does not apply. (Vol 27) 1940 Mad 7 (8) ; (Vol 25) 1938 Lah 502 (502) ; (Vol 4) 1917 Cal 248 (249).

[9] Suits for distinct and different debts — Section does not apply. (Vol 10) 1923 Cal 716 (717).

[10] Suit for declaration of title to properties—Latter suit for profits regarding one of those properties — Section does not apply. (Vol 16) 1929 Oudh 341 (345) : 4 Luck 573.

[11] Three previous suits on hundis by plaintiffs disposed of—Subsequent suit on different hundi against same defendants—Suit cannot be stayed. (Vol 20) 1933 Lah 34 (34).

[12] Question raised in previous suit was whether there had been previous partition and whether land in dispute was allotted to plaintiff in that suit — Subsequent suit for possession of part of land — Latter suit need not be stayed. (1940) 71 Cal L Jour 190 (191).

[13] Suit to set aside award in subordinate Court — Application to High Court to take award off the file—S. 10 has no application. (Vol 21) 1934 Sind 38 (39).

[14] Question whether there was partnership in issue in former suit—Subsequent suit for recovery of money—Suit need not be stayed. (Vol 14) 1927 Mad 1199 (1200).

[15] Suit for specific performance — Future mesne profits not prayed for—Subsequent suit for mesne profits is not barred. (Vol 16) 1929 Mad 785 (786).

[16] Mortgagee's suit for personal decree — Mortgagee's suit in another Court for declaration and injunction against mortgagee's selling mortgaged property — Suits do not fall within S. 10. (Vol 14) 1927 Bom 245 (247).

[17] Identity of reliefs is not necessary. (Vol 14) 1927 Bom 245 (246) ; (Vol 6) 1919 Pat 491 (492, 493) ; (Vol 7) 1920 Low Bur 24 (26) : 10 Low Bur Rul 150 ; (Vol 7) 1920 Oudh 223 (223) : 23 Oudh Cas 214.

8. Previously instituted suit.—[1] Suit is instituted on the date the plaint is presented, although the plaint is not admitted on that date. (1935) 62 Cal 1115 (1117).

[2] Suit in forma pauperis — For purposes of S. 10, plaint should be deemed to have been filed when application for leave to sue as pauper was presented. (Vol 27) 1940 Oudh 441 (442).

[3] Rival applications for probate in different Courts —Date of petition determines priority of proceedings under S. 295, Succession Act, and not date on which proceedings become contentious. (Vol 27) 1940 Oudh 113 (116) : 15 Luck 290.

[4] Rival probate proceedings — In applying S. 10 Court will proceed upon what it thinks to be substantially earlier proceeding. (Vol 28) 1941 Cal 417 (423).

9. Previously instituted suit must be pending. — [1] Judgment delivered — But decree not drawn up — Suit is still pending. (1940) 71 Cal L Jour 190 (191).

[2] Applying for or obtaining leave to appeal to His Majesty does not amount to pendency of appeal. (Vol 16) 1929 Rang 67 (69) : 6 Rang 775 ; (1898) 21 Mad 18 (26).

10. Revision. — [1] Order staying suit under S. 10 wrongly passed—Order is open to revision. (Vol 27) 1940 Oudh 441 (442) ; (Vol 20) 1933 Lah 605 (606) ; (Vol 6) 1919 Oudh 178 (179) ; (Vol 20) 1933 Lah 34 (34). (High Court can interfere if suitable grounds are disclosed.)

[But see (Vol 20) 1933 Lah 191 (192) ; (Vol 7) 1920 All 197 (198) : 42 All 409.]

11. No Court shall try any suit or issue in which the matter directly and substantially in *Res judicata*. issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I. — The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. — For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Section 10 (contd.)

[2] Order refusing to stay suit under S. 10 is revisable. (Vol 12) 1925 Lah 144 (144); (Vol 20) 1933 Lah 50 (50, 51). (Order refusing to stay suit is "case" within S. 115.); (Vol 15) 1928 Oudh 355 (353) : 3 Luck 650; (Vol 27) 1940 Oudh 342 (343) : 15 Luck 641.

[But see (Vol 11) 1924 Lah 567 (567); (Vol 26) 1939 Sind 291 (292).]

[3] Order refusing stay, though not revisable, can be interfered with under S. 151. (Vol 28) 1941 Pesh 34 (36); (Vol 17) 1930 Lah 525 (525).

[4] Decision of lower Court under S. 10 that it has jurisdiction cannot be treated as case decided even though application for stay is also dismissed. (Vol 21) 1934 All 520 (521).

[5] Order resuming proceedings stayed under S. 10 is "a case decided" within S. 115, Civil P. C. (Vol 15) 1928 Oudh 355 (358) : 3 Luck 650.

11. Same parties.—[1] Parties must be identical. (Vol 7) 1920 Bom 296 (297) : 44 Bom 283.

[2] Same question but not same parties in two suits—Section does not apply. (Vol 9) 1922 Mad 321 (325).

[3] Section 10 cannot be applied if parties do not fill the same legal position in two suits. (1911) 13 Bom L R 109 (112); (Vol 3) 1916 Mad 1101 (1101).

[4] Both plaintiff and defendant made defendants in a later suit—Later suit not being among same parties is not without jurisdiction. (Vol 3) 1916 Mad 1101 (1101).

[5] Dispute between A and B—Award—Arbitrators applying to Sind Court to file award—B's suit against A in Delhi to set aside award—Arbitrators not being parties to Delhi suit, S. 10 held did not apply. (Vol 9) 1922 Sind 6 (9) : 16 Sind L R 79.

12. Suit—Meaning of.—[1] Suit includes appeals. (Vol 26) 1939 Sind 329 (330) : I L R (1940) Kar 15. (Section refers to suits pending before Privy Council); (1924) 82 Ind Cas 539 (540) (Sind). (For purposes of S. 10, appeal is continuation of suit.); (Vol 10) 1923 Cal 716 (717); (Vol 3) 1916 Mad 732 (732). (Section 10 applies also where appeal in a previous suit is pending.); (Vol 4) 1917 Cal 248 (249).

[2] Suit connected with pending appeal—Decision turning on result of appeal—Suit should be stayed. (Vol 20) 1933 Lah 50 (50, 51).

[3] Party filing another action on same cause of action—Previous decree is not final—Court of second action should adjourn action pending decision of appeal. (Vol 18) 1931 P C 263 (264) (P.C.). (Case under Ceylon C. P. Code.)

[4] This section does not strictly apply to proceedings other than suit. See (Vol 27) 1940 Oudh 113 (116) : 15 Luck 290. (Proceedings under S. 295, Succession Act, are not suit—S. 10 is not strictly applicable.); (Vol 16) 1929 Lah 533 (533, 534). (Held, S. 10 did not apply to applications under Civil P. C., Sch. 2, para. 20 now repealed by Arbitration Act of 1940.); (Vol 15) 1928 Sind 169 (170) : 28 Sind L R 427. (Arbitration proceedings are not in the nature of suit—(Vol 9) 1922 Sind 6 : 16 Sind L R 79 doubted.)

[See also (Vol 22) 1935 Sind 228 (231). (Objections

to award preferred in Court—Application under S. 10 for stay of proceedings on ground of institution of suit in respect of same matter does not lie.)]

[5] The section applies even to proceedings other than suit, in any Court of Civil jurisdiction by virtue of S. 141. See (Vol 30) 1943 Cal 19 (20) : I L R (1942) 2 Cal 194. (Applications for letters of administration—S. 10 applies by reason of S. 141.); (Vol 9) 1922 Sind 6 (7) : 16 Sind L R 79. (Proceedings to file award—S. 10 applies; doubted in (Vol 15) 1928 Sind 169 : 28 Sind L R 427; (1910) 4 Sind L R 187 (193). (Applications to file awards though not suits are governed by the same principles of general law, as S. 10.)

[6] Proceedings under Chap. 10, Criminal P. C.—Civil suit filed by person proceeded against—Application to stay proceedings till decision of suit—Though S. 10 did not apply its principle held might be applied. (Vol 21) 1934 All 131 (132) : 35 Cri L Jour 1445.

[7] Section 10 does not apply to execution proceedings. (Vol 16) 1929 Lah 694 (695); (1899) 22 Mad 256 (258).

[8] Suit first instituted in wrong Court and subsequently in proper Court—Second suit is not continuation of the first even though subject-matter and parties are identical. (Vol 20) 1933 Sind 117 (117).

See also S. 141.

13. Suit pending in foreign Court.—[1] Defendant filing a suit in a Native State—Plaintiff filing his suit in British India Court regarding the same subject-matter—Defendant submitting to the jurisdiction of British India Court—Latter Court has jurisdiction to restrain defendant from proceeding with his suit. (Vol 14) 1927 Bom 135 (137, 138); (Vol 8) 1921 Bom 128 (129) : 45 Bom 550.

[2] Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits lies in British India but should be stayed till the dispute is subsisting out of British India. (Vol 15) 1928 Nag 56 (57, 58) : 23 Nag L R 170.

[3] Courts in British Burma have no power to stay suits before them by reason of pendency of suits founded on same cause of action in British India. (Vol 25) 1938 Rang 180 (184) : 1938 Rang L R 176 (FB).

SECTION 11—SYNOPSIS.

1. Applicability and scope.
2. Appeals and revisions.
3. Essentials of *res judicata*.
4. Plea of *res judicata*.
5. *Res judicata* and estoppel.
6. Section if exhaustive.
7. Competent Court.
8. Competency—Test—Explanation II.
9. Court—Meaning of.
10. Exclusive jurisdiction.
11. Exclusive jurisdiction of Revenue Courts.
12. Jurisdiction—Pecuniary and relating to subject-matter.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[1892, S. 13; 1877, S. 13; 1859, S. 2.]

Objects and Reasons.

“Clause 11. — *Res judicata*. — It is not possible to make a complete exposition of a subject so complex as that of *res judicata* within the limits of a section of an Act and the Committee think it better to re-enact S. 13 as it stands in the Code with such modifications only as experience has shown to be necessary.

The Committee recognize that a proceeding does not come within the language of that section; but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties. (L. R. 11 I. A. 37 and I. L. R. 29 Cal. 707.)

The word ‘another’ has been substituted for ‘former’ as being more in conformity with Indian decisions.

Explanation I.—(Now Explanation II) is new and is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from his decision.

Explanation VI.—The inclusion of *public rights* is to give due effect to suits relating to public nuisances (Clause 91.)—S. O. R.

“Clause 11. — We have restored the word ‘former’ and have inserted Explanation I on the suggestion of Sir Bhashyam Iyengar to remove a conflict of authority as to the meaning of the expression ‘former suit’.”

—S. C. R.

Section 11 (contd.)

13. Constructive res judicata—Explanation IV.

14. Alternative claims or reliefs.
15. Causes of action.
16. Grounds of attack.
17. Grounds of defence.
18. Mesne profits.
19. “Might”.
20. Knowledge of facts.
21. Pleas not permitted by law.
22. Pleas based on facts not in existence.
23. “Ought”.
24. Partition suits.
25. Suits based on title.
26. Directly and substantially in issue.
27. Incidentally in issue.
28. Issue of fact.
29. Issue of law.
30. Matter not in issue.
31. Mixed question of fact and law.
32. Substantially in issue.
33. Ex parte decree.
34. Explanation III—See Notes 20 to 23.
35. Explanation V—Relief claimed but not granted.
36. “Former suit”—Explanation I.
37. Connected or cross suits or appeals.
38. Execution proceedings.
- 38a. Interlocutory orders—See Note 39.
39. Miscellaneous proceedings.
40. “Suit”—Meaning of.
41. Heard and finally decided.
42. Adverse finding.
43. Consent decree.
44. Decision must be necessary.
45. Decision on merits necessary.
46. Decision on preliminary or technical point.

47. Declaratory decree.
48. Dismissal for default.
49. Finality in appealable cases.
50. Impliedly decided.
51. Matter left undecided.
52. Withdrawal without permission.
53. Litigating under the same title.
54. Different cause of action.
55. Different subject-matter.
56. Maintenance suits.
57. Mortgage suits.
58. Parties and representatives.
59. Co-defendants.
60. Conflict of interest.
61. Constructive res judicata.
62. Decision.
63. Ex parte decisions.
64. Necessity of issue.
65. Necessary parties.
66. Co-plaintiffs.
67. Co-sharers.
68. Co-tenants.
69. Hindu son, whether claims through father.
70. Interveners.
71. Judgment-debtor, decree-holder and auction-purchaser.
72. Judgment ‘in rem.’
73. Jus tertii.
74. Lessor and lessee.
75. Minor.
76. Miscellaneous.
77. Mortgagor and mortgagee.
78. Parties claiming under parties in previous suit.
79. Parties under whom they or any of them claim.

Section 11 (contd.)

80. Same parties.
81. Transferor and transferee.
82. Rent suits.
83. Suits for rent for successive periods or for other recurring liability.
84. Suits relating to rate of rent or area for which rent is payable.
85. Representative suits—Explanation VI.
86. Benamidar or agent.
87. Decree against one of several legal representatives.
88. Hindu reversioners.
89. Hindu widow.
90. Karnavan of a tarwad.
91. Manager of Hindu joint family.
92. Shebait and trustees.
93. Suits under O. 1, R. 8 and S. 91, C. P. C.

1. Applicability and scope. — [1] There is more comprehensive dealing of the subject of *res judicata* in the new Code than in the old. (1903) 26 Mad 760 (770).

[2] The principle of *res judicata* that no litigant can ever have the same case tried twice is not to be evaded by a literal and a narrow application of special section. (Vol 25) 1938 Mad 257 (262).

[3] The principle of *res judicata* is the maxim that it is in the interest of the state that there should be an end to law suits. (Vol 33) 1946 Oudh 33 (34) : 20 Luck 339 (FB). (Overruling (Vol 20) 1933 Oudh 531 on another point.)

[4] A further consideration for the formulation of this principle is to be found in the maxim that no man shall be vexed twice over for the same cause. (Vol 33) 1946 Oudh 33 (34) : 20 Luck 339 (FB). (Overruling (Vol 20) 1933 Oudh 531 on another point); (1910) 8 Ind Cas 9 (11, 12) (All); (1902) 24 All 138 (141); (1938) ILR (1938) Lah 75 (80, 81); (Vol 3) 1916 Mad 157 (161); (Vol 2) 1915 Mad 1235 (1237); (Vol 12) 1925 Oudh 118 (119); (Vol 4) 1917 Sind 93 (94) : 10 Sind L R 29.

[5] The bar of *res judicata* is not merely confined to the decision itself, but extends to all facts involved in it as necessary steps or ground work for the decision. (Vol 24) 1937 Rang 214 (218) : 14 Rang 652; (Vol 12) 1925 Oudh 303 (304) : 28 Oudh Cas 2.

[6] Section 11 not only bars the trial of an issue but also the trial of a suit in which the matter directly and substantially in issue has already been agitated upon in a previous suit. (Vol 32) 1945 All 121 (128) : I L R (1945) All 75.

[7] There can be no *res judicata* or estoppel against a statute. (Vol 32) 1945 All 377 (385) : I L R (1945) All 394; (Vol 22) 1935 All 588 (589).

[8] The application of this rule should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. (Vol 33) 1946 Oudh 33 (34) : 20 Luck 339 (FB). (Overruling (Vol 20) 1933 Oudh 531 on another point); (Vol 3) 1916 P C 78 (80) : 43 Ind App 91 : 43 Cal 694 (P C).

[9] If section does not apply, the general principles of *res judicata* cannot be appealed to, because it would be excluded by the terms of the section. It can only be invoked only to extend the doctrine to cases analogous to those referred to in S. 11. (Vol 30) 1943 Oudh 338 (342) : 18 Luck 683 (FB); (Vol 16) 1929 Mad 121 (134). (Upon general principles of law an interlocutory order passed at one stage of the suit operates to bind in all subsequent proceedings.)

[10] If the section is applicable it must be applied in its entirety. (Vol 21) 1934 Sind 112 (113).

[11] Bar of *res judicata* does not arise where the point at issue between the parties in the subsequent suit

was not before the Court at all and was not considered in the prior suit between the same parties. (Vol 19) 1932 Bom 8 (7).

[12] Conflicting decisions on an issue—Later decision operates as *res judicata*. (Vol 32) 1945 All 121 (126) : I L R (1945) All 75; (Vol 24) 1937 All 481 (492) : I L R (1937) All 628; (Vol 22) 1935 All 645 (647).

[13] Principle of *res judicata* is one of convenience and rest and not one of absolute justice. Hence a decree which is *inter partes* is binding on the parties until it is legally set aside; (1910) 37 Cal 197 (201).

[14] The rule of *res judicata* is in no way opposed to the spirit of Hindu law. (Vol 17) 1930 P C 22 (23) : 57 Ind App 24 (P C). (Vol 3) 1916 P C 78 : 43 Ind App 91 : 43 Cal 694 (P C) Rel. on.)

[15] The law of *res judicata* does not compel the Court trying the later suit to hold the previous decision to be correct. It merely estops the parties from proving that it is incorrect. (1911) 21 Mad L Jour 57 (69); (Vol 18) 1931 All 425 (426).

[16] Section operates as personal estoppel and does not attach to property. (Vol 8) 1921 Mad 306 (308) : 44 Mad 514.

[17] Doctrine should not be qualified to evade its operation where decisions are intended to be final on fair trial. (Vol 7) 1920 Mad 871 (877).

[18] Rule of *res judicata* is necessarily rule of evidence. (Vol 19) 1932 Oudh 199 (206) : 7 Luck 716 (FB).

[19] Section 11 does not affect jurisdiction of Court. (Vol 21) 1934 Cal 282 (284) : 61 Cal 234.

[20] Finding is not conclusive if decree is not based on it but is made in spite of it. (Vol 16) 1929 All 910 (912).

[21] Two decrees operating as *res judicata* : one against plaintiffs and another against defendants—Later of the two must prevail over the former as it shuts out consideration of the former. (Vol 14) 1927 All 717 (718) : 49 All 606.

[22] Decision based on several grounds — It is *res judicata* for each ground. (Vol 19) 1932 Cal 385 (387).

[23] Erroneous prior decision—Subsequent change in the views of law will not take away the effect of the decision. (Vol 10) 1923 Cal 629 (630) : 50 Cal 215.

[24] O. 34, R. 14 expressly relieves plaintiff from bar of *res judicata*, which is contained in O. 2, R. 2 but does not relieve plaintiff from bar of *res judicata* set up by S. 11. (Vol 20) 1933 Rang 158 (159).

[25] Whilst S. 10 bars only a suit, S. 11 bars the trial of both the suit and of issue involved in that suit. (Vol 16) 1929 Oudh 341 (345) : 4 Luck 573.

[26] Execution of decree by a person for possession barred—Fresh suit for possession on basis of judgment in his favour is maintainable. (Vol 3) 1916 All 261 (264).

[27] Permission by Court in judgment to bring fresh suit does not take the case out of bar of *res judicata*. (Vol 18) 1931 Bom 417 (418).

[28] Where the construction of a will is the subject of a definite pronouncement by a High Court, the same matter cannot be raised in the same High Court in a subsequent suit on identical facts, though the parties to the suit are different. (Vol 25) 1938 Cal 34 (35) : I L R (1937) 1 Cal 400.

[29] *Res judicata* precludes a suit as well as a defence. (Vol 8) 1921 P C 231 (232) (P C). (Case from Eastern Africa under Civil P. C., S. 13.)

[30] Section 403 of the Criminal Procedure Code does not refer to the identity of parties, but to the identity of charges as contrasted with the principles of *res judicata* in this section. (Vol 14) 1927 Sind 10 (15) : 21 Sind L R 1 : 27 Cri L Jour 1105.

2. Appeals and revisions.—[1] Rule contained in S. 11 applies to appeals also. (Vol 26) 1939 Sind 329 (331) : I L R (1940) Kar 15; (Vol 1) 1914 Cal 693 (694);

Section 11 (*contd.*)

(Vol 6) 1919 Mad 17 (18); (Vol 12) 1925 Rang 104 (105) : 2 Rang 633.

[2] Mortgage — Redemption suit—Appeal from preliminary decree pending — Appeal from final decree preferred but dismissed for default — Appellate Court is not debarred from granting relief inconsistent with final decree. (Vol 13) 1926 All 665 (667); 48 All 611.

[3] Appeal from preliminary decree pending—Final decree passed is valid and is binding on persons who are parties to the final decree. (Vol 16) 1929 All 287 (289); 29 Cri L Jour 446.

[4] Failure to appeal against a decree for sale precludes objection to the decree in an application under O. 34, R. 6. (Vol 13) 1926 Oudh 27 (28).

[5] Suit for possession of half share in each of two groves in different villages. Suit in respect of one grove dismissed and decreed in respect of other. Appeal by both parties. Plaintiff's appeal dismissed, defendant's allowed, case being remanded. Plaintiff could appeal against order of remand, though he failed to appeal against the order dismissing his appeal. (Vol 5) 1918 All 52 (53); 41 All 54.

[6] Doctrine of *res judicata* applies equally to second appeal. (Vol 6) 1919 Mad 17 (18).

[7] Withdrawal by party of his revision application against a decision which was however upset at other's instance does not estop him from enforcing his rights in another proceeding. (Vol 2) 1915 P C 111 (113); 1915 Pun Re No. 93 (PC).

[8] Rule of *res judicata* applies to appeals and miscellaneous proceedings — Final judgment in another case on the same point pending appeal operates as *res judicata*. (Vol 29) 1942 Mad 421 (422) : I L R (1942) Mad 677.

[9] Where the matter itself is in appeal or revision the decision of the trial Court is no bar to such appeal or revision. (Vol 21) 1934 Lah 416 (416).

[10] Decision of question of *res judicata* raised in a case is not even though wrong, a failure, or a cause of failure to exercise jurisdiction. (1887) 11 Bom 488 (492).

3. Essentials of *res judicata*. — [1] Section 11 takes no note of the fact whether the cause of action is the same or is different. The only matter for investigation is whether the matter directly and substantially in issue has been in the same way in issue in former suit between same parties or between parties under whom they or any of them claim. (Vol 11) 1924 Pat 265 (266) : 2 Pat 771.

[2] Section 11 applies when two Courts concerned have concurrent jurisdiction and governs cases where matter is same and has been previously decided by competent Court. (Vol 24) 1937 Lah 346 (347).

[3] Issues must have been raised and tried to make principles of S. 11 operative. (Vol 3) 1916 Cal 673 (674).

[See (Vol 19) 1932 Oudh 199 (209) : 7 Luck 716 (FB). (For *res judicata* there must be previous decree.)]

[4] The theory of *res judicata* requires the position and the case of the parties to be the same in both suits. (1913) 25 Mad L Jour 324 (327).

[5] Mutuality is one of the tests of *res judicata*. (Vol 6) 1919 Cal 160 (161).

4. Plea of *res judicata*. — [1] Plea of *res judicata* is to be strictly construed. (Vol 4) 1917 Mad 689 (690).

[2] Issue constituting *res judicata* requires to be construed with reference to the pleadings, judgment and record. (Vol 17) 1930 Pat 71 (74); (Vol 16) 1929 All 29 (31); (1911) 13 Bom L R 162 (171); (1897) 24 Cal 504 (519, 520) : 24 Ind App 33 (P C); (Vol 20) 1933 Cal 222 (230); (Vol 18) 1931 Cal 511 (513); (1909) 36 Cal 193 (209, 214); (Vol 5) 1918 Lah 250 (255); 1918 Pun Re No. 13; (1910) 1910 Pun L R No. 77 Page 230 (232); (Vol 23) 1936 Mad 469 (469); (1911) 84 Mad 97 (103);

(Vol 21) 1934 Oudh 265 (270); (Vol 17) 1930 Oudh 465 (467); (Vol 6) 1919 Pat 196 (199).

[3] Substantial effect of previous decision must be considered. (Vol 20) 1933 Cal 222 (230).

[4] Plea in previous suit must be construed in same way as done by former Court. (Vol 5) 1918 Low Bur 135 (136); (Vol 26) 1939 Pat 19 (20).

[5] It is irregular for the Appellate Court, of its own accord to raise the question of *res judicata*, and basing it on flimsy materials which it has before it, to reverse the decision of the first Court. (Vol 12) 1925 Mad 357 (357).

[6] A party cannot by manipulation of the form of plea get round the bar of *res judicata*. (Vol 4) 1917 Mad 495 (498).

[7] A person who wishes to set up the plea of *res judicata* must produce such documents as will bring the case under S. 11 of Civil P. C. (Vol 4) 1917 Pat 196 (198); (Vol 22) 1935 Cal 792 (796).

[8] Plea of estoppel by *res judicata* can prevail even where the result of giving effect to it, will be to sanction what is illegal or prohibited by law. If the legality of an act is a point substantially in dispute it can become *res judicata*; if it is abandoned or not put forward by a party, it will be deemed as decided against him. (1909) 33 Bom 479 (482).

[9] No issue as to *res judicata* raised—Only particular decision incidentally considered as bar by trial Court and no bar by appellate Court—Plea is not wholly excluded especially when whole suit is remanded. (Vol 29) 1942 Cal 445 (446) : I L R (1942) 1 Cal 510.

[But see (Vol 23) 1936 Cal 454 (455).]

[10] A plea in bar can be allowed to succeed only where the law expressly provides for it or the implication is so irresistible that its provisions are inconsistent with a contrary hypothesis. (Vol 16) 1929 All 506 (508); 51 All 805.

[11] *Sulaiman, Ag. C. J.*—A statutory right conferred by a new Act may even be made a foundation of defence to the plea of '*res judicata*'. (Vol 18) 1931 All 635 (639); 54 All 299 (F B).

[12] Plea of *res judicata* can be raised in appeal. (Vol 16) 1929 Pat 173 (175); 8 Pat 107.

[13] Point as to *res judicata* not raised in the Court below cannot be raised in revision. (Vol 8) 1921 Mad 532 (532).

[14] Whether issue was raised and decided is question of fact. (Vol 6) 1919 Bom 81 (82); 43 Bom 568; (1911) 14 Cal L Jour 220 (224); (1904) 14 Mad L Jour 379 (392); (Vol 4) 1917 Pat 50 (52).

[15] Where all the conditions requisite for the application of the rule of *res judicata* are not stated in the plea, it is impossible to say that on the face of it the suit is barred by *res judicata* under S. 11, Civil P. C. (1913) 1913 Pun L R No. 194 Page 665 (666).

[16] Burden of proving *res judicata* is on the person alleging it. (Vol 7) 1920 All 143 (144); (Vol 4) 1917 Pat 196 (198).

[17] *Res judicata* does not affect jurisdiction but is plea which party can waive. (Vol 16) 1929 Cal 163 (164); (Vol 4) 1917 Mad 950 (950).

[18] Party not putting forward plea of *res judicata* must be taken to have waived it. (Vol 20) 1933 Cal 69 (71); 59 Cal 513.

[19] Effect of waiver of plea is same, whether plea was omitted to be taken by accident, by mistake or, by design. (Vol 4) 1917 Mad 950 (950).

5. *Res judicata* and estoppel.—[1] *Res judicata* differs from estoppel. A true *res judicata* ousts the jurisdiction of the Court, while estoppel shuts the mouth of a party. Estoppel means that a person shall not be allowed to say one thing at one time and the opposite

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at another, while *res judicata* means that the person shall not say the same thing twice over. (1912) 36 Bom 283 (289); (Vol 23) 1936 Sind 99 (101, 102) : 29 Sind L R 455.

[2] *Res judicata* is a form of estoppel — There can be no estoppel against statute — Recovery of amount prohibited by statute — Defendant can plead statute though plaintiff is entitled to recover under previous judgment. (Vol 26) 1939 Pat 633 (636).

[3] Estoppel by record operates as an estoppel to the whole right and not to a fragment of it which might be given effect to or repelled by the decree of Court. (Vol 15) 1928 Oudh 359 (362) : 3 Luck 487.

[4] Estoppel must be mutual and party not bound by judgment cannot set it up as a bar against a party to it. (Vol 8) 1921 Mad 248 (256) : 44 Mad 778 (FB).

[5] Equitable estoppel — Defendant's agreement to manage minor plaintiff's property and pay interest on debt and indemnify against loss — On defendant's failure to pay interest, creditor suing plaintiff and defendant — Claim decreed on failure to prove payment of interest — In suit by plaintiff on indemnity defendant is equitably estopped from pleading payment of interest to the creditor. (Vol 2) 1915 Mad 36 (87) : 37 Mad 270.

6. Section if exhaustive.—[1] Section 11 is not exhaustive of the general principle of *res judicata*. General principle can be applied where S. 11 does not apply. (Vol 18) 1931 P C 114 (117) : 58 Ind App 158 : 53 All 103 (PC); (Vol 19) 1932 P C 161 (164) : 10 Rang 322 : 59 Ind App 247 (PC); (Vol 17) 1930 P C 22 (23) : 57 Ind App 24 (PC); (Vol 9) 1922 P C 80 (83, 84) : 45 Mad 320 : 49 Ind App 129 (PC).

[2] The plea of *res judicata* still remains apart from the limited provisions of the Code. (Vol 8) 1921 P C 11 (13) : 48 Cal 499 : 48 Ind App 187 (PC); (Vol 13) 1926 Lah 603 (604) : 8 Lah 15.

[3] English decisions can be considered for grasping general principles of *res judicata*. (Vol 19) 1932 P C 161 (164) : 10 Rang 322 : 59 Ind App 247 (PC).

[4] Section 11 is exhaustive in respect of all cases falling within its terms and with regard to such cases, the Court is not entitled to travel outside the section and apply the general principles. (Vol 22) 1935 Cal 792 (798); (Vol 28) 1941 Cal 104 (106); (Vol 20) 1933 Lah 646 (647) : 14 Lah 437; (Vol 20) 1933 Lah 551 (552) : 14 Lah 369; (Vol 15) 1928 Mad 840 (845); (Vol 21) 1934 Nag 178 (179).

[5] Section 11 cannot be extended to cases not strictly covered by it. (Vol 14) 1927 Mad 450 (453).

[6] Section 11 applies when two Courts concerned have concurrent jurisdiction — General principle of *res judicata* has wider application—It governs cases where matter is same and has been previously decided by competent Court. (Vol 24) 1937 Lah 346 (347).

7. Competent Court.—[1] Decision in previous suit to operate as *res judicata* must be of a Court which would have had jurisdiction to decide question raised in subsequent suit. (1885) 11 Cal 301 (308) : 12 Ind App 23 (PC); (Vol 25) 1938 All 82 (84, 85) : I L R (1938) All 184; (Vol 20) 1933 Bom 398 (401) : 57 Bom 456; (Vol 8) 1921 Bom 434 (435) : 45 Bom 805; (Vol 21) 1934 Cal 192 (198); (1908) 35 Cal 353 (356); (Vol 24) 1937 Lah 346 (347); (Vol 20) 1933 Lah 551 (552) : 14 Lah 369; (Vol 20) 1933 Mad 913 (915) : 57 Mad 335; (Vol 2) 1915 Oudh 30 (31); (1940) 21 Pat L Tim 894 (896); (Vol 26) 1939 Sind 329 (329, 330) : I L R (1940) Kar 15.

[2] First Court must be competent to try not merely subsequent issue but subsequent 'suit'. (Vol 19) 1932 All 434 (439) : 54 All 786; (1902) 29 Cal 707 (715) : 29

Ind App 196 (PC); (1938) 67 Cal L Jour 223 (227, 228); (Vol 20) 1933 Lah 551 (552) : 14 Lah 369.

[3] Decision of competent Court even if *ex parte* is still binding on parties in a later suit. (Vol 26) 1939 Mad 830 (833).

[4] Subsequent suit is not barred by *res judicata* if Court which tried previous suit is incompetent to try subsequent suit. (Vol 26) 1939 Pat 375 (377) : 18 Pat 342; (Vol 11) 1924 All 466 (466); (Vol 7) 1920 All 23 (25); (Vol 28) 1941 Cal 104 (105, 106); (Vol 20) 1933 Lah 646 (647) : 14 Lah 437; (1909) 6 Mad L Tim 375 (376); (Vol 2) 1915 Oudh 30 (31); (Vol 21) 1934 Pat 270 (273).

[5] Decree passed on contest in Small Cause Court not operating as *res judicata* — Decree based on award in same suit or award itself cannot also operate as *res judicata*. (Vol 19) 1932 Pat 105 (110) : 11 Pat 50.

[6] Previous decision must be by a competent Court. (Vol 13) 1926 Bom 481 (484); (Vol 15) 1928 Mad 840 (844).

[7] Decision by a Court having no jurisdiction does not bind the persons who had not been parties to the proceedings. (Vol 1) 1914 P C 67 (69) : 41 Ind App 110 : 47 Cal 972 (PC).

[8] Judgment by Court without jurisdiction is not conclusive between parties and hence cannot operate as *res judicata*. (Vol 18) 1931 All 454 (458) : 53 All 560; (1905) 28 Mad 42 (49, 50) : 32 Ind App 45 (PC); (Vol 17) 1930 All 681 (685, 686) : 52 All 868; (Vol 4) 1917 All 157 (157) : 89 All 353; (1913) 87 Bom 563 (571, 572); (1900) 24 Bom 77 (85); (Vol 22) 1935 Cal 792 (797); (Vol 7) 1920 Cal 131 (134) : 47 Cal 770; (Vol 10) 1923 Lah 141 (142); (Vol 20) 1933 Mad 913 (915) : 57 Mad 335; (Vol 11) 1924 Mad 716 (717) : 47 Mad 850. (A wrong suit followed by a wrong decree does not bar a correct suit.); (Vol 22) 1935 Nag 250 (256) : 31 Nag L R (Sup) 43 (FB); (Vol 4) 1917 Nag 118 (119). (Incompetent reference under O. 46, R. 1.); (Vol 19) 1932 Oudh 313 (314) : 6 Luck 697; (Vol 15) 1928 Oudh 296 (297); (Vol 9) 1922 Pat 252 (255) : 6 Pat L Jour 650; (Vol 22) 1935 Rang 517 (520).

[9] Court having jurisdiction but deciding case erroneously—Judgment is not a nullity. (Vol 13) 1926 Cal 1101 (1103); (Vol 6) 1919 Oudh 123 (124).

[10] Decision without jurisdiction—Expl. 4 does not apply. (Vol 22) 1935 Nag 28 (30).

[11] Application purporting to be under S. 47 — S. 47 not applicable but O. 21, R. 58 possible to apply — Order by Court is not without jurisdiction and can operate as *res judicata*. (Vol 30) 1943 Cal 56 (56, 57).

[12] Party pleading that previous decision is not *res judicata* being delivered by incompetent Court—Party must prove want of jurisdiction. (1910) 6 Ind Cas 93 (99, 100) (All).

[13] Court has jurisdiction to decide whether it has, itself, jurisdiction to try suit — Decision on that point operates as *res judicata*. (Vol 24) 1937 Lah 649 (652).

[14] Court that takes cognizance of case and gives decree must be deemed to have decided that it had jurisdiction. (Vol 13) 1926 Oudh 239 (240).

[15] Court erroneously deciding that it has no jurisdiction — Decision is not nullity which can be ignored. (Vol 28) 1941 Lah 327 (331).

[16] Civil Court is not entitled to treat revenue Court's decree *ultra vires*, because it is of opinion that revenue Court has exceeded its special jurisdiction, if it must be deemed to have held that it had jurisdiction. (Vol 13) 1926 Oudh 369 (369).

[17] Suit in Court having no jurisdiction to try it—No objection raised by either party as regards jurisdiction — Decision therein operates as *res judicata* in subsequent suit between same parties on same cause of action. (Vol 25) 1938 Mad 257 (262).

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[18] Doctrine of *res judicata* does not apply to question of jurisdiction—It can neither confer nor oust jurisdiction of Court nor can it estop party from showing absence of jurisdiction. (Vol 5) 1918 Mad 988 (989); (Vol 22) 1935 Mad 835 (837) : 59 Mad 62; (Vol 28) 1941 Cal 493 (493, 495).

8. Competency—Test — Explanation II.—[1] In determining competency what has to be regarded is competency of original Court. (Vol 26) 1939 Sind 329 (330); I L R (1940) Kar 15; (Vol 9) 1922 All 445 (446) : 44 All 712; (1906) 30 Bom 220 (225) ; (1880) 5 Cal 832 (833) ; (Vol 11) 1924 Lah 644 (644) ; (1911) 21 Mad L Jour 57 (68) ; (Vol 23) 1936 Oudh 387 (400) : 12 Luck 371.

[2] Competency of appellate Court in the previous litigation is immaterial. (1911) 21 Mad L Jour 57 (68) ; (1906) 30 Bom 220 (225) ; (1896) 23 Cal 415 (419) ; (1880) 5 Cal 832 (833); (1912) 14 Ind Cas 86 (88) (Oudh).

[3] Fact that in two suits appeals may lie in different Courts does not affect application of rule of *res judicata*. (Vol 11) 1924 Lah 644 (644); (1901) 24 Mad 444 (446, 447); (1894) 17 Mad 273 (275); (1898) 25 Cal 571 (579).

[4] Fact that no right of appeal exists against a decision does not in any way affect the operation of the rule of *res judicata*. (Vol 15) 1928 Cal 758 (758) ; (Vol 14) 1927 All 189 (189); (Vol 5) 1918 All 52 (53, 54) : 41 All 54. (Suit of small cause nature tried as regular suit — Decision operates as *res judicata* though it is not appealable.)

[5] Explanation 2 to S. 11 has no retrospective effect. (Vol 3) 1916 Mad 1035 (2) (1036).

[6] Inability of Court to try suit arising, not from incompetence, but from existence of another Court with preferential jurisdiction—Court is still competent and its decision operates as *res judicata*. (Vol 5) 1918 Nag 163 (164) : 14 Nag L R 115 ; (Vol 4) 1917 All 263 (264); 39 All 717 ; (Vol 3) 1916 Mad 573 (574).

[7] Competency of Court to entertain subsequent suit must be determined by reference to date on which earlier suit was filed. (Vol 28) 1941 All 18 (22) : I L R (1940) All 805 ; (Vol 24) 1937 All 20 (22); (Vol 20) 1933 Cal 879 (879) ; (Vol 19) 1932 Cal 271 (272) : 59 Cal 636; (Vol 15) 1928 Lah 929 (930) : 10 Lah 528 ; (Vol 6) 1919 Mad 236 (237) : 42 Mad 702. (Subsequent deprivation of jurisdiction to try subsequent suit does not affect.) ; (Vol 5) 1918 Mad 1152 (1154) ; (Vol 29) 1942 Nag 119 (121) : I L R (1942) Nag 721 ; (Vol 6) 1919 Oudh 111 (112) : 22 Oudh Cas 331.

[8] Decision in previous suit if obtained by fraud or collusion cannot be a bar as *res judicata* in a subsequent suit. (Vol 24) 1937 All 28 (29) ; (Vol 23) 1936 All 422 (429) ; (Vol 20) 1933 Lah 573 (574) ; (Vol 4) 1917 Oudh 197 (198); (Vol 3) 1916 Oudh 148 (150) : 19 Oudh Cas 334 ; (Vol 8) 1921 Pat 12 (13) : 6 Pat L Jour 1.

[9] Dismissal of application under O. 9, R. 13, which alleged fraudulent information by applicant's Mukhtar in collusion with plaintiff bars suit. (Vol 11) 1924 Pat 769 (770).

[10] Later suit for declaration that a decree *ex parte* is void for fraud is untenable if an earlier application to set aside the decree has been dismissed, unless fresh grounds of fraud are mentioned. (Vol 11) 1924 Pat 238 (239) : 2 Pat 833.

[11] Suit to set aside *ex parte* decree on ground of fraud—Fraud consisting of allegation that summons had been fraudulently suppressed — Allegation investigated and negatived in proceedings under O. 9, R. 13 — Matter is *res judicata* — Question of falsity of claim does not arise. (Vol 29) 1942 Pat 357 (359).

[12] Rejection of application does not bar a suit to set aside decree as fraudulent and also of proving inci-

dentally non-service of summons. (Vol 11) 1924 Pat 241 (242).

[13] Subsisting judgment set up as *res judicata*—It can be impeached on ground of fraud and collusion in the same suit. (Vol 16) 1929 Cal 685 (686) ; (1904) 26 All 272 (286); (1902) 24 All 242 (247).

[14] Fraud to vacate judgment must be extraneous and not one already judged — Rule allowing vacating a decree for fraud is not an exception to rule of *res judicata* but independent of it—Power to set aside decree is discretionary. (Vol 3) 1916 Mad 364 (365, 366) : 38 Mad 203.

9. Court — Meaning of. — [1] Decisions passed in executive capacity do not operate as *res judicata* (Per *Din Mohammad J.*). (Vol 25) 1938 Lah 369 (418) (FB).

[2] Certificate Officer is not Court with special jurisdiction—His decision cannot operate as *res judicata* in a Civil Court. (Vol 16) 1929 Cal 130 (132).

[3] A Talukdari Settlement Officer is not a Court of competent jurisdiction to decide questions arising out of application under Gujarat Talukdar's Act (Bom. VI of 1888). (1906) 30 Bom 220 (225).

[4] Revenue officer dealing with application for partition—Proceeding is administrative adjustment to which principle of *res judicata* does not apply. (1915) 1915 Pun L R No 229, page 640 (642) : 1914 Pun Re (Rev) No. 5.

[5] There can be no *res judicata* in Burma by reason of orders of Revenue Officer. (Vol 3) 1916 Low Bur 30 (32) : 8 Low Bur Rul 556.

10. Exclusive jurisdiction. — [1] Plea of *res judicata* is not limited to judgment of Court of concurrent jurisdiction but extends to that of exclusive jurisdiction. (Vol 13) 1926 Sind 236 (237) : 21 Sind L R 23; (Vol 19) 1932 Oudh 199 (204); 7 Luck 716 (FB). (Judgment of Court of exclusive jurisdiction directly upon point is conclusive upon same matter between same parties in subsequent suit.)

[2] Question as to whether gurdwara is owner directly in issue before gurdwara Tribunal — Gurdwara found to be owner—Subsequent suit by gurdwara for possession—Ownership of gurdwara cannot be questioned even though Tribunal is not competent to try subsequent suit. (Vol 22) 1935 Lah 826 (827).

11. Exclusive jurisdiction of Revenue Courts. — [1] Prior decision of Revenue Court with exclusive jurisdiction is *res judicata* in Civil Court. (Vol 16) 1929 Lah 586 (587) ; (Vol 8) 1921 P C 181 (134, 135) : 23 Oudh Cas 291 (PC). (Decision by settlement Court is *res judicata*); (Vol 15) 1928 All 343 (344). (Prior decision of Revenue Court); (Vol 8) 1921 All 348 (349) : 43 All 191 (FB). (Decision as to status of tenant); (1913) 35 All 464 (465) ; (1907) 30 Mad 510 (514) ; (Vol 20) 1933 Lah 738 (740); (Vol 26) 1939 Oudh 17 (27); (Vol 16) 1929 Oudh 362 (363) : 4 Luck 220 ; (Vol 18) 1931 Pat 215 (216) : 10 Pat 337. (Decision under S. 106, Bengal Tenancy Act.)

[2] Revenue Court's decision is binding on Civil Court so far as the issue raised there is raised again. (Vol 19) 1932 Lah 623 (624).

[3] Revenue Court not competent to try question—Its decision will not be *res judicata* in subsequent suit. (Vol 16) 1929 All 17 (18).

[4] Decision of Revenue Court as to status of a tenant is not *res judicata* in a subsequent civil suit. (Vol 14) 1927 Oudh 183 (185).

[5] Decision as to title by a Revenue Court, which is not vested with jurisdiction to try those questions, does not operate as *res judicata* to prevent Civil Courts from entertaining subsequent suits involving questions of title. (Vol 22) 1935 Lah 739 (740) : 17 Lah 38; (Vol 17) 1930 All 611 (614); 52 All 823; (Vol 7) 1920 All 21 (21); 42 All 309; (1904) 26 All 468 (472) ; (Vol 17) 1930 Cal 238 (239) ; (Vol 14) 1927 Cal 216 (217) : 54 Cal 114 ;

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(1903) 30 Cal 339 (364, 365); (Vol 20) 1933 Lah 1016 (1016). (Rejection of claim to be occupancy tenant by Revenue Court—Declaratory suit that plaintiff is owner of land is not barred.); (1913) 1913 Pun L R No. 280, page 942 (943); (Vol 24) 1937 Mad 303 (305); (Vol 7) 1920 Mad 558 (560); 43 Mad 859; (Vol 29) 1942 Oudh 25 (27); 17 Luck 215. (Decision as to whether defendant was *muafidar*.); (Vol 15) 1928 Oudh 344 (347); 3 Luck 636. [See however (Vol 24) 1937 Lah 19 (21) : 17 Lah 787.]

[6] Revenue Court invested with power of directly deciding question of title—Revenue Court becomes Civil Court — Question cannot be re-opened in Civil Court. (1908) 30 All 470 (475); (Vol 24) 1937 All 481 (493); I L R (1937) All 628; (Vol 18) 1931 All 462 (466); 53 All 568; (1911) 33 All 453 (455, 456) (FB); (1898) 18 All 270 (275) (FB). (Decision as to the right of tenancy under S. 39 of Act No. XII of 1881.); (Vol 10) 1923 Cal 433 (434); 50 Cal 79. (Decision in a proceeding under S. 106, Bengal Tenancy Act, that defendant was tenant.); (Vol 13) 1926 Oudh 72 (73). (Partition proceedings — Dispute settled definitely by Revenue Court sitting as a Civil Court cannot be opened again in a Civil Court); (Vol 11) 1924 Oudh 245 (247). (Decision of Revenue Court in redemption proceedings bars civil suit for redemption later on.)

[7] Revenue Court — Decision under S. 62 of Oudh Rent Act — Decision operates as *res judicata* in subsequent suit in another Revenue Court. (1915) 27 Ind Cas 525 (525) (Oudh).

[8] Decision of Revenue Officer regarding question of title when he could have tried but did not as Civil Court, is not *res judicata*. (Vol 13) 1926 Lah 178 (178, 179).

[9] Clause (b) of S. 96 of Act XII of 1881 gives to order of Revenue Court same effect as judgment of Civil Court. (1896) 18 All 270 (275) (FB).

[10] Revenue Court not empowered to decide suit in respect of grove under the Agra Tenancy Act, 1901—Its decision relating to grove does not operate as *res judicata*. (Vol 3) 1916 All 50 (51).

[11] Revenue Court having no jurisdiction to go into question of authority of agent to grant lease—Incidental expression on that point by Court is not *res judicata*. (Vol 1) 1914 All 135 (141).

[12] Revenue Court having no jurisdiction to decide whether land is Lakheraj or not—Decision on the point is not *res judicata* in subsequent suit. (1910) 5 Ind Cas 133 (134, 135) (Cal).

[13] Decision of Revenue Court as to genuineness of counterpart of lease, is no bar to suit in Civil Court for declaration that the document is not genuine. (1903) 25 All 138 (140, 141).

[14] Finding by Civil Court as to existence of any right in landlord is not *res judicata* in subsequent suit in Revenue Court—But if right is embodied in decree it operates as *res judicata*. (Vol 5) 1918 Mad 222 (223).

[15] Suit for accounts as trustee and agent for period of agency dismissed — Suit in Revenue Court for profits for same period cannot be allowed. (Vol 19) 1932 All 178 (182).

[16] Suit for ejectment in Revenue Court — Defendants successfully pleading want of jurisdiction to that Court cannot be allowed to raise the plea subsequently that the Civil Court has no jurisdiction. (Vol 14) 1927 All 711 (712).

[17] Decision of Revenue Court even if wrong operates as *res judicata*. (Vol 7) 1920 Oudh 302 (304); 23 Oudh Cas 269.

12. Jurisdiction—Pecuniary and relating to subject-matter.—[1] Concurrent jurisdiction in pecuniary limits and subject-matter is necessary for *res judicata*. (Vol 4) 1917 Nag 107 (108); (Vol 14) 1927 All 297 (298);

49 All 543; (1889) 13 Bom 224 (228); (Vol 13) 1926 Mad 829 (830); (1906) 29 Mad 65 (68); (Vol 32) 1945 Nag 171 (173); I. L. R. (1945) Nag 134.

[2] Previous decision by Court not having pecuniary jurisdiction to try subsequent suit does not operate as *res judicata*. (Vol 17) 1930 Lah 501 (503); (Vol 17) 1930 All 430 (431); (Vol 29) 1942 Cal 571 (574); I L R (1942) 2 Cal 363; (Vol 6) 1919 Lah 18 (18); 1919 Pun Re No. 87; (Vol 11) 1924 Oudh 147 (149).

[3] Court in previous suit not having pecuniary jurisdiction to try subsequent suit — S. 11, though in terms does not apply, general principle of *res judicata* applies. (Vol 28) 1941 Nag 346 (349); (Vol 12) 1925 Mad 1270 (1273).

[But see (Vol 23) 1936 Mad 951 (953).]

[4] Decision by Munsif does not operate as *res judicata* in suit triable by Subordinate Judge. (Vol 7) 1920 Cal 407 (408); (Vol 16) 1929 Lah 781 (782); (Vol 30) 1943 Oudh 53 (60); 18 Luck 220; (Vol 28) 1941 Oudh 429 (432).

[5] Decision by Munsif having powers up to Rs. 1000—Second suit for Rs. 1100 in Court of Munsif having powers up to Rs. 2000 — Second suit is not barred. (Vol 9) 1922 Cal 138 (139, 140).

[6] Plaintiff valuing suit for jurisdiction—Suit dismissed—He cannot avoid effect of S. 11 by overvaluing subsequent suit. (Vol 30) 1943 Pesh 37 (37) * (Vol 15) 1928 All 127 (128) * (Vol 4) 1917 Pat 409 (410).

[7] Bar of *res judicata* cannot be got over by adding untenable claim. (Vol 13) 1926 Mad 829 (830) * (1911) 21 Mad L Jour 154 (155).

[8] Application of *res judicata* cannot be avoided by joining several causes of action and thus instituting suit in superior Court. (Vol 6) 1919 Nag 25 (26); 16 Nag L R 91 * (Vol 22) 1935 Cal 792 (797, 798) * (1913) 25 Mad L Jour 379 (384, 385).

[9] Suit as to portion decided—Decision is *res judicata* though by addition of some property the suit is beyond jurisdiction of former Court. (Vol 21) 1934 Pesh 7 (8) * (Vol 15) 1928 All 714 (716); 50 All 306 * (Vol 11) 1924 All 849 (850) * (1938) 67 Cal L Jour 223 (227, 223, 229) * (Vol 19) 1932 Cal 162 (162, 163) * (Vol 22) 1935 Lah 391 (394); 17 Lah 20.

[10] Principle that causes of action in subsequent suit may be split up to determine competency of earlier Court is too wide (*obiter*). (Vol 13) 1926 Nag 234 (235).

[11] Jurisdiction—Court trying first suit having jurisdiction to try only the particular issue in the second suit but not the whole suit—Decision in the previous suit on that particular issue is *res judicata*. (Vol 14) 1927 Mad 273 (275).

[12] Decision of Small Cause Court as regards actual subject-matter is *res judicata* although not as regards question of title. (Vol 14) 1927 Mad 96 (96).

[13] Suit transferred from Small Cause Court to that of Munsif—Munsif's decision is not appealable but is not '*res judicata*' for other suits not cognizable by Small Cause Court. (Vol 1) 1914 All 229 (230).

[14] Decision of officer as Small Cause Court is not *res judicata* in original suit tried by same Officer. (Vol 9) 1922 All 241 (243) * (Vol 11) 1924 Bom 454 (454); 48 Bom 541.

[15] It is not necessary that the two Courts must have concurrent territorial jurisdiction. (Vol 19) 1932 All 660 (661); 54 All 824 * (Vol 26) 1939 All 202 (202, 203) * (Vol 12) 1925 Mad 1167 (1167).

[16] British Indian Court's judgment, is not *res judicata* in foreign Court (Vol 3) 1916 P. C. 136 (138) (P. C.) * (Vol 1) 1914 All 514 (515, 516); 37 All 1.

[But see (1889) 13 Bom 224 (227).]

[17] Section 13, Civil P. C. provides that a foreign judgment may operate as '*res judicata*'. (Vol 25) 1933 Bom 173 (175); I. L. R. (1933) Bom 16.

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[18] *Res judicata*—Foreign judgment is subject to same condition as one of Court in British India. (Vol 5) 1918 Low Bur 80 (31) : 9 Low Bur 103.

[19] It cannot be said that every issue decided by foreign Court is binding upon British Indian Court. (Vol 16) 1929 Lah 627 (630)* (Vol 15) 1928 Mad 327 (336) : 51 Mad 720.

[20] Immovable property situate in British India—Adjudication with respect to it by a non-British Indian Court is not *res judicata*. (Vol 15) 1928 Mad 327 (333): 51 Mad 720* (Vol 16) 1929 Lah 627 (629).

13. Constructive *res judicata*—Explanation IV. —[1] The doctrine of constructive *res judicata* must not be extended beyond the strict limits of S. 11. (Vol 4) 1917 Pat 47 (49).

[2] Explanation 4 cannot be given effect to unless all conditions mentioned in S. 11 are fulfilled. (Vol 17) 1930 Mad 264 (267).

[3] The principle of constructive *res judicata* does not depend on convenience of parties about taking certain pleas. If the Court finds that there is a plea which if taken by a party would have defeated the suit as brought and such plea is not taken, that plea must be held as one which ought to have been taken and will be barred in a subsequent suit. (Vol 29) 1942 Oudh 354 (356).

[4] Explanation 4 applies to interlocutory proceedings in same suit. (Vol 17) 1930 Bom 431 (433) : 54 Bom 696.

[5] Rule of constructive *res judicata* must be distinguished from rule in O. 2, R. 2. The latter requires that the whole claim which has arisen at the date of the suit out of the cause of action should be included in the suit so as to avoid splitting of claim arising out of the same cause of action, while the former enjoins that every ground which could and ought to have been urged in support of the claims actually made in the suit shall be deemed to have been adjudicated upon therein whether it was actually raised or not. (1903) 26 Mad 760 (767).

[6] Even if the matter is not actually heard and finally decided, any matter that is constructively in issue in a previous suit operates as '*res judicata*' in a subsequent suit. (1929) 11 Lah L Jour 97 (98, 99) ; (1911) 11 Ind Cas 127 (128) (Cal) ; (Vol 3) 1916 Lah 315 (315). (Matter conceded in previous suit — Implied finding—Subsequent suit is barred.) * (Vol 1) 1914 Mad 399 (414) : 37 Mad 70 * (Vol 10) 1923 Oudh 242 (244) ; (1911) 14 Oudh Cas 117 (118).

[See also (Vol 8) 1921 Bom 195 (196) : 45 Bom 24. (Matter not actually decided by Court can be *res judicata* only if Explan. 4 applies.) * (Vol 26) 1939 Mad 94 (94, 95).]

[7] Where the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been but was not raised, that defence must be deemed to have been finally decided. (1909) 9 Cal L Jour 362 (363, 364) ; (Vol 29) 1942 All 410 (421) : ILR (1942) All 624. (Identity of issues and not identity of subject-matter is relevant: (Vol 18) 1931 All 73, overruled.) ; (Vol 14) 1927 All 206 (207) * (1935) 61 Cal L Jour 301 (303) * (Vol 31) 1944 Oudh 94 (99) : 19 Luck 428 ; (Vol 10) 1923 Rang 239 (240) : 1 Rang 363.

[8] Explanation 4 has no application when matter in question has been expressly made ground of defence but has not been decided. (Vol 18) 1931 Oudh 157 (158)* (Vol 24) 1937 Lah 404 (407, 408) ; (Vol 16) 1929 Bom 323 (325). (Partition—Two lands kept undivided — Suit for partition of one—Another not included — Inclusion suggested but point not decided — Subsequent suit to recover share in other is not barred by *res judicata*.) * (Vol 26) 1939 Cal 1 (3). (Point raised but neither put in issue nor argued.)

[See (Vol 26) 1939 Mad 818 (824). (Explanation does not apply where there is express order of Court that matter would be left open)]

[But see (Vol 25) 1938 Pat 427 (429). (Submitted wrong.)]

[9] Applicability of Explan. 4 depends upon the particular facts of each case. (Vol 15) 1928 Oudh 411 (413)* (Vol 7) 1920 Nag 177 (178) * (Vol 4) 1917 Sind 93 (94) : 10 Sind L R 29.

[10] Plea of 'constructive' *res judicata* must be determined only with reference to the suit as framed and not with reference to what under the law the suit must have been. (Vol 26) 1939 Mad 70 (75).

[11] Section 11, Suits Valuation Act and S. 21, Civil P. C., propound that unless objection to the pecuniary or territorial jurisdiction of a Court is taken by the parties at the earliest opportunity, the principle of constructive *res judicata* will apply. (Vol 25) 1938 Mad 257 (262).

[12] Plea disallowed on ground of its being raised late—*Res judicata* applies. (Vol 13) 1926 Cal 511 (511).

14. Alternative claims or reliefs.—[1] The ordinary rule is that an alternative claim need not be added if there would be a distinct incongruity between the two claims. (Vol 32) 1945 Lah 210 (211).

[2] When a prior case has become *res judicata*, the party cannot claim to plead alternative reliefs in the subsequent suit, as such relief ought to have been claimed in the previous suit alone. (Vol 18) 1931 Mad 268 (269).

[3] Where a person failed to assert in the alternative a claim to share, and his claim for the whole is dismissed he or his heirs are precluded from claiming the share (Vol 11) 1924 Mad 711 (712).

[4] In a prior suit plaintiff based his claim on a personal contract with defendant for the supply of boats at an agreed rate and on failing to prove that agreement brought this suit for recovery of the same money as compensation for services rendered. Held, that the second suit was barred as *res judicata*. The matter directly and substantially in issue in the first suit was whether the defendant owed the plaintiff any sum on account of the use by him of the plaintiff's boats. The ground in the second suit ought to have been taken as an alternative in the first suit in the event of a direct contract not being proved. (1912) 15 Ind Cas 374 (375) (Low Bur).

[5] Where a suit claiming relief, alternatively against A and B is decreed against B who prefers an appeal, and the appeal is allowed, a subsequent suit against A for the same reliefs is not barred by *res judicata*. (Vol 5) 1918 Cal 223 (225).

[6] Suit on breach of contract of sale — Brokers joined on defendant's contention — No relief claimed against brokers — Suit dismissed — Fresh suit against brokers-defendants — Held (*Per Pratt J. C.*) Suit is barred as plaintiff should have claimed relief in alternative against broker in previous suit—Held (*Per Crouch, A. J. C. contra*) Suit is not barred. (Vol 4) 1917 Sind 93 (94) : 10 Sind L R 29.

[7] In a suit for divorce, there was no alternative plea that the marriage had long ceased to exist. Held that, the plea of non-existence of marriage was not barred in a subsequent suit, as such an alternative plea was not a necessary plea. (Vol 28) 1941 Rang 118 (120) : 1941 Rang L R 14.

15. Causes of action.—[1] Suit for ejectment by A, assignee of kanomdar against tenant R—N, another assignee of kanom interest, attempting to get possession in collusion with R — N made party to ejectment suit and relief claimed against him — Suit dismissed, as no collusion was found and as N was found in possession — Subsequent suit by A based on title—Subsequent suit held not barred, because the causes of action are distinct — Question of title held could not have been raised in.

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previous suit as *N* was added only in position of tenant. (Vol 24) 1937 Mad 804 (805).

[2] Suit for possession based on false cause of action—True cause of action known to plaintiff not put forth—Subsequent suit based on true cause of action is barred. (Vol 7) 1920 Nag 37 (38).

[3] A person is not bound to sue on an alternative cause of action and failure to do so in the former suit does not bar subsequent suit. (Vol 14) 1927 Nag 322 (322).

[4] Mortgagee applying for removal of mortgagor from possession—Court rejecting application not thinking fit to eject mortgagor at that stage—Another application by mortgagee at another stage for removal of mortgagor held not barred by constructive *res judicata* as there was no decision on the point at the time of rejection. (Vol 25) 1938 Mad 325 (326).

16. Grounds of attack.—[1] Where a plaintiff having striven to establish his claim by one means failed, he cannot establish that claim by other means which previously were equally at his command. (1909) 1 Ind Cas 808 (810) (Cal).

[2] Plaintiff suing for redemption as karnavan—On failure, suit as successor for same relief will be barred. (Vol 7) 1920 Mad 900 (900).

[3] Suit by plaintiff in Revenue Court for ejectment on ground of sub-tenancy of defendant dismissed—Subsequent suit by plaintiff in Civil Court on ground of trespass is barred. (1912) 13 Ind Cas 634 (635, 636) (All).

[4] Previous suit for ejectment on ground of defendant being trespasser dismissed—Subsequent suit on ground of defendant being under-raiyat is barred. (Vol 17) 1930 Cal 690 (691).

[5] Where plaintiff sued the defendant in 1902 for ejectment and for possession of a certain room in a house used as a temple without setting out his title as manager of the temple, and the suit was dismissed on the ground that he did not sue in his capacity as manager, a subsequent suit by plaintiff for the same relief based on his right as manager is barred since he might and ought to have put forward his right as manager in the previous suit. (1910) 34 Bom 416 (419).

[6] Point for decision in subsequent suit same as in former suit—Subsequent suit based on different relationship which could have been but was not set up in former suit—Subsequent suit is barred. (1913) 1913 Pun L R No. 324 p. 1085 (1088); 1913 Pun Re No. 86.

[7] The validity of certain conveyances to a registered company was established in a suit against the company and others by the plaintiff who subsequently brought another suit against the same parties for a declaration that the company was not duly incorporated and that the property conveyed to it should be transferred to the persons "entitled to the same". *Held*, that the question of the validity of the incorporation of the company might and ought to have been made a ground of attack by plaintiff in the former suit and that the subsequent suit for the purpose was barred by *res judicata*. (1913) 40 Cal 1 (19, 20); 39 Ind App 237 (P C).

[8] A creditor filed a suit against the widow and the reversioner. The suit against the reversioner was dismissed but it was decreed against the widow. The subsequent suit was brought against the reversioner for recovering widow's debt. *Held*, that the "matter" ought to have been made a ground of attack in the former suit and therefore was barred by *res judicata*. (1893) 20 Cal 79 (85, 86); 19 Ind App 234 (P C).

[9] Previous suit as legatee of wife of *S*—Suit dismissed as testator was not owner—Subsequent suit against same defendants as owner claiming as legatee and principally as heir of *S*—Suit held barred by *res*

judicata. (Vol 30) 1943 Sind 251 (253); ILR (1943) Kar 386.

[10] In the application to set aside an execution sale the legal representatives of the judgment-debtor contended that the judgment-debtor had died before decree but did not allege that the judgment-debtor had died after decree but before attachment a contention on which they based their subsequent suit to set aside the sale:

Held that the suit was barred by *res judicata*. (Vol 6) 1919 Cal 411 (413).

[11] Suit for possession of land dismissed—Subsequent suit for same land on different title is barred. (Vol 5) 1918 Cal 535 (536).

[12] Where the defendant Railway Company failed to deliver certain parcels consigned by the plaintiff and the plaintiff filed suits for damages for non-delivery which suit failed a subsequent suit for delivery of goods is barred. (Vol 11) 1924 All 849 (850).

[13] Failure by joint Hindu father to take possible plea does not entitle son to plead that he was not properly represented. (Vol 19) 1932 Nag 90 (92).

[14] Where the plaintiff in the previous suit based his claim on nearness of kin but did not mention family custom but for which nearness could not be proved and the suit was dismissed on merits he cannot bring a fresh suit based on family custom. (Vol 12) 1925 P C 55 (57); 47 All 158; 52 Ind App 100; 27 Oudh Cas 334 (P C).

[15] Previous suit does not operate as *res judicata* when grounds of attack in both suits are incongruous and evidence to support one ground of attack is destructive of alternative ground. (Vol 18) 1931 Bom 187 (189).

[16] Suit by *N* against step-mother *J* for declaration that he was exclusive owner of property left by his father *F* on ground that *J* had been divorced by *F*—Suit dismissed—Subsequent suit for declaration that *J* was entitled only to one-fifth share in lieu of maintenance and not to one-half held barred as the ground of action ought to have been taken as a ground of attack in previous suit. (Vol 24) 1937 Lah 872 (874); I L R (1937) Lah 496.

[17] Where one of the members of a joint family challenged a sale of a property on ground that the property belonged to him on partition, and his suit was dismissed, he cannot, in a subsequent suit say that the debt in connection with which the house was sold, was incurred for illegal purpose. (Vol 25) 1938 Lah 443 (444); I L R (1938) Lah 729.

[18] A certain suit was compromised by the guardian ad litem and a consent decree was passed. Then the minor sued by his next friend to have the consent decree set aside on the ground of fraud of guardian ad litem, and it was dismissed. The minor on attaining majority again sued to set aside the consent decree on the ground that the sanction of the Court was not obtained for the compromise. *Held* the suit was barred for this plea ought to have been raised in the former suit by next friend. (1898) 21 Mad 91 (99).

[19] Where the plaintiff in former suit admitted that no portion of the land in suit was included within her taluk but that she had acquired title to it as *taufir* lands and her suit was dismissed the plaintiff cannot in a subsequent suit fall back upon the other title and claim the land as included in her taluk. (1873) 11 Beng L R 158 (167, 168) (P C).

[20] Prior suit by transferee of pro-note against executant and assignor dismissed—Second suit by transferee against assignor alone for damages is barred. (Vol 16) 1929 Oudh 172 (174); 4 Luck 603 (FB).

17 Grounds of defence.—[1] If a defence might and ought to have been taken in a previous suit but was not taken, it cannot be raised in a subsequent suit, being barred as constructive *res judicata*. (1909) 10 Cal L Jour 527 (532) * (Vol 25) 1938 All 542 (544) * (Vol 19)

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1932 Cal 889 (892, 893); 59 Cal 985* (1935) 157 Ind Cas 363 (369) (Lah) * (Vol 1) 1914 Sind 24 (24, 25) : 8 Sind L R 218. (Suit for water-rate decreed—Second suit for injunction restraining defendants from tapping water-course—Plea that it belonged to Government not being raised in first suit is *res judicata*.)

[2] A party having several grounds of defence to the claim in suit is bound to set forth all such grounds. Ground not so taken will operate as *res judicata*. (1911) 10 Ind Cas 29 (31, 32) (Oudh) * (Vol 11) 1921 Cal 138 (139) * (Vol 13) 1926 Lah 182 (183) : 7 Lah 40 * (Vol 11) 1924 Lah 53 (53). (Plea which if raised would have been fatal to prior suit but were not taken cannot be raised in subsequent suit.)

[3] As illustrations of grounds of defence see the undermentioned cases: (Vol 32) 1945 P C 132 (133) : I L R (1945) Kar 299. (In previous suit between same parties plaintiff claiming half share in entire income from offerings made to idol—Plaintiff's title upheld—Defence in subsequent suit that plaintiff was entitled to half share in income of one portion only of offerings held barred.) * (Vol 24) 1937 All 251 (253). (Defence that Court in which suit is filed has no jurisdiction to entertain it not taken—It cannot be raised subsequently.) * (Vol 14) 1927 All 799 (799) : 50 All 28. (Parties carrying on mutual and common account—Defendant's suit based on such account in Small Cause Court decreed *ex parte* against plaintiff—Subsequent suit by plaintiff based on an account due from defendant is barred.) * (Vol 14) 1927 All 39 (41) : 48 All 803. (Suit for recovery of share against Mahomedan widow, in possession, in lieu of dower—Widow not claiming interest on dower—Claim to interest by her representatives subsequently, is barred.) * (Vol 13) 1926 Bom 481 (488). (Objection regarding jurisdiction.) * (1904) 31 Cal 79 (82). (Suit by A against B for declaration of his title of moiety of garden purchased from ancestors of B and for partition decreed *ex parte*—Subsequent suit by B to set aside sale—Question of validity of sale held barred by *res judicata*.) * (Vol 24) 1937 Lah 537 (541) : I L R (1937) Lah 209. (Decree passed without Court being appraised of compromise entered into by parties before decree—Subsequent suit by defendant for declaring compromise binding on plaintiff is barred.) * (Vol 11) 1924 Lah 423 (424). (A purchasing share in house alleged to have belonged to B and suing C for rent—B alleging that A did not purchase share but no plea that share did not belong to B taken—Question as to ownership of B in share is *res judicata*.) * (Vol 19) 1932 Mad 381 (385) : 55 Mad 558. (In prior suit finding that A owed B certain sum on pro-note and no objection raised regarding it—In subsequent suit between A's son and B question whether consideration passed for said pro-note is *res judicata*.) * (Vol 13) 1926 Mad 1144 (1144). (Party not entitled to appeal but in a position to file cross-objection is barred by *res judicata*.) * (Vol 27) 1940 Nag 396 (398, 399). (In suit by transferee from Hindu widow for profits lambardar admitting transfer—Subsequent suit against transferee by lambardar as reversioner of estate for possession is barred.) * (1938) 174 Ind Cas 777 (777) (Nag). (Former suit by plaintiff for possession based on title—Defendants successfully claiming exclusive possession as heirs—Subsequent suit by plaintiff for joint possession of same property as co-sharer is barred.) * (Vol 14) 1927 Oudh 234 (235). (Prior suit for possession on basis of gift decreed—Subsequent suit questioning donor's right to make gift is barred.) * (Vol 22) 1935 Pesh 150 (151). (Plea of defendant in prior suit that she was heir to certain property under Customary law decided against her—Subsequent suit by her claiming same property basing her title on Mahomedan law is barred by *res judicata*.)

[4] Ground of defence must be necessary for purposes of claim actually made in previous suit. (Vol 28) 1941 Cal 574 (576) * (1906) 30 Bom 395 (402) * (Vol 1) 1914 Lah 452 (453) : 1914 Pun Re No. 29. (Where a plea if established would have been complete answer to former suit, it would be deemed to have been adjudicated upon, against defendant.)

[5] Failure to plead set-off or counter claim does not bar fresh suit for the claim. (Vol 13) 1926 Mad 1020 (1021) * (Vol 10) 1923 Lah 146 (146) * (Vol 6) 1919 Lah 220 (220) : 1919 Pun Re No. 74 * (Vol 12) 1925 Mad 830 (831). (Defendant having a cross demand against plaintiff but failing to have it tried—Plaintiff giving some credit in respect of it and decree passed on that footing—Defendant's claim is not *res judicata*.) * (Vol 2) 1915 Mad 1213 (1213) * (Vol 24) 1937 Oudh 394 (395) : 13 Luck 323.

[6] Suit by reversioner against widow and transferees from her—Subsequent similar suit against transferees in respect of other portions of estate—Defendants' failure in previous suit to plead that plaintiff was not next reversioner does not bar that plea in the subsequent suit. (Vol 12) 1925 All 535 (536) : 47 All 929.

[7] Defence given up for decision in another suit subsequently brought and pending—Decision on that point though implied acts as *res judicata*. (Vol 21) 1934 Mad 68 (70).

18. Mesne profits. — [1] Mesne profits prior to suit, though not claimed in a suit for possession can be separately sued for. (Vol 11) 1924 Bom 368 (368).

[2] Future mesne profits not claimed in suit for possession—Subsequent suit for such mesne profits is not barred. (Vol 12) 1925 Pat 145 (147).

[3] Partition suit—Future mesne profits prayed for—Plaintiff neglecting to see that proper provision is made in decree—He cannot make such claim afterwards. (Vol 19) 1932 Bom 222 (224) : 56 Bom 292.

19. "Might".—[1] Whether any matter might and ought to have been made a ground of attack or defence depends upon the fact whether the matters in the two suits are so dissimilar that their union might lead to confusion. (1911) 35 Bom 507 (509).

[2] Person joined as party in former suit and decree passed in his presence—Subsequent suit by such person raising point which could have been taken in former suit is barred by *res judicata*. (Vol 20) 1933 Pat 526 (528).

[3] Decree against dead man—Legal representatives brought on record in execution not pleading abatement—Subsequent suit by legal representative that decree is nullity is not barred. (Vol 10) 1923 Mad 212 (214).

[4] Redemption suit—Claim for mesne profits withdrawn—Suit for mesne profits from date of payment under decree to delivery of possession is not barred. (Vol 13) 1926 Cal 178 (178).

[5] Where a plea of reversionary right by a mortgagee in a redemption suit by the transferee from a widow was overruled on the ground that it was not raised in the first Court, a subsequent suit by the mortgagee after the widow's death claiming reversionary title is not barred by *res judicata* as the previous suit did not finally decide that the latter was not the reversionary heir. Explanation 4 of S. 11, Civil P. C. does not apply as the mortgagee could not have resisted the suit for redemption during the widow's lifetime. (1913) 1913 Pun L R No. 82, p. 310 (314, 315, 319) : 1913 Pun Re No. 87.

[6] Mahomedan widow in possession in lieu of dower sued for recovery of share by other heir—Interest on dower not claimed by widow—In a subsequent suit against her representative, claim to such interest is barred. (Vol 17) 1930 P C 177 (178) : 52 All 272 : 57 Ind App 181 (P C).

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[7] Alienation by Hindu father set aside in a suit by sons on their depositing a certain sum — Purchaser's suit for refund of balance of purchase money is not barred. (Vol 14) 1927 All 421 (421, 422).

[8] A pre-emption decree was obtained in respect of property which had been sold free of charge with a covenant by the vendor to discharge previous mortgages. The vendee then purchased the previous mortgages and put them in a suit. It was held the suit was maintainable though the previous mortgages had not been put forward in the pre-emption suit, as a plea regarding them could not be the subject of a pre-emption suit. (1912) 17 Ind Cas 318 (320) (Oudh).

[9] Mortgage—Sale of mortgaged property — Suit by purchaser for redemption — Mortgagee entitled to pre-emption — Failure to put forward claim in redemption suit does not bar subsequent suit for pre-emption. (1904) 26 All 61 (65, 67, 68) (F B). (1 All 75; 1 All 816; 3 All 189 and 20 All 516, overruled.)

20. Knowledge of facts.—[1] Party sought to be estopped must be shown to have knowledge of facts necessary to raise issue in former suit. (Vol 32) 1945 Nag 288 (289) : 1 L R (1945) Nag 1005 * (Vol 16) 1929 All 400 (402, 403) * (Vol 4) 1917 Lah 19 (21) : 1916 Pun Re No. 94. (Subsequent suit for possession on exclusive title—Plaintiff devoid of its knowledge in previous suit—Suit not barred.) * (1909) 5 Nag L R 189 (189, 191, 192) * (1911) 10 Ind Cas 991 (993) (Upp Bur).

[2] Plea not raised for want of knowledge — Fact with due diligence could have been discovered — Plea is barred by *res judicata*. (Vol 28) 1941 Nag 346 (349).

[3] Suppression of facts in previous suit—Same facts cannot be used again to defeat the claim of others. (Vol 13) 1926 Lah 603 (604) : 8 Lah 15.

[4] When failure to plead specific cause of action is due to wrong view of law, Expl. 4 will apply. (Vol 16) 1929 All 400 (402, 403). (Sub-mortgagee wrongly suing as assignee of mortgagee — His subsequent suit as sub-mortgagee will be barred.)

21. Pleas not permitted by law. — [1] The failure by a defendant to raise a ground of defence which he cannot lawfully raise in a particular suit does not debar him from subsequently suing on that ground. (Vol 12) 1925 Oudh 719 (720) ; (Vol 7) 1920 Cal 888 (889).

[See also (Vol 14) 1927 All 505 (506) : 49 All 918.]

[2] Suit for declaration that decree is null and void — Omission to ask for restitution — Right is not relinquished — Subsequent application is maintainable. (Vol 6) 1919 Sind 79 (79) : 15 Sind L R 153.

22. Pleas based on facts not in existence.—[1] Prior declaratory suit when plaintiffs' title by adverse possession not matured — Subsequent suit on basis of adverse possession is not barred. (Vol 13) 1926 Lah 668 (669) ; (1911) 33 All 463 (465).

[2] Non-transferable occupancy holding — Mortgage of—Landlord settling land with stranger, treating it to be abandoned by raiyat's widow — Mortgagee suing stranger — Widow found not to have abandoned — Mortgagee subsequently obtaining possession after purchase in execution of his mortgage-decree — Widow of raiyat remaining in permissive possession of homestead — Abandonment held complete — Stranger's imperfect title held became perfect by S. 43, T. P. Act — Stranger's suit for possession held not barred by *res judicata* as the cause of action and fact of abandonment came into existence after the decision of the prior suit. (Vol 21) 1934 Cal 82 (84).

[3] Trust suit — Previous suit for formation of a scheme — Subsequent suit for modification of scheme based on events happening subsequent to the previous suit is maintainable — Prior events may be admitted

in evidence to consider the proposed modification. (Vol 12) 1925 Mad 1070 (1072).

23. "Ought".—[1] It is not enough that the ground of attack or defence might have been raised. It is necessary to establish that it should have been raised. (Vol 22) 1935 Lah 753 (756). (Reversing (Vol 18) 1931 Lah 217.)

[2] The word "ought" in Expl. 4 should be considered with reference to the array of parties to the previous litigation and the nature of the estate claimed. (1912) 17 Ind Cas 334 (337) (Oudh).

[3] Plea that might, but not ought to, have been raised, is not barred. (Vol 8) 1921 Lah 17 (19) ; (Vol 10) 1923 Bom 145 (145, 146) ; (Vol 12) 1925 Cal 427 (430) ; (Vol 14) 1927 Mad 120 (121) ; (Vol 14) 1927 Rang 333 (334).

[4] Defendant must be bound to raise defence. (Vol 20) 1933 Lah 279 (282) ; (Vol 26) 1939 Cal 692 (694) : ILR (1939) 2 Cal 551.

[5] Matter in subsequent suit essentially different—Subsequent suit is not barred. (Vol 16) 1929 Lah 872 (874) : 11 Lah 99.

[6] Previous suit confined to a particular right only, general right not being in question — Plea claiming general right in subsequent suit is not barred by constructive *res judicata*. (Vol 17) 1930 Mad 701 (701) : 53 Mad 761.

[7] Plea not necessary but might be made is not always *res judicata*. (Vol 2) 1915 Mad 420 (420) ; (Vol 20) 1933 Cal 793 (794). (Decree for rent—Plea of dispossession by tenant not barred.) ; (Vol 14) 1927 Lah 505 (506) : 8 Lah 308. (Plea of co-ownership found—Subsequent plea to prevent obstruction of joint user not barred.) ; (Vol 4) 1917 Lah 139 (141). (Suit to recover share of inheritance — Subsequent suit for declaration for share in decree owning interest therein was held maintainable.) ; (1912) 1912 Pun L R No. 134 p. 413 (415). (Previous suit for declaration that land was Shamlat Deh—Subsequent suit for declaration of title — Not barred.) ; (Vol 14) 1927 Mad 61 (62). (Suit by one alienee from members of joint family impleading another alienee of other items — Latter is not bound to enforce his remedy in the same suit.) ; (Vol 4) 1917 Oudh 410 (414) : 19 Oudh Cas 171. (Suit by heir against Mahomedan wife in possession for share—Claim for dower debt not set up in defence — Subsequent suit for dower debt not barred.) ; (Vol 24) 1937 Sind 155 (156).

[8] The question whether the person ought to have raised a point in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit is a question of fact. (Vol 7) 1920 Nag 177 (179) ; (1908) 31 Mad 385 (390).

[9] The test to be applied in order to determine whether a matter ought to have been made a ground of attack in a previous suit is whether the matters are so dissimilar that their union might lead to confusion. (Vol 17) 1930 Lah 487 (488) ; (Vol 10) 1923 Rang 122 (123, 124) : 11 Low Bur Rul 451.

[10] Previous claim of keittima bars subsequent claim as apatitha. (Vol 15) 1928 Rang 9 (10, 11) : 5 Rang 565 ; (Vol 20) 1933 Cal 900 (903) : 60 Cal 1158 (Reversioners are not bound to question legal necessity in suit for possession.) ; (Vol 22) 1935 Lah 489 (490). (Pre-emption suit—Subsequent suit by minor challenging sale not barred: (Vol 22) 1935 Lah 44, reversed.) ; (Test of evidence—The fact that the two claims have to be supported by evidence is not a satisfactory test.) (Vol 22) 1935 Mad 90 (90).

[11] Plea not directly relevant for the decision of the question raised in the suit need not be raised. (Vol 12) 1925 Mad 226 (226) * (Vol 16) 1929 Lah 294 (295) * (Vol 15) 1928 Lah 489 (491).

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[12] Where it is not certain that a matter would have affected the result of the suit it cannot be said that it ought to have been raised. (Vol 7) 1920 Pat 291 (322); 5 Pat L Jour 164* (1911) 9 Ind Cas 535 (586) (Cal). (A defendant who had been impleaded in a suit for declaration and possession on the ground that he had purchased a portion thereof is not bound to put forward therein a plea of under-tenancy with respect to the holding.)* (Vol 12) 1925 Lah 552 (553). (Judgment-debtor's omission to challenge liability creates no estoppel)* (1913) 9 Nag L R 143 (144). (The failure to advance a claim to pre-empt as a defendant to a suit on a mortgage is no bar to a subsequent suit for pre-emption.)

[13] Two grounds for relief not mutually destructive must be impleaded in suit—Otherwise fresh suit would be barred. (Vol 4) 1917 Mad 481 (482, 483)* (Vol 13) 1926 Oudh 545 (545). (Pre-emption suit—Pre-emptor is not bound to set up his own title.); (Vol 8) 1921 Pat 326 (327).

[14] It is not necessary to put forward a claim and also an inconsistent claim in the alternative in the same suit. (1913) 24 Mad L Jour 418 (421)* (Vol 27) 1940 Lah 27 (29)* (1928) 107 Ind Cas 110 (112) (Lah). (If its introduction would have been incongruous to the matter of that suit.)* (Vol 29) 1942 Oudh 286 (287, 288)* (1909) 12 Oudh Cas 347 (358). (Suit on title—Inconsistent titles need not be set up—9 Oudh Cas 235, overruled.)

[15] Minor through guardian though bound to object to validity of alienation by father omitting to do so in previous suit—He cannot reopen matter in subsequent suit. (Vol 22) 1933 Lah 44 (46). (Reversed on another point in (Vol 22) 1935 Lah 489.)

[16] Suit for mere declaration—Possession not asked—Subsequent suit for possession is barred as the relief of possession should have been asked in the former suit. (Vol 9) 1922 Nag 129 (134); 21 Nag L R 124.

[17] Suit on agreement for arrears of maintenance—Second suit—Plaintiff not entitled to rely on events prior to former suit. (1912) 1912 Mad W N 182 (182, 183).

[18] Suit for rent against four defendants—Defence that plaintiff alone cannot sue as there are other co-sharers held not barred by *res judicata*. (Vol 31) 1944 Oudh 281 (282).

[19] Validity of will disputed in prior suit—Plea against specific provision of will not necessary in it—Subsequent suit against that specific provision will not be barred. (Vol 15) 1928 Lah 967 (969); 10 Lah 389.

[20] Suit for recovery of money, by lessor of right to receive offerings at temple, on basis of a *kabuliyat*—Suit decreed—Subsequent suit for recovery of money for another period on the basis of same *kabuliyat*—Lessee pleading that the right being not transferable transfer was void—Lessee ought to have taken plea in previous suit, hence defence is barred. (Vol 15) 1928 All 721 (723); 50 All 394.

[21] Suit for specific performance of a contract of sale—Relief as to possession need not be asked. (Vol 12) 1925 Bom 181 (182).

[22] First suit on title by purchase—Second suit on title by inheritance—Second suit is barred. (Vol 10) 1923 Mad 257 (259); 46 Mad 135.

[23] A plea that an alienation is valid on the ground that the next reversioner has given consent ought to have been raised in a prior suit for declaration of the invalidity of the alienation and could not be set up in a subsequent suit for possession. (1909) 3 Ind Cas 117 (121) (All).

[24] Plaintiff suing to recover property from defendants alleging his reversionary right to the last male holder—Another suit against same defendants regarding the same property as reversioner of the female

holder in possession is barred. (Vol 13) 1926 Mad 234 (234).

24. Partition suits.—[1] That generally only one suit for partition will lie represents settled law. (Vol 10) 1923 Mad 584 (584).

[See however (Vol 7) 1920 Cal 108 (109).]

[2] Partition suit should comprise all properties though situated in different jurisdiction so far as their existence is known at the date of the plaint. (Vol 10) 1923 Mad 584 (584, 585)* (1883) 7 Bom 272 (278).

[3] Property omitted by a mistake in partition suit—Subsequent partition suit is not barred. (Vol 21) 1934 Oudh 293 (295)* (Vol 18) 1931 Sind 27 (27).

[4] Claim that ought to have been but was not raised in partition proceedings—Separate suit does not lie. (Vol 9) 1922 Bom 119 (120, 121); 46 Bom 327* (Vol 25) 1938 Lah 671 (673)* (Vol 13) 1926 Oudh 509 (510, 511); 1 Luck 210. (Plea of irredeemable mortgage if not raised in previous partition proceeding is barred.)

[5] Though, ordinarily, it may be convenient that all questions, relating to the administration of the affairs of the family, should be settled in a partition suit, there is no principle of law which prevents the coparceners from restricting the scope of the suit to what may be necessary for the grant of the relief claimed by the plaintiff. (Vol 26) 1939 Mad 70 (74).

[6] Suit for possession of specific portion of the holding on allegation of partition—Allegation found against plaintiff—Subsequent suit for partition of the whole holding is neither barred by S. 11 nor by O. 2, R. 2. (Vol 8) 1921 Low Bur 13 (15); 11 Low Bur Rul 1.

[7] Where first suit to enforce partition effected by father is dismissed a second suit for partition after father's death is not barred because cause of action in prior suit was partition deed executed by father and there was no obligation on plaintiff to sue in the alternative for partition though he certainly might have done so if he liked—Again, when he realised his mistake and asked for leave to amend which was refused, it becomes the direct cause of omission from the suit. (Vol 10) 1923 Bom 467 (468).

25. Suits based on title.—[1] Suit for possession of land dismissed—Subsequent suit for same land on different title is barred. (Vol 5) 1918 Cal 535 (536).

[2] Dismissal of a suit in which the claim to recover property was based on survivorship will bar a suit based on reversionary right. The plaintiffs ought to have pleaded their heirship as a ground of title. (1901) 25 Bom 189 (197).

[3] Later suit based on different title and cause of action and relating to different property—Alternative ground of title not pleaded in previous suit is not barred by *res judicata*—Previous suit is not *res judicata*. (Vol 10) 1923 All 176 (179); 45 All 59.

[4] Omission to claim right of way alternatively in title suit does not bar separate suit for that relief. (Vol 7) 1920 Cal 600 (601).

[5] Suit on title against defendant decreed—Plaintiff taking possession under decree but dispossessed by defendant—Plaintiff suing again for possession—Defendant's plea of thekadari rights of possession is barred by S. 11. (Vol 14) 1927 Oudh 341 (344).

26. Directly and substantially in issue.—[1] When question is directly and substantially in issue between same parties in prior suit it operates as *res judicata* in a subsequent suit. (Vol 0) 1933 Cal 923 (923); 60 Cal 1171; (Vol 15) 1928 All 62 (64). (Two or three issues in a suit—One or some of them decided—Second suit on same grounds but some more reliefs claimed—Finding in the former suit is '*res judicata*.') (Vol 11) 1924 Bom 118 (119); (1913) 37 Bom 224 (230); (Vol 12) 1925 Cal 985 (986, 988); (1909) 13 Cal W N 281 (284); (Vol 25) 1938 Pat 306 (307); 17 Pat 451 (SB).

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[2] Decision on a point not directly and substantially in issue cannot operate as *res judicata* in a subsequent suit. (Vol 15) 1928 Nag 169 (171); (Vol 12) 1925 All 794 (795); (Vol 10) 1923 Cal 879 (380); 50 Cal 475; (Vol 6) 1919 Cal 40 (42); (1909) 36 Cal 75 (82); (Vol 31) 1914 Mad 237 (238); (Vol 24) 1937 Mad 251 (257); ILR (1937) Mad 364. (There can be no '*res judicata*' laying down a wrong rule of law between parties for future guidance also.); (Vol 9) 1922 Oudh 251 (254); 25 Oudh Cas 157; (Vol 4) 1917 Oudh 66 (69).

[3] Subject-matter of the two suits need not be common. (Vol 14) 1927 Mad 273 (275); (Vol 10) 1923 All 613 (615); 45 All 515; (1935) 61 Cal L Jour 301 (303); (Vol 12) 1925 Oudh 390 (391); 29 Oudh Cas 93; (Vol 12) 1925 Oudh 118 (119).

[4] Matter in issue and not "subject-matter of suit," forms essential test of *res judicata*. (Vol 17) 1930 Cal 47 (50); 57 Cal 258; (Vol 20) 1933 Oudh 535 (537); 9 Luck 237.

[5] Issues must be identical and not only allied. (Vol 4) 1917 Pat 47 (49); (Vol 16) 1929 Cal 201 (202); (Vol 2) 1915 Mad 1107 (1110). (Test of application of *res judicata* is whether the issue was same, quite apart from fact that decision now would be quite different.); (Vol 10) 1923 Pat 65 (68); 2 Pat 110.

[6] The question whether a matter is directly and substantially in issue depends on whether parties and Court have dealt with the matter as if there was relief claimed in respect of it. (Vol 3) 1916 Cal 504 (505); (Vol 2) 1915 Mad 1107 (1110); (Vol 29) 1942 Oudh 309 (310); (Vol 14) 1927 Oudh 625 (626).

[7] It is not necessary that before a matter can be said to be '*res judicata*,' it should form the subject-matter of a definite issue. If the Court can gather from the material before it, namely, the pleadings, judgment and the decree, that the matter was directly and substantially in issue and formed the basis of the judgment arrived at in the earlier suit either expressly or by necessary implication, then principle of '*res judicata*' would apply. (Vol 25) 1938 Bom 291 (294); (Vol 13) 1926 Cal 1022 (1027); (1913) 20 Ind Cas 700 (700) (Cal). (The question of *res judicata* is one of substance and not of form); (1894) 21 Cal 430 (433); (Vol 24) 1937 Mad 709 (710); (Vol 6) 1919 Mad 212 (215); (1913) 1913 Mad WN 858 (861).

[8] Issue raised by parties even improperly, and decided by the Court is '*res judicata*'. (Vol 14) 1927 All 803 (804); (Vol 19) 1932 P C 50 (51).

[9 & 10] Framing of issues does not of itself make the matter to which such issues relate "directly and substantially in issue." (1895) 17 All 174 (195).

[11] Decision based on findings of two issues where finding on one issue was sufficient — Findings on both issues are *res judicata*. (Vol 2) 1915 Mad 864 (864); (Vol 12) 1925 All 546 (547); 47 All 778; (Vol 13) 1926 Cal 1003 (1004, 1005); (Vol 8) 1921 Cal 750 (753); (1897) 24 Cal 900 (906, 907); (Vol 18) 1931 Lah 335 (337); (Vol 5) 1918 Lah 250 (255, 256); 1918 Pun Re No 13; (Vol 4) 1917 Mad 299 (305).

[12] Question abandoned by plaintiff but decided by Court at express request of defendant is *res judicata*. (Vol 11) 1924 P C 144 (149); 51 Cal 631; 51 Ind App 293 (P C).

[13] Where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings, which do not go to the root of the title upon which the claim rests, cannot operate as *res judicata*, but not so if the title itself is negated. (1889) 11 All 148 (156); (Vol 16) 1929 All 29 (30, 31); (Vol 13) 1926 Pat 288 (288). (Cause of action a recurring one—Still, matter directly and substantially in issue is *res judicata*.)

[14] The right to sue for ejectment accrues from year to year. Therefore, a previous suit for ejectment does

not bar a subsequent suit for the same against the same parties. (Vol 13) 1926 All 34 (34).

[15] Where a person transfers his property and it is sold in execution of a decree against the transferor, and transferee sues under C. P. C., O. 21, R. 63 and the transferor is made defendant along with the attaching creditor, though the transferor may admit plaintiff's claim, decision against plaintiff operates as *res judicata* in subsequent suit between transferor and transferee. (Vol 12) 1925 Mad 319 (320).

[16] For illustrations of "matter directly and substantially in issue" see the following cases. (Vol 30) 1943 All 362 (363); ILR (1943) All 792. (Previous suit claiming title by adverse possession — Decision that land belonged to Government operates as *res judicata* in subsequent suit claiming easement—(Vol 29) 1942 All 405, *Reversed*). (1930) 1930 All L Jour 1569 (1570). (Suit for restitution of conjugal rights decreed in favour of husband and plea of impotency decided against defendants — Subsequent suit by wife for dissolution of marriage on ground of husband's impotency is barred.) (1908) 30 All 36 (37). (In a suit for redemption, settlement of account between parties is directly and substantially in issue and the decree directs complete and final account of what will be due to the claimant on the fixed date. The party redeeming cannot subsequently sue for profits realized by the mortgagee in possession.) (Vol 28) 1941 Bom 247 (250); ILR (1941) Bom 361. (Suit for specific performance — Subsequent suit for possession is not barred.) (1902) 26 Bom 661 (667); (Vol 22) 1935 Cal 725 (725). (Decision on question as to whether Transfer of Property Act, or Bengal Tenancy Act applies, in a previous suit for rent, operates as '*res judicata*' in a subsequent suit for possession.) (Vol 15) 1923 Cal 459 (460). (Decree in partition suit directing that some of the properties should remain joint — Subsequent suit for their partition barred.) (Vol 8) 1921 Cal 368 (375). (Decision whether particular issue arises in a suit is as much *res judicata* as decision of issue on merits.) (1886) 12 Cal 484 (493, 494); 12 Ind App 188 (P C). (Question of permanent tenure.) (Vol 11) 1924 Lah 702 (706). (Validity of mortgage is directly and substantially in issue in suit on pro-note executed in lieu of interest on mortgage.) (Vol 1) 1914 Lah 24 (26); 1914 Pun Re No. 12. (Puisne mortgagee's suit against prior mortgagee for redemption and against mortgagor for possession—Subsequent suit against mortgagor for possession.) (Vol 13) 1926 Mad 816 (820); 49 Mad 691. (Mortgage suit for sale — Right to redeem is in issue—Decree for sale bars a fresh suit for redemption.); (Vol 5) 1918 Mad 751 (754, 755). (Cause of action for partition is one and same and once it has merged in decree a second suit for partition is barred.) (Vol 2) 1915 Mad 1107 (1110). (In suits by son to set aside father's alienation before and after death of father question of purchaser's adverse possession would be same and decision operates as *res judicata*.) (Vol 21) 1934 Oudh 50 (52); 9 Luck 291. (Mortgage suit—Issue as to whether trees were included in mortgage properties necessary from pleadings — Decision that trees were not in mortgaged property acts as *res judicata*.) (Vol 17) 1930 Pat 71 (75, 76). (Suit by reversioner to set aside alienation by widow — Issue of heirship specifically raised and decided—Subsequent suit by same person on inheritance opening by death of last female owner—Issue of heirship is *res judicata*.)

[17] For illustrations of matter not "directly and substantially in issue" see the following cases. (Vol 27) 1940 P C 222 (225); ILR (1940) Kar PC 460. (Court construing award to decide main issue whether it had jurisdiction to entertain it and deciding that it had no jurisdiction—Construction of award is not *res judicata*—Decision as to jurisdiction is *res judicata* and

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not reasons therefor.) * (Vol 19) 1932 P C 126 (129). (Genuineness of mukarrari grant decided in former suit cannot form *res judicata* in subsequent suit for possession.) * (Vol 12) 1925 P C 63 (69, 70) : 52 Ind App 145 : 47 All 250 (P C). (Suit by heirs against widow for possession dismissed for non-payment of dower-debt ordered by Court to be paid by plaintiff to widow—Second suit for possession by heirs is not barred.) * (Vol 16) 1929 All 696 (697). (Suit for redemption—Possession of part of mortgaged property claimed—Subsequent suit for proportionate contribution for part owned by other party is not barred.) * (Vol 14) 1927 All 39 (40) : 48 All 803. (Prior suit against Mahomedan widow, in possession of estate in lieu of dower, for recovery of share—Conditional decree on payment of certain sum passed—Failure to pay—Subsequent suit by daughter of prior claimant claiming her share is not barred.) * (Vol 10) 1923 All 586 (590) : 45 All 581. (Ostensible vendee suing vendor for possession—Defendant pleading usufructuary mortgage in plaintiff's favour but plaintiff claiming sale—Suit decided in plaintiff's favour—Held that decree could not operate as *res judicata* on the question whether the deed was a mortgage or sale.) * (Vol 6) 1919 All 128 (134) : 41 All 538. (Suit against Mahomedan widow for recovery of property held by her in lieu of unsatisfied dower—Plaintiffs granted decree for possession on payment within specified time of their share of dower-debt—Failure by plaintiffs to make payment—Property then gifted by widow to sons and daughters of her sister's son—Suit by heirs for possession of their share after her death held not barred.) * (Vol 4) 1917 All 292 (294) : 39 All 379. (Suit on mortgage—Mortgaged property held inalienable—Certain other property attached in execution—Question of inalienability of property under attachment is not *res judicata*.) * (1907) 29 All 331 (339) : 34 Ind App 72 (P C). (Former suit for pre-emption—Subsequent suit by reversioner for recovery of property alienated by widow.) * (Vol 22) 1935 Bom 144 (148). (In a suit brought by plaintiff it was decided that sale-deeds of some lands claimed by plaintiff were bogus and therefore ownership remained with vendor—Subsequently, plaintiff filing another suit for other lands under sale-deeds—Plaintiff's title to the lands held not extinguished nor his claims in respect of those lands held barred.) * (Vol 17) 1930 Bom 132 (135) : 54 Bom 162. (Suit between co-sharers.) * (1912) 36 Bom 548 (549, 550). (First suit under general law—Second suit under special law.) * (1902) 26 Bom 25 (32). (If a thing be not directly and precisely alleged, it shall be no estoppel.) * (Vol 22) 1935 Cal 641 (642). (Where form in which the parties were arrayed in a previous suit, prevented raising of questions under consideration in a subsequent suit, the decision in the former was not bar to the subsequent suit.) * (Vol 12) 1925 Cal 225 (232). (Decision that will was "wholly valid" does not bar question as to validity of its provisions regarding succession to the shebaitship, when the only question in the previous case was about the extent of bequest that operated under will.) * (Vol 6) 1919 Cal 974 (974). (Dismissal of suit for declaration of title for survivorship is not *res judicata* on plaintiff's claim in a subsequent suit for declaration that certain alienation shall bind reversion.) * (Vol 7) 1920 Cal 373 (373). (Suit to eject defendant alleged to be under-*raiyat*—Defendant found to have protected interest under S. 160, Bengal Tenancy Act—Suit dismissed—Subsequent suit to restrain defendant from cutting trees—Question of status raised—Previous judgment held did not operate as *res judicata* as question was not directly involved.) * (Vol 6) 1919 Cal 128 (124). (Suit by plaintiff for declaration of a public right of way, alleging special damage—Previous suit for similar declaration dismissed on ground that plaintiff did

not disclose any cause of action. Held, that second suit was not barred by *res judicata*.) * (Vol 3) 1916 Cal 43 (43, 44). (Previous suit by mortgagee to remain in possession till his debt is satisfied out of the usufruct against mortgagor does not bar a subsequent suit for redemption.) * (Vol 20) 1933 Lah 534 (535, 536). (J died—Suit by heirs of S and B alleging J, S and B as real brothers propounding certain pedigree which was held not proved and suit was dismissed as J, S and B not proved to be brothers—Subsequent suit by heirs of B claiming to be heirs to descendant of S, basing claim on same pedigree—B's heirs cannot propound pedigree being barred by rule of *res judicata*.) * (Vol 16) 1929 Lah 833 (833, 834). (Suit for ejectment dismissed—Suit for redemption brought—Decision in prior suit cannot operate as *res judicata*.) * (Vol 8) 1921 Lah 20 (23) : 2 Lah 207. (Decision that plaintiff was entitled by custom as son of kept wife to inherit to deceased is no bar to adjudicating on question as to whether he is legitimate son under Hindu law.) * (Vol 6) 1919 Lah 130 (130). (Though a mortgage suit is dismissed as time-barred a subsequent rent suit by mortgagee against mortgagor is not barred on that account.) * (1911) 1911 Pun L R No. 11 p. 31 (45) : 1910 Pun Re No. 97. (Issue raised in previous suit as to what share a certain person is entitled to does not bar a subsequent suit as to decision of the heirship to the estate.) * (Vol 32) 1945 Mad 396 (400) : ILR (1945) Mad 420. (Decision that bed of portion of river belongs to Government cannot operate as *res judicata* in considering whether bed of different portion of same river belongs to Government.) * (Vol 23) 1936 Mad 983 (989). (Finding negating partition of particular date alleged by V cannot bar question whether V died joint with P at a date earlier than the alleged partition by V.) * (Vol 9) 1922 Mad 413 (415). (Religious endowment—Scheme of management made in previous suit—Later suit for scheme on new facts is not barred.) * (1910) 33 Mad 162 (163, 164). (Dismissal of a suit for revocation of an agency does not bar a second suit by the same principal for dismissal of the agent on the ground of misconduct.) * (Vol 20) 1933 Oudh 415 (419) : 9 Luck 97. (Previous partition proceedings initiated by third person—Determination of shares of parties to subsequent suit not necessary—Subsequent suit to determine rights *inter se* is not barred.) * (Vol 18) 1931 Oudh 263 (266) : 7 Luck 73. (Suit for possession dismissed—Suit for redemption brought—Decision in previous suit does not operate as *res judicata*.) * (Vol 16) 1929 Oudh 463 (466) : 4 Luck 250. (Prior mortgagee who is also puisne mortgagee impleaded in suit by *mesne* mortgagee as subsequent mortgagee—No contest as to prior mortgage—Prior mortgagee's rights are not barred by *res judicata*.) * (Vol 5) 1918 Oudh 98 (99). (Finding in a previous suit as to the amount of *mesne* profits will not operate as *res judicata* in a subsequent suit for *mesne* profits in respect of other years.) * (Vol 4) 1917 Oudh 46 (47) : 20 Oudh Cas 237. (Suit under S. 9, Specific Relief Act—Right to relief based on fact of previous possession—Decision upon question of title does not operate as *res judicata*.) * (Vol 26) 1939 Pat 635 (636). (Judgment deciding merely party's liability to pay is not *res judicata* in subsequent suit regarding nature of sum.) * (Vol 21) 1934 Pat 515 (518). (Suit for declaration on title to certain share—Partition by Collector in the meantime forming six estates out of parent estate—Execution and obtaining of possession of share decreed—Refusal by Collector to record plaintiff's name—Fresh suit for distribution of decreed share to newly formed estates—Suit held not barred by S. 11 or O. 2, Rule 2.)

27. Incidentally in issue. — [1] Issue not directly in issue in previous suit is not *res judicata*. (Vol 10) 1923 Oudh 139 (141).

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[2] A fact cannot be in issue directly when the judgment can be correct whether the fact exists or not. (Vol 18) 1931 Cal 353 (356).

[3] Judgment is not conclusive on matters brought incidentally during trial. (Vol 18) 1931 Cal 353 (356); (Vol 3) 1916 All 26 (27). (Incidental determination of an issue of title in a suit for rent is no bar to any issue of title being raised subsequently.) * (Vol 22) 1935 Cal 792 (798). * (Vol 3) 1916 Cal 504 (505). (Incidental finding as regards boundary of a plot in a previous suit is not *res judicata* as regards the question of title of that strip in a subsequent suit.) * (1893) 20 Cal 888 (894). * (Vol 22) 1935 Mad 634 (636). * (Vol 8) 1921 Mad 694 (695).

[4] Order under O. 22, R. 5 is not *res judicata* but is final so far as suit in which it is made is concerned.—Subsequent decision in separate suit does not affect rights of parties in former suit. (Vol 26) 1939 Nag 147 (148, 149); ILR (1939) Nag 165 (1906) 28 All 109 (111). * (Vol 28) 1941 Lah 142 (143). * (Vol 21) 1934 Lah 465 (467). * (Vol 27) 1940 Nag 99 (100); I L R (1941) Nag 785 * (Vol 8) 1921 Nag 23 (24); 17 Nag L R 45 * (Vol 24) 1937 Oudh 220 (222); 13 Luck 20 (FB). (Overruling (Vol 20) 1933 Oudh 207; 8 Luck 477.) * (1937) 1937 Oudh W N 782 (784).

[But see (Vol 13) 1926 All 439 (439); 48 All 422.]

28. Issue of fact.—[1] Decision between parties though given on a mistake of fact, will operate as *res judicata*. (Vol 10) 1923 Mad 545 (550). * (Vol 6) 1919 Mad 359 (360, 361). (A party's ignorance of a ground of plea during the former litigation does not make the former decision any the less binding.)

[2] Decision on a question of fact is *res judicata* though erroneous. (Vol 15) 1928 Cal 717 (719). * (Vol 5) 1918 Lah 350 (351); 1918 Pun Re No. 82.

[See however (Vol 1) 1914 Oudh 25 (29)].

[3] The question whether an issue was substantially raised and decided is one of fact. (Vol 6) 1919 Bom 81 (82); 43 Bom 568.

29. Issue of law.—[1] A defence or claim based on a question of law is a "matter" within the meaning of the section. As matter must sometimes include an issue of law and where the point of law directly affects the rights in litigation between the parties to the suit it is a matter within the meaning of the section. (Vol 3) 1918 Mad 1309 (1312).

[2] Section does not deal with points or points of law or pure points of law.—Decision is binding and not the reasoning. (Vol 15) 1928 Cal 777 (781, 782); 56 Cal 723.

[3] Question of law may also sometimes be *res judicata* as between the parties. (Vol 30) 1943 Bom 288 (291); I L R (1943) Bom 400. * (Vol 23) 1936 P C 46 (48, 49); 15 Pat 203; 63 Ind App 53 (P C). (Decision on construction of a section of a statute. Reversing (Vol 19) 1932 Pat 337; 12 Pat 147.) * (Vol 19) 1932 Nag 90 (91). * (Vol 11) 1924 Pat 265 (265); 2 Pat 771.

[4] Erroneous decision on a question of law operates as *res judicata* between the parties. (Vol 14) 1927 All 297 (297); 49 All 543. * (Vol 14) 1927 All 206 (207). * (1902) 24 All 138 (141). * (1893) 15 All 327 (330). * (Vol 17) 1930 Bom 135 (138); 53 Bom 676. * (Vol 13) 1926 Bom 481 (489). * (1907) 31 Bom 128 (137). * (Vol 30) 1943 Cal 460 (462, 463). * (Vol 28) 1936 Cal 200 (202). * (Vol 28) 1941 Lah 169 (171). * (Vol 20) 1933 Lah 325 (326); 14 Lah 442. * (Vol 22) 1935 Mad 835 (836); 59 Mad 82. * (Vol 7) 1920 Mad 246 (249). (Mistake of law cannot affect decree being *res judicata* unless for fraud or collusion.) * (1910) 7 Mad L Tim 84 (84). * (Vol 11) 1924 Nag 422 (423). * (Vol 5) 1918 Oudh 15 (16). * (Vol 23) 1936 Pat 198 (199, 200); 14 Pat 633. * (Vol 17) 1930 Pat 565 (567); 9 Pat 674. * (Vol 4) 1917 Pat 581

(592). (Erroneous decision on the question of construction of a document.)

[5] Alteration of law by subsequent decisions does not affect the principle of *res judicata* but Legislature might affect it. (Vol 15) 1928 Cal 777 (780, 781); 56 Cal 723 (F B). (32 Cal 749, overruled.) * (Vol 32) 1945 All 121 (126); I L R (1945) All 75 * (Vol 12) 1925 Cal 1193 (1194). * (1884) 10 Cal 1087 (1091). * (Vol 11) 1924 Pat 265 (266); 2 Pat 771.

[6] Where a suit was already decided but subsequently the law was changed by a Government notification, it was held that the notification does not stand on a higher footing than legislative enactment and hence could not operate against *res judicata*. (1912) 36 Bom 617 (621, 622).

[7] Where causes of action in two suits are different, *res judicata* cannot be applied to pure questions of law. (Vol 16) 1929 Cal 445 (447). * (Vol 15) 1928 Cal 717 (718). * (Vol 19) 1932 All 169 (172). * (Vol 12) 1925 All 761 (762). * (Vol 29) 1942 Bom 322 (324); I L R (1942) Bom 798. * (Vol 19) 1932 Bom 257 (259). * (Vol 17) 1930 Lah 907 (910); 12 Lah 52. * (Vol 24) 1937 Mad 254 (257); I L R (1937) Mad 364. * (Vol 20) 1933 Mad 59 (61). * (Vol 5) 1918 Mad 1187 (1189); 40 Mad 989. * (1905) 28 Mad 517 (518, 519). (Whether principle would apply where party prevented from appeal.) * (Vol 20) 1933 Rang 383 (384).

[8] Erroneous decision of a question of law does not operate as *res judicata*. (Vol 10) 1923 Lah 16 (17). * (Vol 9) 1922 Lah 329 (334). * (1902) 24 All 44 (66). (19 All 202 overruled.) * (Vol 8) 1921 Bom 87 (90); 45 Bom 1260. * (Vol 31) 1944 Cal 13 (14). * (1912) 39 Cal 848 (854). * (Vol 4) 1917 Mad 597 (600). * (Vol 3) 1916 Mad 845 (846). * (1911) 34 Mad 450 (452). * (1907) 30 Mad 461 (463).

[9] A point of law can never be *res judicata*. (1898) 22 Bom 669 (671). * (Vol 5) 1918 Mad 1187 (1189); 40 Mad 989. (Right established cannot be questioned.) * (Vol 15) 1928 Oudh 241 (244); 3 Luck 392. (Construction of document.) * (Vol 16) 1929 Rang 55 (58); 6 Rang 691.

[10] The rule that estoppel by *res judicata* does not apply to a question of law has no force in the case of consent decree. (1912) 35 Mad 75 (88).

[11] All questions of law cannot however be dealt with on the same footing; on questions of jurisdiction the public and Court also are affected and decisions thereon do not operate as *res judicata*. (Vol 23) 1936 Pat 198 (200); 14 Pat 633. * (Vol 16) 1929 All 132 (132). * (Vol 23) 1936 Rang 87 (89); 14 Rang 94. * (Vol 24) 1937 Pesh 62 (63).

[12] A decision on an abstract question of law is not *res judicata*. Where a decision on a point of law, whether it be on a construction of a document or of a statute or on Common law or on customary law, settles a question that arises directly out of the conflicting views as to the rights of the parties, it is *res judicata*. (Vol 5) 1918 Mad 1309 (1311, 1313).

[13] Where there are conflicting decisions on a point of law the adopting of one view in the decision does not constitute an erroneous decision and therefore the decision is binding. (Vol 19) 1932 Oudh 246 (247).

[14] A decision, even if erroneous, in a former suit that the issue between the parties was or was not barred by the plea of *res judicata* is, itself, a decision which operates as *res judicata* in a subsequent suit. (Vol 24) 1937 Lah 649 (651). * (Vol 20) 1933 Lah 606 (609). * (Vol 17) 1930 Pat 585 (586); 9 Pat 674. * (Vol 15) 1928 Cal 717 (719).

30. Matter not in issue.—[1] The decision in a previous case on an issue which did not arise at all, cannot operate as *res judicata* in a subsequent suit. (Vol 5) 1918 Lah 234 (235); (Vol 12) 1925 P C 184

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(187): 52 Ind App 291 : 21 Nag L R 117 : 52 Cal 971 (PC). (Mere decree for share of profits does not conclude right to partition of a grant under the Benar Inam Rules.); (Vol 22) 1935 All 268 (269)* (Vol 20) 1933 All 922 (923)* (Vol 13) 1931 All 99 (100) : 52 All 901 * (Vol 28) 1941 Cal 289 (291). (Partition suit by co-sharer—Defendant co-sharer alleging right of way over property in suit to be taken into consideration at time of allotment of shares—Claim not challenged, nor issue framed regarding it—Decision in partition suit is not *res judicata* for question of the existence of right of way.) * (Vol 16) 1929 Cal 672 (673) (Mortgage suit—Defendant with interest in equity of redemption having also independent paramount title—Latter not impeached—Claim decreed by default—Decree does not operate as *res judicata* in subsequent suit as regards paramount title.) * (Vol 9) 1922 Cal 311 (312) * (Vol 7) 1920 Cal 888 (889) * (Plaintiff not allowed by Court to raise point can raise it in subsequent suit.); (Vol 8) 1921 Lah 133 (134) (Decision in respect of non-existing right is not *res judicata*.) * (Vol 25) 1938 Mad 581 (582, 583)* (Vol 25) 1938 Mad 287 (288)* (Vol 13) 1926 Mad 1128 (1129) (Prior suit for possession based on exclusive title—Subsequent suit for partition and possession is not barred.) * (Vol 13) 1926 Mad 688 (684) : 49 Mad 596 (Partition suit by a purchaser of a coparcener's interest in a joint Hindu family is not barred by a prior decision against him for declaration of his right to possession under O. 21, R. 103.) * (1917) 20 Ind Cas 17 (20) (Oudh) * (Vol 20) 1933 Sind 112 (113) : 26 Sind L R 506.

[2] A casual remark in a previous judgment does not operate as *res judicata* as the matter is not in issue and no proper finding is given. (Vol 3) 1916 Lah 369 (370) : 1916 Pun Re No. 56.

[3] Decision on issue not supporting ultimate decree cannot operate as *res judicata*. (Vol 29) 1942 Cal 1 (14) : I L R (1941) 2 Cal 434 * (Vol 10) 1923 All 495 (497) : 45 All 466 * (1911) 8 All L Jour 409 (410, 411) (Where in a case there are two findings either of which would in law be sufficient to dispose of the case, that one which in the logical sequence of necessary issues should have been first found rendering the determination of the other issue unnecessary is the finding which operates as *res judicata*.) * (Vol 8) 1916 Bom 277 (278) : 40 Bom 662 * (1894) 13 Bom 597 (602) (Where the defendant sets up two grounds of defence to the relief sought by the plaintiff and succeeds on one which causes the dismissal of suit, the decision on the other issue in plaintiff's favour cannot be said to be material to the decision of the suit and is not *res judicata*.) (Vol 28) 1941 Cal 449 (451)* (Vol 22) 1935 Cal (783, 734, 735)* (Vol 21) 1934 Cal 430 (432) : 61 Cal 1 * (Vol 1) 1914 Lah 289 (290) : 1914 Pun Re No 102 * (Vol 6) 1919 Mad 1097 (1099) * (Vol 6) 1919 Mad 212 (213) * (Vol 12) 1925 Oudh 390 (391) : 29 Oudh Cas 98.

[4] Statement made obiter does not operate as *res judicata*. (Vol 22) 1935 Lah 96 (97) * (Vol 23) 1936 Lah 18 (21).

[5] Mere presence of party on record is not decisive of the question of *res judicata*. (Vol 19) 1932 Mad 207 (212) : 55 Mad 483.

[6] A finding against a pro forma defendant against whom no relief is claimed is not *res judicata*. (Vol 15) 1928 Lah 493 (494) * (Vol 9) 1922 All 217 (219) : 40 All 428 * (1905) 27 All 59 (61) * (Vol 1) 1914 Bom 113 (113) : 39 Bom 29 * (1890) 14 Bom 408 (415, 416) * (Vol 3) 1916 Lah 13 (13) : 1916 Pun Re No. 65 * (Vol 5) 1918 Pat 263 (264).

[But see (Vol 5) 1918 Mad 967 (968).]

31. Mixed question of fact and law.—[1] Where the Court in a former suit had to consider questions of law as well as questions of fact, the matter is not an abstract question of law. And the finding on a mixed question of law and fact is *res judicata*. (Vol 15) 1928 Cal 777 (780) : 56 Cal 723 (F B) ; (Vol 13) 1926 Cal 80 (81) * (Vol 1) 1914 Cal 352 (356) * (Vol 13) 1926 Lah 251 (252) * (Vol 4) 1917 Mad 299 (305).

[See also (1903) 29 Mad 225 (231). (When it is not based on a misapprehension of a general rule of law, a decision is *res judicata* between the same parties in a subsequent suit.)]

[2] What is meant exactly by "mixed question of fact and law" in the convenient proposition that the doctrine of *res judicata* does not apply to a case of mixed question of fact and law? The answer depends on the frame of the issues in the case. Any issue involving both questions of law and of fact must be split up as to admit of a pure issue of law being framed on the hypothesis of a finding of fact one way or another. A decision on an abstract question of law is not *res judicata* but a decision on the construction of a document as settling the rights of parties is *res judicata*. (Vol 5) 1918 Mad 1309 (1313).

[3] Whether a particular stipulation contained in a *kabuliat* having been held to be valid between the parties, could be tried as an issue again in a subsequent suit is a mixed question of law and fact. (1901) 28 Cal 318 (323).

[4] In a previous litigation between the parties it was decided that defendants were not entitled to deduct the Government revenue and the cesses but only the collection charges from the gross income of the estate to determine the net assets upon which *malikana* was to be calculated : *Held*, that this being a mixed question of fact and law, the decision upon it though erroneous was binding upon the parties and their successors. (1912) 15 Cal L Jour 684 (686).

[5] The question whether there has been eviction of the tenant by the landlord is a mixed question of fact and law. (1911) 13 Cal L Jour 119 (122).

[6] Question as to whether certain custom is opposed to public policy is not an abstract question of law. (Vol 20) 1933 Lah 603 (608).

[7] Question as to executability of a decree is not a pure question of law but really one of construction of the decree. Hence, the principle of *res judicata* applies. (Vol 20) 1933 Lah 594 (595) : 14 Lah 409.

[8] Whether a document was an award or not is not a question of law alone, but depends upon the consideration of the evidence of circumstances leading to the execution thereof. The question when decided may operate as *res judicata*. (Vol 20) 1933 Lah 274 (277) : 14 Lah 31.

[9] A redemption suit was dismissed under O. 9, R. 2 but before dismissal the issue of limitation was decided in favour of plaintiff. The decision on the question of limitation would operate as *res judicata* in a subsequent fresh suit for redemption by plaintiff as the issue involved not merely a question of law but a mixed question of law and fact. (1913) 1913 Pun L R No. 156 p. 531 (532, 533).

32. Substantially in issue.—[1] A decision on a point not substantially in issue in a suit cannot operate as *res judicata* in any later suit in which it may be substantially in issue. (1911) 6 Low Bur Rul 93 (98) * (Vol 25) 1938 All 555 (556) : I L R (1938) All 800 * (Vol 10) 1923 All 15 (16) * (Vol 22) 1935 Cal 766 (768) * (Vol 17) 1930 Cal 5 (7) : 56 Cal 639 * (Vol 20) 1933 Oudh. 104 (106). (Larger share cannot be claimed than found in previous suit *inter partes*.)

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[2] Refusal of Court to decide irrelevant issues is not *res judicata*. (Vol 4) 1917 Pat 47 (49).

33. *Ex parte* decree. — [1] *Ex parte* decree acts by way of *res judicata* quite as much as decree passed on proper contest. (Vol 16) 1929 All 761 (762)* (Vol 16) 1929 All 346 (346)* (Vol 1) 1914 All 386 (389)* (1902) 24 All 138 (141)* (Vol 28) 1941 Cal 574 (576)* (Vol 15) 1928 Cal 717 (720)* (Vol 20) 1933 Lah 606 (609)* (Vol 10) 1923 Lah 560 (563) (Where the subject-matter of the subsequent suit was directly and substantially in issue.)* (1910) 1910 Pun L R No. 47, p. 112 (114)* (Vol 12) 1925 Mad 378 (379)* (Vol 7) 1920 Nag 113 (114)* (Vol 11) 1924 Oudh 419 (420)* (1911) 12 Ind Cas 329 (330) (Oudh). (If it can be ascertained precisely what matters were involved in the *ex parte* decree passed by the Court.)* (Vol 7) 1920 Pat 584 (586) (If the defendant is absent only at evidence stage, having appeared and filed a written statement, a decree though *ex parte* would be *res judicata*.)*(1914) 7 Low Bur Rul 56 (59).

[See however (Vol 7) 1920 Cal 541 (541). (*Ex parte* decree against joint debtors does not operate as *res judicata* in contribution suit between them.)* (Vol 21) 1934 Nag 33 (34) (Mortgage suit — Some defendants *ex parte* — Such defendants can plead paramount title in future suit.)]

[2] Decision against person in his absence on matter of which he had no notice is not binding on him. (Vol 20) 1933 Mad 844 (846).

[3] A decree for foreclosure passed *ex parte* against a person joined as defendant on the sole ground that he is in possession of the mortgaged property does not operate as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit. (Vol 6) 1919 Nag 57 (59) : 15 Nag L R 114 (F B).

[4] An *ex parte* decree declaring the status of certain persons as reversioners will operate as *res judicata* in a subsequent suit between the parties and their representatives. (Vol 1) 1914 All 386 (389).

[5] *Ex parte* decree — Matter taken on appeal — *Ex parte* defendant having opportunity to contest appeal contesting it — *Ex parte* character is lost. (Vol 21) 1934 Cal 179 (183).

[6] Where a number of defendants have a common interest and the contest is carried on by some of them *bona fide* against the plaintiff's claim, the defendants who are *ex parte* are bound by the decision as much as those who contested. (Vol 11) 1924 Mad 571 (573).

[7] Defendant trying to set aside *ex parte* decree under O. 9, R. 13, failing to prove want of due service of summons — Defendant is barred from agitating same question in appeal or revision. (Vol 23) 1936 Pesh 1 (2)* (Vol 22) 1935 Pat 458 (458) : 14 Pat 439.

[See however (Vol 12) 1925 Cal 663 (664). (Dismissal of application under O. 9, R. 13 — Matters in subsequent suit to set aside decree, outside scope of R. 13 — Question as to non-service of summons is not *res judicata*.)]

[8] An *ex parte* decree can operate as *res judicata* only on an issue which is necessary to be determined. (Vol 4) 1917 Pat 535 (536, 537)* (Vol 14) 1927 All 552 (553) : 49 All 658. (Question as to competency of Court.)* (1909) 2 Ind Cas 11 (12, 13) (Cal). (Even as regards points which ought to have been taken but which were not taken in defence.)* (Vol 25) 1938 Lah 227 (231).

[9] The effect of an *ex parte* decree does not depend on the question whether the decree has or has not been executed. (Vol 1) 1914 Cal 849 (850).

[10] A rent decree though only *ex parte* is *res judicata* on the question of the existence of the relationship of landlord and tenant between the parties. (Vol 7)

1920 Cal 77 (78)* (1913) 17 Cal W N 627 (629, 630). (But it may not operate as *res judicata* in respect of the rate of rent.)* (Vol 5) 1918 Nag 262 (263)* (Vol 23) 1936 Pat 556 (557, 558). (Relationship of landlord and tenant must be presumed to be determined.)

[See however (Vol 1) 1914 Cal 849 (850).]

[11] There is no general proposition that *ex parte* decree for arrears of rent operates or does not operate as *res judicata* in suit for subsequent year's rent — In suit for arrears of rent, defendant pleading that rate claimed was higher but no issue framed on rate of rent payable and *ex parte* decree passed — Decree would not operate as *res judicata* against defendant. (Vol 16) 1929 Mad 673 (674, 675)* (Vol 31) 1944 Cal 118 (119, 120) : I L R (1943) 1 Cal 430* (1899) 16 Cal 300 (307)* (Vol 3) 1916 Mad 147 (150).

[12] A mortgagee under a void mortgage let the property to the mortgagor as tenant and got an *ex parte* decree for rent against him. Held, the plea that the mortgage was void could not be raised in a subsequent suit for rent, though by allowing the previous decision to stand as a bar the Court would be sanctioning a thing prohibited by law. (1909) 33 Bom 479 (482).

[13] Failure of the appellant to raise an objection at the hearing at which an *ex parte* order was passed against him, after due notice, estops him from raising that objection in an appeal against that *ex parte* order. (1910) 7 Mad L Tim 224 (224).

34. Explanation III. — See Notes 20 to 23.

35. Explanation V. — Relief claimed but not granted.

[1] Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits, a subsequent suit for mesne profits *pendente lite* is not barred. (Vol 5) 1918 All 412 (413) : 40 All 292* (Vol 19) 1932 All 169 (171)* (Vol 19) 1932 All 45 (46)* (1899) 21 All 425 (440) (F B). ((1884) 1884 A W N 159, overruled.)* (Vol 25) 1938 Bom 231 (231) : I L R (1938) Bom 655 (F B) ((Vol 7) 1920 Bom 39 : 44 Bom 954, overruled.)* (Vol 16) 1929 Cal 566 (568) : 57 Cal 381* (Vol 18) 1931 Cal 788 (789) : 58 Cal 1040* (1905) 32 Cal 118 (119, 122)* (Vol 24) 1937 Mad 879 (881)* (Vol 5) 1918 Mad 484 (486) : 41 Mad 188 (F B) (Overruling (Vol 2) 1915 Mad 1132.)* (1905) 15 Mad L Jour 462 (464, 465). ((1891) 14 Mad 328, overruled.)* (Vol 2) 1915 Upp Bur 18 (19) : 2 Upp Bur Rul 81* (Vol 26) 1939 Sind 367 (368) : I L R (1940) Kar 36.

[2] The words of Expl. V of S. 11, "relief claimed in the plaint" mean relief which, assuming the defence fails, the plaintiff is entitled to as of right. (1905) 15 Mad L Jour 462 (465). (14 Mad 328, overruled.)

[3] When a claim for past profits was made in the former suit and enquired into, and the finding recorded that there was a balance due to plaintiff, but no particular sum was fixed by decree, no second suit can be maintained by reason of the bar of Expl. V. The remedy is by appeal or review. (1901) 25 Bom 115 (126).

[4] Plaintiffs having been forcibly dispossessed by defendant filed a suit under S. 9 of the Specific Relief Act for possession with crops or their value and the decree in that suit awarded them only the possession of lands. The plaintiffs, subsequent to their getting possession of the lands, filed a suit for mesne profits for 8 years including the one in which the suit was instituted, alleging that as they got possession after the cultivation season they could not get any profits for that year: Held, that the second suit was not barred by the provisions of S. 11 or O. 2, R. 2 of the Civil P. C. (Vol 3) 1916 Mad 328 (330, 331).

[5] Where a Court refuses to grant a relief on the ground that no such relief was claimed, such refusal

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does not operate as *res judicata*. (Vol 4) 1917 Oudh 20 (28).

[6] Mortgage-decree — Personal remedy asked for in plaint — Decree silent about it — Plaintiff is not barred from asking for it later on. (Vol 14) 1927 Mad 779 (780).

[7] In a suit by a puisne mortgagee against an auction-purchaser of the equity of redemption the latter set up a prior mortgagee right as a shield. The preliminary decree gave priority to the auction-purchaser in respect of his claim but the final decree as well as the execution sale that followed did not mention or provide for his rights as prior mortgagee. The puisne mortgagee purchased the property and got possession: *Held*, that the auction-purchaser could not sue upon his prior mortgagee rights in a fresh suit. (Vol 5) 1918 All 339 (341).

[8] Where, in pursuance of the terms of the compromise, the plaintiff agrees to take money-decree in a suit on a mortgage bond, a subsequent suit for sale of the mortgaged property will be barred by operation of *res judicata*, the relief of the sale of property not being expressly granted in previous suit will be deemed as refused. (1909) 31 All 19 (20).

[9] Suit by widow for maintenance — Prayer that it should be charged on property not granted — Subsequent suit to charge property with maintenance is *res judicata*. (Vol 25) 1938 Pesh 68 (69).

[10] Prior suit for refund of tax and declaration of right of free irrigation — Refund decreed — Extent of land entitled to free irrigation also declared — Subsequent suit in respect of other lands — Finding in prior suit is not incidental and second suit is barred. (Vol 14) 1927 Mad 1131 (1132).

[11] Mortgagee in previous suit to enforce his security content to take merely a money-decree — Second suit to realize debt by sale of mortgaged property barred under S. 13 (3) (Present S. 11, Expl. V). (1906) 33 Cal 849 (852).

[12] Explanation V to S. 11 applies only to cases of adjudication by Court — Plaintiff asking decree against joint family including minor sons — Claim against sons withdrawn — Such withdrawal does not operate as *res judicata* under S. 11 but bars plaintiff from instituting suit on same cause of action under O. 23, R. 1. (Vol 24) 1937 Mad 718 (719).

[13] Registered security bond to pay amount and on failure charge to be created over property offered as security — Suit for payment of amount and in case of non-payment sale of land offered as security asked for — Simple money-decree passed — Decree can be executed by attachment and sale of property and suit to enforce mortgage under O. 34, R. 14 is barred by *res judicata*. (Vol 20) 1933 Rang 158 (160).

[14] Explanation V only applies to relief claimed in plaint. Where in disposing of an application for a personal decree against the mortgagor under O. 34, R. 6, the Court does not expressly grant the prayer for a personal decree, a second application for the personal decree is not barred by *res judicata*. (Vol 24) 1937 Lah 204 (206). ((Vol 23) 1936 Lah 388, reversed.)

[15] Ejectment—Future damages claimed but decree silent — Fresh suit for damages from expiry of notice to delivery — Court cannot award damages for period prior to decree in previous suit. (Vol 14) 1927 Pat 395 (395).

[16] Prayer for declaration leading up to the main relief claimed, *viz.*, of possession — Dismissal of suit on failure of main relief — Declaration cannot be deemed to have been refused. (Vol 12) 1925 Cal 1195 (1197).

[17] Relief asked for in plaint but not referred to

in judgment, the matter not heard and finally decided within S. 11 — Decision as to that relief found to be unnecessary — No *res judicata*. (Vol 12) 1925 Bom 181 (183).

[18] Suit to sell certain property in satisfaction of decree withdrawn — No leave for bringing fresh suit obtained — Another suit to sell the same property in satisfaction of a different decree—Suit is not barred. (1894) 21 Cal 265 (268).

[19] Suit compromised — Omission to settle part of dispute — Subsequent suit is not barred. (Vol 21) 1934 Oudh 293 (294) : 10 Luck 61.

36. Former suit — Explanation I. — [1] The doctrine of '*res judicata*' so far as it relates to prohibiting the retrial of an issue, must refer not to the date of commencement of litigation but to the time when the Judge is called upon to decide the issue. (Vol 24) 1937 Mad 544 (546).

[2] The date of decision and competency of the first Court to entertain a suit, irrespective of when the suit was filed or where the appeal lies, determines *res judicata*. (1910) 32 All 67 (70).

[3] A suit decided earlier though filed later is former suit within S. 11. (Vol 16) 1929 Pat 173 (176) : 8 Pat 107.

[4] Same issue in two suits filed consecutively but pending — Earlier decision in suit filed later is *res judicata* in earlier suit. (Vol 1) 1914 Cal 693 (694)* (Vol 19) 1932 All 520 (521).

[5] Cross suits — Appeal from one of them only — Un-appealed decree acts as *res judicata* as being a decree in former suit. (Vol 10) 1923 Cal 496 (499).

[6] The rule that it is the date of decision and not the date of institution of the suit which is relevant for purposes of *res judicata* is not limited to the Court of first instance but applies equally to the procedure of first and second appellate Courts and indeed even to miscellaneous proceedings. (Vol 24) 1937 Mad 544 (546).

[7] A decision between the same parties establishing the title of one of them to the property in dispute which has become final will operate as *res judicata* even for the purpose of an appeal or revision from a decree in another suit between the same parties in another Court though the decision was given after the decision appealed against or sought to be revised. (Vol 23) 1936 Mad 190 (191) : 59 Mad 777.

[8] Suit at Bemetara on partnership accounts for Rs. 3000—Defendant evading service and appearing only, after publication in local newspaper—In the meantime defendant obtaining *ex parte* decree in Small Cause Court, Poona, for Rs. 900—Poona decree held did not operate as *res judicata* in previously filed suit pending in Bemetara Court. (Vol 21) 1934 Nag 178 (179).

37. Connected or cross suits or appeals.—[1] In the case of cross suits between the same parties, an earlier final decision in one suit operates as *res judicata* (1926) 96 Ind Cas 694 (695) (All).

[2] Connected suits — Decision in one not affecting decision in the other—Failure to appeal from one is no bar to appeal from the other. (Vol 10) 1923 Lah 8 (9).

[3] Three connected suits by daughter challenging mother's alienations decided by one judgment — Decree in one suit appealed against in Divisional Court — Appeal dismissed — Other two decrees of higher value appealed against in Chief Court—*Held* Divisional Court could not have entertained these appeals and were not therefore barred by previous decision. (Vol 3) 1916 Lah 177 (179) : 1916 Pun Re No. 48.

[4] Suits for pre-emption by rival claimants — One claimant's suit dismissed—No appeal by vendees or other pre-emptors—Appeals from decrees passed in their own suits are not barred. (Vol 14) 1927 All 540 (541).

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[3] Pre-emption suits relating to same transaction—One judgment—Identical decree in each record—Plaintiffs in suit given right to certain order of priority—Plaintiff in one suit need not appeal against decree in suit by himself as well as in suit by plaintiff who has been given preferential right. (Vol 31) 1914 Oudh 220 (220, 225); 19 Luck 469 & 588.

[6] Where in a partition suit several appeals by defendants are dismissed on the same ground and one of the defendants appeals against the judgment on his appeal without appealing against the other judgment in the other appeals to which he was no party, there is no bar on *res judicata*. (1910) 5 Ind Cas 325 (328) (All).

[7] Cross-objections dismissed as being filed after dismissal of appeal and without going into merits—Appeal on the same points is not barred. (Vol 11) 1924 All 867 (868).

[8] Cross-objection treated as cross-appeal and two separate decrees passed in appeal and on cross-objection—Second appeal from decree in appeal but not from decree on cross-objection held not barred by *res judicata* as the appeal was from entire decree inclusive of the dismissal of cross-objections. (Vol 29) 1942 Oudh 335 (336, 337); 17 Luck 702.

[9] Two similar suits by a party decreed by the same Munsif—Two appeals heard by different Judges one of which is allowed and the other is dismissed—Second appeal from both—What the Court has to determine is whether there is ground for interference with either judgment taken by itself. (Vol 20) 1933 Oudh 115 (115).

[10] Separate decrees out of two suits heard together—In both, same question arising between parties—Appeal against one decree only—Even on appeal succeeding, nothing causing prejudice to other decree—Appeal on the other is not barred by the rule of *res judicata* because the unappealed judgment was in favour of the appellant. (Vol 18) 1931 All 660 (661) * (Vol 15) 1928 All 274 (275); 50 All 517 * (Vol 12) 1925 All 488 (489, 491) * (Vol 10) 1923 All 490 (492); 45 All 506 (F B). (Overruling (1908) 1908 A W N 211, (1911) 33 All 51 and (1913) 35 All 187.) * (Vol 25) 1938 Lah 114 (115) * (Vol 14) 1927 Oudh 575 (575) * (Vol 14) 1927 Oudh 106 (107).

[11] A suing B and B suing A—Same question in issue—Suits tried together but separate judgments given—Judgment in one case appealed from but not that in the other suit—Appeal is barred. (Vol 8) 1921 Cal 291 (292) * (1935) 156 Ind Cas 998 (999) (Lah) * (Vol 22) 1935 Nag 156 (162) * (Vol 13) 1926 Rang 122 (122); 4 Rang 8.

[12] Two cross-suits about the same subject-matter filed simultaneously between the same parties—Suits consolidated and one judgment delivered in both the suits, but two decrees framed—Appeal from one of the decrees only—No appeal from the other decree—Appeal is not barred by *res judicata*—Principle of *res judicata* applies only to judgments and not decrees. (Vol 14) 1927 Lah 289 (295); 8 Lah 384 (F B) * ((Vol 6) 1919 Lah 42; 1 Lah 83 * (Vol 8) 1921 Lah 271 and (Vol 9) 1922 Lah 390; 3 Lah 215, Overruled—impliedly overruling (Vol 14) 1927 Lah 93 * (Vol 8) 1921 Lah 255 * (Vol 13) 1921 Lah 346; 1 Lah 368.) * (1935) 62 Cal 642 (652) * (Vol 18) 1931 Cal 353 (353, 354) * (Vol 14) 1927 Lah 821 (822) * (Vol 5) 1918 Lah 142 (143, 144, 145) * (Vol 30) 1943 Mad 544 (546) * (Vol 30) 1943 Mad 139 (142, 143); I L R (1943) Mad 235 (F B) * (Vol 29) 1942 Mad 226 (227) * (Vol 27) 1940 Mad 564, reversed) (1908) 29 Mad 333 (335) * (Vol 33) 1946 Oudh 33 (34, 37); 20 Luck 339 (F B). (Overruling (Vol 20) 1933 Oudh 581 and impliedly overruling (Vol 12) 1925 Oudh 598 * (Vol 11) 1924 Oudh 311; 14 Ind Cas 321 (Oudh); 15 Oudh Cas 23 and 21 Ind

Cas 264 (Oudh.); (Vol 27) 1910 Oudh 45 (46, 47); 15 Luck 126.

[But see (Vol 28) 1941 All 277 (277, 278); I L R (1941) All 360 * (Vol 20) 1933 Pat 78 (81); 12 Pat 139 * (Vol 11) 1924 Pat 823 (824) * (Vol 32) 1945 Pesh 35 (37) * (Vol 21) 1934 Pesh 116 (117); 13 Pat 197 * (1911-12) 6 Low Bur Rul 93 (97).]

[13] Consolidated appeal from two cross-decrees—Entire appeal cannot be dismissed till appellant fails to elect which one he intends to strike out. (Vol 4) 1917 Oudh 220 (221).

[14] Cross suits—Appeal from one of them only—Unappealed decree acts as *res judicata* as being a decree in a former suit. (Vol 10) 1923 Cal 496 (499).

38. Execution proceedings. — [1] Principle of *res judicata* is applicable to execution proceedings, though S. 11 does not in terms apply. (Vol 28) 1941 Mad 440 (442, 443) * (Vol 31) 1944 All 288 (291); I L R (1914) All 486 * (Vol 25) 1936 All 21 (29); 58 All 313 (F B) * (Vol 33) 1946 Bom 105 (108) * (Vol 30) 1943 Bom 252 (253) * (Vol 24) 1937 Lah 21 (22) * (Vol 20) 1933 Lah 3 (5); 13 Lah 208 * (Vol 24) 1937 Mad 511 (514) * (Vol 20) 1933 Mad 466 (469) * (Vol 10) 1923 Nag 236 (237) * (Vol 29) 1942 Oudh 183 (185); 17 Luck 366 * (Vol 26) 1939 Pat 19 (19) * (Vol 16) 1929 Rang 182 (183) * (Vol 30) 1943 Sind 11 (12); I L R (1942) Kar 326.

[See however (Vol 28) 1933 Lah 246 (247). (Principle not applicable to execution of portion of decree.)]

[2] Where a point has once been expressly or by necessary implication decided in the execution proceedings that decision binds the parties in all subsequent proceedings and operates as *res judicata*. (Vol 13) 1926 All 71 (73); 48 All 201 * (Vol 29) 1942 All 104 (107) * (Vol 20) 1933 All 192 (195) * (Vol 28) 1941 Bom 395 (397); I L R (1941) Bom 652 * (Vol 11) 1924 Bom 495 (497). (Same proceedings.) * (Vol 3) 1916 Bom 138 (139) * 40 Bom 675. (Decision inferentially.) * (Vol 21) 1934 Cal 472 (473) * (Vol 21) 1934 Cal 465 (467). (Implied decision.) * (Vol 30) 1943 Lah 189 (191). (Subsequent stages of same proceedings.) * (Vol 22) 1935 Lah 844 (845, 846). (Decision by necessary implication.) * (Vol 31) 1944 Mad 420 (420) * (Vol 30) 1943 Mad 449 (451); I L R (1943) Mad 804. (Implied decision as to executability.) * (Vol 16) 1929 Mad 404 (408). (Subsequent application for different relief) * (Vol 7) 1920 Nag 40 (41). (Implied decision as to limitation.) * (Vol 29) 1942 Oudh 183 (186); 17 Luck 366 * (Vol 17) 1930 Oudh 65 (67); 5 Luck 458 * (Vol 29) 1942 Pat 68 (69) * (Vol 26) 1939 Pat 230 (231); 18 Pat 378 * (Vol 26) 1939 Rang 384 (385) * (Vol 22) 1935 Rang 174 (177). (Assignment impliedly regarded as valid.)

[3] Where the plea of limitation was raised *inter alia* in defence to an execution application and the application was granted, held, that the plea was barred by *res judicata* although the judgment did not expressly refer to it. (Vol 8) 1921 PC 23 (24); 48 Ind App 45 (PC).

[4] A decision regarding the construction or executability of the decree is *res judicata* in subsequent execution proceedings. (Vol 5) 1918 Pat 67 (68, 69); 4 Pat L Jour 330. (Executability.) * (1910) 32 All 210 (212, 213). (Construction.) * (1885) 7 All 102 (106); 11 Ind App 181 (PC) (Do.) * (Vol 13) 1926 Cal 1019 (1021); 53 Cal 582. (Executability.); (Vol 12) 1925 Lah 640 (641). (Do.) * (Vol 13) 1926 Lah 518 (518). (Do.) * (Vol 22) 1935 Mad 835 (836, 838); 59 Mad 62. (Do.) * (Vol 5) 1918 Mad 751 (755). (Construction.) * (Vol 27) 1940 Pat 56 (57). (Executability.) * (Vol 22) 1935 Pesh 119 (119). (Do.)

[5] A decision as to liability of the property to attachment is binding in subsequent proceedings. (Vol 14) 1927 Lah 872 (872) * (Vol 23) 1936 All 722 (723) *

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(Vol 7) 1920 All 56 (58)* (Vol 25) 1933 Lah 608 (609)* (Vol 18) 1931 Lah 6 (7)* (Vol 10) 1923 Mad 562 (562).

[6] The decision will operate as *res judicata* though it may be erroneous. (Vol 8: 1921 Bom 260 (261): 45 Bom 952 * (Vol 7) 1920 Bom 264 (264): 44 Bom 227* (Vol 23) 1941 Mad 861 (862) * (Vol 25) 1931 Pesh 77 (78).

[But see 1937: 30 Mad 504 (505)* (Vol 4) 1917 Nag 118 (119).]

[7-8] Rule of constructive *res judicata* applies to execution proceedings. (Vol 8) 1921 P C 23 (24): 48 Ind App 45 (P C) * (Vol 30) 1943 Bom 252 (254) * (Vol 30) 1943 Lah 159 (160) * (Vol 29) 1942 Lah 153 (158): I L R (1942) Lah 559 (F D)* (Vol 18) 1931 Mad 192 (193) * (Vol 15) 1928 Mad 748 (758) * (Vol 23) 1936 Nag 123 (124, 125): I L R (1936) Nag 30 * (Vol 27) 1940 Pat 251 (251) * (Vol 28) 1936 Rang 218 (219)* (Vol 19) 1932 Sind 116 (119): 26 Sind L R 91.

[But see (Vol 17) 1930 All 628 (629, 630): 52 All 217 * (Vol 22) 1935 Mad 935 (935) * (Vol 9) 1922 Pat 289 (290): 1 Pat 593.]

[9] An objection open to a party in execution proceedings, e. g., an objection as to limitation, executability, or validity of the decree, etc., but not taken by him, cannot be taken at any subsequent stage. (Vol 13) 1926 Nag 164 (163) * (Vol 10) 1928 All 600 (601). (An order restoring execution application to file passed with notice and not objected to, cannot be questioned afterwards.) * (Vol 9) 1922 All 27 (28): 44 All 850. (Executability) * (Vol 8) 1916 All 219 (219): 38 All 289. (Assignment of decree.) * (Vol 32) 1945 Bom 20 (21). (Executability.) * (Vol 29) 1942 Bom 184 (186): I L R (1942) Bom 190. (Assignment of decree.) * (Vol 18) 1931 Bom 446 (447). (Exemption under S. 60.) * (Vol 32) 1945 Cal 535 (536). (Limitation.) * (Vol 24) 1937 Cal 4 (6). (Assignment of a decree.) * (Vol 20) 1933 Cal 855 (856). (Limitation.) * (Vol 15) 1928 Cal 861 (862). (Application being not in accordance with law.) * (Vol 27) 1940 Lah 161 (162). (Objection that execution could not proceed because deed of assignment in favour of the decree-holder was not registered.) * (Vol 14) 1927 Lah 780 (780). (Executability.) * (Vol 24) 1937 Mad 760 (762). (Application not in accordance with law.) * (Vol 15) 1928 Mad 1052 (1053). (Limitation.) * (Vol 15) 1928 Mad 203 (204). (Executability.) * (Vol 13) 1926 Mad 12 (14, 15, 16). (Transferability of property.) * (1901) 24 Mad 669 (671). (Limitation.) * (Vol 13) 1926 Nag 476 (478). (Substitution of names.) * (Vol 30) 1943 Oudh 385 (386). (Limitation.) * (Vol 21) 1934 Oudh 299 (291). (Substitution of name.) * (Vol 26) 1939 Pat 113 (114). (Executability.) * (Vol 5) 1918 Pat 533 (534). (Objection as to non-transferability.) * (Vol 5) 1918 Pat 41 (46): 4 Pat L Jour 213. (Validity of decree.) * (Vol 4) 1917 Pat 158 (159). (Limitation.) * (Vol 23) 1936 Pesh 9 (10). (Limitation.)

[But see (Vol 14) 1927 Pat 170 (171). (Notice under O. 21, R. 16, given — No objection raised — Decree transferred — Judgment-debtor can still object to executability by transferee in transferee Court.)

[10] The principle of constructive *res judicata* will not apply when the earlier order did not decide the point raised in the later application. (Vol 11) 1924 Mad 145 (146)* (Vol 24) 1937 All 446 (448, 449)* (Vol 22) 1935 All 727 (729): 57 All 965. (Question not decided by Court, no *res judicata*.) * (Vol 30) 1943 Bom 246 (248): I L R (1943) Bom 382* (Vol 20) 1933 Lah 826 (827) * (Vol 20) 1933 Mad 508 (509) * (Vol 14) 1927 Mad 842 (844)* (Vol 20) 1933 Nag 287 (289) * (Vol 32) 1945 Oudh 21 (24, 25): 20 Luck 933* (Vol 15) 1928 Pat 471 (472): 7 Pat 465* (Vol 16) 1929 Rang 172 (173).

[11] In the course of the same execution proceedings

a different objection can be raised at a different stage thereof. (Vol 27) 1940 Lah 27 (30).

[12] The party who is sought to be affected by the bar of constructive *res judicata* should have notice of the point likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. (Vol 5) 1918 Mad 1167 (1172): 40 Mad 1016* (Vol 30) 1943 Bom 252 (254)* (1912) 15 Cal L Jour 123 (125)* (1911) 13 Cal L Jour 26 (29)* (Vol 18) 1931 Mad 381 (386)* (Vol 11) 1924 Mad 518 (520)* (Vol 20) 1933 Nag 182 (184): 29 Nag L R 193* (Vol 3) 1916 Oudh 338 (339).

[13] Where execution of something not granted by the decree is sought, mere notice to the defendant that further execution is to be applied for, is not sufficient to make the order *res judicata*. (1909) 5 Mad L Tim 293 (294)* (Vol 8) 1916 All 42 (48)* (Vol 2) 1915 All 344 (345): 37 All 589* (Vol 20) 1933 Mad 844 (847). (No notice to judgment-debtor in previous execution — Question cannot be said to have been decided)* (Vol 16) 1929 Mad 903 (906).

[14] Order made without notice to judgment-debtor cannot be basis for application of rule of *res judicata*. (Vol 30) 1943 Mad 667 (669): I L R (1944) Mad 667* (Vol 17) 1933 All 699 (700): 52 All 1024* (Vol 21) 1934 Bom 113 (115) * (Vol 24) 1937 Cal 581 (583): 67 Cal L Jour 92* (Vol 7) 1920 Cal 533 (534)* (Vol 16) 1929 Lah 334 (334, 335)* (Vol 8) 1921 Mad 532 (532)* (Vol 1) 1914 Mad 663 (664)* (Vol 7) 1920 Pat 615 (616) * (Vol 4) 1917 Pat 158 (159).

[15] An order passed by the Court *ex parte* after holding that the notice was duly served binds the defendant on general principles of *res judicata* as much as a contested order. (Vol 1) 1914 Mad 162 (168): 37 Mad 462* (Vol 31) 1944 Mad 193 (194)* (Vol 20) 1933 Mad 466 (469)* (Vol 20) 1933 Mad 406 (406).

[16] Where no objection is taken, but the application for execution does not fructify and there is no judicial determination of the point in issue, the judgment-debtor is not debarred by the principles of '*res judicata*' from raising the objection in a later application. (Vol 26) 1939 Rang 245 (247): 1939 Rang L R 152* (Vol 23) 1936 All 21 (32): 58 All 313 (FB)* (Vol 22) 1935 Cal 664 (665)* (1910) 12 Cal L Jour 312 (316)* (Vol 22) 1935 Mad 786 (787)* (Vol 3) 1916 Mad 886 (886)* (Vol 29) 1942 Oudh 219 (220): 17 Luck 449* (1910) 13 Oudh Cas 90 (92, 93)* (Vol 12) 1925 Pat 588 (590)* (Vol 30) 1943 Pesh 52 (54).

[17] Want of notice to judgment-debtor will not prevent operation of *res judicata* against judgment-creditor. (Vol 20) 1933 Mad 745 (746)* (Vol 1) 1914 Mad 532 (533): 37 Mad 314.

[18] In the case of dismissal of an execution application for default the only point that is decided is that the application is dismissed. There is no bar for a fresh application. Unless, therefore, there was a decision or adjudication, which either directly or impliedly decided a question on which the parties are at issue, that decision being essentially for passing the order, the rule of *res judicata* does not apply. (Vol 24) 1937 Mad 289 (290) * (Vol 16) 1929 Bom 217 (219).

[19] An order dismissing an objection to execution application dismissed for default of appearance of judgment-debtor does not operate as *res judicata* against him to prevent him from making same objection again. (Vol 22) 1935 All 238 (239)* (Vol 22) 1935 All 502 (502): (Vol 22) 1935 Cal 230 (231)* (Vol 19) 1932 Cal 569 (571)* (Vol 10) 1923 Cal 287 (288)* (Objection withdrawn)* (Vol 30) 1943 Lah 189 (191)* (Vol 19) 1932 Lah 643 (643)* (Vol 15) 1928 Oudh 38 (39)* (Vol 19) 1932 Pat 357 (358): 11 Pat 607* (Vol 11) 1924 Pat 122 (125): 2 Pat 759* (Vol 23) 1936 Pesh 41 (43).

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[20] Issue tried in suit cannot be re-agitated in execution. (Vol 13) 1926 Oudh 613 (614)* (Vol 24) 1937 Cal 481 (481, 482)* (Vol 22) 1935 Cal 816 (817).

[21] It is only certain descriptions of orders passed in the course of the execution of a decree that have operation by way of *res judicata* and not every order passed in execution. (1889) 17 Cal 57 (63).

[22] Execution — Interlocutory orders in, do not operate as *res judicata*. (Vol 19) 1932 All 392 (393)* (Vol 14) 1927 Lah 232 (234).

[23] Where substantive rights are decided in an order passed in execution proceedings such decision is *res judicata* in subsequent execution applications. But when the decision on the prior application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. (Vol 3) 1916 Mad 728 (2) 730 : 39 Mad 923.

[24] Decision in previous execution proceedings between same parties operates as *res judicata* in a subsequent suit on same subject-matter. (Vol 2) 1915 Lah 179 (181)* (Vol 31) 1944 Bom 50 (54)* (Vol 29) 1942 Bom 309 (310)* (Vol 4) 1917 Cal 198 (198, 199)* (Vol 17) 1930 Lah 628 (628)* (Vol 14) 1927 Lah 112 (112)* (Vol 27) 1940 Mad 59 (60) (Decision of issue between parties in prior execution petition under different and anterior decree—Attempt to raise similar matter at similar stage of proceedings in subsequent suit between same parties would be barred.)* (Vol 29) 1942 Nag 107 (108) : I L R (1942) Nag 779* (Vol 22) 1935 Nag 80 (81)* (1909) 3 Sind L R 133 (135, 136).

[See (Vol 2) 1935 Rang 399 (400)].

[25] Order under O. 21, R. 66, is not final and cannot be *res judicata*. (Vol 12) 1925 Pat 500 (502): 4 Pat 731 (F B)* (Vol 11) 1924 All 480 (480)* (Vol 14) 1927 Bom 234 (236).

[26] Where at the time of settling the terms of proclamation, the parties put into issue a question affecting their rights and liabilities with regard to execution and this matter is heard and decided, that decision is a judicial decision and the parties will not be allowed in the course of execution to canvass the same matter again. (Vol 27) 1940 Mad 54 (55) * (Vol 10) 1923 Pat 184 (135).

[27] Notice of date fixed for settling sale proclamation under O. 21, R. 66 served on judgment-debtor—Whether failure of judgment-debtor to appear on aforesaid date debars him from raising plea that property was not liable to be sold depends on facts of each case. (Vol 32) 1945 Mad 77 (80).

[28] Omission to appear to settle terms does not bar plea that property was not liable to attachment. (Vol 11) 1924 Mad 1 (6) : 46 Mad 768 (F B)* (Vol 5) 1918 Cal 705 (706) : 45 Cal 530.

[29] Judgment-debtor not appearing on date for settlement of sale proclamation—Subsequent appearance—Objection by review petition dismissed—Order is *res judicata* in subsequent proceedings. (Vol 1) 1914 Mad 812 (817).

[30] Ground of want of attachment available at the time of notice of settlement of proclamation must be urged then and not reserved for later occasions—It operates otherwise as *res judicata*. (Vol 17) 1930 Mad 414 (417, 418)* (Vol 11) 1924 Pat 628 (629).

[31] Point not raised and decided in judicial order but only in application for leave to bid—Decision does not operate as *res judicata*. (Vol 16) 1929 Mad 903 (905).

[32] A plea though not barred on ground of *res judicata* may be barred on ground of estoppel. (Vol 6) 1919 Cal 1082 (1083, 1084)* (Vol 22) 1935 Cal 816 (817). (Estoppel.)* (Vol 13) 1926 Lah 35 (37).

[33] In the following cases the party was held not precluded from raising the issue on ground of *res judicata* as the conditions for the applicability of the rule were not satisfied. (Vol 20) 1933 All 579 (581, 582) : 55 All 735. (Plea not such as might and ought to have been raised—No *res judicata*.)* (Vol 19) 1932 All 288 (288) : 54 All 444. (Matter not in issue in previous proceeding—No *res judicata*.)* (Vol 18) 1931 All 490 (494) : 54 All 25. (Court not competent to decide issue — No *res judicata*.)* (Vol 18) 1931 All 65 (67) : 52 All 964. (Executing Court incompetent to decide question — No *res judicata*.)* (Vol 13) 1926 All 220 (222) : 48 All 245. (Point not directly and substantially in issue in former proceedings — No *res judicata*.)* (Vol 11) 1924 All 804 (805). (No final decision—No *res judicata*.)* (1912) 34 All 518 (521, 522). (*Ex parte* decision against decree-holder who had parted with his interest—No *res judicata* against assignee.)* (1911) 33 All 264 (271, 272) : 38 Ind App 37 (PO). (Matter in issue not identical—No *res judicata* —Affirming 29 All 623.)* (1909) 31 All 590 (591). (Matter not in issue in previous proceedings — No *res judicata*.)* (1911) 35 Bom 245 (246, 247). (Decision not final—No *res judicata*.)* (1912) 14 Bom L R 264 (265, 266). (Matter not heard and finally decided.)* (Vol 31) 1944 Cal 328 (330). (Application for permission to execute decree against estate in hands of receiver — Objection that decree was, not binding on estate, overruled—Decision held did not operate as *res judicata*.)* (Vol 27) 1940 Lah 67 (67). (No decision on merits — No *res judicata*.)* (Vol 27) 1940 Lah 27 (29). (Alternative plea inconsistent with main plea hence not one which ought to have been raised—No *res judicata*.)* (Vol 26) 1939 Lah 556 (557). (Matter not in issue.)* (Vol 26) 1939 Lah 168 (169, 170). (Objection could not be raised in previous proceeding—No *res judicata*.)* (Vol 24) 1937 Lah 404 (408). (Mere omission to grant relief—Relief not refused—No *res judicata*.)* (Vol 24) 1937 Lah 21 (22). (No decision on merits—No *res judicata*.)* (Vol 23) 1936 Lah 930 (931). (No decision — No *res judicata*.)* (Vol 21) 1934 Lah 153 (154, 155) : 36 Cri L Jour 217. (Order of attachment before judgment does not act as *res judicata* in execution proceedings on point of attachability of property.)* (Vol 20) 1933 Lah 352 (353) : 14 Lah 591. (Interpretation of some words in original decree—Original decree merged in appellate decree—Execution of appellate decree—Interpretation of same words is not barred by *res judicata*.)* (Vol 24) 1937 Mad 289 (290, 291). (Question raised but not decided — No bar)* (Vol 18) 1931 Mad 303 (308). (Matter not one which ought to have been raised in previous proceeding — No *res judicata*.)* (Vol 14) 1927 Mad 327 (328). (Withdrawal of claim under O. 21, R. 58, does not bar action under R. 89)* (Vol 11) 1924 Mad 509 (510). (Incidental finding regarding order of sale of property does not bind executing Court.)* (Vol 8) 1921 Mad 30 (36) : 44 Mad 232. (Person not party to former proceedings — No *res judicata*.)* (Vol 6) 1919 Mad 197 (197, 198). (Plea not one which ought to have been raised — No *res judicata*.)* (Vol 5) 1918 Mad 884 (887) (SB). (Matter not in issue in former proceeding — No *res judicata*.)* (Vol 4) 1917 Mad 101 (102). (Order not final—No *res judicata*.)* (1913) 1913 Mad V N 54 (55). (Parties not same — No *res judicata*.)* (1910) 7 Mad L Tim 258 (260, 262). (Parties different—No *res judicata*.)* (1901) 24 Mad 681 (682, 683). (Omission to grant relief—Relief not refused — No *res judicata*.)* (1895) 18 Mad 482 (483). (Reliefs claimed different — No *res judicata*.)* (Vol 28) 1941 Nag 152 (153, 154). (Order not on merit.)* (Vol 25) 1938 Nag 273 (273) : I L R (1939) Nag 104. (Order not between same parties)* (Vol 4) 1917 Nag 118 (119). (Decision on reference which was incompetent — No *res judicata*.)* (Vol 12) 1925 Oudh 417 (417) : 29 Oudh Cas 98. (Decision on technical plea — No *res*

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judicata. * (Vol 4) 1917 Oudh 92 (96). (Executing Court not competent to decide issue — No *res judicata.*) * (Vol 26) 1939 Pat 41 (42, 43). (Objection of one defendant to attachment of his property dismissed — Other defendants are not debarred from raising objection to attachment of their property.) * (Vol 12) 1925 Pat 807 (810). (Order *ultra vires* of executing Court does not operate as *res judicata.*)

38a. Interlocutory orders. — See Note 39.

39. Miscellaneous proceedings.

(i) *Arbitration proceedings.* — [1] A valid and enforceable award made out of Court bars a suit on the original cause of action. (Vol 3) 1916 Lah 264 (265). * (Vol 17) 1930 Oudh 389 (391, 392) * (Vol 3) 1916 Low Bur 101 (102). (A valid award bars a suit based on any of the claims covered by the award.)

[2] Award neither acted upon nor replacing original rights is no bar to a suit on original rights. (Vol 14) 1927 Bom 237 (238).

[3] An award is as binding as decree of the Court even in respect of those matters not embodied in the decree as not being referred to arbitration. (Vol 7) 1920 Mad 615 (617).

[4] Decree on award is as binding on parties as any other decree in suit. (Vol 27) 1940 Lah 107 (109).

[5] Refusal to file a supplementary award does not operate as *res judicata* on a suit brought to enforce such award. (1911) 33 All 490 (493).

[6] An order of Court, refusing to file an award on the ground of misconduct of the arbitrators, is no decision and hence it does not operate as *res judicata.* (1910) 32 All 484 (488). (29 Cal 167 : 29 Ind App 51 (P C) Dist.).

[7] Arbitrator giving no indication that his award was merely preliminary — Award impeached by plaintiff by suit — Subsequently arbitrator purporting to make final award and decree passed in its terms — Plaintiff's suit was not premature and subsequent conduct of arbitrator would not vitiate it — Decree passed in terms of his final award would not operate as *res judicata.* (Vol 17) 1930 All 584 (586).

[8] Stray remark not incorporated in operative portion of a subsequent award held could not supersede the previous decree passed in terms of a previous award. (Vol 16) 1929 All 521 (525).

[9] Award though not in terms of reference if incorporated in decree operates as *res judicata.* (Vol 7) 1920 Cal 647 (647).

[10] Application to file awards registered as suit — Abatement ordered for non-joinder of representatives — Second suit to recover money due is not barred. (Vol 12) 1925 Bom 418 (418).

[11] Question in later suit is not barred by previous arbitration proceedings if question was not before arbitrator. (Vol 7) 1920 P C 121 (123) (P C) * (Vol 6) 1919 Lah 49 (50) : 1919 Pun Re No. 68. (Partition effected by arbitrators — Subsequent suit for partition of joint property besides that dealt with by arbitrators — Award does not operate as *res judicata.*)

[12] Award filed in Court at Karachi — Suit filed on same day at Lahore for cancelling contract and reference to arbitration and *ex parte* decree obtained — Lahore decree held operated as *res judicata* in award proceedings in Karachi Court. (Vol 11) 1924 Sind 60 (61).

[13] A reference to arbitration made before, and the award delivered after the suit cannot be pleaded in bar of the suit. The case would be different if by a reference and award before the suit the rights and liabilities of the parties had been determined at the date of the suit. (Vol 7) 1920 Sind 124 (126) : 13 Sind L R 193.

[14] Award filed in Court — Objection to jurisdiction of arbitrator can be raised even by separate suit —

Objection if raised before arbitration Court under S. 14, Arbitration Act (1899) and decided, separate suit is barred by S. 11, Civil P. C. (Vol 19) 1932 Lah 373 (380) * (Vol 23) 1936 Lah 865 (870). * (Vol 17) 1930 Sind 195 (196).

[15] Filing of unregistered award requiring registration — No objection by other party — Question is barred in subsequent suit. (Vol 24) 1937 Nag 132 (134) : I L R (1937) Nag 6.

[16] Subsequent suit is not barred by application to file award under Sch. 2, para. 20. (Vol 21) 1934 Mad 63 (69).

(ii) *Proceedings under Bengal Tenancy Act.* — [17] Doctrine of constructive *res judicata* does not apply to proceedings under Ss. 109 and 105, Bengal Tenancy Act. (Vol 10) 1923 Pat 174 (176).

[18] *Ex parte* decision of settlement officer under S. 105, Bengal Tenancy Act, as to fair and equitable rent does not operate as *res judicata* in subsequent suit for establishing Nishkar rights. (Vol 21) 1934 Cal 467 (468).

[19] Proceedings under S. 105-A, Bengal Tenancy Act. — Relationship of landlord and tenant held not to exist — Suit for ejectment as trespasser — Issues raised and determined in previous proceeding held *res judicata* (Vol 5) 1918 Pat 660 (663) : 3 Pat L Jour 379.

[20] Tank recorded as *niskar* of defendant — Suit by plaintiff under Bengal Tenancy Act for correcting the entry but failing — Subsequent suit in Civil Court for possession and declaration that tank is his *mal* and not defendant's *niskar* is barred. (Vol 16) 1929 Cal 385 (386).

[21] Proceedings under S. 26-J, Bengal Tenancy Act — Nature of tenancy does not arise as merely subsidiary to the main point in dispute but arises directly and essentially. (Vol 26) 1939 Cal 169 (175) : I L R (1938) 2 Cal 418. ((Vol 23) 1936 Cal 263, overruled.)

(iii) *Proceedings under Berar Patels and Patwaris Law.* — [22] Where it is found that, the order of a Deputy Commissioner regarding rotation of village offices, was not arrived at after a full and fair inquiry into the question of rotation and also that that official did not take cognizance of a new law, in promulgating the order, held that the order cannot operate as *res judicata* in subsequent proceedings on the question of rotation. (1938) 1938 Nag L Jour 171 (172).

(iv) *Proceedings under Bihar and Orissa Co-operative Societies Act.* — [23] Section 11 does not apply to disputes arising under the Act. (Vol 27) 1940 Pat 552 (555).

(v) *Proceedings under Bombay Gujarat Talukdars Act.* — [24] Decision of District Judge under S. 16 does not bar a regular suit on the principle of *res judicata.* (Vol 12) 1925 Bom 241 (243) : 49 Bom 442 (FB).

(vi) *Proceedings under Charitable and Religious Trusts Act.* — [25] Decision of District Judge in proceedings under the Act does not operate as *res judicata.* (Vol 21) 1934 Lah 771 (773) : 16 Lah 85.

(vii) *Proceedings under Chota Nagpur Tenancy Act.* — [26] Order of revenue Court under S. 87, operates as *res judicata.* (Vol 3) 1916 Cal 686 (688) : 43 Cal 136.

(viii) *Proceedings under Civil Procedure Code.* — (A) AMENDMENT. — [27] Decision of a District Judge, confirmed by High Court in revision regarding correction of clerical mistake in a decree bars a subsequent suit in respect of the same clerical mistake. (1910) 7 Mad L Tim 266 (266) * (Vol 2) 1915 Cal 696 (697). (Application to amend decree refused on merits — Decision is conclusive between parties and no further applications lie.)

[28] Successive applications for amendment can be entertained provided there has been no adjudication on a former application on the merits, either for default

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or because the Court thought the amendment unnecessary. Else a second application will be barred under the general principles of law of *res judicata*. (1912) 39 Cal 265 (271).

(B) LEGAL REPRESENTATIVE (DECISION UNDER O. 22, R. 5).—[29] A decision under O. 22, R. 5 that a certain person is not the legal representative of the deceased party, is not '*res judicata*,' because this order is not subject to appeal, and the matter decided is, therefore, not finally decided. (Vol 26) 1939 Lah 580 (581).

[30] Order *inter partes* under O. 22, R. 5, which did not concern property in subsequent suit between those parties does not operate as *res judicata* in subsequent suit (Vol 23) 1936 All 412 (422) : 58 All 734.

(C) MESNE PROFITS.—[31] When the Court dismisses an application for ascertaining mesne profits, all subsequent applications are barred, in spite of a direction in the decree to ascertain mesne profits in execution. (Vol 5) 1918 Cal 712 (743).

[32] The rejection of an application for assessment of mesne profits awarded by a decree in a suit, has the effect of dismissing the suit and a further application for the purpose is barred. (Vol 6) 1919 Cal 71 (72).

[33] Striking off application for accounts of mesne profits for want of sufficient stamps—Application not being necessary cannot act as *res judicata* for another application of decree-holder for reminding Court to proceed with the suit. (Vol 21) 1934 All 465 (469).

(D) OBJECTION UNDER O. 21, R. 58.—[34] An order in a claim case on the validity of a waqf is not *res judicata* in a suit between the same parties, in which the property in dispute is not the same as that in the claim case though both were included in the waqf. (Vol 4) 1917 Cal 669 (670) : 44 Cal 698.

(E) PAUPER APPLICATIONS.—[35] Application to file appeal *in forma pauperis* set aside—Decision cannot operate as *res judicata*. (Vol 17) 1930 Lah 501 (503).

[36] Proceeding for dispaupering is not a 'former suit' within the meaning of S. 11 and decision in such proceeding will not act as *res judicata*. (Vol 21) 1934 All 823 (823).

(F) PROCEEDINGS UNDER O. 21 R. 100.—[37] The finding of fact arrived at in the summary proceedings, under R. 100 of O. 21, would not be '*res judicata*' in a subsequent suit. (Vol 27) 1940 Cal 16 (17).

(G) RESTITUTION.—[38] Application under S. 144 for principal amount allowed—Subsequent application for interest is not barred either by *res judicata* or under O. 2, R. 2. (Vol 22) 1935 All 195 (197).

(H) REVIEW.—[39] A suit cannot be barred by *res judicata* by reason of the rejection of an application for review of a judgment in a previous suit made upon the same grounds as an application for review is not a suit within S. 11. Mere technicality should not stand in the way of granting a relief which a person is entitled to. (1913) 40 Cal 541 (543) : (1909) 10 Cal L Jour 420 (447, 448) : (Vol 17) 1930 Oudh 112 (112).

[But see (Vol 2) 1915 Cal 161 (161).]

[40] The principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect. Hence it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. (Vol 9) 1922 P C 80 (84) : 45 Mad 320 : 49 Ind App 129 (P C). (Case relating to award under Land Acquisition Act.)

[41] Suit decreed in favour of plaintiff for certain items in will, details of which could not be ascertained—Review petition by plaintiff saying that under will he

was entitled to further properties is not barred by *res judicata*. (1926) 1926 Mad W N 94 (95).

[42] Where a review against decree enhancing rent of a tenancy and holding it to be permanent was dismissed holding however that judgment as to permanent nature of tenancy was based on misapprehension judgment is not *res judicata* as to nature of tenancy. (Vol 14) 1927 P C 102 (103, 104) : 54 Ind App 178 : 8 Lah 573 (P C).

(ix) *Proceedings under Companies Act*.—[43] A question once settled by a Liquidating Court cannot be re-opened by a regular suit. (Vol 5) 1918 Lah 45 (47) : 1918 Pun Re No. 40.

[44] An order settling the list of contributories unappealed becomes final and *res judicata* and the question of liability of such person under the list cannot be re-opened. (Vol 2) 1915 Lah 227 (227).

[45] Where a suit by the liquidator of a company on a promissory note executed by a person for money due on shares is dismissed on the merits, the same matter cannot be re-agitated in the liquidation Court, as the acceptance of the pro-note in lieu of the shares amounted to a novation of the contract to pay the premium and thus the suit on the promote was dismissed on the merits by a competent Court. (Vol 5) 1918 Lah 371 (371).

[46] Suit by Official Liquidator to recover money due on pro-note—Defendant is entitled to claim set-off of sum due to him—Defendant not contributory of bank—Liquidation Court has no jurisdiction to recover money by summary process—Order of liquidation Judge disallowing plea of set-off does not operate as *res judicata*. (Vol 6) 1919 Lah 242 (243).

[47] On dismissal of a suit by the voluntary liquidator against a person for the recovery of a certain sum due by him to the company by reason of his being a share-holder an application by an official liquidator to place defendant on list of contributories of the company is barred. (Vol 7) 1920 Lah 43 (44) : 1 Lah 237.

(x) *Election proceedings*.—[48] District Magistrate declaring election void—Declaratory suit in Civil Court—Civil Court's jurisdiction is not ousted by R. 40, Bengal Election Rules (1930). (Vol 20) 1933 Cal 492 (493) : 60 Cal 438.

(vi) *Proceedings under Guardians and Wards Act*.—[49] A petition by one of the relations of a minor to be appointed guardian in preference to another, who was appointed already, is not barred when at the time of appointment the former was referred to a separate petition. (1909) 5 Mad L Tim 208 (208).

(vi) *Proceedings under Income-tax Act*.—[50] Doctrine of *res judicata* is inapplicable to assessment made by income-tax officer. The income-tax officer does not constitute a Court (Vol 25) 1938 Mad 148 (151); 11 Lah 1938 Mad 183.

[51] Decision regarding assessment arrived at after investigation and inquiry—Income-tax authorities are competent to reopen the decision—Income-tax authorities are not Courts and hence principle of *res judicata* does not apply to them. (Vol 17) 1930 Mad 209 (210, 213) : 53 Mad 420 (F B).

[52] *Res judicata* does not apply to orders under Income-tax Act, S. 33. (Vol 16) 1929 Mad 453 (456) (F B).

(viii) *Insolvency proceedings*.—[53] Decision under S. 4, Provincial Insolvency Act, is final and conclusive and operates as *res judicata*. (Vol 33) 1946 Mad 141 (143) : (Vol 6) 1919 All 229 (230) : 41 All 378 : (Vol 5) 1918 All 346 (349) : 39 All 626 : (Vol 23) 1936 Nag 112 (112) : 1 L R (1936) Nag 28 : (Vol 20) 1933 Nag 373 (374) : 30 Nag L R 112.

[But see (Vol 20) 1933 Cal 673 (674). (Decision in insolvency proceedings does not operate as *res judicata* in subsequent suit.)]

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[54] General principles underlying rule of *res judicata* can be invoked during insolvency proceedings, although S. 11 does not in terms apply. (Vol 24) 1937 Lah 4 (5).

[55] *Res judicata* applies to insolvency proceedings—Receiver's application for setting aside alienation dismissed—Creditor cannot again apply. (Vol 20) 1933 Mad 9 (10) : 56 Mad 395.

[56] Where the first application to be declared an insolvent was dismissed owing to failure to produce evidence a second application for the same is not barred by *res judicata*. (1912) 10 All L Jour 51 (51).

[57] Dismissal of previous application by debtor or creditor for adjudication does not bar another application by another creditor. (Vol 15) 1928 Pat 116 (117).

[58] Decision under S. 7, Presidency Towns Insolvency Act, is *res judicata*. (Vol 8) 1921 Mad 456 (457).

[59] When the question of title to certain property belonging to an insolvent was directly and substantially an issue in a previous suit between the parties in which the Official Receiver was impleaded, and it was finally decided neither party can re-agitate the question before the insolvency Court. (Vol 24) 1937 Lah 4 (5).

[60] In-solvency—Assignee substituted in place of holder of promissory note in schedule of creditors after notice to holder—Order acts as *res judicata* against persons claiming through holder. (Vol 21) 1934 Mad 292 (292).

[61] *Insolvency, p. c. dec.*—61. Section 11 prevents retrial of issues decided in a former suit and not in the same suit, yet the principle applies. The plea of *res judicata* still remains apart from the provision of S. 11. (Vol 8) 1921 P C 11 (13) : 43 All 297 : 48 Ind App 135 : 24 Oudh Cas 118 (P C).

[62] The rule of *res judicata* is applicable to all the stages of a suit and is not confined to Courts of first instance. (Vol 1) 1914 Cal 693 (694) & (Vol 11) 1924 Mad 406 (410). (*Res judicata* in the same suit is possible.)

[63] Decision in interlocutory orders operates as *res judicata* in subsequent stages of the same proceeding. The principle of S. 11 applies. (Vol 11) 1924 P C 202 (206) (P C) & (Vol 14) 1927 Cal 616 (617) & (Vol 11) 1924 Cal 1006 (1007) & (Vol 8) 1921 Cal 699 (701) & (Vol 7) 1920 Mad 732 (735) & (Vol 17) 1930 Pat 260 (264).

[64] Previous decision in the same suit is binding though not *res judicata*. (Vol 13) 1926 Oudh 420 (422).

[65] Order passed by predecessor-in-office after consideration of authorities cannot be set aside by successor. (Vol 17) 1930 Lah 836 (837) : 11 Lah 470.

[66] Lower Appellate Court remanding case ordering one of several documents to be admitted—Case coming up before successor of Judge making that order—He passing another order of remand ordering all documents in question to be admitted—Second order of remand is proper. (Vol 16) 1929 Oudh 398 (399).

[67] *Proceedings under Land Acquisition Act.*—[67] Adjudications by the appropriate tribunal under Land Acquisition Act are as much subject to the principles of *res judicata* as adjudication by Courts under C. P. C. (Vol 26) 1939 Sind 66 (67, 68) : I L R (1939) Kar 152.

[68] Decision by a Court on reference by Collector determining a question of title as between rival parties claiming compensation, operates as *res judicata* in a later suit involving the issue. (Vol 26) 1939 P C 135 (136) : I L R (1939) Kar 199 : 66 Ind App 145 : I L R (1939) All 460 (P C) & (Vol 11) 1924 Cal 757 (759) & (Vol 4) 1917 Cal 442 (443). (Where a party to a reference omits to make a claim at the time of the apportionment of the compensation, a subsequent suit to recover a portion of the compensation in a Civil Court is barred.) & (1941) 1941-1 Mad L Jour 408 (410).

[69] Decision in a proceeding under the Act is not a decision in a former suit and does not operate as *res*

judicata with reference to property other than that to which the enquiry under that Act related. (1909) 2 Ind Cas 853 (853) (All) & (1907) 34 Cal 466 (469).

[70] A finding in the land acquisition case regarding the validity of a gift does not operate as *res judicata* as that proceeding is a special proceeding confined to the determination of the amount of compensation due, and the persons to whom it is to be paid. (1897) 20 Mad 269 (272, 273).

[71] A prior decision in land acquisition case, though between the same parties and in respect of adjacent land is not *res judicata* if land is acquired under different notification. (Vol 15) 1928 Lah 263 (266).

[72] Land acquisition officer party to acquisition proceedings—Decision held not *res judicata* against Secretary of State as he was not a party. (Vol 19) 1932 Bom 386 (389) : 56 Bom 501.

[73] *Proceedings under Madras Estates Land Act.*—[73] Proceeding under Ss. 74 and 75 is one of summary nature—Finding of Collector as to payment of rent has not effect of decree and does not operate as *res judicata*. (Vol 4) 1917 Mad 242 (242).

[74] Applications of the kind contemplated by S. 20-A are not matters to which the doctrine of *res judicata* can be applied. (Vol 26) 1939 Mad 901 (902).

[75] Dismissal of suit under S. 115 is no bar to suit under S. 55 of the Act. (Vol 21) 1934 Mad 601 (603).

[76] *Proceedings under Madras Hindu Religious Endowments Act.*—[76] Order under S. 44—Suit challenging will is not barred by *res judicata*. (Vol 32) 1945 Mad 242 (243) : I L R (1946) Mad 36.

[77] *Proceedings under Oaths Act.*—[77] The decision by oath of any matter in issue in a former suit between the parties is *res judicata* in a subsequent litigation between them. (1913) 36 Mad 287 (290) & (1901) 24 Mad 444 (447).

[78] Decree against father in representative capacity by special oath operates as *res judicata* against sons under S. 11 Explan. VI, Civil P. C. (Vol 25) 1938 Bom 465 (466).

[79] *Proceedings under Registration Act.*—[79] Failure of suit under S. 77 does not operate as *res judicata* in subsequent suit for specific performance. (Vol 19) 1932 All 96 (97) : 51 All 68.

[80] *Proceedings under Small Cause Courts Acts.*—[80] Decision of a Small Cause Court on a question of title cannot operate as *res judicata* in a suit on title on regular side. (Vol 21) 1934 Lah 324 (325) & (Vol 25) 1938 Lah 811 (812) : I L R (1939) Lah 133 & (1881) 3 Mad 192 (199).

[81] Former suit in Small Cause Court—Subsequent suit on regular side—Same Judge presiding over both Courts—Decision in former suit is not *res judicata*. (Vol 26) 1939 Nag 130 (131).

[82] Where an application to set aside an *ex parte* decree, made with a necessary security bond, is withdrawn due to defect in certain formalities, second application for the same purpose, attacking the genuine security bond is not barred by *res judicata* by reason of dismissal of the first application. (Vol 23) 1935 Oudh 35 (35).

[83] A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law is no bar to a subsequent suit, in the same Court, which not being of a small cause nature is open to second appeal. (1906) 29 Mad 195 (206) (FB). (17 Mad 273 ; 24 Mad 444 and 27 Mad 63 overruled.)

[84] *Proceedings under Specific Relief Act.*—[84] Decree under S. 9 does not operate as *res judicata*—It is evidence of fact that a suit for possession was filed. (Vol 12) 1925 Cal 1046 (1047, 1048) & (Vol 32) 1945 Mad 265 (265). (Party to suit under S. 9, Specific Relief Act is not precluded from subsequently proving his title

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by long possession only. The failure in that suit is conclusive only regarding the fact that he was not in possession within six months of the suit and nothing more.)

[85] Dismissal of a possessory suit on merits by a Mamlatdar's Court does not bar a suit under S. 9 of the Specific Relief Act in the ordinary Courts. (1900) 24 Bom 251 (253, 254) (F.B.)

(*xvii*) *Proceedings under Succession Act.* — (A) **ADMINISTRATION PROCEEDINGS.**—[86] Decision in probate proceedings as to relationship of parties operates as *res judicata*. (Vol 17) 1930 P C 22(23) : 57 Ind App 24 (P C)* (Vol 19) 1932 Cal 634 (635)* (Vol 23) 1936 Rang 401 (402)* (Vol 10) 1923 Rang 257 (257, 258) : 1 Rang 258.

[But see (Vol 5) 1918 Lah 114 (116) : 1913 Pun Re No. 49. (Decision about relationship in proceedings for letters of administration does not operate as *res judicata* — This case is no longer good law in view of (Vol 17) 1930 P C 22 : 57 Ind App 24 (P C).)]

[87] Administration suit — Point of genuineness of will raised and decided — Question cannot be raised in subsequent litigation between parties. (Vol 17) 1930 Oudh 29 (31) : 5 Luck 186.

[88] The findings of facts arrived at in proceedings on application for letters of administration would not operate as *res judicata* in a subsequent suit for possession of the deceased's property. (1910) 5 Low Bur Rul 78 (79).

(B) **PROBATE PROCEEDINGS.** — [89] Decision in probate proceedings can operate as *res judicata*. (Vol 14) 1927 Cal 421 (423).

[90] Points in issue formulated and decided by a decree passed by the probate Court are *res judicata* in a subsequent suit. (1910) 11 Cal L Jour 623 (630, 631). (32 Ind App 244 : 33 Cal 116 (P C) followed)

[91] Finding under Succession Act as to genuineness or otherwise of will is conclusive between parties and operates as *res judicata* against parties affected. (Vol 23) 1936 Pesh 39 (40).

[92] The decision of a probate Court as to the genuineness of a will is binding on Courts exercising other than testamentary jurisdiction in the country. (Vol 3) 1916 P C 78 (80) : 43 Cal 694 : 43 Ind App 91 (P C).

[93] An application for grant of a probate only requires the question of representation to be settled. And its findings about rights and titles of parties are only incidental — Decision in the probate not *res judicata*. (1911) 13 Cal L Jour 547 (556, 558).

[94] Probate case — Finding as to who is entitled to letters is not *res judicata* in suit on title to the properties. (Vol 10) 1923 Rang 9 (10) : 11 Low Bur Rul 331.

[95] A grant of probate does not conclude the parties as to title. On application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition. (1910) 34 Bom 589 (592).

[96] The decision in a probate proceeding that two prior wills of the testator had not been revoked by a third does not bar a subsequent suit where the question is how far the dispositions in the prior wills were affected by the third will. (1911) 21 Mad L Jour 485 (486).

[97] Application for probate dismissed for default — Applicant's heirs can plead existence of will as defence to suit for property. (Vol 12) 1925 Mad 861 (869).

[98] Probate proceedings — Contesting caveators are bound by the decision unless good cause under S. 50 of the Probate and Administration Act is made out. (Vol 11) 1924 Mad 578 (581).

[99] Contentious probate proceeding which is suit under Probate and Administration Act, S. 82, is also

suit under S. 11 — Finding of fact in probate proceedings is *res judicata* though such judgment is not judgment within Evidence Act, S. 41. (Vol 1) 1914 Bom 8 (15) : 38 Bom 309 (F.B.).

[100] Probate proceedings — The order passed on compromise in previous probate proceeding cannot operate as a bar to an application for probate of the same will. (Vol 11) 1924 Cal 864 (866) : 51 Cal 745.

(C) **PROCEEDINGS UNDER SUCCESSION CERTIFICATE ACT (NOW REPEALED).** — [101] Decisions under the Act are not *res judicata*. (Vol 11) 1924 Lah 493 (494) : 5 Lah 105* (1902) 24 All 138 (142).

[102] Application by adopted son for succession certificate — Question of validity of adoption — Intricate enquiry not held — Decision is not *res judicata*. (Vol 12) 1925 Mad 497 (525) : 48 Mad 1.

(*xviii*) *Proceedings under U. P. Revenue and Tenancy Acts.* — [103] U. P. Land Revenue Act (1901), S. 233 (k) does not take place of rule of *res judicata* in partition suits — S. 233 (k) only bars suits asking for alteration of total amount of shares in mahal or suits asking for holdings to be changed from one mahal to another. (Vol 18) 1931 All 462 (465) : 53 All 568.

[104] U. P. Land Revenue Act, S. 233 (k) — Certain property put in separate patti of particular person — Objection not raised by cosharer though party to partition suit — Civil suit for possession by him of that patti claiming that he is entitled to it, is barred. (Vol 18) 1931 All 29 (31).

[105] U. P. Land Revenue Act, S. 233 (k) — Party having no opportunity to have his claim as to his title considered in partition proceedings is not barred from seeking declaration in Civil Court either by *res judicata* or by the provisions of cl. (k), S. 233. (Per *Wajir Hasan C. J.*) (Vol 20) 1933 Oudh 507 (512) : 9 Luck 249.

[106] U. P. Land Revenue Act (1901), S. 233-K — Application for partition — Mahal divided into four parties — One patti jointly allotted to A and B and their sister, C — A and B being recorded as owning 14 shares in the patti and C as owning only one share — C bringing civil suit against A and B claiming larger share than recorded in her name — C's suit was neither barred by S. 233-K nor by *res judicata* because in partition proceedings there was no conflict of interest between A, B and C and as for effecting partition it was unnecessary to determine shares of the parties *inter se*. (Vol 19) 1932 All 666 (668) : 54 All 742.

[107] The decision given by a Deputy Commissioner in summary proceedings under U. P. Land Revenue Act (1901) as regards the amount of rent and cess is not *res judicata* in a subsequent suit. (1911) 12 Ind Cas 331 (332) (Oudh).

[108] The decision of the Assistant Record Officer, under U. P. Land Revenue Act on tenancy rights, does not operate as '*res judicata*' in a subsequent suit not only before a Civil Court but also before a Revenue Court. (1941) 1941 Oudh W N 461 (462).

[109] Decision of settlement officer in jamabandi case does not operate as *res judicata* in a Civil or Revenue Court. (Vol 3) 1916 All 238 (239).

[110] Finding, under S. 30-A of the Oudh Rent Act, of the Deputy Commissioner is not *res judicata* and suit to set it aside is maintainable. (Vol 26) 1939 Oudh 73 (73, 74) : 14 Luck 416.

[111] Decree by settlement Court passed in accordance with directions contained in settlement circulars and declaring nature of grant operates as *res judicata*. (Vol 23) 1936 Oudh 225 (229) : 11 Luck 642.

[112] Questions decided by Settlement Court in previous suit are *res judicata*. (Vol 8) 1921 P C 131 (135) : 23 Oudh Cas 291 (P C).

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40. "Suit"—Meaning of.—[1] Per *Full Bench; Madeley J., dissenting.*—The word 'suit' should be construed liberally as meaning a part of a suit. There is no reason why, when a matter has been decided by a Court of competent jurisdiction, the decision should not be regarded as conclusive between the same parties when the question arises again in a different suit, though that suit as a whole could not be tried by the Court which decided the earlier suit. (Vol 30) 1943 Oudh 383 (346, 353) : 18 Luck 655.

[2] An application under S. 22, Provincial Insolvency Act to recover property wrongfully seized by the receiver is a "suit" within the meaning of S. 11, Civil P. C. (Vol 5) 1918 All 346 (349) : 39 All 626.

[3] Application to file award under Sch. II, para. 20 now incorporated in the Arbitration Act is not a suit. (Vol 8) 1921 Bom 339 (390) : 45 Bom 239.

[4] Where a judgment is obtained against a dead man and subsequently another suit is brought against his representatives, the former judgment must be treated as never having existed and it cannot operate as *res judicata*. (1907) 9 Bom L R 274 (279).

41. Heard and finally decided.—[1] To support the plea of *res judicata* in addition to the fact that the parties to the suits are the same and that the same matter is in issue the matter must have been heard and finally decided. (1897) 24 Cal 616 (626) : 24 Ind App 50 (PC) * (Vol 22) 1935 All 457 (457) * (Vol 6) 1919 Cal 65 (65) : 46 Cal 733 (An order of remand if not appealed against is final and cannot be re-opened thereafter.) * (Vol 2) 1915 Cal 629 (631) * (Vol 7) 1920 Lah 54 (55, 56) (Reasons for decision do not form part of decree and being appealable cannot operate as *res judicata*.) * (Vol 20) 1933 Mad 925 (927) : 57 Mad 73 (Principle of *res judicata* cannot be ignored on ground that reasoning in previous decision can be attacked on particular point.) * (1911) 21 Mad L Jour 57 (67, 68) * (Vol 18) 1931 Oudh 157 (158) * (Vol 6) 1919 Oudh 272 (274) : 22 Oudh Gas 60 (Court coming to decision after weighing evidence—Decision is final.) * (Vol 5) 1918 Pat 618 (619, 620) * (Vol 24) 1937 Sind 110 (112) : 31 Sind L R 55 * (Vol 21) 1934 Sind 112 (113).

[2] When an issue is raised, but not decided, it will not be *res judicata* in a subsequent suit. (Vol 24) 1937 Cal 741 (745) : I L R (1938) 1 Cal 187 * (Vol 24) 1937 All 401 (405) : I L R (1937) All 489 * (Vol 16) 1929 All 29 (30) * (Vol 19) 1932 Bom 326 (327) * (Vol 20) 1933 Lah 593 (593) : 14 Lah 365 (Mere negative finding would not constitute *res judicata*.) * (Vol 11) 1924 Lah 469 (470).

[3] It is not necessary that the decision should have been appealable. (Vol 26) 1939 Cal 169 (174) : ILR (1938) 2 Cal 418 (Question of *res judicata* can arise even in consequence of antecedent summary proceedings (Vol 25) 1938 Cal 246, reversed).

[4] In the following cases it was held that the matter was heard and finally decided :—(Vol 17) 1930 P C 224 (225, 226) : 57 Ind App 208 : 8 Rang 326 (PC) * (Vol 13) 1926 All 420 (420, 421) (Finding as to existence of custom of pre-emption in previous suit *inter partes*.) * (Vol 12) 1925 All 417 (418) (Mortgage by Hindu widow—Mortgagor held entitled to mortgage during her lifetime—Question is *res judicata* in subsequent suit questioning right of mortgagor to property.) * (1913) 11 All L Jour 937 (940) (Suit for possession and mesne profits by prior mortgagee.) * (1912) 9 All L Jour 165 (169) (PC) (Genuineness of document.) * (Vol 17) 1930 Bom 135 (137) : 53 Bom 676 (Suit by mortgagor of *khotsi* land for redemption.) * (Vol 8) 1921 Cal 761 (761) (Subsequent publication of Record of Rights does not destroy the effect of a previous decision between the parties.) * (Vol 5) 1918 Cal 125 (126) (Suit to set aside decree

obtained by fraud.) * (Vol 2) 1915 Cal 660 (661) (First suit against under-*raiyat* dismissed as plaintiff held not the sole landlord—Second suit against same defendant and another co-sharer landlord.) * (1906) 33 Cal 679 (681, 682) (Suit on decree barred by limitation.) * (Vol 27) 1940 Lah 1 (3) : I L R (1940) Lah 63 (Suit by decree-holder against father and son for declaration that son had saleable interest in the properties.) * (Vol 16) 1929 Lah 769 (769) (Custom in Punjab being primarily tribal, decision on question of custom given in suit about property situate in one village is *res judicata* in suit brought about property situate in neighbouring village.) * (Vol 12) 1925 Lah 596 (597). (Suit by principal against agent relating to certain transactions decided—Cross suit by agent in respect of the same matter is barred.) * (Vol 8) 1921 Lah 394 (395) (Mortgage—Successive suits on.) * (Vol 8) 1921 Lah 187 (187) (Hindu reversioner suing for declaration against widow's alienation—Decision bars fresh suit by him after widow's death.) * (Vol 14) 1927 Mad 1131 (1132) (Suit for declaration of plaintiffs' right to irrigate lands free of water-tax.) * (Vol 12) 1925 Mad 1179 (1181) (Prior decision on the plea of parties being divided from the deceased is *res judicata*.) * (Vol 5) 1918 Mad 1309 (1313) (Suit for cesses—Cesses held not payable by sheer force of custom without corresponding liability—Subsequent suit raising same question—Previous decision between same parties is binding.) * (Vol 5) 1918 Mad 1159 (1161) (Suit for ejectment—Execution barred—No fresh suit.) * (Vol 6) 1919 Nag 155 (155) (Prior decision—Finding as regards possession mixed with question of title between vendor and vendee operates as *res judicata* in suit for pre-emption.) * (Vol 3) 1916 Nag 1 (2) : 13 Nag L R 76 (Mortgage suit—Claim for personal decree refused—Matter cannot be re-agitated.) * (Vol 16) 1929 Oudh 275 (278) : 4 Luck 713 (Father's mortgagee impleaded in sons' suit for partition to get sons' share released from mortgage—Point fought in appellate Court which reduced rate of interest and held whole family property liable for mortgage—Decision being final and complete will be *res judicata*.) * (Vol 14) 1927 Oudh 60 (62) (Previous suit for possession based on inheritance and partly on agreement—Question of title finally decided.) * (Vol 11) 1924 Pat 307 (309) (The question in prior suit regarding the area of parcel of land demised if decided is binding in future litigation.) * (Vol 21) 1934 Rang 154 (155) (Order striking out party's name from list of defendants—No appeal filed—Subsequent suit against party for same relief by plaintiff does not lie.) * (Vol 6) 1919 Low Bur 38 (38) : 9 Low Bur 273 (Application for grant of letters of administration.)

[5] In the following cases it was held that the matter was not heard and finally decided. (Vol 29) 1942 P C 8 (10) : I L R (1942) 2 Cal 1 : I L R (1942) Kar P C 23 : 69 Ind App 51 (PC) (Decree in suit subject to final decision of Privy Council in another case is not final decree.) * (Vol 12) 1925 All 486 (487) : 47 All 561 (Suit to set aside sale on ground of non-receipt of consideration—Court finding that consideration was partly paid—Subsequent suit for balance of purchase money is not barred.) * (1910) 5 Ind Cas 325 (329) (All) (Suit abated is not *res judicata*.) * (Vol 23) 1936 Bom 402 (404) : 60 Bom 1008 (Former suit by widow's adoptee to recover possession against widow's alienee—Subsequent suit for possession by adoptee's alienee brought after widow's death.) * (Vol 19) 1932 Bom 442 (443) (Previous suit by widow to revoke probate of husband's will—Subsequent suit by adopted son for declaration.) * (Vol 16) 1929 Bom 116 (117) (Mortgagee in possession being also co-sharer suing for partition—Court overlooking stipulation of payment in mortgage and assuming mortgagee to be owner of the mortgaged property—Suit for

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redemption is not barred.) * (Vol 12) 1925 Bom 311 (313) (Suit relating to mortgage.) * (Vol 6) 1919 Bom 81 (83) : 43 Bom 568 (Question of tenancy.) * (Vol 6) 1919 Cal 974 (974) (Dismissal of suit for declaration of title by survivorship — Subsequent suit for declaration that certain alienations shall not bind reversioner is maintainable.) * (Vol 2) 1915 Cal 46 (47, 48) (Suit on mortgage.) * (1897) 24 Cal 711 (712) (Suit for rent.) * (Vol 28) 1911 Lah 169 (171) (Prior suit framed under Muhammadan Law — Later suit on customary law.) * (Vol 24) 1937 Lah 21 (22) (Execution case.) * (Vol 1) 1914 Lah 76 (78, 79) (Rent suit.) * (1909) 1909 Pun L R No. 152, page 703 (704) : 1909 Pun Re No. 100 (Successive suit for possession.) * (Vol 20) 1933 Mad 868 (869) (Suit on promissory note.) * (Vol 16) 1929 Mad 291 (292) (Suit for partition.) * (Vol 13) 1926 Mad 162 (163) : 18 Mad 688 (Suit under S. 92, Civil P. C.) * (Vol 13) 1926 Mad 692 (693, 694) (Question as to necessity for alienation by widow.) * (Vol 8) 1921 Mad 126 (128) (Mere suggestion by Court complied with by party is not *res judicata*.) * (1912) 35 Mad 216 (226, 227) (Title to land.) * (Vol 14) 1927 Oudh 15 (16) (Declaratory suit by sons that the property is not liable to execution and sale in decree against father.) * (Vol 13) 1926 Pat 289 (290) : 5 Pat 276 (Application challenging validity of a compromise decree under S. 151 dismissed — Subsequent suit for the same purpose is not barred.) * (Vol 24) 1937 Rang 824 (825, 827) (Previous partition suit dismissed as not maintainable — Subsequent suit for possession not barred.) * (Vol 24) 1937 Rang 204 (205).

[6] A decree-holder is not barred from bringing a fresh suit for possession of property for which he got a conditional decree previously and failed to execute it. (Vol 2) 1915 Lah 165 (165, 166) : 1915 Pun Re No. 77 : (Vol 12) 1925 P C 63 (69) : 47 All 250 : 52 Ind App 145 (P C) (Decree for possession passed on condition of payment of dower debt — Decree-holder failing to pay — Subsequent suit for possession is not barred.)

[7] Order, contingent on information to be furnished by parties, is not final. (Vol 4) 1917 All 21 (26).

[8] If a point had to be decided for the determination of a particular litigation and was so decided, the observations made obiter will not prevent its being *res judicata*. (1936) 17 Pat L Tim 356 (358).

[9] Each finding additional and supplemental ground for decision — Each acts as *res judicata*. (Vol 31) 1914 Oudh 321 (326) : 20 Luck 64.

[10] Accepting a decision and acting in accordance with it under protest does not prevent its being *res judicata*. (Vol 11) 1924 Pat 362 (366).

[11] The right to sue for partition is a continuing right incidental to the ownership of joint property. Therefore so long as the property remains joint, one of the co-owners can bring a second suit for partition though a previous suit for partition has been dismissed. (Vol 7) 1920 Cal 108 (109) * (Vol 2) 1915 All 1 (2) : 37 All 155.

[12] Plaintiff obtained a decree for possession of certain property which was not executed for three years. Possession over the property had been obtained otherwise than in execution and plaintiff was subsequently dispossessed. *Held*, that dispossession of the plaintiff subsequent to the date of the decree was a fresh cause of action and the suit was rightly brought. (Vol 3) 1916 All 163 (164) : 38 All 509.

[13] Erroneous decision as to rights of parties is as much *res judicata* as just a decree. (Vol 6) 1919 Mad 359 (360, 361) * (Vol 18) 1931 Bom 570 (576) * (Vol 11) 1924 Mad 193 (196) * (Vol 18) 1926 Nag 476 (478) * (Vol 7) 1920 Nag 274 (274) * (Vol 7) 1920 Oudh 302 (304) : 23 Oudh Cas 269 * (1909) 12 Oudh Cas 124 (127). (When a question is finally decided between the parties, the fact

that the grounds given for decision are erroneous does not prevent the matter from being *res judicata*.) * (Vol 30) 1943 Pat 327 (346) : 22 Pat 220 * (Vol 17) 1930 Pat 71 (74) * (Vol 17) 1930 Rang 294 (295).

[14] Questions that have been once settled between parties are not less *res judicata* on ground that similar questions between same parties have been decided otherwise in other litigation. (Vol 6) 1919 Mad 236 (237) : 42 Mad 702.

[15] As between two inconsistent decrees it is the later decree that will operate as *res judicata*. (1912) 14 Bom L R 854 (859) * (Vol 11) 1924 All 810 (810, 811) : 46 All 220 * (Vol 16) 1929 Cal 163 (164) * (Vol 8) 1921 Mad 612 (613) * (Vol 4) 1917 Mad 950 (950) * (Vol 22) 1935 Nag 123 (122, 123) : 31 Nag L R 211 * (Vol 21) 1934 Oudh 491 (492) * (Vol 25) 1938 Pat 359 (360).

[16] Rejection of an application for a rule does not make the matter *res judicata*. (Vol 23) 1936 Pat 119 (120).

42. Adverse finding.—[1] Adverse finding on an issue against successful party cannot operate as *res judicata* in subsequent suit. (Vol 22) 1935 Mad 701 (702) * (Vol 10) 1923 Cal 297 (297) * (Vol 20) 1931 Mad 770 (771) * (Vol 19) 1932 Mad 541 (541) * (Vol 2) 1915 Mad 294 (295, 296) : 37 Mad 25 * (Vol 31) 1914 Nag 154 (154) : I L R (1944) Nag 465 * (Vol 25) 1938 Oudh 18 (19, 20).

[2] Issue immaterial to decision decided and embodied in decree — It is not *res judicata* against party having decree in his favour. (Vol 3) 1916 Bom 277 (277, 278) : 40 Bom 662 * (Vol 11) 1924 Mad 626 (632).

[3] Decision on issue, not necessary to decide, does not operate as *res judicata*. (Vol 4) 1917 Cal 398 (399) * (Vol 7) 1920 Bom 335 (336) : 44 Bom 321 * (Vol 11) 1924 Mad 469 (470) : 47 Mad 453 * (Vol 6) 1919 Mad 212 (213) * (Vol 10) 1923 Nag 139 (139) * (Vol 31) 1914 Oudh 314 (316) : 20 Luck 226.

[4] Findings against successful party can operate as *res judicata* if they are not inconsistent with the decree. (Vol 7) 1920 Mad 871 (874). (13 Cal 17; 18 Cal 647 and 40 Cal 29, Diss. from) * (Vol 4) 1917 Cal 398 (399) * (Vol 4) 1917 Pat 653 (654) : 2 Pat L Jour 159.

[5] Decision arrived at in previous suit, though dismissed, operates as *res judicata* when that decision is embodied in the decree. (Vol 16) 1929 Cal 449 (449) * (Vol 6) 1919 Mad 1097 (1099).

[See however (Vol 7) 1920 Mad 871 (876).]

[6] Where in a former suit, between the parties, there were several issues, which were found against a party to a suit, who has appealed against all of them and there have been adverse findings against him, the decision on all those issues is *res judicata* against him. (Vol 19) 1932 Bom 484 (486) * (Vol 19) 1932 Lah 421 (422).

[7] Where a judgment is based on findings on more than one issue but it is doubtful as to on which issue the final conclusion is based, then the decision on all issues is '*res judicata*'. (Vol 6) 1919 Mad 1097 (1099).

[8] A finding in a suit will operate as '*res judicata*' in a subsequent suit against a party, when he has a right of appeal. (Vol 4) 1917 Pat 653 (654) : 2 Pat L Jour 159 * (Vol 33) 1946 Lah 256 (258) * (Vol 5) 1918 Pat 329 (329) : 8 Pat L Jour 178.

[See however (Vol 6) 1919 Mad 1097 (1099).]

[9] Party succeeding in suit though some findings against him — Fact that he does not appeal against such findings does not operate as *res judicata* against him. (Vol 20) 1933 Oudh 439 (451) : 8 Luck 602.

[10] Where suit against a defendant is dismissed but judgment contains finding adverse to him, he can re-agitate in a fresh suit the question decided by the

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finding (Vol 12) 1925 Mad 52 (52).

[See however (Vol 7) 1920 Mad 871 (873).]

43. Consent decree.—1. Section 11 does not apply to compromise suits as it applies in terms only to what was actually heard and finally decided. (Vol 16) 1929 Mad 96 (103)* (1912) 1912 Mad W N 1073 (1073).

See (1912) 35 Mad 75 (81). (Principles applicable to judgments by consent are not the same as those applicable to judgments by default.)

2. Estoppel can be proved by a judgment given by consent as by a judgment given after opposition. In either case the estoppel consists of the establishment of facts by order of the Court either by an agreed statement of the parties, or by the adjudication of the Court upon the controversy being fully heard. (Vol 5) 1921 P C 231 (232) (PC) (Case from East Africa)* (Vol 16) 1929 P C 249 (294) (PC) (Consent decree not discharged—It is as effective as ordinary decree.)* (Vol 15) 1928 P C 190 (192, 193) : 55 Ind App 266 : 10 Lah 75 (PC) (Pre-emptor party to suit by village landlords challenging sale to be pre-empted—Sale confirmed by compromise decree—Right of pre-emption cannot be exercised)* (Vol 17) 1930 All 619 (619) (Omission to settle part of dispute in consent decree—Subsequent suit not barred)* (Vol 9) 1922 All 19 (20) : 44 All 384 (Unless tainted by fraud or procured under undue influence)* (Vol 17) 1930 Bom 431 (435) : 54 Bom 696 (Est of illegality)* (Vol 15) 1928 Bom 279 (281, 282). (Previous petition for declaring marriage a nullity dismissed by consent of parties—Second petition is incompetent)* (1900) 24 Bom 77 (85)* (Vol 15) 1928 Cal 852 (853)* (Vol 13) 1926 Cal 672 (675)* (1897) 24 Cal 216 (237)* (Vol 33) 1946 Lah 73 (75) (Compromise decree for sale passed against mortgagor on assumption that mortgagor did not belong to agricultural tribe—Mortgagor precluded by *res judicata* from pleading in execution that he belonged to agricultural tribe)* (Vol 17) 1930 Lah 487 (488)* (Vol 11) 1924 Mad 88 (89, 90)* (1918) 36 Mad 46 (49)* (Vol 28) 1941 Nag 271 (273) : I L R (1942) Nag 498* (Vol 26) 1939 Oudh 269 (272) : 14 Luck 768* (Vol 8) 1921 Pat 131 (134) : 6 Pat L Jour 208 (Principle of S. 11 applies also to consent orders)* (Vol 4) 1917 Pat 9 (10) : 1 Pat L Jour 208 (In regard to properties not included in suit it operates as evidence of agreement and not as *res judicata*)* (Vol 23) 1936 Sind 99 (102) : 29 Sind L R 455* (Vol 20) 1933 Sind 53 (55)* (Vol 28) 1941 All 18 (23) : I L R (1940) All 691 (Whether S. 11 covers consent decree is immaterial for even if such decree creates estoppel it would bar trial of same question between the parties.)

[3] But parties must advert to point at issue and agreement on which decree is based must settle question finally. (Vol 21) 1934 Mad 454 (456)* (Vol 3) 1916 Mad 411 (411)* (Vol 25) 1938 Mad 225 (225, 226).

[See (1936) 63 Cal 550 (558).]

[4] Consent decree is as good as decree on contest—Party not choosing to raise grounds of attack or defence in previous suit which could have been raised cannot be raised in subsequent suit. (Vol 22) 1935 Lah 487 (488).

[5] Judgment confessed without any pleadings in the former suit—Question not put in issue in the former suit can be agitated in a subsequent one. (Vol 16) 1929 Mad 694 (696)* (Vol 21) 1934 All 1038 (1039).

[6] Parties admitting certain facts and hence no issue raised nor decision given on that point in prior suit but decree passed—*Res judicata* in such cases operates not only to actual decisions incorporated in decree but to facts accepted by both parties. (Vol 19) 1932 Mad 519 (521).

[7] Question left open by compromise—Consent

decree cannot operate as *res judicata*. (Vol 7) 1920 Pat 212 (213).

[8] Compromise decree cannot be taken to decide every point that ought to have been pleaded though decree on merits must. (Vol 16) 1929 All 243 (249) : 51 All 575.

[9] Suit for possession of land already decreed is not competent—Remedy is by way of execution. (Vol 4) 1917 Lah 11 (12).

[10] Agreement by father consenting to retention of custody of a minor by the mother—Agreement embodied in decree—Decree is not binding in a subsequent proceeding under the Guardians and Wards Act for the appointment of a guardian. (Vol 11) 1924 Mad 45 (45).

[11] Declaratory suit under O. 21, R. 63 by decree-holder—Compromise between decree-holder and defendant whereby latter acquiring right to occupy attached property in lieu of certain sum—Subsequent suit by decree-holder as zamindar is barred. (Vol 26) 1939 All 110 (111).

[12] A suing mortgagors and prior charge-holder B—Suit ending in razinama decree to which B agreed without making provision for his charge—Razinama decree providing payment of money to A by mortgagors and creating new charge on property in A's favour—Decree was not mortgage decree but only created new charge and did not defeat B's prior charge. (Vol 16) 1929 Mad 379 (381).

[13] Rent suit—Compromise in former suit superseded by another compromise—Decision based on former compromise does not operate as *res judicata* in subsequent suit. (Vol 20) 1933 Cal 69 (71) : 59 Cal 513.

[14] Compromise in Revenue Court making temporary arrangement—Subsequent suit in Civil Court is not barred by *res judicata*. (Vol 21) 1934 All 75 (76).

[15] Suit by a Hindu daughter in her personal capacity as limited owner asking for personal relief—Compromise decree—Decree is not binding on reversioners as *res judicata*. (Vol 26) 1939 All 197 (202).

[16] Consent decree—Plaintiff awarded mesne profits up to date of decree—No order regarding profits after date of decree—Subsequent suit in 1928 by plaintiff for profits after decree—Suit held not barred by *res judicata*. (Vol 19) 1932 Bom 222 (223) : 56 Bom 292.

[17] When under a compromise arrived at in a redemption suit, the parties did not agree that plaintiff's right of redemption would be extinguished, plaintiff is not prevented from bringing a suit for redemption. (Vol 13) 1926 All 20 (21) : 48 All 17.

[18] Compromise decree—Plea of '*res judicata*' will prevail even when result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. (Section 5, Hereditary Offices Act.) (Vol 28) 1936 Bom 301 (304).

[19] A consent decree can only be set aside on any ground that may invalidate an agreement. Question of want of jurisdiction is not sufficient. (Vol 23) 1936 Sind 99 (105) : 29 Sind L R 455.

[20] Consent decree obtained by successors of a trustee of choultry against founder's heirs in a suit for management—Suit by descendant and heir of founder against successors of trustee for management is not barred. (1910) 8 Mad L Tim 205 (205).

[21] Consent decree entitling plaintiff to a certain share in income of certain land for a particular fasli—Plaintiff not estopped from claiming larger share in income of land for subsequent years. (1911) 21 Mad L Jour 449 (450).

[22] Principle of *res judicata* does not apply to a suit for partition of joint property where the previous suit for partition was compromised as the plaintiff did not then desire to press his claim for partition and

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there was no decision on merits. (Vol 11) 1924 All 905 (906) : 46 All 820.

44. Decision must be necessary.—[1] A finding not necessary to the relief granted by the decree cannot operate as *res judicata*. (Vol 11) 1924 Oudh 205 (206)* (1911) 11 Ind Cas 89 (89) (All)* (1895) 17 All 174 (195) * (1894) 18 Bom 597 (602) (Even when such finding is inserted in the decree.)* (Vol 23) 1936 Cal 772 (774)* (Vol 12) 1925 Cal 996 (1000)* (Vol 24) 1937 Lah 638 (638, 639) * (Vol 20) 1933 Lah 218 (219) (Nor party given opportunity to challenge it.)* (Vol 10) 1923 Lah 248 (249)* (1911) 1911 Pun L R No. 120 p. 455 (457)* (Vol 22) 1935 Mad 551 (552)* (Vol 14) 1927 Mad 120 (121)* (1912) 1912 Mad W N 380 (381)* (Vol 4) 1917 Nag 107 (109)* (Vol 12) 1925 Oudh 386 (387)* (Vol 5) 1918 Oudh 275 (277)* (Vol 22) 1935 Pat 306 (316) : 14 Pat 70* (Vol 25) 1938 Rang 275 (275).

[See however (Vol 11) 1924 Cal 600 (605, 606) * (Vol 17) 1930 Lah 690 (691)* (Vol 5) 1918 Mad 39 (41, 42) (If it is embodied in the decree.)* (Vol 32) 1945 Oudh 144 (146) : 20 Luck 262 (Suit for possession by mortgagee — Question of rate of interest raised and decided — Finding, though unnecessary, held operated as *res judicata*.)]

[2] Possibility of appeal, from finding, is a test of its necessity for decision of the case. (Vol 17) 1930 Pat 71 (75)* (Vol 4) 1917 Pat 530 (531)* (Vol 17) 1930 Lah 149 (150).

[3] A finding by an appellate Court on a point not necessary for the decision of the suit and on which no issue was raised in the primary Court cannot operate as *res judicata* in a subsequent suit between the parties. (Vol 6) 1919 Cal 55 (55).

[4] Where an appellate Court omits to record findings on certain points raised in the case, on the ground that they were unnecessary for the decision of the case, its judgment does not in respect of those points operate as *res judicata*. (1912) 15 Ind Cas 229 (230) (Mad).

[5] Judgment operates by estoppel as regards all findings which are essential to sustain judgment. (Vol 17) 1930 Pat 71 (74)* (1895) 17 All 174 (195)* (Vol 7) 1920 Bom 385 (386) : 44 Bom 321* (Vol 6) 1919 Bom 81 (82) : 43 Bom 568 * (1911) 35 Bom 38 (39) (Though the suit is also rejected on the ground of under-valuation before registration or at any subsequent stage.)* (Vol 18) 1926 Cal 50 (82)* (1913) 40 Cal 29 (32, 33)* (Vol 14) 1927 Lah 804 (805) (Previous decision must be final and necessary.)* (Vol 7) 1920 Lah 465 (466)* (Vol 16) 1929 Mad 633 (640)* (Vol 2) 1915 Mad 106 (106, 107) : 39 Mad 1202 * (Vol 5) 1918 Oudh 275 (277) (Especially when the appellate Court has ignored the other findings.)* (Vol 4) 1917 Pat 622 (623).

[See however (1938) I L R (1938) Lah 75 (81)* (Vol 12) 1925 Lah 160 (162) (Finding in suit which the plaintiff was not bound, but nevertheless, did institute, operates as *res judicata* if it satisfies all other requirements of it.)* (1930) 31 Pun L R 406 (407) * (Vol 14) 1927 Mad 643 (644).]

[6] Matter which is *res judicata* cannot be agitated afresh merely by reason of suggestion in judgment which was unnecessary to the decision of the case that party may bring another suit. (Vol 22) 1935 Pesh 150 (151)* (Vol 33) 1946 Mad 141 (143) (Mere direction by Insolvency Court that another proceedings might be taken for having point more adequately considered and decided is of no avail.)

[7] Matter not in issue in previous suit decided — Decision is not *res judicata*. (Vol 21) 1934 Rang 375 (377)* (Vol 8) 1921 Mad 21 (22, 24) (FB)* (Vol 23) 1936 Pesh 61 (63).

[8] Obiter dictum in previous suit cannot be *res judicata* in subsequent suit. (Vol 20) 1933 Lah 412 (415)* (Vol 11) 1924 All 884 (890) : 47 All 17* (Vol 6) 1919 Bom 81 (82) : 43 Bom 568 (*Per Heaton, J.* — Where a finding is followed by a result which would equally follow from something essentially different then it cannot be supposed that finding is a final decision. It is merely an expression of opinion and nothing more.)* (1911) 13 Bom L R 1061 (1074)* (1909) 11 Bom L R 366 (370) (If a Judge decides a case on a preliminary point and then expresses his opinion on the other issues in the case, the latter will not be *res judicata*.) * (Vol 29) 1942 Cal 486 (488)* (Vol 20) 1933 Lah 404 (405)* (Vol 16) 1929 Lah 437 (438) (Interpretation of decree not necessary for disposal of execution application — Opinion expressed by executing Court will not be binding on parties.)* (Vol 5) 1918 Mad 751 (752)* (Vol 24) 1937 Oudh 116 (119) : 12 Luck 697* (Vol 6) 1919 Pat 561 (562) : 4 Pat L Jour 682 (Question was not a matter in issue in the previous litigation.)

45. Decision on merits necessary.—[1] The rule of *res judicata* does not come into operation unless the matter is expressly or impliedly decided on merits in the previous proceedings. (Vol 24) 1937 Lah 211 (212, 213)* (Vol 12) 1925 P C 55 (57) : 52 Ind App 100 : 47 All 158 : 27 Oudh Cas 334 (P C)* (Vol 24) 1937 All 54 (55)* (Vol 15) 1928 Lah 244 (245). (Application for amendment of decree.)* (Vol 16) 1929 Mad 404 (407) (Dismissal for want of evidence is on merits.)* (Vol 7) 1920 Mad 449 (451). (Rejection of plaint after full trial on merits operates as *res judicata*.) * (Vol 5) 1918 Mad 78 (79) (Suit dismissed on pleadings.)

[But see (Vol 29) 1942 Lah 71 (72) (Objection to attachment under S. 60, Civil P. C., dismissed for default.)* (Vol 16) 1929 Oudh 275 (277) : 4 Luck 713.]

[2] A former judgment proceeding wholly upon a technical defect or irregularity is not a bar to a subsequent suit on the same cause of action. (1886) 8 All 282 (287)* (1909) 2 Ind Cas 622 (623) (All) * (1912) 13 Ind Cas 351 (352) (Cal)* (Vol 24) 1937 Nag 146 (147) : I L R (1937) Nag 430 (Want of registration of firm.)

[3] Suit between landlord and tenant — Question of title raised in issue and decided after evidence — Decision operates as *res judicata*. (Vol 30) 1943 All 340 (341) : I L R (1943) All 834.

46. Decision on preliminary or technical point.—

[1] Former suit dismissed on preliminary or technical point — Merits not gone into — Subsequent suit is not barred. (Vol 3) 1916 Nag 38 (38)* (Vol 29) 1942 All 410 (419) : I L R (1942) All 624. (Dismissal for plaintiff's failure to sue within three years of his attaining majority.)* (Vol 18) 1931 All 200 (201) (Dismissal for want of jurisdiction.)* (Vol 17) 1930 All 112 (113). (Order of rejection of memorandum of appeal presented by unauthorized person.)* (Vol 8) 1921 All 242 (243, 244). (Copy of judgment not filed — Appeal dismissed.)* (Vol 16) 1929 All 844 (844) (Suit dismissed for want of cause of action.)* (Vol 4) 1917 All 21 (27) (Rejection of application for review of preliminary order.)* (1886) 8 All 282 (286). (Suit dismissed for failure to pay court-fees and for misjoinder.)* * (Vol 22) 1935 Bom 131 (132) (Suit dismissed for misjoinder of causes of action and misjoinder of parties.)* (Vol 9) 1922 Bom 96 (97) : 46 Bom 726. (Suit dismissed as being barred under S. 47.)* (1880-81) 5 Bom 48 (57) : 7 Ind App 181 (P C) (Dismissal for want of cause of action.)* (Vol 21) 1934 Cal 799 (802). (Dismissal of suit for want of cause of action against some defendants.)* (Vol 14) 1927 Cal 794 (795). (Dismissal for non-joinder.)* (Vol 22) 1935 Lah 974 (975) (Suit dismissed as being premature.)* (Vol 18) 1931 Lah 79 (80) : 12 Lah 275. (Suit dismissed as abated.)* (Vol 16) 1929 Lah 596 (597)

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(DB). (Dismissal of declaratory suit under S. 42, Specific Relief Act.) * (Vol 12) 1925 Lah 193 (194). (Dismissal for misdescription of suit property.) * (Vol 10) 1923 Lah 150 (151) (Dismissal of suit as time barred.) * (Vol 3) 1916 Lah 229 (229); 1916 Pun Re No. 1 (DB) (Suit dismissed as time barred.) * (Vol 23) 1936 Mad 165 (166) * (Vol 22) 1935 Mad 696 (697) (Dismissal on ground of misjoinder.) * (Vol 9) 1922 Mad 259 (262) (DB). (Dismissal for non-joinder.) * (Vol 4) 1917 Mad 946 (947) (Suit dismissed as premature.) * (1890) 13 Mad 510 (511, 512) (Dismissal for failure to pay commissioner's fees.) * (Vol 6) 1919 Nag 15 (15, 16); 16 Nag L R 206 (Dismissal for non-joinder.) * (1912) 8 Nag L R 68 (70, 71) (Dismissal of suit as premature.) * (Vol 31) 1941 Oudh 321 (327); 20 Luck 64 (DB) * (Vol 25) 1934 Oudh 54 (56) (Dismissal on ground that plaintiff could not sue alone.) * (Vol 15) 1928 Oudh 503 (507); 4 Luck 159 (DB) (Suit dismissed for want of proper court-fees.) * (Vol 2) 1915 Oudh 143 (149) (Suit dismissed for misjoinder.) * (Vol 29) 1942 Pat 293 (294) (Order that question raised was premature and should be raised at proper stage of litigation.) * (Vol 4) 1917 Pat 599 (590, 591); 2 Pat L Jour 313 (DB) (Dismissal for misdescription of property.)

47. Declaratory decree. — [1] Executable decree precludes fresh suit for same relief. (Vol 12) 1925 P C 31 (33); 52 Ind App 79; 32 Cal 314 (PC).

[2] Decree not acted upon for long time—Suit based on decree—Court should grant relief on basis of decree. (Vol 11) 1924 Pat 163 (166).

[3] A decree in a declaratory suit by a reversioner in the widow's life-time, impeaching an alienation by her is conclusive of actual reversioner's rights. The principle is less obviously just in cases where it operates to bind the ultimate reversioner if the declaratory suit fails. (Vol 11) 1924 P C 247 (248); 51 Ind App 381; 46 All 831 (I.C).

[4] Administration suit — Declaratory decree incapable of execution — Suit for distribution of shares as declared by the decree is not barred. (Vol 8) 1921 Low Bur 22 (24); 11 Low Bur 60.

[5] Suit in 1924 by co-tenant for share of income — No ouster claimed or decided—Claim decreed — Subsequent suit by son of such co-tenant for partition of same property held not barred by S. 11 or S. 47. (Vol 29) 1942 Bom 44 (45, 46); 1 L R (1942) Bom 14.

[6] Parties can bring a second suit for partition if the first decree, declaring their right to partition has not been given effect to. (1913) 37 Bom 307 (312) (DB).

[7] Decree in suit on mortgage by widow of mortgagor declaring her right to recover possession and further declaring devolution of right on her death — No period for payment of mortgage money fixed — Decree is purely declaratory—Subsequent suit for redemption is not barred. (Vol 14) 1927 Oudh 457 (460) (DB).

48. Dismissal for default. — [1] A dismissal for default does not operate as *res judicata*. (Vol 7) 1920 Nag 113 (114); (Vol 1) 1914 All 222 (223); (Vol 1) 1914 All 83 (84); (Vol 22) 1935 Cal 160 (166); 61 Cal 1023; (Vol 4) 1917 Cal 11 (11); (1889) 16 Cal 98 (102); 15 Ind App 156 (PC); (Vol 5) 1918 Nag 79 (80); (Vol 1) 1914 Nag 20 (20); 10 Nag L R 39; (Vol 20) 1933 Pat 208 (208); 12 Pat 179; (Vol 10) 1923 Pat 514 (514, 515); 2 Pat 739.

[2] A dismissal under O. 9, R. 3 creates no *res judicata*. (Vol 12) 1925 Oudh 337 (346); 28 Oudh Cas 8; (Vol 1) 1914 Cal 674 (675); (Vol 4) 1917 Pat 627 (629).

[3] A dismissal of a suit under O. 17, R. 3 operates as *res judicata* in respect of the rights of the plaintiff to recover in a subsequent suit the property sued for in the first suit. (1912) 1912 Pun L R No. 25, p. 84 (86); (Vol 23) 1936 Lah 385 (386); (1887) 10 Mad 272 (277, 278).

[4] The dismissal of a suit under S. 106 of the Bengal Tenancy Act, for default may bar a second suit of the same scope and nature, but it does not operate as *res judicata*. (1912) 15 Ind Cas 863 (864) (Cal).

[5] In the absence of any rules made by the Court, there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant. Dismissal of suit under Calcutta High Court Rules (Original Side) Chap. 10, R. 36, does not prevent a plaintiff from bringing a fresh suit. (Vol 22) 1935 Cal 212 (216); 62 Cal 15.

[6] Where a person fails to adduce evidence and contest the issue on a point raised, and allows the Court to come to a decision on that point, that decision operates as *res judicata*. (Vol 11) 1924 Rang 119 (122); 1 Rang. 500; (Vol 14) 1927 Cal 421 (425); (1917) 34 Ind Cas 640 (640) (Oudh).

[7] Dismissal of a suit by a tenant against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar mourashi* tenure for default does not preclude him, in a subsequent suit for rent brought by the landlord, from claiming abatement of rent owing to dispossession by the landlord. (Vol 7) 1920 Cal 407 (408) * (Vol 1) 1914 All 222 (223). (Suit for rent.)

[8] The dismissal of a suit under S. 120, Civil P. C. (1882) for default of appearance in obedience to the Court's order is a decree and bars a subsequent suit on the same cause of action. (1911) 13 Bom L R 658 (660).

[9] Arbitrators appointed to effect partition—Suit by one party to complete arbitration proceedings dismissed for default—Fresh suit for recovery of specific property allotted by award is not barred. (Vol 6) 1919 Mad 8 (9).

[10] Redemption—First suit dismissed for failure to pay decretal amount—Second suit is not barred. (Vol 9) 1922 All 377 (379); 44 All 730.

[11] Redemption suit dismissed for default under Code of 1859 does not bar second redemption suit though dismissal was before Transfer of Property Act was made applicable. (Vol 16) 1929 Bom 116 (119).

[12] Subject-matter the same — Previous judgment upon merits after hearing some evidence on both sides though in plaintiff's absence is *res judicata*. (Vol 15) 1928 Cal 271 (272).

[13] Where a previous suit by the defendant against the plaintiff for *varam* due to the former was dismissed for default and in that suit the plaintiff had raised the plea of discharge in respect of a loan due by the defendant to the plaintiff, a subsequent suit by the plaintiff against the defendant for money advanced is not barred by *res judicata* when the pleadings and judgment in the previous suit had not been produced. (1912) 11 Mad L Tim 201 (202).

[14] Suit on promissory note dismissed in default — Application to set aside dismissal dismissed, so also an appeal—Fresh suit on basis of entries in account books alleging that note was null and void — Cause of action held same and second suit was barred under S. 11. (Vol 7) 1920 All 340 (341); 42 All 193.

49. Finality in appealable cases. — [1] Court having jurisdiction to decide a question deciding it—Decision being appealable not appealed against is final and is *res judicata*. (Vol 13) 1926 Cal 1180 (1181) * (Vol 18) 1931 Cal 397 (400). (Where state of affairs after decision in suit still continues, the decision operates as *res judicata*.) * (Vol 9) 1922 Lah 361 (361) * (Vol 17) 1930 Mad 471 (473). (Portion of decree becoming *res judicata* not having been appealed against — Rest of decree taken up in appeal but based on same reasoning becomes also *res judicata*.) * (Vol 9) 1922 Pat 44 (46, 47); 1 Pat 90 * (Vol 23) 1936 Sind 99 (101); 29 Sind L R 455 * (Vol 28) 1936 Rang 393 (393, 394); 14 Rang 529.

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[2] The appellate decree supersedes the original decree and in deciding whether a certain decree operates as *res judicata* it should be seen whether the appellate decree had been passed against anybody representing the interest of the plaintiff in the subsequent suit. (1912) 39 Cal 925 (929, 930).

[3] Appeal from decision in previous suit pending before Privy Council—Decision does not operate as *res judicata* in subsequent suit. (Vol 18) 1931 Lah 161 (162) : 12 Lah 497.

[4] Possibility of appeal being filed and decision upset does not affect finality of decision. (Vol 13) 1926 Rang 122 (123) : 4 Rang 8 * (Vol 14) 1927 Mad 643 (644).

[But see (1889) 11 All 148 (158, 161) * (Vol 25) 1938 Lah 232 (234) (Following (Vol 3) 1916 Lah 177: 1916 Pun Re No. 48.) * (Vol 3) 1916 Lah 177 (179) : 1916 Pun Re No. 48 * (Vol 4) 1917 Mad 597 (597, 598).]

[5] Appeal filed from the first decision—Abatement of appeal does not amount to final decision and second suit is not barred. (Vol 14) 1927 Lah 1 (1) : 7 Lah 423 (DB).

[But see (Vol 19) 1932 All 603 (605).]

[6] If a party could not have appealed against the decree the decision cannot be held to operate as *res judicata*. (Vol 13) 1926 Cal 568 (572).

[7] If appeal fails or is not proceeded with, judgment appealed from becomes final. (Vol 23) 1936 Pat 193 (199) : 14 Pat 633 * (1883) 6 Mad 43 (46, 47) * (Vol 18) 1931 Sind 170 (173) : 25 Sind L R 493.

[8] No finding of a Court of first instance can be said to have "finally decided" any matter in issue when a competent appeal has been preferred against its decree and therefore it cannot operate as *res judicata*. (Vol 32) 1945 Mad 62 (64) : I L R (1945) Mad 378.

[9] Suit dismissed by lower Court — Appellate Court allowing plaintiff to withdraw suit — Appellate order cannot operate as *res judicata*. (Vol 4) 1917 Pat 188 (189).

[10] Suit dismissed by first Court — Appellate Court allowing withdrawal of suit with permission to bring fresh suit on ground that plaintiff could not adduce all evidence — Order is without jurisdiction—Fresh suit is barred as *res judicata*. (Vol 3) 1916 Cal 255 (256) : 44 Cal 367.

[11] Where an appeal is filed and admitted the matters decided by the lower Court cease to be *res judicata* and if the appeal is disposed of on some other ground, the finding of the lower Court is not *res judicata* concerning matters not referred to by the appellate Court. (Vol 7) 1920 Mad 77 (80) * (Vol 5) 1918 Pat 526 (528) * (Vol 21) 1934 Cal 14 (17) * (Vol 16) 1929 Lah 1 (5) : 10 Lah 447 (Suit relating to attached property abated — District Judge relying on abatement making order for compensation under Land Acquisition Act—Abatement reversed in appeal — District Judge's decision is not *res judicata*.) * (Vol 8) 1921 Mad 21 (23) (FB) (Secondary relief claimed and determined by lower Court but not by appellate Court is not *res judicata*.) * (Vol 6) 1919 Mad 38 (39, 40). (Suit dismissed as barred by limitation—Decision reversed on appeal—Decision of appeal Court and not of lower Court on question of limitation operates as *res judicata*.)

[12] Two cases on same facts but different decisions — One not appealed against — Appellate Court is not barred from hearing appeal from other. (Vol 22) 1935 Mad 214 (215).

[13] When a decree has been passed determining the extent of recurring liability in one suit and when the decision is under appeal from other decrees passed on

the authority of the first decision, they stand superseded by the decree passed in appeal and the fact that the subsequent suits were decided on the authority of the first decision and not on the ground of *res judicata*, makes no difference. (Vol 7) 1920 Mad 387 (388).

[14] Order of lower appellate Court reversed by High Court and whole case remanded—All intermediate proceedings wiped out — Another order of lower appellate Court passed in the meantime and not appealed against is not *res judicata*. (Vol 10) 1923 All 456 (457).

[15] Trial Court deciding on merits—Appellate Court deciding on preliminary points only—Decision is not *res judicata*. (Vol 19) 1932 Lah 452 (454) : 13 Lah 375.

[16] Suit decided on technical ground—Findings on merits given to avoid remand — Appellate Court confirming decision without entering into merits — Such findings held do not operate as *res judicata*. (Vol 7) 1920 Mad 871 (875).

[17] Preliminary decree specifying judgment-debtor's personal liability to pay in case sale proceeds be insufficient—Sale proceeds insufficient—Decree-holder obtaining order under O. 34, R. 6, Civil P. C. — Preliminary decree set aside on appeal—Order passed on application under O. 34, R. 6 falls to the ground and cannot operate as *res judicata*. (Vol 24) 1937 Lah 6 (7).

[18] Suit against several defendants — Other defendants deriving title from first defendant—Suit dismissed against all — First defendant not joined in appeal — Decision of trial Court is *res judicata* as between plaintiff and other defendants also. (Vol 14) 1927 P C 252 (255) : 55 Ind App 7 : 6 Rang 29 (PC).

[19] When a High Court gives a decision which is possible only on certain findings of the lower Court, those findings are *res judicata* in subsequent suit. (1905) 28 Mad 338 (340, 341).

[20] Suit by landlord to eject tenant and recover possession—Tenant denying lease and title of landlord and claiming adverse possession—In previous litigation between them, finding by trial Court as regards title and lease in favour of landlord but suit and appeal therefrom dismissed on ground of failure to give notice to quit to tenant — Tenant disallowed costs for failing to prove his title — Appeal by tenant in which title again raised, dismissed—Findings as regards title, lease and adverse possession are *res judicata* in subsequent suit. (Vol 24) 1937 Mad 114 (115, 117) : I L R (1937) Mad 545.

[21] Decision in second appeal that firm did not possess certain land—Letters Patent appeal pending—Subsequent suit against firm by other party to appeal for possession of same land under S. 9, Specific Relief Act—Court trying suit is bound by decision in second appeal on question of possession. (Vol 25) 1938 All 635 (636).

[22] A contention by the respondent regarding deduction of funeral expenses, of a *wakif*, from the *wakif* property in appeal is *res judicata*, when that point was specifically raised in the pleadings in the trial Court, and the findings of that Court were against respondent, and where there was no appeal by respondent nor any cross-objection by plaintiffs in their appeal. (1937) 1937 Oudh W N 429 (433).

[23] Execution proceedings — Judgment-debtor not objecting in spite of notice — Attachment directed — Subsequent objection by judgment-debtor held not barred by *res judicata* as it was raised before expiry of time for appeal or review against order of attachment. (Vol 22) 1935 Cal 306 (307).

[24] When an appeal against an order refusing to extend the time for payment of the mortgage amount has been made, and dismissed, the same point cannot be raised again as a ground of appeal in the appeal

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against the final decree. (Vol 4) 1917 Nag 127 (128) : 14 Nag L R 25.

[25] Suit against two defendants — Suit decreed as against defendant 2 only and plaintiff asked to pay costs of defendant 1—Appeal by plaintiff on question of costs — Defendant 2 impleaded but no contest made by him and defendant 2 asked to pay costs of defendant 1 — In an appeal by defendant 2, it was held that the decision on plaintiff's appeal did not bar appeal — No constructive *res judicata*. (Vol 22) 1935 Lah 825 (826).

[26] Suit for possession of some banjar land by all proprietors of one mahal against all proprietors of another—Only few appealing—Appellate Court directed inquiry into possession of these few—After inquiry appeal confirmed and possession was obtained—In subsequent suit for the same land against all proprietors title held *res judicata* — Decision in prior suit held binding against all proprietors. (Vol 1) 1914 Lah 133 (135) (DB).

[27] Mortgage decree for full amount against father and also against son on the ground that hypotheca was joint family property and not separate property of mortgagor father as claimed by mortgagee and mortgage was binding on son — Decree subsequently amended under S. 19, Madras Agriculturists' Relief Act, at the instance of son—Appeal by mortgagee against amended decree—Finding adverse to mortgagee that hypotheca was joint family property held could not operate as *res judicata* in amendment proceedings. (Vol 32) 1945 Mad 62 (64) : I L R (1945) Mad 378.

50. Impliedly decided.—[1] Question though not expressly but impliedly decided operates as *res judicata*. (Vol 7) 1920 Cal 253 (254) (DB) * (Vol 21) 1934 Cal 179 (185, 186) (DB) * (Vol 20) 1933 Lah 594 (595, 596) : 14 Lah 409 * (Vol 15) 1928 Lah 888 (891) (DB) * (Vol 6) 1919 Mad 597 (598) * (Vol 13) 1926 Oudh 101 (107) (DB).

51. Matter left undecided.—[1] A decision in a previous suit cannot operate as *res judicata* in a subsequent suit if there was no contest, no issue and no finding between the parties although they were ranged on opposite sides. (Vol 11) 1924 Nag 124 (124, 125) * (Vol 12) 1925 P C 184 (187) : 52 Ind App 294 : 21 Nag L R 117 : 52 Cal 971 (P O).

[2] A decision on pleas A but not on pleas B is not *res judicata* on pleas B in a subsequent suit. (Vol 9) 1922 P C 241 (243) : 48 Ind App 49 : 48 Cal 460 (P O) * (Vol 12) 1925 All 770 (771) : 48 All 34 * (Vol 20) 1933 Cal 325 (329) : 60 Cal 87 (DB). (Mortgage suit—Question of paramount title raised but not decided.) * (Vol 18) 1931 Cal 511 (513) (DB). (Decree silent as regards certain claim.) * (1910) 6 Ind Cas 646 (647) (Lah) * (1912) 1912 Pun L R No. 251, p. 787 : 1912 Pun Re No. 56 (DB). (Previous suit decreed only against some defendants and dismissed against the rest—No cause of action.) * (Vol 25) 1938 Mad 193 (195) * (Vol 16) 1929 Mad 391 (392) * (Vol 14) 1927 Mad 1100 (1100) * (Vol 5) 1918 Pat 575 (577) : 3 Pat L Jour 404 (DB). (Dismissal for improper frame of suit is not *res judicata*.) * (1931) 1931 Mad W N 813 (814).

[3] Plea disallowed in previous suit owing to state of law at the time and the question left undecided—Change in law on the subject—Question is not *res judicata*. (Vol 12) 1925 Mad 1107 (1107).

[4] A question does not become *res judicata* if it has been left open. (1918) 1918 Pun W R No. 6 * (Vol 5) 1918 Cal 523 (524) (D B) * (Vol 2) 1915 Cal 568 (569) (D B). (Issue left open by consent.) * (1926) 96 Ind Cas 302 (302) (Lah) * (Vol 18) 1931 Pat 1 (10, 12) (D B).

[5] Decision on issue in previous suit, not necessary for decree, does not bar the issue in subsequent suit. (Vol 17) 1930 Oudh 124 (125, 128) : 4 Luck 404 (D B).

[6] Where the Court has expressly refused to decide the case on merits, there is no '*res judicata*'. (Vol 22) 1935 Lah 686 (687).

[7] Refusal of the Court to determine a particular issue does not operate as *res judicata* in the trial of that issue in a subsequent suit. (Vol 5) 1918 Pat 618 (619, 620) (DB) * (Vol 6) 1919 Cal 974 (974, 975) (DB) * (Vol 6) 1919 Lah 72 (74, 75, 76) : 1918 Pun Re No. 70 (D B) * (Vol 10) 1923 Oudh 101 (102).

[8] When plaintiff brings a fresh suit after withdrawal of the first with permission, the defendant cannot plead *res judicata*. (Vol 1) 1914 Oudh 234 (235) * (Vol 11) 1924 All 260 (261) * (Vol 17) 1930 Lah 634 (634, 635). (Suit dismissed on account of formal defect in plaint but permission to file fresh suit granted—Subsequent suit is not barred.) * (Vol 18) 1931 Mad 830 (832) * (Vol 5) 1918 Mad 1287 (1291, 1292) : 40 Mad 259 (F B). (Leave granted in appeal.) * (Vol 22) 1935 Oudh 35 (35).

[9] Plaintiffs abandoning their claim — There being no trial of issues arising between parties, there is no decision which can operate as *res judicata*. (Vol 26) 1939 Lah 414 (415).

[10] Plea taken and abandoned cannot be taken in subsequent proceedings. (Vol 10) 1923 Cal 121 (130) (DB).

[11] What is, and not what ought to have been, decided is to be looked to. (Vol 6) 1919 Lah 72 (74) : 1918 Pun Re No. 70 (D B).

[12] Suit for declaration of public right of way dismissed as no special damage alleged—Court declared that subsequent suit properly framed would not be barred—Subsequent suit is not barred. (Vol 6) 1919 Cal 123 (124) (D B).

[13] Review against decree enhancing rent of a tenancy and holding it to be permanent was dismissed, holding however that judgment as regards permanent nature thereof was based on misapprehension—Judgment is not *res judicata* on the point of permanent nature of tenancy. (Vol 14) 1927 P C 102 (104) : 54 Ind App 178 : 8 Lah 573 (P O).

[14] Direction to file separate suit — Subsequent suit for that relief is not barred. (Vol 2) 1915 Lah 503 (504).

[15] Where in a suit for money defendant pleaded discharge, and the Court decreed with the consent of the parties the full amount, reserving the right of the defendant to bring a separate suit for the amount of his plea, held that the reservation by agreement was not known to law and that a subsequent suit for the amount was barred by *res judicata*. (Vol 3) 1916 Mad 554 (554) (D B).

[16] Order 23, Rule 1, being the only provision for permitting suits to be withdrawn, the decision of the trial Court operates as *res judicata* where an appellate Court allows a suit to be withdrawn without jurisdiction. (Vol 7) 1920 Pat 63 (64) (D B).

[17] Order allowing some plaintiffs to withdraw without consent of others is without jurisdiction and the suit is deemed not to be withdrawn — However a fresh suit for partition is maintainable as the cause of action is a recurring one. (Vol 9) 1922 Pat 489 (490, 491) : 1 Pat 228.

[18] Order under O. 23, R. 1, without jurisdiction is not *res judicata* though not nullity—In any case it does not amount to disposal of suit. (Vol 5) 1918 Mad 1093 (1095) (D B) * (Vol 8) 1921 Cal 34 (38) : 48 Cal 138 (F B). (Overruling (Vol 3) 1916 Cal 255 : 44 Cal 367.) * (1912) 9 All L Jour 378 (379).

[19] Trial and first appeal Court dismissing suit on merits—Second appellate Court dismissing appeal on ground of defective constitution of suit without going into merits—Issue as to fraud decided on merits is not *res judicata*. (Vol 4) 1917 P C 201 (203) : 45 Cal 442 : 44 Ind App 213 (P O).

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[20] Issue decided by trial Court—Appeal—Appellate Court deciding on other grounds and declining to decide that issue—That issue is not *res judicata*. (Vol 13) 1926 Cal 179 (179, 180) * (Vol 12) 1925 All 243 (244) * (1912) 9 All L Jour 67 (69, 70) (DB) * (1881-82) 6 Bom 110 (112) * (1909) 3 Ind Cas 87 (87) (Cal) * (Vol 26) 1939 Lah 540 (540, 541) * (Vol 24) 1937 Mad 709 (710, 711) * (Vol 8) 1921 Mad 21 (22, 23, 24) (D B) * (Vol 1) 1914 Upp Bur 43 (43).

52. Withdrawal without permission. — [1] Withdrawal of suit does not operate as *res judicata*. (Vol 15) 1928 Lah 710 (712) * (Vol 15) 1928 All 689 (692) * (1911) 1911 Pun L R No 249, p. 922.

[2] Suit for recovery of possession of land — Relinquishment of portion of claim without leave of Court—Subsequent suit for recovery of relinquished portion is barred by *res judicata* and also under O. 23, R. 1 as the alleged cause of action in the subsequent suit was identically the same as that in the previous suit. (Vol 5) 1918 Cal 23 (26) (D B).

53. Litigating under the same title. — [1] The words "litigating under the same title" in S. 11 mean that the disputed title between the two parties must be same in both the suits. (1912) 14 Ind Cas 12 (14) (Oudh) * (Vol 17) 1930 Cal 47 (49) : 57 Cal 258.

[2] Section 11 requires that parties must be litigating under same title in both suits. (Vol 19) 1932 Mad 589 (591) * (1901) 24 All 114 (118) * (Vol 28) 1941 Cal 574 (579) * (Vol 12) 1925 Cal 1195 (1198) (Claim in the first suit based on a different title than that on which second suit was based — Plaintiff cannot be said to be litigating under the same title in the second suit.) * (Vol 2) 1915 Cal 129 (129) (Suit by reversioner to set aside alienation by widow.) * (Vol 20) 1933 Lah 920 (921) (Suit to declare property as belonging to temple.)

[3] The expression 'title' in S. 11 refers not to the cause of action on which the suit is brought, but to the interest or capacity of the party suing or being sued. If the plaintiff, in both suits, is suing in his individual capacity and in his own interest then he is litigating under the same title. (Vol 28) 1941 Cal 574 (579) * (Vol 16) 1929 All 400 (401) * (Vol 20) 1933 Lah 66 (67) * (Vol 29) 1942 Nag 119 (121) : I L R (1942) Nag 721 * (Vol 22) 1935 Oudh 121 (128) : 10 Luck 361 * (Vol 20) 1933 Oudh 535 (536) : 9 Luck 237.

[4] Parties not litigating under same title in subsequent suit — Decision in prior suit will not operate as *res judicata*. (Vol 4) 1917 Cal 667 (668) * (Vol 23) 1936 All 422 (429) (Previous suit against person in his personal capacity—Later suit against him as shebait.) * (Vol 18) 1931 All 21 (22) * (Vol 7) 1920 All 318 (321, 322) (Former suit brought to establish personal right—Subsequent suit on behalf of corporation.) * (Vol 4) 1917 All 261 (262) (Suit on promissory note and sale-deed by which it was transferred failed—Suit on covenant of indemnity in sale-deed held not barred.) * (1910) 6 Ind Cas 696 (697) (All) (Suit for declaration of title — Subsequent suit as mortgagor for possession.) * (Vol 27) 1940 Bom 311 (312) (First suit claiming as owner — Second suit as mortgagee.) * (Vol 21) 1934 Bom 36 (37) : 58 Bom 119 (Former suit contested as daughter of her mother — Subsequent suit as sister of her brother.) * (1912) 36 Bom 29 (36) (DB) (First suit as reversioner — Second suit as trustee.) * (Vol 31) 1944 Cal 42 (43) * (Vol 26) 1939 Cal 148 (151) * (Vol 21) 1934 Cal 356 (362) : 60 Cal 1406. (Claim proceedings taken against plaintiffs in their capacity as stridhan heirs to their mother—Order passed becoming conclusive — Subsequent suit for partition by plaintiffs as heirs to their father's estate is not barred.) * (Vol 17) 1930 Cal 688 (589) (Previous suit as against trespasser—Subsequent suit brought as against tenant.) * (1897) 24

Cal 84 (87) * (Vol 18) 1931 Lah 161 (162) : 12 Lah 497 (Personnel of plaintiffs in two suits when different illustrated.) * (Vol 17) 1930 Lah 284 (284) (Title of reversioners and of owner are entirely different.) * (Vol 9) 1922 Lah 44 (45) (Sale to tenant of proprietary right set aside and possession given to landlord in execution — Suit thereafter by tenant for occupancy rights is not barred.) * (Vol 22) 1935 Mad 670 (671) (First suit by creditor against insolvent — Subsequent application by him in insolvency Court to annul sale in favour of his wife.) * (Vol 12) 1925 Mad 59 (59) (Person added as legal representative of deceased party — Decision is not binding on him in personal capacity.) * (Vol 9) 1922 Mad 394 (396) (Plaintiff's present suit under S. 92—Previous suit in private capacity cannot operate as a bar.) * (Vol 6) 1919 Mad 743 (745) (Suit for possession as landlord does not bar like suit as reversionary heirs as titles are different and causes of action also differ.) * (Vol 2) 1915 Mad 62 (62) (DB) (Parties—Dismissal of suit against President, Taluk Board, is no bar to suit against private parties.) * (Vol 23) 1936 Nag 71 (73) : 31 Nag L R (Sup.) 202 * (Vol 21) 1934 Oudh 293 (295) : 10 Luck 61 (Suit by grandfather of plaintiff as reversionary heir claiming property — Subsequent suit by plaintiff for partition as joint family property not barred by *res judicata*.) * (Vol 13) 1926 Oudh 578 (583) : 1 Luck 489. (Previous suit in private capacity — Subsequent suit in public capacity.) * (1912) 14 Ind Cas 12 (14) (Oudh). (Litigating under same title— Meaning of.) * (Vol 16) 1929 Pat 173 (176) : 8 Pat 107 * (Vol 5) 1918 Pat 275 (276) (DB) (Suit on promissory note dismissed—Suit for damages for malicious prosecution — No *res judicata*.) * (Vol 28) 1941 Rang 159 (160) : 1941 Rang L R 204 * (Vol 13) 1926 Rang 191 (191, 192).

[5] Decision in prior suit does not operate as *res judicata* against person who had no title to land in suit at date of decree, but who acquires it under sanad creating successive life estate. (Vol 19) 1932 Bom 456 (458).

[6] Where a person sues as a decree-holder in one case, and as zamindar in another, the difference is not one of capacity or title but that of cause of action. (Vol 26) 1939 All 110 (111).

[7] Right claimed in two suits different—Suit though by same individual and with respect to same property is not barred by *res judicata*. (Vol 31) 1944 Lah 282 (284) : I L R (1944) Lah 568 (FB). ((1907) 1907 Pun Re No. 55 and (Vol 22) 1935 Lah 753 overruled.)

[8] Decision in previous suit is *res judicata* though property is different where title is identical (Vol 11) 1924 All 10 (10) * (1885) 8 Mad 219 (227, 228).

54. Different cause of action. — [1] Decision in former suit cannot operate as *res judicata* in another suit in which cause of action is distinct. (Vol 19) 1932 All 553 (554) * (Vol 32) 1945 Bom 67 (68) : I L R (1945) Bom 38 (Cause of action in previous suit split up to give jurisdiction to inferior Court in subsequent suit.) * (1912) 36 Bom 189 (194, 195, 197) (DB) (A fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar a second suit.) * (1888) 12-Bom 454 (464) (The ground relied upon in the present suit is a new ground not known and not in existence at the time of the former suit—There is not the necessary condition to establish an estoppel, namely, *eadem causa petendi* and *eadem conditio personarum*.) * (Vol 16) 1929 Cal 445 (447) * (Vol 12) 1925 Cal 1195 (1197) * (Vol 25) 1938 Lah 492 (493) * (Vol 20) 1933 Lah 1017 (1017) (Suit for declaration of title to property purchased by a plaintiff allowed to be dismissed — Subsequent suit for refund of purchase money is not barred.) * (Vol 4) 1917 Lah 250 (250) (*Allegus contrarius non audiendus* — Applicability of.) * (Vol 25) 1938 Mad 221 (223) *

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(Vol 14) 1927 Mad 415 (415, 416)* (Vol 25) 1938 Nag 401 (406) : I L R (1938) Nag 496* (Vol 5) 1918 Nag 96 (97)* (Vol 24) 1937 Oudh 263 (265) : 13 Luck 142.

[2] Causes of action arising out of the same title.—One cause of action decided in an independent suit—Second suit on the other cause of action is barred. (Vol 15) 1928 Nag 112 (113).

[3] Previous suit on no cause of action at all.—Subsequent suit is not barred. (1883) 7 Bom 408 (410).

[4] Plaintiff cannot evade bar of *res judicata* by joinder of several causes of action against the same defendants in subsequent suit. (Vol 32) 1915 Bom 45 (49).

[5] Previous suit dismissed.—Subsequent suit on same cause of action is not maintainable. (Vol 18) 1931 Mad 265 (269). (Vol 9) 1922 Bom 29 : 46 Bom 803 and (Vol 12) 1925 Mad 1172 (Dist.)* (1911) 34 Mad 97 (104) (Mere difference in the form in which they are stated or in relief prayed for can make no difference in law.)

[6] Ordinarily when a person has a cause of action and brings a suit upon that cause of action it is merged in the decree and is *transit in rem judicatum* and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his rights are gone. A person, therefore, allowing execution of a decree to be barred by time cannot institute fresh suit on the same cause of action. (Vol 5) 1918 Mad 370 (370, 371) : 41 Mad 641.

55. Different subject-matter.—[1] Applicability of S. 11 depends on identity of issues and not subject-matter. (Vol 20) 1933 Cal 222 (230)* (Vol 25) 1938 Nag 401 (406) : I L R (1938) Nag 496* (Vol 12) 1925 Oudh 444 (444).

[2] Subject-matter in previous suit different from that in subsequent suit—Previous suit does not operate as *res judicata*. (Vol 18) 1931 Lah 254 (254)* (Vol 4) 1917 Cal 669 (670) : 44 Cal 698* (Vol 5) 1918 Nag 96 (97).

[3] Alluvial land in subsequent suit not the same in previous suit but newly formed while old land disappeared.—There can be no *res judicata* or estoppel. (Vol 16) 1929 Oudh 15 (16).

[4] Land and crops on that land are different subject-matters.—Decision on claim as to latter is not *res judicata* as to former. (Vol 29) 1942 Mad 128 (129).

[5] Mere fact that value of subject-matter has arisen in interval between two suits cannot affect question of *res judicata*. (Vol 23) 1936 Lah 993 (1000) : I L R (1937) Lah 100.

56. Maintenance suits.—[1] Plea of maintenance not complete answer to claim for possession.—Suit for maintenance is not barred. (Vol 20) 1933 Pesh 61 (62).

[2] Suit for partition.—Person added as party.—Person not claiming maintenance.—Subsequent suit for maintenance by such person is not barred. (1913) 17 Cal W N 341 (347).

[3] Claim for maintenance against father founded on *ekhrarnama* dismissed.—Suit claiming maintenance charged upon estate against elder brother who alone succeeded to estate is not barred by *res judicata*. (1883) 9 Cal 945 (948) : 10 Ind App 45 (P C).

[4] Widow obtaining decree of maintenance against husband's house while residing in husband's house.—Defendants obtaining decree for her ejection.—Suit for declaration of right to reside in family house is not barred by reason of maintenance suit wherein no relief for residence was sought as, at that time, she was residing in her husband's house. (Vol 1) 1914 Sind 22 (23) : 8 Sind L R 306.

[5] Mother of minor illegitimate son of Sudra suing for maintenance making minor also plaintiff.—Plaint claiming maintenance until minor attained majority or during lifetime of plaintiffs.—Decree passed giving

maintenance to mother during her life and to minor until majority.—No plea raised as to minor's maintenance after majority nor issue framed.—Subsequent suit by minor after attaining majority for maintenance would not be barred by *res judicata*. (Vol 16) 1929 Mad 545 (561).

57. Mortgage suits.—[1] Section 85 of the Transfer of Property Act, corresponding to O. 34, R. 1, does not modify the law of *res judicata*. (1906) 29 Mad 65 (68).

[2] Claim for personal decree.—Mortgagee's right to obtain a personal decree in the event of the sale proceeds proving insufficient adjudicated upon and decided in favour of plaintiff.—Same is *res judicata* in subsequent proceedings and cannot be challenged in an application under O. 34, R. 6. (Vol 17) 1930 Oudh 378 (389) : 6 Luck 132 (F B).

[But see (1905) 1905 All W N 141 (145, 146) (Case under the Transfer of Property Act)]

Plea of paramount title.—[3] A defendant claiming paramount title is an unnecessary party in a mortgage suit and he need not raise such plea in the suit (Vol 29) 1942 Pat 226 (229, 230) : 20 Pat 841* (Vol 20) 1933 Cal 325 (329) : 60 Cal 87* (Vol 16) 1929 Cal 672 (675)* (Vol 3) 1916 Cal 170 (172) (But see a contrary view in 1891 All W N 132.* (1937) 1937 Mad W N 60 (62)* (Vol 14) 1927 Mad 301 (304)* (Vol 11) 1924 Nag 108 (408)* (Vol 17) 1930 Oudh 97 (99) : 5 Luck 658* (Vol 16) 1929 Pat 678 (682) : 9 Pat 539.

[4] Where A mortgages properties X, Y and Z to B and then mortgages X alone to C but it appears that Y and Z did not belong to A at all but to C as owner and in a suit on his mortgage by B, C is made a party as subsequent mortgagee of property X, the question of C's paramount title to Y and Z need not be raised by him in that suit. A subsequent suit by him for declaration of his title to Y and Z is not barred by *res judicata*. (Vol 5) 1918 All 81 (83, 84) : 40 All 534* (Vol 21) 1934 Cal 334 (337)* (Vol 21) 1934 Nag 33 (34).

[5] It makes no difference that the person claiming paramount title is impleaded in the suit as a purchaser or other person interested in the equity of redemption. (Vol 27) 1940 Sind 103 (104) : I L R (1940) Kar 302.

[6] Lease of property to A.—Subsequent mortgage of same property to B.—Then purchase of equity of redemption by A.—Suit on mortgage by B—A impleaded as party.—But no allegations derogatory to his right as prior lessee.—He need not plead his right as lessee. (Vol 26) 1939 Cal 692 (694, 695) : I L R (1939) 2 Cal 551.

[7] If the party claiming paramount title invites the Court to decide the question of his title and the Court goes into it and decides the question against him, he will be bound by it. (Vol 29) 1942 Pat 226 (229, 230) : 20 Pat 841* (Vol 18) 1931 Pat 64 (68) : 10 Pat 234* (1906) 33 Cal 425 (439).

[See also (Vol 20) 1933 Cal 680 (682) : 60 Cal 832.]

[8] Where A party claims paramount title in the mortgage suit and causes himself to be dismissed from the suit, he cannot sue subsequently to redeem the mortgage. (1886) 12 Cal 414 (421, 422) : 12 Ind App 171 (P C).

Several suits for redemption of same mortgage.—[9] Before the decision of the Privy Council reported in (Vol 21) 1934 P C 205:61 Ind App 362:56 All 561 (PC), there was a conflict of opinion as to whether, where nothing is done under a prior decree for redemption, a subsequent suit for redemption is barred by *res judicata* (1910) 32 All 215 (218)* (1899) 21 All 251 (262)* (Vol 14) 1927 All 305 (305)* (Vol 13) 1926 All 20 (21) : 48 All 17* (Vol 9) 1922 All 377 (379) : 44 All 730* (1909) 4 Ind Cas 410 (412, 413) (Lab)* (1902) 24 All

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44 (52, 56, 66) (FB) (Overruling (1897) 19 All 202.) * (Vol 1) 1914 Bom 200 (201) : 39 Bom 41 (46, 47) * (Vol 3) 1916 Cal 43 (44).

[10] In 1934 the conflict has been set at rest by the Judicial Committee which held that by the proviso to S. 60, Transfer of Property Act, 1882, the right to redeem subsists unless "it has been extinguished by order of a Court." This right conferred upon the mortgagor by express enactment can only be taken away by means and in manner enacted for the purpose. The words in the decree for redemption "his case will stand dismissed" cannot be construed as meaning that the plaintiff is to be debarred from all right to redeem. It does not operate as *res judicata*. (Vol 21) 1934 P C 205 (207, 208) : 61 Ind App 362 : 56 All 561 (P C).

[11] Where the prior decree for redemption does not provide that in default of payment within the time fixed, the right of redemption must be extinguished, a fresh suit for redemption is not barred. (Vol 23) 1936 Pat 420 (421) : 15 Pat 607.

[12] Unless there has been an extinction of the mortgage right or of the right to redeem, by a decree passed under O. 34, R. 8 (2) in the former suit, there can be no question of bar by way of *res judicata* to a second suit for redemption. (Vol 28) 1941 Mad 217 (221).

[13] All matters actually decided, such as the amount due, etc., will be conclusive and cannot be raised in the fresh suit. (1874) 22 Suth W R 269 (270).

Suit by mortgagees against mortgagor and puisne mortgagee. — [14] Puisne mortgagee impleaded in a suit on a mortgage brought by a prior mortgagee—Prior mortgage satisfied before sale under the decree in favour of prior mortgagee—Puisne mortgagee can sue mortgagor for sale on his mortgage. (Vol 6) 1919 Mad 100 (102) : 42 Mad 90 * (Vol 6) 1919 Mad 63 (66) * (Vol 9) 1922 Lah 358 (360). (Sale under prior mortgage decree—Deposit by subsequent mortgagee and application to reserve rights under his mortgage—Latter prayer rejected—Suit on his mortgage—Latter is not barred.)

[15] Where a usufructuary mortgagee brings a suit for possession against the mortgagor, a subsequent suit by the latter for redemption is not barred. (1913) 35 All 227 (233, 234) : 40 Ind App 74 (P C).

[16] In a suit on a mortgage the defendant, mortgagor, is bound to put forward a counter-claim for any sum that may be due to him by the mortgagee arising out of the mortgage transaction, the general rule being that all claims relating to the mortgage between the parties thereto must be determined in one suit. (Vol 7) 1920 Mad 531 (532).

[17] In a suit to enforce a mortgage against the heirs of a mortgagor, an heir who has an independent title in the mortgaged properties is not bound to set up his title. (Vol 19) 1932 Cal 12 (13) : 58 Cal 1222.

[18] Where the subsequent mortgagee of a holding governed by the Central Provinces Tenancy Act is the landlord himself, and the prior mortgage has not been created with his consent, it has been held that he is in the position of a person claiming by title paramount in respect of such prior mortgage and so, even though he may be added as a party to the suit by the prior mortgagee, the landlord is not bound to set up his rights under his mortgage in such suit. (1936) 19 Nag L Jour 290 (293).

Suit by mortgagee without impleading puisne mortgagee. — [19] A mortgagee who omits to implead a subsequent mortgagee in his suit for sale is not debarred from afterwards bringing a second suit on the same mortgage against the subsequent mortgagee. (Vol 25) 1938 All 115 (115).

Suits by puisne mortgagee against mortgagor and prior mortgagee. — [20] Prior mortgagee made a party to suit by puisne mortgagee on his mortgage—Prior mortgage not impugned or sought to be postponed in any way—Prior mortgagee need not set up his prior mortgage. (Vol 7) 1920 P C 81 (83) : 47 Cal 662 : 47 Ind App 11 (P C) * (Vol 16) 1929 Oudh 462 (466) : 4 Luck 250.

[21] Where the prior mortgage is impugned or sought to be postponed in any way, the prior mortgagee must set up his rights under the mortgage. Otherwise his rights will be barred. (Vol 10) 1923 Pat 290 (291) : 2 Pat 435 * (1912) 34 All 599 (602) : (1902) 24 All 429 (438) : 29 Ind App 118 (P C) : (1904) 31 Cal 428 (431).

[22] Where a person having a prior mortgage is impleaded only as a subsequent mortgagee or as the owner of the equity of redemption, thus impliedly negating the priority, he must, by way of defence, set up his priority or he will be barred from doing so later on. (Vol 3) 1916 Cal 808 (808) * (1912) 39 Cal 527 (556, 557, 558) : 39 Ind App 68 (P C) * (Vol 2) 1915 Cal 496 (498) * (1904) 8 Cal W N 385 (390).

[But see (Vol 6) 1919 Nag 57 (59, 60, 62) : 15 Nag L R 114 (F B).]

[23] In a mortgage suit paramount title cannot ordinarily be drawn into controversy without the consent of the parties. But if there is an allegation in the plaint, derogatory to the title of the prior mortgagee and if the prior mortgagee consents to have that title decided then he will be bound by the decision in that suit. (Vol 29) 1942 Pat 226 (229, 230) : 20 Pat 841.

Suits for redemption and for ejectment. — [24] A suit for redemption of a mortgage does not bar a subsequent suit by the mortgagor as a proprietor for ejectment of the mortgagee and *vice versa*. (Vol 16) 1929 Lah 833 (833, 834) * (1899) 2 Oudh Cas 139 (142) * (1911) 35 Bom 507 (509, 510) * (1904) 27 Mad 102 (105).

[25] Suit by a prior mortgagee against puisne mortgagee for ejectment—Latter is not bound to set up his title to redeem. (Vol 8) 1921 Nag 69 (70) : 17 Nag L R 33.

[26] Suit for possession on basis of ostensible sale-deed executed by defendant to plaintiff—Omission by defendant to plead that transaction was really mortgage—Plea in later suit is not barred by *res judicata*. (Vol 26) 1939 Bom 303 (304, 305).

[27] Where mortgagor sues to eject the mortgagee, not entitled to possession under his mortgage, the latter need not set up his rights under his mortgage. (1904) 14 Mad L Jour 485 (487).

[28] Suit by plaintiff against mortgagee—Claim founded upon absolute title treating mortgagee as trespasser—No question of plaintiff's right of redemption raised—Subsequent suit by plaintiff on the dismissal of prior one, for redemption of mortgage is not barred. (Vol 27) 1940 Cal 550 (552) : 1 L R (1940) 1 Cal 544.

Suits for redemption and settlement of accounts between mortgagor and mortgagee. — [29] In suits for redemption there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee up to the date of the redemption. (1908) 30 All 36 (37) * (1892) 16 Bom 656 (659) * (1908) 30 All 225 (229) * (1907) 34 Cal 223 (232, 233, 234) * (Vol 7) 1920 Mad 531 (532) * (1909) 12 Oudh Cas 152 (153) * (1905) 8 Oudh Cas 302 (303).

[30] Mortgagee must include claim for over-payments made to mortgagee or excess profits received by latter. (Vol 23) 1936 Cal 200 (202).

[31] Separate suit for mesne profits between the date of the payment under the preliminary decree and the date when the mortgagor is put in possession of the mortgaged property is not barred. (Vol 12) 1925

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Rang 13 (14) : 2 Rang 382 * (Vol 5) 1918 Mad 284 (284) * (Vol 25) 1938 Mad 405 (411) * (Vol 18) 1931 Pat 13 (13).

[But see (1907) 31 Bom 527 (534) (Deposit under S. 83, Transfer of Property Act.)]

Suit for redemption by mortgagor — Pleas which the mortgagee might and ought to raise.—[32] Two mortgages by A in favour of B, one usufructuary and one simple—Suit by A for redemption of usufructuary mortgage—B need not set up his rights under the simple mortgage also. (Vol 12) 1925 Lah 516 (516).

[33] Suit for redemption decreed — On failure of mortgagor to deposit mortgage amount within the time fixed, mortgagee failing to obtain order for sale—Mortgagee is barred from suing again on the mortgage-debt. (1839) 13 Bom 567 (570, 571).

[34] Where a mortgagor sues to cancel a mortgage given in renewal of an earlier mortgage and for possession, the defendant, mortgagee, if he fails to set up his rights under the earlier mortgage will be barred from subsequently suing to enforce his rights thereon. (1911) 14 Oudh Cas 117 (123).

[But see (Vol 14) 1927 Nag 83 (84).]

[35] A mortgagee who had purchased the equity of redemption in a portion of the mortgaged property and whose mortgage amount was thus discharged in proportion, filed a suit on the mortgage for recovery of the whole amount denying the fact of his purchase when raised by the defendants. The suit was decreed to the effect that on payment of the whole amount, the whole of the mortgaged properties should be delivered to the defendants. The latter paid up the whole amount. Subsequently, the mortgagee filed a suit for a declaration of his title to the property purchased by him. It was held that he was barred by *res judicata* from claiming such relief. (Vol 6) 1919 All 123 (125).

[36] In a suit for redemption by a puisne mortgagee against the prior mortgagee and sub-mortgagee, it is not incumbent on the latter to claim payment of the amount due to him and the failure to do so will not preclude him from subsequently suing his mortgagor for recovery of such money. (Vol 16) 1929 Oudh 455 (455) : 5 Luck 369.

[37] Mortgagee need not, in a redemption suit, set up in defence his right to specific performance of an agreement to sell. (Vol 17) 1930 Mad 539 (540).

Suits for redemption of several mortgages.—[38] Where there are several mortgages by the mortgagor in favour of the same mortgagee, a suit for redemption of one of such mortgages cannot bar a subsequent suit for redemption of the other mortgages. The redemption of other mortgages is not a ground of attack in a suit for the redemption of the first mortgage. (1906) 29 Mad 152 (154) (F B) * (1903) 26 Mad 760 (761, 762, 763) * (Vol 17) 1930 Mad 264 (266). (cf (Vol 14) 1927 P C 32 : 50 Mad 180 : 54 Ind App 68 (P C) which is no longer law. See S. 61, Transfer of Property Act.)

Suit on mortgage against Hindu father impleading the sons.—[39] Suit brought against father of Hindu joint family for enforcement of mortgage—Sons also joined as defendants—Plaintiff not asking for any relief against their interests in joint family property but only claiming a personal decree against them—Personal decree not granted—Plaintiff seeking to proceed against sons' interests in the joint family property—Held that the granting of such relief to the plaintiff was barred by the principle of constructive *res judicata*. (Vol 29) 1942 Oudh 9 (11) : 17 Luck 319 * (Vol 23) 1936 Oudh 139 (141) : 11 Luck 523.

Two mortgages in favour of same person, suit on one of them only.—[40] See Transfer of Property Act, 1892, S. 67A.

58. Parties and representatives. — [1] Per *Walsh J. (obiter)* Decision among parties out of Court may be *res judicata* independently of the provisions of S. 11. (Vol 12) 1925 All 503 (504) : 47 All 637 (F B).

[2] Judgment *inter partes* can bind only parties or privies. (Vol 32) 1945 Cal 283 (291, 292) * (1911) 33 All 493 (495) (F B) * (Vol 7) 1920 Cal 754 (755) * (Vol 9) 1922 Nag 189 (190) * (1910) 1910 Pun L R No. 100, p. 232 (286).

[3] Judgment *in personam* — Judgment not *inter partes*—No *res judicata*. (Vol 3) 1916 Lah 205 (206).

[4] If all who have a right to appear and be heard in a proceeding have been duly made parties, the judgment establishes a perfect and complete right against them all even where third persons are concerned. (1913) 36 Mad 141 (142, 143, 144) (D B) * (1911) 10 Mad L Tim 450 (450).

[5] For plea of *res judicata* person must be properly represented. (Vol 1) 1914 Low Bur 141 (141).

[6] Real beneficiaries are parties. (Vol 11) 1924 Lah 702 (705).

[7] Where a person is a *pro forma* defendant in a previous suit and no relief is sought against him therein, he is not precluded from raising the same question in a subsequent suit. (Vol 22) 1935 Lah 942 (943).

[8] The previous judgment will not operate as *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the prior suit. (1901) 25 Bom 74 (77).

[9] The pre-emptor by mistake impleaded in his suit only one of the four vendees, who realised the whole of the pre-emption money. Pre-emptor's application for mutation was resisted by the rest of the vendees. A subsequent suit for possession of the shares of these vendees or for proportionate refund in the alternative was not barred. (Vol 9) 1922 All 475 (476).

[10] An operative decree, obtained after the death of a defendant, by which the extent and quality of his liabilities are for the first time ascertained, cannot bind the representatives of the deceased, unless they were parties to the suit in which it was pronounced. (1889) 13 All 53 (64) : 17 Ind App 150 (P C).

[11] Final decree is binding on party whether he got notice or not and operates as *res judicata* in subsequent suit. (Vol 19) 1932 All 698 (700).

59. Co-defendants. — [1] Judgment can operate as *res judicata* between co-defendants. (Vol 7) 1920 Oudh 221 (222) * (1938) I L R 1938 Lah 75 (81). (New party added as defendant with knowledge of original parties — New party allowed to raise an issue—Decision is binding on the parties.)

[2] In order that a decision should operate as *res judicata* between co-defendants three conditions must exist : (1) there must be a *conflict of interest* between those co-defendants, (2) it must be *necessary to decide* the conflict in order to give the plaintiff the relief he claims, and (3) the question between the co-defendants must have been *finally decided*. (Vol 18) 1931 P C 114 (117) : 53 All 103 : 53 Ind App 158 (P C) * (Vol 30) 1943 P C 115 (120) : I L R (1943) Kar P C 123 (P C) * (Vol 18) 1931 P C 231 (234) * (Vol 30) 1943 All 197 (201) (Unnecessary decision in former suit does not operate as *res judicata*.) * (Vol 21) 1934 Bom 313 (316) : 53 Bom 544 * (Vol 30) 1943 Cal 76 (83) : I L R (1942) 2 Cal 299 * (Vol 30) 1943 Mad 276 (277) : I L R (1943) Mad 477 * (1892) 15 Mad 264 (265) * (Vol 31) 1944 Pat 185 (186) : 22 Pat 655 * (Vol 23) 1936 Rang 308 (309, 310).

[3] In order to apply the doctrine of *res judicata* as between co-defendants it is also necessary to show that the co-defendants were *necessary or proper parties*. (Vol 29) 1942 Cal 92 (95) : I L R (1942) 1 Cal 169 *

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(Vol 29) 1942 Cal 1 (17) : I L R (1941) 2 Cal 434. (Proper party.)

[4] Where all these conditions exist, the adjudication will operate as *res judicata* between the co-defendants. (Vol 19) 1932 P C 161 (164, 165) : 59 Ind App 247 : 10 Rang 322 (P C) * (1900) 22 All 336 (390) * (1887) 11 Bom 216 (220) * (Vol 30) 1943 Mad 276 (277) : I L R (1943) Mad 477. (Second condition not fulfilled — No *res judicata*.)

[But see (1886) 12 Cal 580 (582) (F B).]

[5] The doctrine of *res judicata* as between co-defendants must be applied with great caution. Where the plaintiff itself in a prior suit did not raise any conflict between the co-defendants and a defendant did not appear, but a co-defendant appeared and claimed an interest, conflicting with the interest of the absentee defendant, the decision, if any, on the point cannot operate as *res judicata* unless the absentee defendant gets notice of the conflict. In such circumstances the matter cannot be said to have been heard and finally decided so as to bind the parties. (Vol 30) 1943 Cal 76 (84) : I L R (1942) 2 Cal 299.

60. Conflict of interest. — [1] Co-defendants — *Res judicata* applies only where there is conflict of interest between them. (Vol 18) 1931 P C 114 (117) : 53 All 103 : 58 Ind App 158 (P C) * (Vol 19) 1932 All 520 (522, 523) * (Vol 12) 1925 All 546 (546, 547) : 47 All 872 * (Vol 21) 1934 Bom 313 (318) : 58 Bom 544 (Partition suit.) * (Vol 1) 1914 Bom 134 (135) : 38 Bom 438 * (Vol 22) 1935 Lah 544 (544, 545) (One of the co-defendants exactly in the position of plaintiff — Decision operates as *res judicata*.) * (Vol 2) 1915 Lah 283 (284) (A suit however by a third party against all the defendants in a prior suit is not affected by the rule of *res judicata*.) * (Vol 23) 1936 Mad 252 (254, 255) (Issue of joint family nature decided between co-defendants in a suit by another — In suit between co-defendants issue of jointness is *res judicata*.) * (Vol 17) 1930 Nag 3 (4) : 26 Nag L R 121 * (Vol 7) 1920 Oudh 221 (222) * (Vol 28) 1941 Pat 83 (87) : 19 Pat 669 (Partition suit.) * (Vol 24) 1937 Pat 27 (30, 31) (Occupancy tenancy.) * (Vol 15) 1928 Rang 315 (316) : 6 Rang 575 * (Vol 13) 1926 Sind 282 (283).

[2] Where there is no conflict of interest between the co-defendants, the decision will not be *res judicata*. (Vol 8) 1921 Cal 632 (633) * (Vol 8) 1921 Lah 47 (47) : 2 Lah 88 * (Vol 26) 1939 Mad 228 (233) (S B) * (1937) 20 Nag L Jour 159 (163) * (1937) 1937 All L Jour 1141 (1150) * (Vol 14) 1927 All 365 (365, 366) * (Vol 10) 1923 All 169 (170) * (Vol 2) 1915 Bom 222 (223) : 40 Bom 210 (Dissolution of partnership.) * (Vol 12) 1925 Cal 996 (1000) (Suit between co-shebaits.) * (Vol 4) 1917 Cal 679 (680) * (Vol 9) 1922 Mad 404 (405) * (Vol 28) 1941 Pat 211 (212) (Principal and surety.)

[3] Where there is a conflict the mere fact that the defendant supported the plaintiff or that he was *pro forma* party does not detract from the nature of the decision being *res judicata*. (Vol 26) 1939 Mad 830 (833) * (Vol 22) 1935 Lah 102 (102). (Plea of plaintiff and one defendant identical — Plea of co-defendants however conflicting — Decision *res judicata*.)

61. Constructive *res judicata*. — [1] A decision between the co-defendants can be on a point directly and substantially in issue between them either actually or constructively. (Vol 15) 1928 Oudh 155 (179, 181).

[But see (Vol 13) 1926 Cal 568 (572).]

[2] The finding upon a point not directly and substantially in issue among the defendants raised in a previous suit does not operate as *res judicata* in a subsequent suit between them. (Vol 4) 1917 Oudh 66 (69).

62. Decision. — [1] Where the conflict between

the co-defendants has not been decided, there will be no *res judicata*. (Vol 3) 1916 Pat 126 (129) * (Vol 9) 1922 All 19 (21) : 44 All 334 * (Vol 16) 1929 Mad 291 (292) * (Vol 10) 1923 Oudh 101 (102) * (Vol 28) 1941 Pat 211 (212) * (Vol 32) 1945 Mad 375 (376) * (Vol 27) 1940 Rang 136 (137) (Dismissal on a preliminary point — Issue not decided — No *res judicata*.)

[2] Co-defendants — Rights and obligations *inter se* must be defined. (Vol 6) 1919 Mad 359 (362).

[3] Court deciding points at invitation of parties — Matters so decided operate as *res judicata* although only one of such points is sufficient for disposal of suit. (Vol 17) 1930 Cal 810 (813) : 57 Cal 872.

[4] Where there is no conflict between the defendants and the point is not necessary for disposal of plaintiff's suit, there is no *res judicata*. (Vol 11) 1924 Mad 711 (712) * (Vol 6) 1919 Mad 359 (362) * (Vol 5) 1918 Mad 564 (568). (Finding on issues not in active controversy between defendants *inter se* does not operate as *res judicata*.)

[5] Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are not *res judicata*. (Vol 11) 1924 Mad 858 (858).

[6] Decision affecting right of one defendant against another is decision *inter partes* and will be *res judicata*. (Vol 16) 1929 Oudh 275 (277) : 4 Luck 713.

[7] Contest between co-defendants in partition suit — Issue expunged — Decree giving right claimed to one party — Issue does not operate as *res judicata*. (Vol 3) 1916 Pat 126 (128, 129).

[8] Co-defendants — Decision of material issue operates as *res judicata* in subsequent suit. (Vol 7) 1920 All 189 (190) * (Vol 12) 1925 All 663 (663) (Interpretation of *wajib-ul-ara* in previous suit is binding in later suit.) * (1910) 32 All 469 (475) * (Vol 12) 1925 Lah 434 (434) * (1912) 11 Mad L Tnn 71 (72) (In which they are arranged on different sides.) * (Vol 14) 1927 Nag 369 (369) * (Vol 6) 1919 Oudh 105 (108) : 22 Oudh Cas 300.

63. Ex parte decisions. — [1] An *ex parte* decree as against one defendant — Finding actually recorded as between decree-holder and another defendant is not *res judicata* between decree-holder and *ex parte* defendant. (Vol 22) 1935 All 678 (682) : 58 All 98.

[2] An *ex parte* decree on a bond against two joint debtors is not *res judicata* between those two debtors, when the question of their respective liability is raised in a suit for contribution by one against the other. (Vol 7) 1920 Cal 541 (541).

64. Necessity of issue. — [1] Co-defendants will be bound as between themselves only when the plaintiff cannot get at his case without deciding a case between the co-defendants. (Vol 19) 1932 P C 161 (164) : 10 Rang 322 : 59 Ind App 247 (P C) ((Vol 17) 1930 Rang 222 reversed.) * (Vol 22) 1935 P C 139 (142) : 14 Pat 611 : 62 Ind App 224 (P C) * (Vol 11) 1924 Rang 279 (281) (Defendant joining in one capacity but acting in another — Suit in latter capacity is barred.)

[2] Even when a decision on an issue is indirectly necessary, the decision operates as *res judicata*. (Vol 20) 1933 Lah 274 (278) : 14 Lah 31.

[3] If there is no necessity to decide the conflict for granting relief to the plaintiff, there will be no *res judicata*. (Vol 30) 1943 Mad 276 (277) : I L R (1943) Mad 477 * (Vol 10) 1923 Bom 208 (205) : 47 Bom 534 * (1936) 1936 Oudh W N 982 (997, 998) * (Vol 9) 1922 All 19 (21) : 44 All 334 * (1901) 25 Bom 74 (77) * (1898) 22 Bom 245 (250) * (Vol 8) 1921 Cal 632 (632) * (Vol 6) 1919 Cal 256 (257) * (Vol 21) 1934 Lah 688 (689) * (Vol 7) 1920 Lah 54 (56) * (Vol 22) 1935 Mad 649 (650, 651) (Question as to partition between defen-

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dants though specifically raised, not necessary for suit — *Held* decision did not operate as *res judicata* between defendants.) * (Vol 15) 1928 Mad 630 (635) * (Vol 13) 1926 Pat 478 (480, 481) * (Vol 4) 1917 Pat 535 (536, 537) * (Vol 13) 1926 Rang 71 (72).

[4] Plaintiff's case dismissed — Issue between co-defendants need not be decided. (Vol 14) 1927 Rang 156 (156).

65. Necessary parties. — [1] Co-defendant not necessary party — Decision is not *res judicata*. (Vol 8) 1921 Lah 47 (48) : 2 Lah 88 * (Vol 9) 1922 All 19 (21) : 44 All 384 * (Vol 30) 1943 Cal 76 (83) : I L R (1942) 2 Cal 299 * (Vol 6) 1919 Cal 596 (597) * (Vol 15) 1928 Pat 603 (606) : 7 Pat 566.

[2] *Res judicata* operates against contesting defendant though described as pro forma defendant. (Vol 2) 1915 Cal 629 (631) * (Vol 29) 1942 Cal 1 (16, 17) : I L R (1941) 2 Cal 434.

[3] Interpleader suit — Defendants though arrayed on same side are deemed to have adverse interests. (Vol 15) 1928 Oudh 155 (179, 181).

66. Co-plaintiffs. — [1] *Res judicata* between co-plaintiffs — Essentials are that there must be a conflict of interest between them; the decision of the conflict should be necessary for relief against defendants, and that a decision should have been given. (Vol 20) 1933 Lah 569 (570) * (Vol 12) 1925 Mad 645 (650) (Principle is the same as for *res judicata* between co-defendants.) * (Vol 5) 1918 Mad 1080 (1081) (Do.).

[2] No conflict between co-plaintiffs — Decision is not *res judicata*. (Vol 8) 1921 Pat 218 (222) * (1912) 14 Bom L R 854 (859).

[But see (Vol 25) 1938 Lah 571 (574).]

[3] A finding to become *res judicata* as between co-plaintiffs must have been essential for giving relief against the defendant. Where in the previous suit it was an insignificant matter for the defendant therein for the relief to be given against him, whether the one plaintiff succeeded or the other, the plea of *res judicata* ought to be disallowed. (1912) 36 Bom 207 (211, 212) * (Vol 20) 1933 Bom 287 (289) : 57 Bom 488.

[4] Decree passed in partition suit — While giving relief if question is decided as between different parties, decree is binding on all parties whether they are arrayed as plaintiffs or defendants. (Vol 17) 1930 All 287 (288) : 51 All 850.

67. Co-sharers. — [1] Judgment against one co-owner does not bar suit against another co-owner. (1886) 13 Cal 352 (356) (F B).

68. Co-tenants. — [1] A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants. (1912) 24 Mad L J 79 (83).

69. Hindu son, whether claims through father. — [1] Suit dismissed on ground that a person had no right to continue suit, cannot act as *res judicata* against his sons. (Vol 16) 1929 All 910 (911).

[2] Plea of *res judicata* available against Hindu father is not available against his son who does not claim property through him. (Vol 13) 1931 Mad 550 (551) * (Vol 3) 1916 Lah 15 (19) : 1916 Pun Re No. 25.

[3] Sale of ancestral house in execution of decree against Hindu father — Objection by father under S. 60 (1) (c) dismissed for default — Sale is binding on minor sons and suit by them to restrain decree-holder from interfering with their possession is not maintainable. (Vol 26) 1939 All 399 (400) : I L R (1939) All 602 (F B). (Vol 17) 1930 All 727 overruled.)

[4] Suit by father against son for declaration that certain property was his self-acquisition, and son had no

right thereto — Pending suit, attachment of same property by decree-holder in execution of a decree against son — Father's suit decreed in his favour — Suit by father against attaching decree-holder and son for declaration that property was not liable to be attached in execution of decree against son — *Held* that, decree-holder was estopped from impeaching father's title. (Vol 24) 1937 Mad 611 (652).

[5] Mortgage-decree against Hindu father — Minor sons not parties — Decree is still binding on sons and acts as *res judicata*. (Vol 16) 1929 Bom 213 (214) : 53 Bom 441.

[6] Suit to set aside alienation by father by one son does not bar similar suit by another after-born son. (Vol 11) 1924 Oudh 141 (142) : 27 Oudh Cas 107.

70. Interveners. — [1] Suit to set aside lease of land belonging to B by A claiming to be B's adopted son — Defence denying that A was legally adopted son of B — Issue on the point settled and C claiming to be reversioner of B, made defendant — Decision that A was adopted son of B bars subsequent suit by C against A to set aside adoption. (1875-76) 1 Cal 144 (146) : 2 Ind App 283 (P C). (1 Beng L R (A C) 68, overruled ; 12 Beng L R 304, (P C) approved.)

71. Judgment-debtor, decree-holder and auction-purchaser. — [1] Judgment against creditor who sought to attach property cannot operate as *res judicata* as against the judgment-debtor in a suit brought by judgment-debtor against the claimant. (Vol 15) 1928 Cal 130 (134) : 55 Cal 448.

[2] Judgment-debtor adjudged insolvent — Official Assignee is not a representative of the judgment-debtor. (Vol 12) 1925 Mad 688 (688).

[3] Decree-holder in claim suit under O. 21, R. 63 is not representative of judgment-debtor. (Vol 29) 1942 Mad 128 (129) * (Vol 29) 1942 Cal 92 (95) : I L R (1942) 1 Cal 169.

[But see (Vol 21) 1934 Rang 206 (207). (Suit under O. 21, R. 63 — Decree-holder claims under judgment-debtor.)]

[4] For operation of doctrine of *res judicata*, there must be reciprocity — Execution by attaching creditor held to be barred by time — Decision not binding on decree-holder. (Vol 20) 1933 Pat 210 (217).

[5] Title suit under O. 21, R. 63 on basis of kobala executed by members of joint Hindu family including defendants 8 to 10 — Alternative claim for declaration that at least share of defendants 8 to 10 did not pass by auction sale as they were not parties to decree or execution proceeding — Suit dismissed as kobala found to be farzi transaction — Decision held could not preclude defendants 8 to 10 from asserting their right to property. (Vol 29) 1942 Pat 279 (281).

[6] Declaration suit against decree-holder and judgment-debtor failing — In suit by auction-purchaser same plea of title cannot be raised though auction-purchaser not party to previous suit — Though not *res judicata* decision binds parties to that suit. (Vol 1) 1914 Cal 281 (282, 283).

[7] Auction-purchaser is a party claiming under judgment-debtor. (Vol 20) 1933 Lah 171 (172) * (Vol 13) 1926 Pat 478 (479) * (Vol 9) 1922 Pat 63 (67, 68) : 1 Pat 174.

[8] Auction-purchaser at revenue sale though not bound by but can take advantage of any decree between tenant and ex-proprietor. (Vol 7) 1920 Cal 420 (421).

[9] Purchaser under puisne mortgagee's decree subject to prior mortgage — Validity of prior mortgage not in question — Sons of mortgagor impleaded, but not doing anything so as to debar them from challenging

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prior mortgage—Prior mortgagee later on suing on his mortgage—Purchaser can challenge validity of prior mortgage as sons would have done. (Vol 15) 1928 Mad 557 (558).

[10] Purchaser in court auction of defendant's interest in certain properties is not bound by findings of Court as to the genuineness of documents in a suit to which the defendant was a party but the purchaser was not. (1911) 8 Ind Cas 846 (847, 848) (Mad).

[11] Permanent settlement—Revenue sale—Auction-purchaser is remitted to all rights possessed by original settlor at date of settlement—But he does not claim title through defaulting proprietor—Decision against previous proprietor is not *res judicata* as against him. (Vol 22) 1935 Pat 306 (314) : 14 Pat 70.

[12] Finding in previous execution proceeding about price of property is not binding upon auction-purchaser in subsequent sale as he is not representative of decree-holder—Finding is not *res judicata*. (Vol 15) 1928 Pat 108 (109).

72. Judgment 'in rem'.—[1] A judgment not *inter partes* or *in rem* is not *res judicata* in a subsequent suit. But such judgment or the whole record in that suit is admissible as evidence that a right had, in the previous suit, been unsuccessfully set up by one of the parties to the subsequent suit. (1912) 1912 Pun L R No. 142, p. 429 (430).

[2] A creditor who has unsuccessfully opposed his debtor's application to be declared an insolvent on the ground that he had made fraudulent transfer of the property, cannot in a subsequent suit raise the plea that the transfers were fraudulent and void. He is barred by the previous decision which is both a judgment *in rem* under S. 41 of the Evidence Act and also a judgment *inter partes* operating as *res judicata*. (Vol 7) 1920 Nag 97 (98) : 16 Nag L R 201.

[3] Decisions referred to in S. 41, Evidence Act, are binding on all parties (*Obiter*). (Vol 13) 1926 Cal 568 (573).

73. *Jus tertii*.—[1] Plea of *jus tertii*—Decision thereon is not *res judicata*. (Vol 14) 1927 Mad 844 (845) : 50 Mad 877.

[2] Suit for determination of rent in revenue Court—Finding that defendants held under a third person and not under plaintiff—Suit against third person for recovery of possession is not barred. (Vol 13) 1926 All 77 (78).

[3] Plaintiff's title negated in a former suit against contesting claimant—Plaintiff can reassert his title in another suit against third party—The judgment in previous suit is no bar to second suit. (Vol 8) 1921 Mad 248 (254) : 44 Mad 778 (FB). (Overruling (Vol 3) 1916 Mad 465 and 33 Mad 483.)

[4] Right between two persons adjudicated upon—Third person though not party cannot set up defeated person's rights. (Vol 19) 1932 Oudh 342 (343) : 6 Luck 710.

74. Lessor and lessee. — [1] A lessor is not bound by a finding as between the lessee and a third party. (Vol 11) 1924 Mad 576 (577) (Vol 14) 1927 Bom 270 (272) (Vol 8) 1921 Mad 306 (308) : 44 Mad 514 (Vol 22) 1935 Oudh 394 (398) : 11 Luck 209.

[See also (Vol 29) 1942 Oudh 301 (303).]

[2] A lessee who claims under a title previously created by a lessor is not bound by a subsequent finding between the lessor and the third parties. (Vol 11) 1924 Mad 576 (577) (Vol 8) 1921 Mad 708 (708).

[But see (Vol 24) 1937 Mad 544 (546).]

[3] Permanent tenure-holder is not represented by zamindar in title suits. (Vol 6) 1919 Cal 782 (795) (SB).

[4] A successor of a land-holder claiming a right to enhance rent under S. 26 (3), Madras Estates Land Act, I of 1908, is not a person claiming under the land-holder. (Vol 5) 1918 Mad 812 (813, 814).

[5] Suit for ejectment of licensee from predecessor-in-title—Previous suit by predecessor-in-title dismissed—Suit is not barred. (Vol 17) 1930 Oudh 203 (204).

[6] Question as to what villages were included in tenure decided between landlord and tenant—Plaintiff having subordinate interest in tenure suing landlord—Question is not strictly *res judicata* but plaintiff must produce strong evidence in his support. (Vol 15) 1928 Pat 615 (625) : 8 Pat 122.

[7] When a lessee assigns his lease, the lessor gets a distinct cause of action against each, the lessee and the assignee of the lessee, so that the judgment for rent obtained against the assignee is no bar for one against the lessee. (Vol 25) 1938 Bom 360 (361, 362) : I L R (1938) Bom 471.

[8] Decision as to title obtained against a lessor binds tenant, at least on the question as to whom rent is payable. (Vol 12) 1925 Cal 1218 (1219, 1220).

[9] Title suit against landlord—Tenant specifying certain lands in plaint as being included in his tenancy—Claim negated—Claim cannot be re-agitated in subsequent suit. (Vol 1) 1914 Cal 693 (694).

[10] Proprietor of 4/5ths share of zamindari X purchasing defaulting tenure A in X in execution of decree for his share of rent of tenure—Tenant of another zamindari Y putting forward claim to portion of land purchased—Claim allowed—Suit by proprietor of 4/5ths share in X against claimant and zamindars of Y to establish his title as landlord and as purchaser of A tenure—Decision that A tenure formed part of plaintiff's zamindari and plaintiff had title to it—Decision that A tenure formed part of plaintiff's zamindari found erroneous and found to form part of zamindari Y—Held that decision was *res judicata* both as regards title to tenure and zamindari title to suit lands. (Vol 6) 1919 Cal 782 (793) (S B).

75. Minor. — [1] Negligence of a guardian can be relied on as an answer to a plea of *res judicata*. (1912) 25 Mad L Jour 379 (383, 384) (1995) 19 Bom 571 (576) (Vol 33) 1946 Lah 233 (243) (F B) (Vol 5) 1918 Lah 223 (224) : 1917 Pun Re No. 103 (Not preferring appeal is not negligence.) (Vol 20) 1933 Mad 806 (816) (Vol 7) 1920 Mad 895 (897) (Vol 2) 1915 Mad 384 (385).

[2] Omission to rely on a previous judgment for pleading *res judicata* is not gross negligence of the guardian vitiating the decree against the minor. (Vol 12) 1925 Mad 258 (259).

[3] Defence open to but not raised by guardian—Minor is not precluded from raising that defence. (Vol 12) 1925 Oudh 633 (640).

[4] Minor not properly represented in former suit—Decision is not *res judicata*. (Vol 15) 1928 All 447 (448) (Vol 1) 1914 Low Bur 141 (141).

[5] Previous suit through next friend—Gross negligence by the next friend must be proved to overcome the bar of *res judicata*. (Vol 14) 1927 Oudh 354 (354, 355). (Guardian not going into witness box does not establish gross negligence.) (1909) 1909 Pun L R No. 25, p. 109 (112).

[6] Where it was not shown that a guardian *ad litem* acted in fraud of the minor's interests or that his or her interest was adverse to the minor, the minor is bound by the decree in the prior suit. (Vol 6) 1919 Mad 562 (564).

[7] Minor defendants are bound where their co-defendants had identical interest. Their minority during

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previous suit does not avail to escape the bar of *res judicata*. (Vol 16) 1929 All 346 (346).

[8] Suit to set aside decree on ground that plaintiff was wrongly impleaded as major though in fact he was minor — Question decided in proceeding under O. 9, R. 13 and negatived—Suit is barred. (Vol 29) 1942 Pat 357 (360).

[9] Suit by minor's guardian to recover property from vendee sold in excess of that sanctioned by Court dismissed — Fresh suit by minor after majority is not barred. (Vol 13) 1926 Lah 289 (239) : 7 Lah 129.

[10] A compromise involving a minor without the Court's sanction prescribed by O. 32, R. 7, does not operate as *res judicata*. (1912) 36 Bom 53 (56, 57).

[11] Suit resulting in decree against minor—Guardian *ad litem* is not estopped from contesting decree and urging his own claim to property in that suit, in subsequent suit brought by him in personal capacity. (Vol 1) 1914 Lah 233 (238) : 1914 Pun Re No. 1.

[12] Application by guardian *ad litem* to be discharged on the ground of minor's attaining majority—No notice to minor served — Order that minor had attained majority is not *res judicata*. (Vol 14) 1927 Pat 271 (275) : 6 Pat 383.

[13] Plea that minor was not properly represented in a previous suit though not taken by guardian is *res judicata* where it might and ought to have been taken. (Vol 11) 1924 Mad 608 (609) : 47 Mad 476.

[14] Decision in a suit brought by a person as next friend of a minor operates as *res judicata* in a suit by the minor, on attaining majority, on the same issue. (Vol 17) 1930 Lah 654 (655).

76. Miscellaneous. — [1] Previous suit for rent by patnidar dismissed on ground that relationship of landlord and tenant was not established — Subsequent suit by purchaser at patni sale for recovery of rent is not barred. (1913) 17 Cal W N 340 (340, 341).

[2] A decree by consent against the shebait of a temple as such who to the knowledge of the plaintiff has been dismissed from temple is not binding on the properties of the endowment in the hands of his successor in office. (1911) 14 Cal L Jour 337 (345).

[3] Prior suit under S. 5, Religious Endowments Act — Public not made parties—Second suit by public under S. 92, Civil P. C., is not barred. (Vol 8) 1921 Cal 425 (426).

[4] First suit by shebait for framing a scheme of management against other shebait — Second suit by gods themselves through one member of the dedicator's family against other members for declaration that the properties are debutter — Second suit is not barred as not being between the same parties. (Vol 14) 1927 P C 128 (128, 129) : 54 Ind App 238 : 54 Cal 770 (P C).

[5] Insolvency Court—Decision of, between insolvent and creditor that debt is time barred does not operate as *res judicata* between insolvent and surety when surety was no party to the insolvency proceeding. (Vol 19) 1932 All 610 (613) : 54 All 1007.

[6] Parties and representatives—Saranjamdar—Suit by, to recover possession for non-rendering of service — Dismissal of suit—Second suit for recovering possession on the same ground by the next Saranjamdar is barred. (Vol 3) 1916 Bom 273 (274) : 40 Bom 606.

[7] A person who has obtained a decree against firm cannot subsequently sue the partners for the same debt. (1910) 34 Bom 244 (247) (D B).

[8] Finding in previous suit that certain defendant was sub-partner—Appellate Court assuming the finding to be correct dismissing suit on ground that he was neither proper nor necessary party — Subsequent suit

for recovery of money on ground that defendant was sub-partner is not barred. (Vol 7) 1920 Mad 65 (69).

[9] On application by certain creditors of a firm, the firm was adjudged insolvent, and certain persons were held not partners of the firm—*Held*, decision was not *res judicata* in a subsequent suit by different creditors against the firm. (Vol 27) 1940 Cal 225 (226).

[10] Contract Act applies to partners—Judgment against one partner is no bar to subsequent suit against other partners, so long as debt is not extinguished. (Vol 20) 1933 Bom 407 (408, 409).

[11] Pre-emption—Suit for, decreed—Vendor getting decree for greater amount subsequently against vendee — Vendee cannot sue pre-emptor or vendor again. (Vol 20) 1933 Lah 257 (257).

[12] Vendee's suit against vendor successful—Part of property pre-empted — Vendor suing vendee and pre-emptor—Suit is barred. (Vol 20) 1933 Lah 529 (530).

77. Mortgagor and mortgagee. — [1] Decision against mortgagor does not bind mortgagee. (Vol 13) 1926 Oudh 1 (2) : 1 Luck 25.

[2] Suit for redemption of kanom mortgage by jenmi — Previous suit against mortgagor and mortgagee deciding title to property operates as *res judicata* at least as equitable estoppel. (Vol 2) 1915 Mad 1215 (1218).

[3] Mortgagor has only equity of redemption and not such an estate as to enable him to represent the mortgagee—He does not represent mortgagee in a suit instituted after the mortgage—A decree in such a suit does not bind the mortgagee as *res judicata*. (Vol 3) 1916 Bom 204 (205) : 40 Bom 679.

[4] On failure of a co-mortgagor plaintiff to comply with a decree in prior redemption suit, in which other co-mortgagors were defendants the latter may subsequently sue for redemption. The co-mortgagors plaintiffs in the subsequent suit cannot be said to claim under the plaintiff in the previous suit. (Vol 5) 1918 Oudh 25 (27).

[5] One A the owner of three houses and a well mortgaged two of them and the well with possession to K; and gave the third and half of the well to P. K filed a suit in respect of certain rooms of one of the houses mortgaged and for an injunction restraining P from using the well. The suit was decreed. R, the adopted son of A, sued to recover the third house and half of the well but it was finally dismissed. R then sold to K the mortgaged houses and the entire well. K filed a suit against P for a declaration of his right to the well and for injunction : *Held*, that the gift of A to P conveyed the equity of redemption in half of the well and P's right was *res judicata* by the decision of the suit between R and P and thus R's right is barred. (1911) 34 Mad 115 (116, 117).

[6] Person brought on record after preliminary decree as representative of mortgagor challenging mortgage — Court refusing to go behind preliminary decree and passing final decree—Final decree will not bar suit for declaration that mortgage was not binding on him. (Vol 16) 1929 All 252 (253).

[7] Person added as party but dismissed for having set up title adverse to mortgagor and mortgagee — Decree, though made in his absence, would act as *res judicata* so as to preclude him from subsequently claiming right of redemption. (Vol 7) 1920 Cal 688 (689).

[8] Decision against mortgagee is not binding on mortgagor. (Vol 5) 1918 Oudh 176 (180).

[9] A permanent lessee or a mortgagee from the owner of property is not bound by an adjudication against the owner after the creation of the mortgage or lease unless the lessee or mortgagee is himself a party to the suit. (Vol 6) 1919 Cal 782 (795) * (1901) 25 Bom 589 (592) * (Vol 13) 1931 Pat 64 (67) : 10 Pat 234.

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[10] Where in the previous suit by the prior mortgagee, the subsequent mortgagees of a part of the mortgaged property had by mistake been left out, there is nothing to bar the subsequent suit against the persons so left out. (Vol 25) 1938 All 115 (116)

[11] A puisne mortgagee and a prior mortgagee each obtained a decree on their mortgage without impleading the other and purchased the property in execution. A suit by the prior mortgagee, as first purchaser for possession was dismissed. *Held*, that it did not bar a suit by the prior mortgagee to enforce his mortgage. (1910) 32 All 119 (123, 124).

[12] A mortgage executed during the pendency of a mortgage suit in which the mortgagor's title is in question is subject to the result of the suit and if it goes against the mortgagor a subsequent suit by the mortgagee would be barred by *res judicata*. (1912) 13 Ind Cas 641 (641, 642) (All).

[13] Mortgagee suing for declaration that property is not liable to be sold free of his encumbrance — Defendants contending that one defendant alone was exclusive owner under will proved in another suit — Plaintiff not being party to that suit that decision could not be *res judicata* (Vol 6) 1919 Lah 174 (176) * (1915) 28 Ind Cas 440 (441) (Oudh).

[14] Decision against mortgagor is not *res judicata* against mortgagee if latter is not party to suit. Similarly decision between transferee of mortgagor and third person is not *res judicata* between mortgagee and such third person as mortgagee cannot be considered as litigating under same title in subsequent suit as mortgagor did in earlier suit nor under same title as transferee. (Vol 22) 1935 All 351 (352, 353).

[15] Mortgagee's suit for possession against stranger decreed — Stranger cannot set up title in subsequent suit by son of mortgagor for redemption because in the latter suit plaintiff mortgagor is really claiming through the mortgagee who had sued in the previous suit as representing the estate and as such defendant is barred from raising the same plea which has been adjudicated upon once before. (Vol 11) 1924 Bom 299 (299, 300).

78. Parties claiming under parties in previous suit. — [1] Person not party to suit acquiring interest before suit — He is not bound by decision in suit. (Vol 19) 1932 Mad 238 (239) * (Vol 15) 1928 Mad 635 (636) * (Vol 12) 1925 Mad 358 (358) * (Vol 3) 1916 Cal 673 (674).

[2] An alienee from the plaintiff pending a suit by him for mesne profits cannot, after the suit is decided against the plaintiff, sue for the recovery of the land from the same defendant as he will be barred by *res judicata*. (Vol 2) 1915 Mad 502 (503).

[3] Previous decision on same point between predecessors-in-interest of parties is *res judicata* — Ambiguous decision is not *res judicata*. (Vol 10) 1923 Mad 514 (515).

[4] A suit by plaintiffs' father to recover certain property as trustee was dismissed. After plaintiffs' father's death, plaintiffs brought the present suit to recover the same property as trustees: *Held*, that whether the plaintiffs succeeded their father as trustees or the trusteeship was joint family property of which the father was the manager, the plaintiffs were estopped by the decision in the previous suit. (1910) 8 Mad L Tim 221 (221).

[5] Suit by plaintiff's predecessor in office to recover certain land as an emolument attached to his office, dismissed — Subsequent suit by plaintiff to recover same land is barred. (1889) 12 Mad 235 (237, 238).

[6] A decision of the Court regarding an adoption in a suit between X and Y, can be questioned in a

subsequent suit between parties both of whom claim under Y. (1883) 6 Mad 43 (47).

[7] Decision in former suit against Municipality — Government neither claiming under Municipality nor Municipality litigating under same title as Government — Decision against Municipality does not bind Government. (Vol 22) 1935 Nag 61 (62) : 31 Nag L R 165.

[8] Decision in favour of insolvent after insolvency — Official Receiver not party to decision — No *res judicata* operates in favour of Official Assignee and persons claiming through him. (Vol 11) 1924 Mad 689 (690) ; 47 Mad 633.

[9] Trustee in bankruptcy and bankrupt are privies. (Vol 6) 1919 Sind 42 (45) : 12 Sind L R 61.

[10] Official Receiver is not privy of creditor — Creditors are not bound by decision in suit to which Official Receiver was party. (Vol 6) 1919 Sind 42 (45) : 12 Sind L R 61.

[11] Title suit against vendor and vendee — Decree holding that vendor had no title — Appeal by vendee impleading plaintiff alone — Vendor not party to appeal — Vendor not appealing — Finding against vendor does not operate as *res judicata* against vendee so as to bar his appeal. (Vol 25) 1938 Mad 501 (502). (Vol 24) 1937 Mad 228, Reversed).

79. Parties under whom they or any of them claim. — [1] Original suit right and proper — Decision obtained therein is binding on all persons on whom the interest or right may devolve. (Vol 15) 1928 Mad 246 (248).

[2] Assignee of decree applying but application dismissed for want of proof of assignment — Second application held barred as *res judicata* — Assignee retransferring decree to decree-holders — They and their subsequent assignees are bound by decision against first assignee. (Vol 13) 1926 Nag 200 (201) : 21 Nag L R 159.

[3] Judgment against person in whom estate vests is binding on his successor who claims and litigates under same title — Mode of devolution whether by special or ordinary rules is immaterial. (Vol 3) 1916 Bom 273 (274) : 40 Bom 606 * (Vol 19) 1932 Bom 15 (18) * (1885) 9 Bom 198 (219, 220) (F B) (In the absence of fraud or collusion judgment against one holder of service watan lands is *res judicata* against succeeding holders.) * (Vol 2) 1915 Lah 92 (93).

[4] A party who is privy to a decree is bound by the decree whether he has notice thereof or not. (Vol 6) 1919 Cal 169 (170).

[5] The words 'under whom they or any of them claim' are wide enough but their meaning should be restricted so as to bind a party to a subsequent suit by the decision in the previous suit only in respect of interest represented by the party in the former suit at the time of suit. The ground of privity for purposes of *res judicata* is property and not personal relationship. (1910) 33 Mad 459 (461, 462) * (1909) 5 Mad L Tim 37 (39, 40).

[6] *Res judicata* applies to parties and their privies — But privy must claim under title arising subsequently to commencement of first suit. (Vol 20) 1933 Lah 66 (67).

[7] Where the plaintiff in a subsequent suit has derived no title subsequent to the previous suit, the subsequent suit is not barred by *res judicata*. Where no issue was raised or tried in the former suit between the parties to the new suit: *Held*, that the claim was not barred by S. 11. (Vol 3) 1916 Cal 673 (674).

[8] Parties in subsequent litigation ranged on opposite sides but claiming through the same person — No *res judicata* applies. (Vol 12) 1925 Oudh 164 (166) * (1903) 30 Cal 556 (564) : 30 Ind App 71 (P C).

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[9] Doctrine of S. 52, Transfer of Property Act (4 of 1882) is extension of *res judicata* and makes decisions binding on transferees from parties. (Vol 5) 1918 Mad 578 (580) : 41 Mad 458

[10] Jurisdiction cannot be questioned when predecessor of party has himself invited and accepted jurisdiction. (Vol 30) 1913 All 340 (342) : 1 L R (1913) All 834.

[11] A pre-emption suit decreed on the ground that an ostensible mortgage is in reality a sale, bars a subsequent suit brought by the vendor's sons and nephews against the vendee to impugn the alienation. (1909) 4 Ind Cas 1017 (1018) (Lah.).

[12] Sale of property by A first to C and then to E—Suit by A against C for cancellation—Sale held to be good—E suing A and C for possession—Suit held not barred by *res judicata*. (Vol 3) 1916 Low Bur 102(102).

[13] A obtaining decree in pre-emption suit — B not impleaded—Suit for same relief by B impleading A—A's rights found inferior to B's—Decree in B's favour can be passed. (Vol 33) 1916 Oudh 77 (78)

[14] Plaintiffs sued for a declaration that the defendants had no right of easement. The defendants were the representative tenants of the village, the villagers of which claimed the right of easement. The proprietors of the village were not parties to the suit. The defence which was based upon a grant alleged to have been made by the proprietors of the village was upheld—Held that plaintiffs' suit against proprietors was not barred. (Vol 14) 1927 Cal 97 (98).

[15] A finding in an earlier suit between a defendant and third party is not *res judicata* between the parties to the subsequent suit. (Vol 6) 1919 Lah 174 (176).

80. Same parties.—[1] The decision on a point of fact not directly and substantially at issue in a former suit cannot operate as *res judicata* in a subsequent suit as between parties arrayed on the same side in the former suit with no difference whatever between them. (1911) 8 All L Jour 807 (809, 810).

[2] Parties not same — Decision is not *res judicata*. (Vol 2) 1915 Lah 309 (309) & (Vol 16) 1929 All 500 (501) & (Vol 10) 1923 Lah 556 (556) & (Vol 19) 1932 Lah 232 (234) & (Vol 14) 1927 Lah 900 (902).

[3] If in a subsequent suit parties who were not necessary parties in the previous suit are added, the fact of such addition does not prevent *res judicata* from applying. (Vol 15) 1928 Pat 436 (437) : 7 Pat 840 & (Vol 27) 1940 Mad 201 (203). (So far as parties to previous suit were concerned.)

[But see (Vol 14) 1927 Lah 259 (261).]

[4] Application for removal of receiver dismissed — Order unappealable—Additional parties and grounds in second application — Second application is not barred. (Vol 12) 1925 Lah 309 (310).

[5] Plea of undue influence through weak intellect and want of consideration decided against plaintiff in prior suit is *res judicata* in subsequent suit challenging decree in former suit on ground of plaintiff being not properly represented. (Vol 2) 1915 All 265 (267).

[6] Discharged defendant is not bound by the decree. (Vol 12) 1925 Oudh 650 (651).

[7] Some persons, who were wrongly impleaded as defendants in execution proceedings and who did not prefer any claim to plaintiff's attachment and sale of property therein, were not estopped by the said circumstance, from making a claim in subsequent suit or proceedings. (1910) 8 Ind Cas 161 (161) (Mad).

[8] A finding in favour of a party joined as *pro forma* defendant, and not a necessary party in previous suit does not operate as *res judicata* in subsequent suit. (Vol 25) 1938 Lah 842 (846).

[9] Only defendant found not necessary party — In absence of necessary party suit should be dismissed without going into merits — Decision on merits would not operate as *res judicata*. (Vol 32) 1945 Mad 11 (12).

[10] A person who applied to be made a party but was refused is not bound by the decision in the suit. (Vol 14) 1927 P C 108 (110) : 54 Ind App 189 : 54 Cal 595 (PC).

[11] Person party to suit but omitted in formal order by oversight — Bar of *res judicata* is still applicable. (Vol 17) 1930 P C 22 (23) : 57 Ind App 24 (PC).

[12] Suit by person filling dual position of karnavan of tarwad and uralan of dewaswom against another shrine claiming homage including certain payments from defendant shrine—Same relief claimed in previous suit, but uralan figuring as plaintiff suing through dewaswom while in latter suit, dewaswom figuring as plaintiff suing through uralan — Both suits identically same — Parties to both suits cannot be regarded as different parties and hence subsequent suit is barred by *res judicata*. (Vol 25) 1938 Mad 257 (258, 259).

[13] Plaintiffs basing suit on agreement to import gold into French India—Defendants urging that agreement was for unlawful purpose being one to import gold into British India — In previous suit against present plaintiffs by present defendants, present plaintiffs raising same objection, but Court finding contract to be quite legal — That finding would operate as *res judicata* in present suit. (Vol 17) 1930 Mad 714 (716).

[14] Where in a previous suit between the husband and wife it was decided that there was no divorce, in the husband's suit for restitution of conjugal rights against his wife and father-in-law, the question of divorce is *res judicata* and the father-in-law cannot be permitted to agitate it again. (Vol 11) 1924 All 815(816).

81. Transferor and transferee. — [1] In order that a previous decision against a transferor may be *res judicata* as against the transferee his title must have arisen subsequent to the commencement of the previous suit. (Vol 3) 1916 Low Bur 102 (102) & (1911) 35 Bom 297 (300) (Gift.)

[2] A person having a charge on property under S. 55, T. P. Act, can enforce it against a person who obtains the property from the vendor by a consent decree with notice of the charge and he is not bound by a decision regarding this property when he was not a party to the suit. (Vol 3) 1916 Nag 78 (81) : 13 Nag L R 19.

[3] Previous decision between Mahomedan widow and heirs that no interest was payable on dower-debt is binding on her transferee. (Vol 31) 1944 Pat 163 (173).

82. Rent suits. — [1] Section applies to rent suit. (Vol 12) 1925 Cal 427 (430).

[2] Same parties, same subject-matter and same defence in both suits for rent—First suit is *res judicata*. (Vol 13) 1926 Cal 369 (370).

[3] Rent suit—Issue on disputed point raised, heard and finally decided—Decision operates as *res judicata*. (1912) 16 Cal L Jour 69 (91).

[4] Rent suit — Relationship of landlord and tenant denied — Question of title directly in issue — Decision bars subsequent suit on title. (Vol 4) 1917 Low Bur 94 (96) & (1888) 15 Cal 756 (761) : 15 Ind App 97 (P C) & (Vol 19) 1932 Cal 385 (386) (Question of right to recovery of rent found to be *res judicata*—Even assessment of rent cannot be claimed.) & (Vol 13) 1926 Cal 114 (115) & (Vol 12) 1925 Cal 427 (428, 430) (Defendants defeated as regards their contention that they are tenants in severalty.) & (Vol 11) 1924 Cal 138 (131) (Landlord a party — Decision between his tenants.) & (1913) 19 Ind Cas 632 (633, 634) (Cal) (Plea of rent free title found against.) & (1898) 25 Cal 136 (141) (Question in previous suit whether land was *mal* or

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lakhiraj). * (Vol 17) 1930 Oudh 335 (335) (*Ex parte* decision on questions of status and rate of rent.) * (Vol 21) 1934 Pat 282 (283). (Ownership of house.)

[But see (Vol 21) 1934 Cal 60 (61, 62) : 60 Cal 1307. (Previous rent suit—Decision in, does not operate as *res judicata* but should be considered and due weight given to it in subsequent title suit.)]

[5] Rent suit — Tenant setting up third person as landlord—Decision does not operate as *res judicata* in subsequent suit by same plaintiff against tenant as well as third person. (1899) 26 Cal 428 (431, 433, 434) (FB) * (Vol 12) 1925 All 574 (575) * (Vol 11) 1924 All 270 (271) * (Vol 7) 1920 Cal 601 (603).

[6] Suit for rent—Tenant alleging some other person to be landlord — Existence of previous rent decrees in favour of landlord against tenant in respect of same holding operates as *res judicata*. (Vol 25) 1938 Nag 195 (197) : ILR (1940) Nag 181.

[7] A Revenue Court's decision in a rent suit declaring a tenant's status operates as *res judicata* to bar a declaratory suit in the Civil Court declaring the tenant as an occupancy tenant. (Vol 8) 1921 All 348 (349) : 43 All 191.

[8] A decision by the Revenue Court that defendant was not plaintiff's tenant does not bar a plea that a party was a rent-free grantee. (Vol 11) 1924 All 479 (479).

[9] Settlement officer deciding that tenant was occupancy tenant and fixing fair and equitable rent—Subsequent suit by tenant to determine his status and nature of holding is barred by *res judicata*. (1902) 29 Cal 252 (256).

[10] Suit for rent in respect of land alleged to be within plaintiff's patti — Suit dismissed — Subsequent suit for rent alternatively for assessment of fair rent in respect of same land but alleging that it fell within separate patti of plaintiff—Suit held barred by *res judicata*. (Vol 23) 1936 Pat 511 (511, 512).

[11] Decision in previous rent suit regarding title arrived at incidentally is not *res judicata* in subsequent suit for declaration of title. (Vol 17) 1930 Cal 579 (580) : 57 Cal 371 * (Vol 25) 1938 Bom 291 (294) * (Vol 16) 1929 Bom 32 (32). (Ejectment suit—Rent decree only passed—Finding as to title need not be incorporated in the decree.) * (Vol 27) 1940 Cal 347 (350) * (Vol 22) 1935 Cal 607 (608) * (Vol 14) 1927 Cal 431 (432) * (Vol 11) 1924 Cal 460 (461) (In prior rent suit defendants held not to be tenants—Second suit to eject defendants as trespassers not barred.) * (Vol 6) 1919 Cal 131 (131, 132) * (Vol 26) 1939 Pat 519 (519) * (Vol 4) 1917 Pat 471 (471) * (Vol 4) 1917 Low Bur 94 (96).

[12] Rent suit—Relationship of landlord and tenant disputed—Decision on point of defendant's duration of possession does not operate as *res judicata* in subsequent suit for ejectment and possession. (Vol 7) 1920 Cal 729 (730).

[13] Prior mortgage suit for arrears of rent against several defendants—No question of personal liability of particular defendant involved and only charge decree passed — Subsequent money suit for arrears of rent against same defendant among other defendants—Question of liability of such defendant is not barred. (Vol 31) 1944 Pat 129 (134).

[14] Though one and the same person can combine in himself the status of an occupancy raiyat and a raiyat at a fixed rent still decision as to status is no bar to the consideration of the question as to fixity of rent. (Vol 13) 1926 Cal 887 (889).

[15] Suit for resumption of rent-free land — Land found to be not resumable—Suit dismissed—Fresh suit for assessment of rent is not barred. (1915) 29 Ind Cas 676 (676) (UPBB).

[16] Rent suit by one landlord—Tenant claiming to be tenant of all proprietors — Adverse decision is not *res judicata* in subsequent suit against all proprietors for declaration. (Vol 4) 1917 Pat 471 (471).

[17] Suit for rent by cosharers — Other cosharers impleaded not claiming rent from tenant — Subsequent suit by other cosharers for their share of rent is barred. (Vol 30) 1943 Pat 454 (454, 455) * (Vol 6) 1919 Cal 861 (862).

[18] Bengal Tenancy Act (1885), S. 148A—Rent suit by cosharer—Other claiming to be tenant by purchase in his rent decree—Court can consider validity of such purchase and such decision binds parties. (Vol 19) 1932 Cal 894 (895, 896) : 59 Cal 1250.

[19] Rent suit in respect of seven jotes dismissed—Seven jotes ceasing to exist as such but converted into two jotes—Suit in respect of one such jote under S. 105, Bengal Tenancy Act, is not barred. (Vol 10) 1923 Cal 333 (335).

[20] Execution of certain kabuliyat by defendant, a material issue in prior suit — Plaintiff failing to prove the same there — Admission in kabuliyat cannot be proved in subsequent suit. (Vol 13) 1926 Cal 1228 (1228).

[21] Suit for delivery of kabuliyat dismissed—Court determining rent for ascertaining costs — Subsequent suit for rent is maintainable. (Vol 4) 1917 Pat 653 (654) : 2 Pat L Jour 159.

[22] A decision, by a Court recovering *thakkavi* arrears, that rent was not paid by the sub-tenant to the tenant, in proceedings for sale of the tenure to recover *thakkavi* paid to the tenant is not *res judicata* in a subsequent suit by the purchaser against the sub-tenant for the recovery of the rent payable by the sub-tenant. (Vol 11) 1924 All 910 (911).

[23] Suit for rent against A and B — A alleging lessorship of B who was *ex parte*—Suit decreed against A and B—Next suit for rent for same property against C and B—C is bound by decision against B though not as *res judicata*. (Vol 12) 1925 Mad 1025 (1025).

[24] Previous rent decree without judgment is not *res judicata*. (Vol 12) 1925 Cal 1116 (1118).

[25] Prior decision in rent suit of a Court having no jurisdiction is not *res judicata*. (Vol 13) 1926 Cal 603 (603).

[26] Rent suit — Trying Court holding that plea of deduction of rent barred by *res judicata* — First appellate Court disagreeing on this point but decreeing plaintiff's suit on another ground—Decision of first appellate Court on point of *res judicata* is not *res judicata* in a subsequent suit between the same parties. (Vol 13) 1926 Cal 672 (676).

[27] In rent suit revenue Court held certain land to be included in lease—Decree for rent as claimed passed and defendant accepting it under protest — In subsequent suit by defendant for possession of that land decision of revenue Court held not *res judicata*. (Vol 1) 1914 Cal 701 (702).

[28] Deed of lease once construed in rent suit—Decision remains binding for ever. (Vol 4) 1917 Pat 54 (55).

[29] Suit for recovery of arrears of rent—Objection by defendant that plaintiff was seeking to recover rent only of part of holding—Plaintiff required to include in suit entire area recorded in Record of Rights as forming holding—Amendment under protest—Suit for declaration that entry was wrong is not barred either by doctrine of estoppel or by that of *res judicata*. (Vol 4) 1917 Pat 50 (51, 52).

[30] Claim for rent is distinct cause of action from that for recovery of possession—Hence rent suit does not bar ejectment suit. (Vol 20) 1933 Rang 107 (109).

[31] Suit for rent—First suit brought on contract to recover rent of room rented—Suit dismissed for want of proof of tenancy — Second suit brought on tort for

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compensation for use and occupation — Two causes of action being mutually exclusive, second suit held was maintainable. (Vol 20) 1933 Rang 106 (107).

83. Suits for rent for successive periods or for other recurring liability. — [1] Rent suits — For *res judicata* to apply it must be shown that in the previous suit right or liability, not only for the period in suit, but for all time to come, was decided. (Vol 13) 1926 Cal 650 (652) * (Vol 17) 1930 Pat 585 (587) : 9 Pat 674.

[2] A decree for rent involves the question of the right of the plaintiff to recover and of the defendant's liability to pay rent to the plaintiff. It becomes *res judicata* in subsequent suit for rent. (1911) 12 Ind Cas 329 (330) (Oudh).

[3] Some cosharers obtaining *ex parte* decree for arrears—They again suing for subsequent years — Plea of payment to lambardars — Previous decision operates as *res judicata* as to plaintiff's right to sue for rent. (Vol 14) 1927 All 145 (145, 146).

[4] Decree for rent for specific year does not operate as *res judicata* in suits for subsequent years. (Vol 4) 1917 Pat 615 (616) * (Vol 1) 1914 All 1 (2) * (1889) 11 All 148 (155) * (1911) 13 Cal L Jour 653 (654) * (Vol 11) 1924 Nag 422 (423).

[But see (Vol 21) 1934 Mad 563 (564) * (Vol 20) 1933 Mad 925 (928) : 57 Mad 73 * (Vol 12) 1925 Mad 378 (379) * (Vol 29) 1942 Nag 119 (121) : I L R (1942) Nag 731.]

[5] Previous rent suit deciding that rent was payable as *bhauhi* rent — Decision does not operate as *res judicata* in suit for rent of subsequent years at cash rent system. (Vol 11) 1924 Pat 371 (371).

-- [6] Suit for rent — Defendant held entitled to pay money rent instead of rent in kind — Money rent decreed — Decision operates as *res judicata* in subsequent suit. (1910) 12 Cal L Jour 595 (596).

[7] Rent variable by contract — Previous rent decree is *res judicata* only on question of previous rent—Presumption arises that same rent continues payable until otherwise proved. (Vol 4) 1917 Pat 54 (54, 55).

[8] Previous decision in rent suit that rent was payable to plaintiff is merely presumptive evidence of rent of future years and presumption may be rebutted. (Vol 11) 1924 Pat 371 (371).

[9] Decision in a previous suit for arrears of rent that interest is not payable is not *res judicata* in a subsequent suit for arrears of rent for a different period. (1909) 1 Ind Cas 529 (530) (All).

[10] Question of abatement of rent if left open by consent, would not be *res judicata* — Rent suit is one for recurring cause of action — Question of abatement can be raised in every suit. (Vol 2) 1915 Cal 568 (569).

84. Suits relating to rate of rent or area for which rent is payable. — [1] Previous decision as to rent payable for particular year is *res judicata* for that year. (Vol 10) 1923 Cal 282 (283) * (Vol 5) 1918 Pat 647 (649) : 3 Pat L Jour 372.

[2] Rent suit — General rule is that decision in previous suit as to amount of rent is not *res judicata* as to rate of rent in suit for subsequent year. (Vol 6) 1919 Pat 526 (526) * (Vol 13) 1926 Cal 698 (700) (It is evidence in so far only as the rate of rent allowed in that suit.) * (Vol 6) 1919 Cal 981 (982) (But it is good evidence as to rate of rent.) * (Vol 5) 1918 Cal 984 (985) (*Ex parte* decree.) * (Vol 5) 1918 Cal 684 (684) (Decision about rate of rent is *res judicata* unless rent alleged to be subsequently changed.) * (1901) 28 Cal 109 (111) (Cess.) * (Vol 14) 1927 Oudh 32 (32) * (Vol 5) 1918 Oudh 98 (99) * (Vol 17) 1930 Pat 355 (356) * (Vol 14) 1927 Pat. 58 (59) (Decision as to cess.)

[But see (Vol 1) 1914 Cal 826 (827) * (Vol 22) 1935 Pat 306 (324) : 14 Pat 70.]

[3] Rent decree based on compromise — Terms of compromise not known—Decree is not *res judicata* as to rate of rent. (Vol 12) 1925 Cal 1011 (1012).

[4] Fact that in previous suit amount in patta was taken as basis of rent payable in kind cannot be *res judicata* in subsequent suit. (Vol 4) 1917 Cal 113 (114).

[5] *Ex parte* rent decree — Decree is admissible in a subsequent rent suit to prove rate of rent allowed but is not conclusive—Its value depends on the facts of each particular case. (Vol 13) 1926 Cal 767 (769).

[6] Previous suit for rent based on contract between parties — Question of contract rate of rent in issue — Decision thereon operates as *res judicata*. (Vol 6) 1919 Pat 526 (526) * (Vol 5) 1918 Cal 684 (684) (Decision about annual rent payable.) * (1912) 16 Ind Cas 590 (591) (Cal) * (1913) 17 Cal L Jour 71 (72) * (Vol 7) 1920 Pat 584 (585) * (Vol 4) 1917 Pat 615 (616).

[7] Previous rent suit deciding liability of defendant to pay interest as per *kabuliyat* — Decision is *res judicata* in subsequent rent suit. (Vol 10) 1923 Cal 361 (362).

[8] Suit for enhancement of rent — Question of rate of rent will operate as *res judicata* in subsequent rent suit. (Vol 7) 1920 Cal 814 (815).

[9] Landlord and tenant — Record of Rights cannot supersede previous decision of civil Court — In absence of fresh arrangement between parties previous decision operates as *res judicata*. (Vol 27) 1940 Cal 588 (589).

[10] Plaintiff claiming rent at Rs. 16 — Record of Rights in 1918 in plaintiff's favour — Cess-return filed in 1912 showing jama to be Rs. 5-2-5—Plaintiff having previously in 1917 sued for rent at Rs. 86 and obtained full decree *ex parte*—Suit in 1917 was *res judicata* and presumption under Record of Rights was not rebutted by cess-return. (Vol 16) 1929 Cal 515 (516).

[11] Suit for rent—Defendant claiming abatement of Rs. 155 from rent — Decision that defendant was entitled to Rs. 42 as abatement — Suit by defendant to obtain permanent abatement of rent — Abatement claimed at Rs. 155. *Held*, question was *res judicata*. (1875-76) 1 Cal 202 (206).

[12] Decree fixing rate of rent passed under Act 8 of 1865 operates as *res judicata*. (Vol 5) 1918 Mad 1152 (1154).

[13] Grant of permanent ganti lease by proprietor on fixed rent—Portion resumed by Government and again settled with proprietor for particular time at certain rent — Rent suit by transferee from settlement holder dismissed ultimately by Privy Council — After expiry of term farming lease of land granted by Government to plaintiffs—Rent fixed by Revenue Officer — Plaintiff held entitled to rent fixed — Decision of Privy Council held not to operate as *res judicata*. (Vol 4) 1917 Cal 599 (600).

[14] Landlord and tenant — Previous decision as to area of tenancy is *res judicata*. (Vol 13) 1926 Cal 513 (515) * (Vol 13) 1926 Cal 672 (676) * (Vol 22) 1935 Pat 526 (527).

[15] Taking of plea of excess land being included in patta in previous suit for rent bars the plea that the patta was incorrect in suit for subsequent year's rent. (Vol 1) 1914 Mad 399 (414) : 37 Mad 70 (FB).

85. Representative suits—Explanation VI.—[1] Explanation 6 applies to those suits only which are instituted in a representative capacity. (Vol 22) 1935 Lah 537 (538) * (1881) 6 Cal 49 (51) (Case under Code of 1877.)

[2] Expl. 6 is not confined to cases covered by O. 1, R. 8, Civil P. C., but extends to any litigation in which parties are entitled to represent interested persons. (Vol 20) 1933 P C 183 (189) : 60 Ind App 278 : 56 Mad 657 (P C) (Overruling (Vol 16) 1928 Mad 77 : 51 Mad 128 (FB).) * (Vol 10) 1923 All 338 (339) (Suit to recover property by one heir under a compromise among

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the heirs is a representative suit.) * (Vol 24) 1937 Bom 238 (240) : I L R (1937) Bom 326 * (Vol 32) 1945 Mad 118 (118, 119) (Creditor attacking gift to wife by the debtor is not representative of the body of creditors.) * (Vol 4) 1917 Mad 457 (459) (DB).

[3] Every attempt should be made to bring all interested persons before Court. (Vol 14) 1927 Mad 645 (647).

[4] Principle of *res judicata* which is made applicable under the explanation rests not on the theory that the persons represented by the party litigating in respect of the common right are parties to the suit, but on the ground that such persons are for the purposes of the section deemed to claim under the persons so litigating. (Vol 31) 1944 Mad 381 (383) : I L R (1945) Mad 138.

[5] A decision to operate as *res judicata* by reason of Explanation 6 must satisfy the conditions that (1) there must be a right claimed by the persons litigating in common for themselves and the parties not expressly named in the suit; (2) the parties not expressly mentioned must be interested in such right so as to give them the right to join as co-plaintiffs. (Vol 4) 1917 Mad 457 (460) * (Vol 24) 1937 All 289 (289) * (Vol 16) 1929 All 775 (776) : 52 All 71 * (Vol 11) 1924 All 178 (180); 46 All 110 (DB) (Public right — Parties different in subsequent suit.—If suit relates to the same subject parties are also the same.) * (Vol 22) 1935 Lah 391 (394, 395) : 17 Lah 20 (DB) * (Vol 20) 1933 Lah 325 (326) : 14 Lah 442 (D B) * (Vol 14) 1927 Mad 1088 (1089) * (Vol 7) 1920 Mad 563 (572). 43 Mad 487 (Decree though *ex parte* and against person litigating for class will bind persons claiming through such person.) * (1905) 28 Mad 457 (463) (FB). (Overruling (1891) 14 Mad 324 on another point.) * (Vol 18) 1931 Nag 182 (183, 184) : 27 Nag LR 127 (Decree against jagirdar.) * (Vol 12) 1925 Oudh 566 (566) (Decision in suit for partition by one member of family operates as *res judicata* between all members). (Vol 5) 1918 Pat 73 (75, 76) : 2 Pat L Jour 725 (DB).

[6] Section 11, Expl. 6 will not apply where a plaintiff claims a right for himself though the right may be common to others also. (Vol 29) 1942 Oudh 199 (200) * (Vol 22) 1935 Lah 505 (507) * (1910) 33 Mad 483 (484) (Subsequent suit in a special capacity other than that as members of community.—Decisions not binding.) * (1907) 30 Mad 185 (190) : 34 Ind App 93 (PC) * (Vol 22) 1935 Oudh 62 (67) : 10 Luck 443 * (Vol 10) 1923 Oudh 185 (199) : 26 Oudh Cas 133.

[7] In order that Expl. 6 may apply, litigation must be *bona fide*.—But *bona fide* litigation is not panacea for all irregularity. (Vol 20) 1933 P C 183 (190) : 60 Ind App 278 : 56 Mad 657 (PC) * (Vol 15) 1928 Mad 268 (271) (DB) (Fraudulent withdrawal of suit — No *res judicata*.) * (Vol 12) 1925 Oudh 75 (75, 76).

[8] The provisions contained are mandatory and the effect of a decision can be avoided only on proof of fraud. Court cannot infer fraud or collusion from mere negligence or gross negligence unless fraud or collusion is the proper inference from facts. (Vol 24) 1937 P C 1 (4) : 64 Ind App 17 : I L R (1937) Mad 263 (PC).

[9] A private individual is entitled to sue for damages for injuries sustained by him in the exercise of his privileges connected with a public right. And if the Court gives a finding in such a suit that the right is a public right it becomes *res judicata* in a subsequent litigation by virtue of Explanation 6. (Vol 5) 1918 Mad 166 (167).

[10] Suit in a representative capacity — Question as to, should be decided with reference to substance and not the form of pleadings. (Vol 15) 1928 Mad 445 (446) (DB).

[11] Non-payment of proper court-fee or the addi-

tion of an individual relief in the previous suit will not render inoperative the rule where in the subsequent suit the common right is re-litigated. (Vol 4) 1917 Mad 457 (459) (DB).

[12] An executor or administrator of a deceased person's estate represents the estate in litigation and a decision against him as such representative is binding on all persons who subsequently succeed to the estate. (1909) 4 Ind Cas 483 (485) (Cal) (Executrix) * (1905) 29 Bom 96 (101) (Administrator).

[13] Official Liquidator represents the body of creditors, debenture-holders and the company. An order passed against him is conclusive against all the parties so represented. (Vol 7) 1920 P C 56 (58) : 43 Mad 550 : 47 Ind App 33 (PC).

86. Benamidar or agent. — [1] A decision in a suit by benamidar binds the real owner. (Vol 5) 1918 P C 140 (143) : 46 Cal 566 : 46 Ind App 1 (P C) * (1908) 30 All 30 (31) (Right of redemption not availed of by benamidar given under the decree — Decree made absolute — Subsequent suit by real owner barred) * (Vol 1) 1914 Cal 896 (898, 899) (D B) * (1884) 10 Cal 697 (705) * (1892) 15 Mad 267 (268).

[2] In the absence of evidence to the contrary it is to be presumed that the benamidar has instituted or defended the suit with the consent of the real owner. (1896) 18 All 69 (76).

[3] Decree passed while benamidar protests that he is only benamidar without bringing on record the real owner will not bind the real owner. (Vol 1) 1914 All 173 (175) : 36 All 446.

[4] Abatement of suit on death of benamidar by the failure to bring the legal representatives operates as a bar in a subsequent suit by the real owner. (Vol 24) 1937 Mad 101 (103).

87. Decree against one of several legal representatives. — [1] Where one of several heirs is brought on record such heir can fully represent the whole estate and the decision will operate as *res judicata* against others also. (Vol 11) 1924 Bom 420 (421) (D B) * (1911) 10 Ind Cas 32 (33) (Cal) (Wrong representative brought on record in appeal against mortgage decree — No fraud found — Decision will bind) * (Vol 15) 1928 Mad 1199 (1199, 1200) * (Vol 5) 1918 Mad 147 (148) (DB).

[2] Decree obtained against supposed legal representative — Fresh suit on the same cause of action against real representative is maintainable. (Vol 15) 1928 Pat 362 (363).

88. Hindu reversioners. — [1] Where during the lifetime of the widow a suit is brought by the nearest reversioner challenging either an adoption by her or an alienation made by her, the suit is one brought with the object of removing a common apprehended injury to all the reversioners. It is a suit brought in a representative capacity and on behalf of all the reversioners. (Vol 2) 1915 P C 124 (125) : 38 Mad 406 : 42 Ind App 125 (P C).

[2] The decision in such a suit affects the reversioners as a body and under Explanation 6 of this section bars a fresh suit by another reversioner on the same cause of action. (Vol 12) 1925 P C 272 (276, 277) : 47 All 883 : 52 Ind App 398 (P C) * (Vol 12) 1925 All 483 (484) : 47 All 505 * (Vol 9) 1922 All 301 (305, 309) : 44 All 19 (FB) (The decisions in (Vol 8) 1921 All 237 : 43 All 558; 22 All 33 and 3 Ind Cas 117 in so far as they are contrary to this decision are to be deemed as overruled.) * (Vol 25) 1938 Lah 571 (573) * (Vol 16) 1929 Lah 295 (305) : 10 Lah 613 (DB) (Suit against other alienees in respect of other property is not however barred.) * (Vol 12) 1925 Lah 180 (180) * (Vol 12) 1925 Mad 1162 (1163) (Notwithstanding a decision in the prior suit that suit for possession will lie on widow's death.) * (Vol 12) 1925 Mad 86 (86, 87) (D B) * (Vol 6)

Section 11 (contd.)

1919 Mad 911 (920) : 41 Mad 639 (FB) * (Vol 9) 1922 Oudh 236 (242) : 25 Oudh Cas 189 * (Vol 7) 1920 Oudh 265 (267) : 23 Oudh Cas 238. (Withdrawal of some of the plaintiffs does not change the position.)

[3] The decree will bind even if it is on a compromise provided the compromise was *bona fide*. (Vol 20) 1933 Oudh 322 (327) : 8 Luck 586.

[4] Where in the prior suit the plaintiff was found not to be a reversioner he cannot be said to have represented the body of representatives. (Vol 13) 1926 All 573 (578) * (Vol 17) 1930 All 9 (11). (Relief claimed in personal capacity — Decision not binding on other reversioners.)

89. Hindu widow. — [1] A Hindu widow represents the entire inheritance in respect of her husband's estate. A decree against her fairly and properly obtained, is binding on the succeeding heirs. (1868) 9 Moo Ind App 539 (604) (P C) * (Vol 18) 1931 P C 114 (117, 118) : 53 All 103 : 58 Ind App 155 (P C) * (1885) 11 Cal 186 (197) : 11 Ind App 197 (P C) * (1866) 11 Moo Ind App 241 (266, 267) (P C) * (Vol 12) 1925 All 339 (340) : 47 All 490 * (Vol 2) 1915 All 360 (364, 365, 366) : 37 All 496 * (Vol 5) 1918 Bom 85 (86, 88) : 43 Bom 249 * (1913) 37 Bom 172 (176) * (Vol 9) 1922 Cal 321 (324, 326) : 49 Cal 45 * (1894) 21 Cal S (17) : 20 Ind App 183 (P C) * (1889) 16 Cal 40 (56) : 15 Ind App 195 (P C). (Decree against widow as representing estates binds subsequently adopted minor son.) * (1868) 9 South W R 505 (507) (F B) * (Vol 12) 1925 Mad 1270 (1272, 1273) * (Vol 9) 1922 Mad 233 (234) * (Vol 5) 1918 Nag 1 (5) : 15 Nag L R 24 * (Vol 15) 1928 Oudh 155 (182) * (Vol 5) 1918 Pat 175 (177) : 3 Pat L Jour 426.

[2] A decision against the widow is binding on the succeeding heirs not by virtue of the rule of *res judicata*, but on general principles of *res judicata*. (Vol 5) 1918 P C 87 (91) : 40 All 593 : 45 Ind App 168 (P C).

[3] The general principle of *res judicata* applies to a decree based on a *bona fide* compromise as equally as it does to a decree on contest. (Vol 9) 1922 P C 356 (357, 358) : 49 Ind App 342 : 1 Pat 741 (P C) * (Vol 3) 1916 All 38 (41) : 38 All 679 * (1918) 35 All 240 (242) * (1911) 33 All 356 (367) : 38 Ind App 87 (P C) * (1907) 29 All 239 (242, 243) (Collusive arbitration.) * (Vol 5) 1918 Bom 85 (86, 87) : 43 Bom 249 * (Vol 3) 1916 Cal 938 (943) * (Vol 6) 1919 Lah 292 (294) : 1919 Pun Re No. 9 * (Vol 8) 1921 Mad 475 (476) * (Vol 4) 1917 Mad 807 (808). (Allowing suit to go *ex parte*.) * (1914) 1 Oudh L Jour 490 (492). (Judgment confessed.) * (Vol 5) 1918 Pat 477 (480) * (Vol 4) 1917 Pat 600 (606) * (Vol 4) 1917 Pat 490 (491, 492) : 2 Pat L Jour 370 (376). (Compromise of her own interest is not binding.)

[See however (Vol 12) 1925 All 79 (83) : 46 All 637. (Hindu widow sues in a representative capacity within meaning of Expl. VI.)]

[4] A decree passed against the widow on a ground personal to herself does not bind the reversioner. (Vol 25) 1938 P C 254 (256, 258) : 1 L R (1938) 2 Cal 653 : 65 Ind App 365 : 32 Sind L R 918 (P C) * (Vol 26) 1939 All 197 (202).

[5] If the suit is not conducted by the widow *bona fide* for the benefit of the estate, it binds only her widow's estate and is not binding on the reversioner. (Vol 6) 1919 Bom 146 (148, 150) : 43 Bom 869 * (Vol 18) 1931 All 407 (411) * (Vol 16) 1929 All 963 (965) : 52 All 178 * (1887) 11 Bom 119 (130) * (Vol 18) 1931 Cal 511 (513) * (Vol 18) 1931 Cal 73 (75) * (Vol 10) 1923 Cal 204 (206) * (1899) 26 Cal 265 (292) * (1889) 16 Cal 511 (513) * (1884) 10 Cal 985 (991, 992) : 11 Ind App 66 (P C) * (1875) 1 Cal 133 (138, 140) : 2 Ind App 275 (P C).

[6] If in the suit the contentions raised are those connected with the inheritance and the trial was with reference to them, the widow is held to be representing the estate. (Vol 11) 1924 Mad 301 (307) * (Vol 23) 1936 All 422 (430) * (Vol 16) 1929 All 963 (965) : 52 All 178 * (Vol 12) 1925 All 79 (83) : 46 All 637. (Suit challenging adoption.) * (Vol 4) 1917 Bom 11 (13) : 42 Bom 69 * (1913) 37 Bom 172 (177, 178). (Recovery of inheritance.) * (1909) 9 Cal L Jour 346 (349, 350). (Suit to recover inheritance.) * (1895) 1895 Pun Re No. 29 (FB). (Adoption challenged.) * (Vol 6) 1919 Oudh 258 (259) : 22 Oudh Cas 260 * (Vol 21) 1934 Pat 696 (698).

[But see (Vol 5) 1918 Mad 756 (757).]

[7] If the suit is in relation to anything which the widow may have done herself to the prejudice of the reversionary heirs, she cannot be said to be litigating in respect thereof as representing the estate. (Vol 6) 1919 Oudh 258 (259) : 22 Oudh Cas 260.

[8] A decree obtained by a mortgagee on the basis of a mortgage not executed by the widow for legal necessity cannot bind the reversioners. (Vol 27) 1940 All 433 (436) * (Vol 6) 1919 Oudh 258 (259) : 22 Oudh Cas 260 * (Vol 12) 1925 Pat 625 (673, 674) : 4 Pat 510.

[But see (Vol 5) 1918 Cal 876 (877). (A decree against the widow and the then reversioner binds the whole inheritance.)]

[9] As to the binding nature of compromise made by the widow out of Court, on the reversioners, see the following cases. (Vol 11) 1924 P C 56 (58, 59) : 47 Mad 131 : 51 Ind App 145 (P C) * (Vol 5) 1918 P C 70 (74) : 40 All 487 (496) : 45 Ind App 118 (P C) * (Vol 4) 1917 P C 95 (98) : 45 Cal 590 : 45 Ind App 35 (P C). (Conditions that make a decree against a limited owner binding on estate absent — Compromise is not binding.) * (Vol 1) 1914 P C 41 (45) (P C) * (Vol 9) 1922 All 217 (219) : 44 All 428 * (Vol 12) 1925 Oudh 30 (33).

90. Karnavan of a tarwad :— [1] Decree in a suit brought against a Karnavan of a Malabar tarwad in his representative capacity and which he honestly conducts, precludes suit by other members of tarwad, though not actually made parties. (Vol 14) 1927 Mad 1043 (1050) : 51 Mad 46 (F B) (30 Mad 215 and 24 Mad 853, overruled.) * (Vol 96) 20 Mad 129 (133) (F B) (5 Mad 201 and 6 Mad 121, overruled.) (Vol 10) 1923 Mad 153 (156) * (Vol 8) 1921 Mad 520 (522).

[2] Where the members of a tarwad are represented by a Karnavan of the tarwad in an irregular fashion the decree does not raise an absolute estoppel against members not actually brought on the record. (1894) 17 Mad 214 (215).

[3] Where in the previous suit, the Karnavan did not implead the junior members of his tarwad and even disputed their title as members it was held that the decree in the previous suit did not operate as *res judicata*. (1910) 8 Mad L Tim 445 (446).

91. Manager of Hindu Joint family :— [1] Each member of a Hindu family cannot be allowed to litigate the same point over again. (Vol 14) 1927 P C 56 (56, 57) : 51 Bom 450 : 54 Ind App 122 (P C) * (Vol 1) 1914 P C 136 (137) : 36 All 883 : 41 Ind App 216 (P C) (Manager represents the family. Affirming 33 All 71). (Vol 32) 1945 All 392 (392) * (Vol 26) 1939 All 203 (205) * (Vol 24) 1937 All 108 (111) * (Vol 24) 1937 All 23 (29) (Manager guilty of collusion with the opposite party — Decree does not bind.) * (Vol 13) 1926 All 201 (201). (Binding on the minors, as well as those who are not then born unless fraud or collusion is proved.) * (Vol 12) 1925 All 67 (68) * (Vol 7) 1920 All 50 (51) : 42 All 359 * 1912 17 Ind Cas 290 (291) (All) * (1911) 33 All 71 (78, 79) (Defence with consent of adult male members.) * (Vol 25) 1938 Bom 465 (467) * (Vol 27) 1940 Lah 120 (122) * (Vol 20) 1938 Nag 44 (46) : 29 Nag L R

12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any *Bar to further suit*. particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Objects and Reasons.

"Clause 12. — This clause is new and is necessitated by the transfer of certain of the provisions of the existing Code to Rules."—S. O. R.

Section 11 (contd.)

77. (Hindu father not only omitting to take part in suit but declining to redeem—Grave injustice is done to son and his right to redeem is not lost) * (Vol 8) 1921 Nag 52 (53) * (Vol 21) 1934 Pat 617 (617).

[2] Matter in execution *res judicata* against Hindu father—Plea of *res judicata* is also effective against son (Vol 17) 1930 Mad 257 (258).

[3] Where there was no effective representation of the sons in the prior suit, it will not operate as *res judicata*. (1913) 11 All L Jour 36 (37, 38).

[4] Hindu father whether representative or not depends on circumstances of each case: (Vol 12) 1925 Pat 308 (309) * (Vol 31) 1944 Lah 230 (230); I L R (1945) Lah 67 [Per Din Mohammad and Sale JJ.—Decree on debt against father — Does not bind son when the factum of debt itself is challenged.—Teja Singh J; *contra*.] * (Vol 23) 1936 Mad 488 (489) [Validity of alienation by father questioned on ground of immorality or illegality — Previous decision on the basis of alienation no bar.] * (Vol 6) 1919 Mad 776 (777).

[5] Decree in previous suit against Hindu father not expressly described as manager—Decree is binding on sons in subsequent suit as *res judicata*. (Vol 17) 1930 Mad 206 (207, 208).

[6] Finding of existence of family custom—All branches impleaded—Question decided after contest—Fact that some branches not contesting does not prevent its operating against all. (Vol 3) 1916 Pat 269 (270); I Pat L Jour 221.

92. Shebait and trustees. [1] Where some persons sue as trustees it must be taken that they are suing on behalf of themselves and all the other persons interested in the subject-matter of the trust. (Vol 11) 1924 Mad 88 (88) * (Vol 22) 1935 All 255 (256). (Suit by mahant). * (Vol 11) 1924 All 504 (506); 46 All 651. (Suit by a trustee against co-trustees) * (Vol 19) 1932 All 603 (605). (Suit against math) * (Vol 1) 1914 All 441 (442); 36 All 424. (Suit relating to wakf). * (Vol 29) 1942 Cal 1 (19); I L R (1941) 2 Cal 434. (Wakf). * (1909) 9 Cal L Jour 597 (602) (PC) (Suit by shebait). * (Vol 25) 1938 Lah 499 (501). (Suit against trustees of temple). * (Vol 25) 1938 Lah 369 (388, 389, 418) (FB). (Suit by mutawalli for possession of mosque). * (Vol 23) 1936 Lah 998 (999); I L R (1937) Lah 100. (Decree against municipality in respect of Government land transferred in trust). * (Vol 6) 1919 Lah 172 (173, 174). (Addition of new party cannot make it different) * (1910) 33 Mad 483 (485). (Trustee's suit on the same rights adjudicated in suit between the sects). * (1888) 11 Mad 191 (192, 193) * (Vol 29) 1942 Pat 181 (183). (Suit by some of shebait operates as *res judicata* against remaining shebait).

[2] Where a suit though in form one between private persons was in effect between trust and defendant, it is binding on defendant. (Vol 16) 1929 Mad 687 (688).

[3] Decree under S. 92 binds all persons interested in the trust. (Vol 12) 1925 Mad 1070 (1071) (FB). * (Vol 15) 1928 Lah 888 (891).

[4] Suit filed with sanction under S. 92 but amended without sanction—Stranger defendants and reliefs not covered by S. 92 added — Suit compromised by some

plaintiffs—Expl. VI does not cover such a case. (Vol 15) 1928 P. C. 16 (20); 55 Ind App 96; 55 Cal 519 (PC)

[5] Prior proceedings against shebait in person but idol effectively represented by shebait—Decision is against idol. (Vol 14) 1927 Cal 606 (607) * (Vol 12) 1925 Cal 996 (999) * (Vol 18) 1926 Mad 267 (269) * (Vol 2) 1915 Cal 327 (329); 42 Cal 440. (Binding on the succeeding shebait in absence of fraud or collusion.)

[6] Trustee by not taking possible defence and allowing decree to be passed against temple — Decree will not be binding on succeeding trustee. (Vol 18) 1931 Mad 641 (641, 642) * (Vol 28) 1941 Pat 354 (362).

93. Suits under O. 1 R. 8 and S. 91 Civil P. C. — [1] Explanation VI of S. 11 is controlled by O. 1 R. 8. If therefore a Court allows a suit to which that rule applies to proceed in a representative capacity for the benefit of numerous parties all these parties will not be bound by the decree if the procedure prescribed by that rule is not followed. (Vol 20) 1933 P C 183 (189); 60 Ind App 278; 56 Mad 657 (FC). (Vol 15) 1928 Mad 77:51 Mad 128 (FB) overruled. * (Vol 23) 1936 PC 147 (150) (Case from Gold Coast Colony.) * (Vol 25) 1938 All 523 (524) * (Vol 24) 1937 All 289 (289, 290) * (Vol 24) 1937 Lah 425 (428); I L R (1937) Lah 629 * (Vol 6) 1919 Pat 230 (231) * (Vol 31) 1944 Sind 165 (167); I L R (1944) Kar 62.

[2] Where a person has been made a party to the suit brought under O. 1 R. 8, and the suit is dismissed after hearing him, the matter will become *res judicata*. (Vol 28) 1941 Rang 24 (25); 1940 Rang L R 643.

[3] Representee served with notice of suit but not a party — Suit dismissed at instance of plaintiff representative without any decision on the merits of the case — Subject matter not *res judicata* for a member of the class on whose behalf the suit was brought. (Vol 28) 1941 Rang 24 (25, 26); 1940 Rang L R 643.

[4] Words 'claimed in common for themselves and others' govern only 'private right' and not 'public right'. (Vol 24) 1937 Lah 425 (428); I L R (1937) Lah 629 * (Vol 24) 1937 Lah 70 (71).

[5] In the case of a claim for establishing a public right the provisions of S. 91 must be observed. Mere *bona fides* alone cannot cure the defect where there is no sanction by the Advocate General. (Vol 24) 1937 Lah 425 (428); I L R (1937) Lah 629 reversing (Vol 24) 1937 Lah 70.)

Section 12 — Note 1.

Bar under O. 2 R. 2 : — [1] Suit for setting aside alienation by mother acting as certificated guardian—Property situated in Thana—Order of appointment and authority to sell from Bombay High Court—Subsequent suit for possession—Suit held not barred by O. 2, R. 2, as cause of action in previous suit was quite different from that in subsequent suit though arising out of same transaction and also because High Court could not have granted relief for possession as property is outside jurisdiction of original side of High Court. (Vol 20) 1933 Bom 398 (402); 57 Bom 456.

Decree against wrong person : — [2] Decree obtained against supposed legal representative — No rule preventing plaintiff from instituting fresh suit on same cause of action against real representative — Fresh suit is maintainable. (Vol 15) 1928 Pat 362 (363).

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- When foreign judgment not conclusive.*
- (a) where it has not been pronounced by a Court of competent jurisdiction;
 - (b) where it has not been given on the merits of the case,
 - (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;
 - (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
 - (e) where it has been obtained by fraud;
 - (f) where it sustains a claim founded on a breach of any law in force in British India.

[1882, S. 14; 1877, S. 14: see S. 2, cls. 5, 6; Expln. to S. 10; S. 20; Ss. 43-45.]

Objects and Reasons.

The last paragraph of Section 14 of the Code of 1882 run as follows:—

"Where a suit is instituted in British India on the judgment of any foreign Court in Asia or Africa, except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Consular Court established by an order of Her Majesty in Council, the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed."

Clause 13.—The provisions as to foreign judgments

Section 12 (contd.)

[3] For illustrations of suits barring fresh suits, see O. 2 R. 2; O. 9 R. 9; O. 22 R. 9 and O. 23 R. 1.

SECTION 13—SYNOPSIS.

1. Applicability and scope.
2. Clause (a).
3. Clause (b).
4. Clause (c).
5. Clause (d).
6. Clause (e).
7. Clause (f).
8. Effect of foreign judgment.
9. Execution of foreign decree.
10. Foreign Courts.
11. Foreign judgment—Meaning.
12. Jurisdiction of foreign Courts.
13. Submission to jurisdiction.
14. Suits on foreign judgment.

1. Applicability and scope.—[1] A foreign judgment is subject to the same conditions as to *res judicata* as a judgment of a Court in British India. (Vol 5) 1918 Low Bur 30 (31) : 9 Low Bur Rul 103.

[2] Section 13 provides that foreign judgment may operate as *res judicata* except in the six cases specified in that section and subject to other conditions mentioned in S. 11. (Vol 25) 1938 Bom 173 (175) : I L R (1938) Bom 16 (1899) 26 Cal 931 (935).

[3] Section 13 applies to plaintiffs as well as defendants. (Vol 15) 1928 Rang. 319 (319) : 6 Rang. 552 (Vol 15) 1928 Mad 327 (336) : 51 Mad 720.

[4] Every issue decided by foreign Court is not binding though the relief granted or refused is binding. (Vol 15) 1928 Mad 327 (336) : 51 Mad 720.

[5] The wording in S. 13 'Court of jurisdiction competent to try such subsequent suit' means a 'Court having concurrent jurisdiction with the Court trying the subsequent suit whether as regards the pecuniary limits of its jurisdiction or the subject-matter of the

have been re-arranged and as it is hoped stated more clearly. Section 14.—The last paragraph has been omitted. It appears to the Committee that it is not possible to maintain this distinction in the case of all Asiatic Courts. The Courts of Japan for instance are entitled to be treated on the same footing as European Courts. They knew of no satisfactory distinction which could be drawn so as to give effect to the intention of the existing provisions; and they recommend that the paragraph should be omitted and the Courts should rely on the powers given by Clause 13.—S. O. R.

suit' to try it with conclusive effect. (1889) 13 Bom 224 (228).

[6] Words "as if they had been passed by Court in British India" in S. 44 do not control operation of S. 13 (a). (Vol 22) 1935 Lah 551 (551) (Vol 18) 1931 All 689 (691) : 53 All 747.

[7] Judgment of foreign Court is conclusive if passed by competent Court. (Vol 15) 1928 P C 83 (85) (P C).

2. Clause (a).—[1] The foreign Courts must have competent jurisdiction to make the judgment. (1888) 1888 Pun Re No. 191, p. 491 (497) [Reversed on another point in 21 Ind App 171 : 22 Cal 222 : 1894 Pun Re No 112 (P C).]

[2] Office of trusteeship—Court competent to decide is the Court of domicile of trust. (Vol 15) 1928 Mad 327 (337) : 51 Mad 720.

[3] Foreign Court whether of competent jurisdiction must be determined by rules of private international law. (Vol 25) 1938 Cal 511 (515, 516, 517) : 63 Cal 1033.

[4] The principle upon which actions on foreign judgments rest is that a judgment of a Court of competent jurisdiction imposes a duty on the defendants to pay the sum for which the judgment has been given. (1890) 13 Mad 496 (497).

3. Clause (b).—[1] In order to operate as *res judicata* a foreign judgment must be on the merits of the case. (1888) 1888 Pun Re No. 191, page 491 (506). (Reversed on other point in 21 Ind App 171 : 22 Cal 222 : 1894 Pun Re No. 112 (P C)).

[2] Decree to be conclusive must involve controversy and adjudication thereon—Decree by foreign Court on strength of compromise is not on merits. (Vol 33) 1946 Mad 296 (297).

[3] Foreign judgment—*Ex parte* judgment without further hearing is not on merits. But if evidence is taken on behalf of plaintiff and judgment given, it is on merits. (Vol 22) 1935 Rang 284 (289) (Vol 14) 1927 Mad 265 (270) : 50 Mad 261 (F B) (Vol 15) 1928 Mad 133 (135) (Vol 15) 1928 Rang 319 (320) : 6 Rang 552.

[4] "Judgment on merits" is used in contradistinction to decision on a matter of form or by way of penalty. (Vol 22) 1935 Lah 396 (400) : 16 Lah 768. (Vol 14) 1927 All 510 (512) : 50 All 270 (Vol 19) 1932

Section 13 (*contd.*)

Lah 649 (650) : 14 Lah 58 * (Vol 28) 1941 Pat 109 (112) : 20 Pat 144.

[5] Judgment of French Court in *ex parte* case is presumed to be on merits. (Vol 28) 1941 Pat 109 (112) : 20 Pat 144.

[6] *Ex parte* decree under summary procedure of Ceylon is not on merits within S. 13 (b). (Vol 20) 1933 Mad 544 (545) * (1909) 32 Mad 469 (471, 475) * (Vol 17) 1930 Mad 146 (148) * (Vol 17) 1930 Mad 149 (152).

[7] *Ex parte* decree of foreign Court passed without jurisdiction — Decree transferred to British India for execution — Application in foreign Court to set aside decree — Decree is nullity and continues to be inexecutable in British India. (Vol 20) 1933 Mad 393 (394, 395).

[8] Merely because one of the issues is not dealt with decision cannot be said to be not on merits. (Vol 28) 1941 Pat 109 (112) : 20 Pat 144.

[9] Foreign judgment — Judgment entered on failure by defendant to answer interrogatories is not a judgment on the merits. (Vol 3) 1916 P C 121 (123) : 44 Ind App 6 : 40 Mad 112 (P C) * (Vol 26) 1939 Bom 374 (376).

[10] Suit by plaintiff in England — Service of summons accepted by solicitor and appearance put in by him on behalf of defendants — Judgment given on plaintiff's evidence — Judgment held to be on merits. (Vol 6) 1919 All 223 (229) : 41 All 521 * (Vol 17) 1930 Bom 511 (515) * (Vol 7) 1920 Mad 587 (588) * (Vol 16) 1929 Mad 469 (471) : 52 Mad 503 * (1913-14) 7 Low Bur Rul 56 (59).

[11] Foreign judgment — If procedure is strictly followed and defendant, though given opportunity to appear and contest, voluntarily refrains from doing so, decision of foreign Court is on merits. (Vol 22) 1935 Lah 396 (399, 401) : 16 Lah 768.

[12] Decision on merits — Fact that defendant did not appear cannot make it otherwise. (Vol 29) 1942 Bom 199 (202) : I L R (1942) Bom 688.

4. Clause (c). — [1] Law relates to procedure having reference only to *lex fori*. (Vol 3) 1916 Low Bur 67 (68).

[2] Court in Penang dealing with property in British India — International law incorrectly adopted — Defect makes judgment such as cannot be sued upon in British India. (Vol 21) 1934 Mad 145 (147) * (1888) 1888 Pun Re No. 191, page 491 (501). (Confirmed in 21 Ind App 171 : 22 Cal 222 : 1894 Pun Re No. 112 (P C).)

[3] Foreign judgment — Judgment in conflict with international law has no effect in British India. (Vol 25) 1938 Bom 173 (179) : I L R (1938) Bom 16.

[4] In a personal action a decree pronounced in absentem by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. (1895) 18 Mad 327 (330).

5. Clause (d). — [1] Expression 'natural justice' cannot be said to mean British justice as opposed to justice of any other country. Because the foreign Courts have not followed the rules of procedure and evidence of British Courts does not make the proceedings of foreign Court 'opposed to natural justice.' (Vol 28) 1941 Pat 109 (114) : 20 Pat 144.

[2] A wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it. A mistake of law in a foreign judgment is no ground for vacating it. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. (Vol 5) 1918 Mad 274 (275) : 41 Mad 205.

[3] Foreign judgment — Legal representative not brought on record — Judgment is opposed to natural justice. (Vol 14) 1927 Lah 200 (215) : 8 Lah 54.

[4] Proceedings against minor defendant without

appointing guardian ad litem are opposed to natural justice. (Vol 14) 1927 Lah 200 (214) : 8 Lah 54.

[5] Foreign judgment based on second or third review on the same grounds is opposed to natural justice. (Vol 14) 1927 Lah 200 (211) : 8 Lah 54.

[6] The fact that foreign Courts do not regard rules of the Courts of British India as imperative, even if the rules are of legal application in such states, should not be a reason for dismissing suits based on such foreign judgments on the ground that they are contrary to natural justice. (Vol 3) 1916 Lah 330 (332).

[7] A judgment obtained without notice of the suit to the defendant is against natural justice. (1888) 1888 Pun Re No. 191, page 491 (501). (Affirmed in 21 Ind App 171 : 22 Cal 222 : 1894 Pun Re No. 112 (P C).)

6. Clause (e). — [1] Explanation V to S. 13, Civil Procedure Code refers to bona fide claims, not to bona fide defences. (1900) 24 Bom 77 (85).

[2] It is competent for every Court whether superior or inferior to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. (1899) 26 Cal 591 (908).

[3] A foreign judgment may always be impeached on the ground of fraud or collusion or for want of jurisdiction. (1884) 7 Mad 164 (166).

[4] Mere fact that decree is obtained on evidence which is believed by Court but which in fact is not true does not mean that it is obtained by fraud. (Vol 28) 1941 Mad 387 (389).

[5] Claim including certain items for which defendant was not liable — Judgment cannot be said to have been obtained by fraud on Court. (Vol 29) 1942 Bom 199 (202) : I L R (1942) Bom 688.

7. Clause (f). — [1] Claim founded partly on breach of Contract Act but also partly upon claim under Contract Act not involving its breach — Decree sustaining claim not wholly founded upon breach of Contract Act — Decree-holder can execute decree in British India. (Vol 28) 1941 Mad 387 (389).

[2] Claim that would be time-barred in British India cannot be said to be claim founded on breach of any law in force in British India. (Vol 3) 1916 Low Bur 67 (68).

[3] Defendant a British subject in India — Breach of contract in England — *Ex parte* decree of the Court of King's Bench binding on defendant. (1909) 3 Sind L R 81 (83, 84).

8. Effect of foreign judgment. — [1] It is only in proceedings based upon 'foreign judgments' that question of effect of foreign judgment can properly arise. (Vol 1) 1914 All 514 (516) : 37 All 1.

[2] A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. It is only in such proceedings that the question of effect of the foreign judgment properly arises. (Vol 3) 1916 P C 136 (138) (P C) * (Vol 1) 1914 All 514 (516) : 37 All 1.

[3] It is not open to the Courts in British India to sit in appeal over a foreign judgment and the Court cannot refuse to recognise a foreign judgment because it proceeds on grounds which would not be adequate in British India unless it offends against the rules under S. 13. Civil P. C. (Vol 25) 1938 Bom 173 (177) : I L R (1938) Bom 16.

[4] Suit for administration in foreign Court — Title of executors under will challenged — Judgment of foreign Court against executors is not binding on legatee not party to suit. (Vol 25) 1938 Bom 394 (401, 402) : I L R (1938) Bom 529 * (1910) 8 Mad L Tim 287 (288).

[5] It is not a sufficient ground for impugning the judgment of a foreign Court, which ordinarily proceeds in accordance with the recognised principles of judicial

Section 13 (contd.)

investigation to show that in the particular instance its procedure may have been irregular. (1880) 2 Mad 400 (406).

[6] Foreign judgment can be final even when an appeal is pending in foreign Court. (Vol 14) 1927 Lah 200 (207) : 8 Lah 54.

[7] Probate — It is conclusive evidence that instrument was testamentary according to law of country where it was granted—Revocation of probate shows that instrument was not testamentary—Order granting or revoking probate is not judgment *in rem* so as to bind Courts in India. (Vol 23) 1936 Mad 197 (198).

[8] Award by foreign arbitrator — Misconduct not affecting his jurisdiction—British Indian Court cannot go into that question—Foreign Court only can consider it. (Vol 30) 1943 Bom 201 (206) : I L R (1943) Bom 366.

[9] Conclusiveness of the judgment of a foreign Court, if there is no flaw mentioned in the section. (Vol 9) 1922 Lah 175 (176) * (1899) 26 Cal 931 (935) * (1901) 28 Cal 641 (651).

[10] What the law in foreign country is, is question of fact — Judgment of highest tribunal of that country is best evidence. (Vol 29) 1942 Bom 185 (189) : I L R (1942) Bom 467.

[11] Foreign judgments in connexion with immovables do not operate as *res judicata*. (Vol 16) 1929 Lah 627 (629).

[12] Exceptions specified in S. 13 shown to be inapplicable — Defendant cannot be allowed to go behind conclusive foreign judgment and reopen issues as to merits. (Vol 28) 1941 Pat 109 (114) : 20 Pat 144.

9. Execution of foreign decree. — [1] *Ex parte* foreign decree in personam against British subject not residing there at date of action will not be executed by British Courts. (Vol 20) 1933 Mad 112 (113) * (Vol 21) 1934 Mad 434 (434) : 57 Mad 824.

[2] A Court in British India to which the decree of a foreign Court is sent for execution has the power to consider whether it is a valid decree binding on the defendant and whether it was passed with jurisdiction. (Vol 3) 1916 Bom 307 (308) : 40 Bom 551 * (Vol 12) 1925 Cal 955 (956) * (Vol 2) 1915 Mad 486 (487) : 39 Mad 24 (FB).

[3] Foreign judgment that an application is a step-in-aid of execution binds Court in British India. (Vol 10) 1923 Mad 72 (73) : 45 Mad 1014.

[4] Application for execution for foreign decree may be resisted on grounds mentioned in S. 13. (Vol 4) 1917 Mad 780 (782) : 39 Mad 733 (F B) * (1891) 15 Bom 216 (219, 220) * (Vol 12) 1925 Mad 788 (790).

[5] Decree of foreign Court — Acquiescence by judgment-debtor—Decree can be executed in British India. (Vol 1) 1914 Bom 111 (112) : 39 Bom 34.

[6] Decree passed by British Indian Court on foreign judgment — Judgment and decree of foreign Court do not merge in decree of British Indian Court (*Obiter*). (Vol 31) 1944 Lah 302 (313) : I L R (1944) Lah 79.

[7] The existence of a decree in a foreign Court is no bar to the execution of a decree of a Court in British India, even though the cause of action in both suits be the same. (1881) 7 Cal 82 (83, 84).

[8] Irregularity in the service of notice cannot be raised as a ground for questioning validity of foreign decree. (Vol 12) 1925 Mad 155 (157) : 47 Mad 877.

10. Foreign Courts. — [1] The Courts in native States are all 'foreign Courts.' (1898) 1888 Pun Re No. 191, page 491 (499). (Confirmed in 21 Ind App 171 : 22 Cal 222 : 1894 Pun Re No. 112 (P C).)

11. Foreign judgment—Meaning. — [1] Foreign judgment means an adjudication by a foreign Court upon the matters before it, and not a statement by a foreign Judge of the reasons for his order. (Vol 30) 1943 Bom 201 (204) : I L R (1943) Bom 366.

[2] Point raised in Burma Court but not pressed — No express decision on the point in judgment and decree — Still, it amounts to adjudication within S. 13. (Vol 31) 1944 Mad 427 (427, 428).

[3] Foreign judgment — Appeal dismissed — Judgment in that suit is appellate and not original judgment. (Vol 20) 1933 Mad 511 (512) : 56 Mad 951.

[4] The Courts in India must treat a call order made by the Court in Chancery upon a contributory of a company registered in England as a foreign judgment. (1885) 9 Bom 346 (352).

12. Jurisdiction of foreign Courts. — [1] Where foreign tribunal has decided a question of fact necessary to determine jurisdiction of that particular Court, it is not open to a British Indian Court to go behind that decision. (Vol 30) 1943 Bom 201 (205) : I L R (1943) Bom 366.

[2] In an action in personam foreign Courts have jurisdiction in the following cases. (1) Where at the commencement of action the defendant resides or presents in that Court. (2) Where the defendant at the time of judgment was a subject or a citizen of that country. (3) Where the party objecting to jurisdiction has by his own conduct submitted to such jurisdiction. (Vol 29) 1942 Bom. 199 (201) : I L R (1942) Bom 688 * (1895) 22 Cal 222 (238) : 21 Ind App 171 : 1894 Pun Re No 112 (P C). (1888 Pun Re No 191 reversed.) * (1884) 7 Mad 105 (107) * (1897) 20 Mad 112 (115, 116, 117) * (Vol 13) 1928 Mad 327 (336). (Most of the trust property situate in Pondicherry—Trust to be performed there—Decision of Pondicherry Court as to appointment of trustee of that property should not be disturbed.)

[3] In an action in personam the Courts in foreign country do not acquire jurisdiction either, (1) from the mere possession by the defendants at the commencement of action of property locally situate in that country, or (2) from the presence of defendant in such country at the time when the obligation was incurred or (3) from the fact that defendant was carrying on business in such country through manager or agent at the time of the arising of obligation. (Vol 29) 1942 Bom 199 (201) : I L R (1942) Bom 688 * (1935) 158 Ind Cas 24 (24) (Lah) * (1908) 1 K B 302 (309).

[4] Foreign judgments are not binding in respect of property not situate in that Court's jurisdiction. (Vol 5) 1918 Mad 949 (954).

[5] Appearance of defendants implies waiver of plea of want of jurisdiction. (Vol 11) 1924 All 161 (162) : 46 All 119.

13. Submission to jurisdiction. — [1] Defendant not submitting to jurisdiction of foreign Court — Judgment of such Court is regarded as nullity in British India — Subsequent conduct of defendant does not validate it. (Vol 28) 1941 Pat 109 (113) : 20 Pat 144. * (1907) 30 Mad 222 (294).

[2] A party is said to subject himself to the jurisdiction or preclude himself from objecting thereto, when (1) he appears as plaintiff in the action, or (2) voluntarily appears as defendant in such action, or (3) expressly or impliedly contracts to subject himself to the jurisdiction. (Vol 29) 1942 Bom. 199 (201) : I L R (1942) Bom 688.

[3] If the defendant submits to the jurisdiction of a foreign Court and takes the chance of a judgment in his favour then the decree is binding but if he appears

14. The Court shall presume, upon the production of any document purporting to be a *Presumption as to certified copy of a foreign judgment, that such judgment was pronounced by foreign judgments.* a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

[1882, S. 13, Expl. VI; 1877, S. 13, Expl. VI.]

Section 13 (*contd.*)

not voluntarily but under decrees or coercive process he is said to have not appeared, (Vol 4) 1917 Mad 780 (783, 787): 39 Mad 733.

[4] Non-resident foreigner can be said to submit to jurisdiction of foreign Court when he appears and pleads to the merits. It may be that he voluntarily submits to jurisdiction when he appears but does not plead on merits. (Vol 25) 1938 Cal 511 (516): 63 Cal 1033* (Vol 1) 1914 Mad 556 (558, 560, 562): 37 Mad 163. (Submission to forum by non-resident partners through agent makes them personally liable on foreign judgment.)* (Vol 3) 1916 Mad 1037 (1037)* (Vol 13) 1926 Mad 259 (259). (Execution of power of attorney to defend suits in foreign Court amounts to submission.)* (Vol 23) 1936 Mad 552 (553, 556): 59 Mad 918. (Request by defendant in foreign Court for concession regarding attachment before judgment.)* (Vol 28) 1941 Mad 387 (388). (Filing written statement and attacking jurisdiction of Court.)* (Vol 28) 1941 Mad 688 (689, 690): I L R (1941) Mad 891. (Renunciation of Cochin nationality by defendant after passing of decree against him.)* (Vol 13) 1926 Nag 77 (78): 22 Nag L R 82.

[5] It was held in the following cases that there was no submission to jurisdiction. (Vol 20) 1933 Mad 112 (113) (Entering into partnership in foreign country is not submission to its jurisdiction in matters connected with partnership.)* (Vol 23) 1936 Mad 552 (554): 59 Mad 918. (Filing suit in foreign Court does not amount to submission to jurisdiction for purposes of other suits.)* (Vol 24) 1937 Mad 97 (99). (Previous litigation in same Court by defendants but then as plaintiffs — No submission.)

[6] Execution of power of attorney in favour of agent does not amount to agreement to submit to jurisdiction. (Vol 29) 1942 Bom 199 (201, 202): I L R (1942) Bom 688.

[7] Parties cannot resile from contract to submit to jurisdiction. (Vol 29) 1942 Bom 199 (201): I L R (1942) Bom 688.

14. Suits on foreign judgment. — [1] In order that a suit may be filed on foreign judgment in British India, it must be final and conclusive in Court in which it was passed. (Vol 22) 1935 Rang. 284 (289).

[2] No duty is cast on the defendant to obey the judgment passed by the foreign Court against the subject of British India and the suit is not barred in British India. (1882) 4 Mad 359 (366)* (1883) 6 Mad 273 (277).

[3] If a judgment is obtained in a Court of any colony of the British Crown against an absent person who was not domiciled within that colony at the time of the suit or the judgment is passed against him in absentem, he might be sued upon in British Court. (1902) 29 Cal 509 (517).

[4] Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed. (1900) 24 Bom 86 (87)* (Vol 25) 1938 Bom 173 (177): I L R (1938) Bom 16.

[See however (Vol 21) 1934 Bom 390 (392).]

[5] Question whether foreign Court had jurisdiction to pass decree can be gone into. (Vol 22) 1935 Lah 551 (551).

[6] Suit based on foreign judgment — Party properly served — Cause of action arising in foreign country — Judgment cannot be objected on ground of want of

jurisdiction. (Vol 3) 1916 Low Bur 67 (68)* (1892) 15 Mad 82 (83).

[7] The plaintiff sued the defendant in British India on a judgment obtained at French Court. Before instituting a suit in British India in the Court of the District Judge, the defendant was declared insolvent. The business was carried on by the cousin of the defendant. Held that the District Judge had no jurisdiction. (1900) 23 Mad 458 (470, 471).

[8] Probate proceedings in Penang — Law of British India not recognized with respect to immovable property in British India — Judgment cannot be sued upon in British India. (Vol 21) 1934 Mad 145 (147).

[9] Property in British India — Trustees granted letters of administration — Suit for dispossession of them based on decision in French Indian Court removing those trustees will not lie. (Vol 5) 1918 Mad 949 (954).

[10] In a suit upon a foreign judgment defendant cannot be permitted to urge a defence which he had an opportunity of pleading in a foreign Court. (1885) 9 Bom 346 (352).

[11] In giving effect to foreign judgment strict proof may properly be exacted both of the source whence the notices come and the authority under which they are sent. (1887) 11 Bom 241 (245).

[12] Suit on foreign judgment — Provisions of S. 78 (6) of Evidence Act, not complied with — Court can grant time to plaintiff to obtain and file requisite certificate. (Vol 6) 1919 Lah 188 (188).

SECTION 14—SYNOPSIS.

1. Applicability and scope.

2. Presumptions.

3. Burden of proof.

1. Applicability and scope.—[1] A foreign judgment can be relied on in Courts to which the Code applies. (1889) 13 Bom 224 (227).

[2] Party appearing voluntarily in foreign Court even to dispute jurisdiction submits himself to that Court's jurisdiction. (Vol 13) 1926 Nag 77 (78): 22 Nag L R 82.

2. Presumptions. — [1] In a suit on a foreign judgment the plaintiff need not state that the Court had jurisdiction over the parties or the cause, every presumption being made in favour of the foreign judgment. (Vol 6) 1919 Mad 446 (446)* (Vol 29) 1942 Bom 199 (200): I L R (1942) Bom 688.

[2] Parties not present—Presumption is that they submitted to judgment. (Vol 6) 1919 Mad 446 (446).

[3] See also Evidence Act, S. 79 (Presumption as to genuineness of certified copies) and S. 86 (Presumption as to certified copies of foreign judicial records).

3. Burden of proof — [1] In a suit on a foreign judgment, the burden lay under the old Code on the plaintiff of proving jurisdiction of the foreign Court. The subsequent change of law in S. 14 of the new Code cannot take retrospective effect. (1910) 1910 Pun L R No 41 page 96 (98).

[2] Copy of foreign judgment produced by plaintiff—Burden of proving want of jurisdiction in foreign Court is on defendant. (Vol 14) 1927 All 510 (512): 50 All 270* (Vol 6) 1919 Mad 446 (446).

PLACE OF SING.

Court in which suits to be instituted. 15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

[1882, S. 15. 1877, S. 15 and 25; 1859, S. 6 Para. 1.]

SECTION 15 — SYNOPSIS.

1. Applicability, scope and object.
2. Cases in which satisfactory valuation is not possible.
3. "Court of the lowest grade".
4. Objection to jurisdiction—Waiver.
5. "Shall be instituted".
5. Valuation improper—Effect.
7. Valuation in plaint determines jurisdiction.

1. Applicability, scope and object. — [1] Section 15 is intended to protect Courts of higher grade and does not affect their jurisdiction. (Vol 31) 1944 All 1 (4); 1 L R (1944) All 20.

[2] The section is a rule of procedure and does not affect the question of jurisdiction (1885, 7 All 230 (241) (F B) * (Vol 31) 1944 Bom. 300 (302), * (1910) 14 Cal W N 322 (324) * (1898) 25 Cal 46 (48) * (Vol 30) 1943 Cal 450 (451).

[3] Section 15 does not apply to High Court though not excepted by S. 120. (Vol 22) 1935 Rang 517 (520).

[4] No provision in special Act—Civil Procedure Code must govern place of suing—Special Act providing forum—Suit must be filed there. (Vol 29) 1942 Cal 69 (71); 1 L R (1942) 1 Cal 235.

[5] Section 15 does not apply to suit cognizable by Village Munsif under Madras Village Courts Act. (Vol 27) 1940 Mad 495 (496); 1 L R (1940) Mad 684.

2. Cases in which satisfactory valuation is not possible. — [1] Suit for restitution of conjugal rights is not necessarily excluded from jurisdiction of Munsif—Value of such suit is as a rule value put by plaintiff. (1906) 28 All 545 (549).

[2] Suit to set aside adoption — Value for purposes of jurisdiction is not value of property, but value put upon plaint. (1893) 15 All 378 (379).

[3] Subject-matter of suit incapable of valuation — Interest of plaintiff affected must be considered for jurisdiction purposes. (1891) 14 Mad 169 (170) * (1883) 6 Mad 192 (196) (Suit to set aside valuation.) * (1888) 11 Mad 266 (268) (Suit to remove Karnavan.) * (1890) 13 Mad 56 (60) * (1892) 15 Mad 294 (295) * (1903) 31 Mad 89 (96) (F B) * (Vol 11) 1924 Mad 84 (85) (Suit to set aside award).

3. "Court of the lowest grade." — [1] The term "Court of the lowest grade" refers only to Courts to which Civil P. C. is applicable. (1890) 13 Mad 145 (146).

[2] Having regard to Cl. 12, Letters Patent and S. 22, Presidency Small Cause Courts Act, High Court has jurisdiction to hear suit wherein damage claimed exceeds Rs. 100 — Jurisdiction is not taken away by S. 15. (1910) 34 Bom 13 (34).

4. Objection to jurisdiction—Waiver. — [1] In the matter of pecuniary jurisdiction, the waiver of a party is not sufficient to clothe the Court with jurisdiction which it does not otherwise possess. (Vol 22) 1935 Mad 723 (724).

5. "Shall be instituted". — [1] It is imperative on suitor to bring his suit in the Court of lowest grade. (Vol 12) 1925 Rang 278 (278) * (Vol 15) 1928 Lah 484 (486).

[2] Word "shall" in S. 15 is not imperative on Courts and does not deprive higher Court of its jurisdiction to try suit triable by Court of less pecuniary jurisdiction. (Vol 12) 1925 Rang 278 (278) * (1910) 14 Cal W N 322 (324) * (1890) 17 Cal 155 (158).

[3] Suit triable by Court of lower grade instituted in Court of higher grade—Its trial by latter is merely an irregularity. (Vol 14) 1927 Mad 568 (569).

[4] Punjab Courts Act, S. 34—Judge receiving plaints for distribution is acting not as Court but ministerially—His discretion overrides the provisions of S. 15 in so far as he can direct suit to be tried by higher Court. (Vol 13) 1928 Lah 484 (486).

[5] Plaint presented to Court having jurisdiction — Its acceptance by Court as being in order—Subsequent finding of fact as to value of subject-matter of suit requiring presentation to another Court having jurisdiction — Plaint returned for presentation to that Court—Plaint held instituted when presented to first Court. (Vol 23) 1941 Mad 711 (712).

[6] Once the institution takes place in accordance with the provision of S. 15, Civil P. C., the operation of the section is exhausted. The section does not authorise the transfer of a pending suit, merely because in the course of the trial, it is found that the plaintiff is entitled only to a part of the claim, which would have been cognizable by a lower Court. (Vol 7) 1920 Nag 47 (48).

[7] Preliminary decree for accounts—Amount found due being in excess of Court's jurisdiction — Proper order is to transfer case to Court having jurisdiction and not to return plaint for presentation to proper Court. (Vol 16) 1929 Lah 107 (110).

[8] Suit involving accounts — Court is competent to pass decree for amount exceeding limits of its pecuniary jurisdiction. (Vol 12) 1925 Sind 324 (328); 18 Sind L R 286 * (1911) 33 All 97 (99, 100).

[9] Court having no jurisdiction — Its judgment is void. (1911) 38 Cal 639 (668).

[10] Court having no jurisdiction over subject-matter of suit—Jurisdiction cannot be conferred by consent of parties. (1911) 38 Cal 639 (668) * (1887) 9 All 191 (203) * (1911) 14 Cal L Jour 337 (345, 346) * (1904) 31 Cal 849 (852, 853).

6. Valuation improper—Effect. — [1] Court finding that value of relief has been overvalued — Court's duty is to return plaint for presentation in proper Court. (Vol 22) 1935 All 157 (160) * (1897) 24 Cal 661 (663) * (1898) 21 Mad 271 (273, 274).

[2] If from improper motives, plaintiff either under-values or overvalues it, the Court must decide the proper value. (1907) 34 Cal 352 (356) * (1913) 40 Cal 245 (250).

[3] False statement to bring case within jurisdiction is abuse of process of Court. (Vol 10) 1923 All 137 (138, 139); 45 All 193.

[4] False statement to avoid jurisdiction of Court — Plaintiff should be required to prove that allegation is *bona fide* and not colourable to change venue. (1901) 24 Mad 158 (159).

7. Valuation in plaint determines jurisdiction. — [1] Value of subject-matter of suit for purposes of jurisdiction is the value stated by plaintiff in his plaint. (1891) 13 All 320 (323) * (1895) 1895 Bom P J 238, p. 333 (334, 335) * (1884) 8 Bom 31 (33) * (1907) 31 Bom 73 (79) * (Vol 20) 1933 Lah 8 (8, 9) * (Vol 2) 1915 Sind 3 (3); 9 Sind L R 164.

[2] Plaint and not written statement should be looked into for determining jurisdiction. (Vol 20) 1933 Pat 246 (247); 13 Pat 65 * (1894) 16 All 286 (290) * (Vol 3) 1916 All 343 (343) * (Vol 11) 1924 Cal 733 (735); 51 Cal

Suits to be instituted where subject-matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits —

- (a) for the recovery of immoveable property with or without rent or profits,
 - (b) for the partition of immoveable property,
 - (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,
 - (d) for the determination of any other right to or interest in immoveable property.
 - (e) for compensation for wrong to immoveable property,
 - (f) for the recovery of moveable property actually under distraint or attachment,
- shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section “property” means property situate in British India. [1882, S. 16; 1877, S. 16; 1859, S. 5.]

Objects and Reasons.

“Clause 16 (a).—The insertion of the words ‘with or without rent or profits’ is intended to remove any

difficulty there may be where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situate.”—S. O. R.

Section 15 (contd.)

737* (Vol 18) 1931 Cal 159 (159) : 58 Cal 829* (Vol 7) 1920 Nag 47 (48).

[3] Jurisdiction continues whatever may be the result, unless different principles intervene and make proceedings from the first abortive. (Vol 11) 1924 Cal 783 (785) : 51 Cal 737* (1884) 8 Bom 31 (33).

[4] Plaint amended rendering claim beyond jurisdiction of Court—Suit cannot be tried by that Court. (1886) 9 Mad 208 (208).

[5] Partition suit — Value of share sought to be recovered, and not value of entire property, should be taken to be value for determining jurisdiction. (1891) 14 Mad 183 (184)* (1890) 17 Cal 680 (683).

[6] In a suit for partition of lands of which plaintiff is in joint possession, he is entitled to value the relief for purposes of jurisdiction. (1912) 11 Mad L Tim 155 (157).

[7] In a suit by plaintiff in possession for declaration of his title to land the Court must take the relief sought, for the purposes of jurisdiction. (1905) 32 Cal 734 (738).

SECTION 16 — SYNOPSIS.

1. Applicability and scope.
2. Clause (a).
3. Clause (b).
- 3a. Clause (c).
4. Clause (d).
5. Clause (e).
6. Clause (f).
7. Immoveable property.
8. Proviso.
9. Specific performance.

1. Applicability and scope.—[1] Where an item of property is admittedly in foreign territory on the date of suit, the British Courts have no jurisdiction to entertain a suit for possession of that property. (1910) 8 Mad L Tim 244 (244).

[2] Courts in India have limited jurisdiction to entertain suits relating to foreign property. (Vol 21) 1934 Sind 193 (199) : 28 Sind L R 54.

[3] Before Government of India Act of 1935, Courts in British India lacked territorial jurisdiction in respect of property in Berar. (Vol 28) 1941 Nag 36 (38, 39) : 1 L R (1941) Nag 1 (F B) * (Vol 22) 1935 Nag 250 (255) (F B). (Berar is foreign territory.)

[4] Part of property outside British India — British Indian Court has no jurisdiction although rest of property is within jurisdiction — S. 17 does not apply. (Vol 28) 1941 Mad 129 (137).

[5] A suit for *Joshipan* income in respect of villages situated in and outside British India can be decreed only in respect of villages situated in British India. (Vol 5) 1918 Nag 151 (152).

[6] Courts are not precluded from trying questions relating to property outside their territorial jurisdiction, when the question is merely incidental to the relief claimed. (1911) 10 Ind Cas 267 (267) (Mad).

[7] Sections 16 and 17 relate to moveable property also. (Vol 13) 1926 Lah 503 (504).

[8] Provisions of Ss. 16 to 20 govern applications under Sch. 2, Para. 17 (now repealed by the Arbitration Act, 1940). (Vol 18) 1931 Lah 673 (674).

[9] Decision of a Board under the Madras Religious Endowments Act — Suit to set aside lies only in the Court where the temple is situate. (Vol 15) 1928 Mad 1272 (1277).

[10] Non-compliance with provisions of Ss. 16 to 20 is in no way fatal to jurisdiction of Court and does not render decree passed by Court of competent jurisdiction mere nullity so as to empower executing Court to refuse to execute it on that ground. (Vol 18) 1931 Sind 47 (49, 50) : 25 Sind L R 204.

[11] This section does not apply to the High Court in the exercise of its original civil jurisdiction; see S. 120.

2. Clause (a). — [1] Clause (a) refers to suits to recover possession of immoveable property where title to that property is in dispute. (Vol 6) 1919 All 350 (350) : 41 All 513.

[2] Suit for specific performance and possession by vendee under prior agreement against vendor and vendees under subsequent sale — Suit as against subse-

Section 16 (*contd.*)

quent vendees held fell under S. 16 (a). (Vol 28) 1941 Bom 247 (249, 250); I L R (1941) Bom 361.

[3] Suit to recover property after setting aside decree—Suit must be brought in Court having local jurisdiction over property. (1901) 5 Cal W N 559 (561). (Decree may be that of another Court.)

3. Clause (b).—[1] Partition suit—British Indian Court cannot entertain suit with regard to immovable property outside British India. (Vol 15) 1928 Nag 295 (296); 24 Nag L R 95.

[2] Partition suit—Property consisting both of immovables and movables—Movable property within jurisdiction but immovable outside—Court has no jurisdiction to grant relief in respect of immovable property. (Vol 18) 1931 Sind 59 (51); 25 Sind L R 275 & (1905) 28 Mad 216 (221, 224).

[See also (1879) 4 Bom 482 (487)] (Case under Cl. 12, Letters Patent.)

[3] Suit in respect of property in British India and Burma filed in British India—Pending suit, Burma separated—Jurisdiction of British Indian Court to try suit in respect of property in Burma held not taken away. (Vol 29) 1942 Mad 614 (621); I L R (1942) Mad 376.

[4] Suit for accounts and partition of joint family property, part of which situated in foreign State—Court held could grant relief even in respect of property situated in the foreign State. (Vol 10) 1923 Lah 551 (553).

[But see (Vol 14) 1927 Sind 160 (161); 23 Sind L R 46.]

3a. Clause (c).—[1] Suits for foreclosure, sale or for redemption, must be brought in the Court within the local limits of whose jurisdiction the property is situate. (1898) 9 Cal 733 (735). (Foreclosure.) & (1876) 1 Cal 163 (167); 3 Ind App 1 (P C) (Sale.) & (1868) 9 Suth W R 170 (173) (F B) (Sale.) & (1892) 19 Cal 361 (362) (Redemption.)

[2] Mortgage of properties in C. P. and Berar—Suit in C. P. Court for sale of both properties—Court cannot pass decree for sale of Berar property. (Vol 22) 1935 Nag 192 (193); 31 Nag L R 357.

[3] In a redemption suit, questions relating to mortgaged property held by defendants outside jurisdiction may be incidentally decided for deciding plaintiff's right to recover mortgage property within jurisdiction. (1877) 1 All 431 (433).

[4] Suit by purchaser for contribution on account of payment of arrear of revenue—No personal obligation but estate alone liable—Suit must be brought within local limits of jurisdiction of Court where property is situate. (Vol 3) 1916 Mad 980 (981); 39 Mad 795.

[5] Hypothecation bond—Suit on the bond brought in a Court having no jurisdiction—Decree passed can be looked upon as a money-decree. (1886) 8 All 117 (119).

[6] Suit relating to mortgage brought in Court having jurisdiction over mortgaged property—Before final decree, territorial jurisdiction of Court transferred to another Court—Original Court's jurisdiction is not lost. (Vol 12) 1925 Mad 117 (118).

4. Clause (d).—[1] Suit for relief not directly affecting immovable property—Section does not apply. (Vol 10) 1923 Mad 109 (110).

[2] Suit for maintenance to be charged on immovable property falls within Cl. (d). (Vol 3) 1916 Bom 272 (273); 40 Bom 337 (Suit against subject of Native State.) & (Vol 13) 1926 Lah 660 (661) (Suit for money due on pro-note and for charge.) & (Vol 18) 1931 Sind 47 (48); 25 Sind L R 204 (Where property sought to be charged is outside jurisdiction, S. 16 ousts jurisdiction

of Court) & (Vol 22) 1935 Mad 1043 (1043) (Suit by Hindu widow.)

[3] Property in two provinces—Probate proceedings pending in one—Administration suit in the other province is maintainable. (Vol 13) 1926 Lah 503 (504) (Reversing (Vol 13) 1926 Lah 456.)

[4] Declaration of proprietary title granted as relief in award—Court outside whose jurisdiction property is situate has no jurisdiction to file the award. (Vol 20) 1933 All 380 (382); 55 All 542.

[5] Question of jurisdiction in case of awards should be determined by considering reliefs granted by award. (Vol 20) 1933 All 380 (381); 55 All 542.

[6] Dispute regarding immovable property situated outside jurisdiction of Court referred to arbitration out of Court—Court has no jurisdiction to file award. (Vol 21) 1934 Sind 183 (184).

[7] Plaintiffs' suit for determination of their right to and interest in a decree for sale upon mortgage, cannot be regarded as one for the determination of a right to or interest in immovable property within the meaning of Cl. (d) of S. 16. (1904) 26 All 603 (605, 606).

[8] A suit for declaration that a mortgage-decree in respect of properties at Patna passed by Court at Benares is inoperative against the plaintiff, is not a suit for land and S. 16 does not apply. The cause of action cannot be said to arise in Patna. (Vol 11) 1924 Pat 331 (331).

[9] Immovable property attached before judgment—Objector's claim allowed—Suit for declaration that property belongs to defendant should be filed in Court where property is situate. (Vol 28) 1941 Cal 363 (364).

[10] Section 16 (d) will not govern the case of a suit for declaration that an adoption is invalid. (1929) 30 Mad L W 691 (693).

[11] The Court in whose jurisdiction the properties are not situate cannot try a case for declaration that a mortgage in favour of the defendant is invalid against the plaintiff. (1912) 23 Mad L Jour 679 (679).

[12] A suit for possession of land and for opening a water-course, is one for an interest in immovable property. (1865) 4 Suth W R 107 (107).

[13] Suit for accounts of factory for particular year is not suit regarding interest in immovable property. (Vol 18) 1931 Lah 673 (674).

[14] A suit for dissolution of partnership with the usual ancillary relief does not fall either under clause (a) or (d) and can be brought in the Court within whose jurisdiction the parties reside or the cause of action arises. (Vol 6) 1919 All 350 (350); 41 All 513.

[15] Immovable property attached before judgment—Objector's claim allowed—Suit for declaration that property belongs to defendant should be filed in Court where property is situate. (Vol 28) 1941 Cal 363 (364).

[16] Fact that revenue for particular land is collected in one district is not conclusive that civil suit in respect of that land lies in that district. (Vol 20) 1933 Pat 555 (556).

5. Clause (e).—[1] The word "wrong" in S. 16 (e) refers to torts affecting immovable property such as trespass, nuisance, infringement of easements, etc. (Vol 9) 1922 Bom 188 (188); 46 Bom 108.

6. Clause (f).—[1] Section 16 (f) does not apply to a suit for recovery of movable property which is under attachment by a foreign Court and the British Indian Courts have no jurisdiction to entertain such a suit even independently of S. 16. (1912) 1912 Mad W N 524 (528) (Case is different if the defendant is a resident of British India and attachment is made at his instance.)

7. Immovable property.—[1] Suit for recovery of *joshipani* income is one relating to immovable property. (Vol 5) 1918 Nag 151 (151).

17. Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

[1882, S. 19 ; 1877, Ss. 19, 22, 23, 24, 1859, Parts of Ss. 11 and 12.]

Section 16 (contd.)

[2] A tree attached to soil is immovable property. (1895) 19 Bom 207 (208).

[3] A suit for rent of a fishery is one for immovable property within the meaning of S. 16 (a). (1897) 24 Cal 449 (452, 453).

[4] A right of ferry is immovable property. (1890) 13 Mad 54 (55).

8. Proviso.—[1] Defendant means all defendants. (Vol 11) 1924 Cal 443 (444).

[2] Suit for specific performance and possession—Defendants and property in different places—Proviso does not apply and suit should be brought in Court within whose jurisdiction property is situate. (Vol 28) 1941 Bom 247 (249) : ILR (1941) Bom 361.

[3] A suit for rents on land situated in Thana district can be tried by the Courts at Satara, provided the defendant resides within their territorial limits and if necessary plaintiff's title to the land can also be adjudicated. (1869) 6 Bom H C R (A C) 29 (30).

[4] Suit for rent can be brought where property is situate or where tenant resides—But suit for ejectment can be brought only where property is situate. (Vol 10) 1923 Cal 619 (620, 621).

[5] Suit for rent is not a suit for obtaining relief respecting immovable property—Proper Court is in whose jurisdiction cause of action wholly or partly arises. (Vol 22) 1935 Mad 545 (545).

[6] Suit to recover mesne profits of land situated outside British India can be instituted in British India if the relief can be obtained entirely through the personal obedience of the defendant. (Vol 15) 1928 Nag 56 (58) : 23 Nag L R 170.

[7] A suit claiming compensation for wrong to immovable property is not a suit for which relief can be entirely obtained through the personal obedience of the defendant even though it may be joined with a claim for an injunction. (1893) 20 Cal 689 (692).

[8] Suit for mesne profits—Lands outside British India—But defendant residing within jurisdiction of British Indian Court—Suit in that Court lies. (Vol 9) 1922 Bom 188 (188):46 Bom 108.

9. Specific performance.—[1] Proviso—Suit to enforce defendant to execute sale deed as promised—Defendant residing in one district—Property lying in another—Suit in the Court of former district is tenable. (Vol 13) 1926 Nag 313 (318).

[2] Suit by vendor for specific performance is not suit for land or for determination of any right to or interest in immovable property. (Vol 3) 1916 Low Bur 44 (45).

[But see (Vol 20) 1933 Mad 436 (437).]

[3] A suit to compel specific performance of an agreement to purchase the plaintiff's house or in the alternative for damages is a suit for the determination of a right to immovable property. (1909) 5 Nag L R 128 (129).

[4] A suit for specific performance of an agreement to lease lies in a Court within the local limits of whose jurisdiction, part of the land covered by lease was situate. (1906) 33 Cal 1065 (1075).

[5] Injunction to person within jurisdiction can but will not be issued unless effective. (Vol 19) 1932 Mad 705 (706) : 55 Mad 966.

[6] A suit for recovery of unpaid purchase money under a contract of sale is one for determination of any other right or interest in immovable property. (1905) 28 Mad 227 (228).

[7] Suit by vendee for refund of purchase money which has been made charge on property—Court in which property is situate has jurisdiction. (Vol 20) 1933 Mad 436 (437).

SECTION 17 — SYNOPSIS.

1. Causes of action.
2. Chartered High Courts.
3. "Courts".
4. Scope and object.
5. Withdrawal of part of claim — Effect.

1. Causes of action.—[1] Plaintiff having two or more causes of action cannot take advantage of S. 17 if the joinder of such causes of action is bad for multifariousness. (Vol 27) 1940 All 205 (206)* (1885) 1885 All W N 123 (126) (Overruled on a different point in 30 All 560 (F B)).

[2] Distinct causes of action against several defendants can be combined in same suit if there is some common question of law or fact—S. 17 can be applied. (Vol 20) 1933 Mad 622 (622, 624).

2. Chartered High Courts.—[1] Section 17 does not apply to chartered High Courts : see S. 120.

[2] A suit for land partly within the jurisdiction of the High Court and partly outside cannot be entertained with respect to the latter part on the original side unless leave is obtained under cl. 12, Letters Patent (Bom). (1898) 22 Bom 922 (926) * (1887) 14 Cal 835 (838).

[3] Property situated in Native State—High Court can order sale of such property in mortgage decree—Letters Patent (Bombay), cl. 12—Bombay High Court Rules (Original), R 581. (Vol 19) 1932 Bom 642 (644, 645):57 Bom 234.

3. 'Courts.'—[1] Words 'within jurisdiction of different Courts' must mean within jurisdiction of different Courts to which the Code applies, that is Courts in British India. (Vol 17) 1930 P C 188 (189) : 57 Ind App 194 : 54 Bom 495 (P C) * (Vol 6) 1919 P C 150 (152) : 46 Ind App 151:42 Mad 813 (P C) * (Vol 23) 1936 P C 189 (191) : 15 Pat 567 : 63 Ind App. 311 (P C).

4. Scope and object.—[1] Section 17 is intended to solve the difficulty which would naturally arise if there was a dispute about some immovable property which is situate in different jurisdictions. (Vol 29) 1942 All 387 (389) : I L R (1942) All 862.

[2] Section 17 and the later sections in the group of the sections dealing with jurisdiction, proceed to widen and enlarge the scope of S. 16 by enacting other and more liberal rules. (Vol 28) 1941 Mad 129 (137).

[3] Section 17 deals as to which Court is to be held for the purpose of Sch. 2 para. 20 to have jurisdiction in a given case. Consequently when part alone of the subject-matter of an award is within a Court's jurisdiction, then the Court has jurisdiction over the entire property. The only case wherein S. 17 is displaced is where part of the property is situate outside British India. (Vol 28) 1941 Mad 129 (135, 136, 137).

[4] Sections 16 and 17 are not confined to suits involving immovable property only but they apply

18. (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which *Place of institution of suit where local limits of jurisdiction of Courts are uncertain.* of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

[1882—S. 16A.]

Suits for compensation for wrongs to person or moveables.

19. Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on

Section 17 (contd.)

equally to suits for immovable property as well as moveable property provided the immovable property is situate wholly or in part within the local jurisdiction of the Court. (Vol 13) 1926 Lah 503 (504).

[5] Section applies only where the properties are situate in British India. (Vol 1) 1914 P C 140 (145, 146) : 42 Cal 116 : 41 Ind App 197 (P C) (Lands situate in Sonthal Parganas—Section 17 cannot confer jurisdiction.) * (Vol 17) 1930 P C 188 (189, 190) : 57 Ind App 194 : 54 Bom 495 (P C) (Suit for foreclosure, sale or redemption is a suit to obtain relief respecting immovable property—Such immovable property must however be in British India—Mortgage of property partly in British India and partly out of British India—Courts in British India have no jurisdiction to try a suit on such mortgage so far as property outside British India is concerned.) * (Vol 25) 1938 Bom 121 (123, 124) : I L R (1937) Bom 895 (Berar is foreign territory—Courts in British India have no jurisdiction to pass decree in respect of property situated in Berar.) * (Vol 28) 1941 Lah 347 (353) (Property situated outside British India—No decree nor injunction in respect of its management can be passed—But property in British India though outside jurisdiction of particular Court may be included in suit with property situated within Court's jurisdiction.)

[See however (Vol 21) 1934 Pat 292 (296) : 13 Pat 486 (Lands situate both in Santal Parganas and in Gaya District—Gaya Court has jurisdiction within the meaning of Santal Parganas Regulation (1872), Ss. 5 and 5 (a).)]

[6] Part of property was wakf in different jurisdiction—Wakf property being appendage of the estate—Court trying suit for the estate can also try claim to wakf. (Vol 15) 1928 Oudh 67 (78).

[7] Suit in British India in 1932—Property partly in Burma—Separation of Burma in 1937—Jurisdiction of British Indian Courts to proceed with respect to Burma properties is not taken away. (Vol 30) 1943 F C 24 (25, 28) : I L R 1943 Kar F C 21 : (1943) 5 F C R 39 (F C).

[8] Property situate within jurisdiction of two Courts—Plaintiff can bring two separate suits and need not combine them in one suit. (1866-68) 3 Mad H C R 376 (377) * (Vol 4) 1917 Mad 350 (351) (Suit for partition of property situate in different jurisdictions.)

[9] Phrase "relief respecting immovable property" in S. 17 has not the effect of including in

that section suits relating to immovable property of a nature different from suits in respect thereto as are specified in S. 16 (a) to (e). (Vol 29) 1942 Cal 69 (72) : I L R (1942) 1 Cal 235.

[10] This section does not apply to the High Court in the exercise of its original civil jurisdiction: see S. 120.

5. Withdrawal of part of claim—Effect.—[1] Where a Court is invested with jurisdiction by virtue of this section, it will be not divested of the jurisdiction by reason of the withdrawal or compromise with respect to part of property situate within jurisdiction unless the withdrawal or compromise is not *bona fide*. See (1908) 30 All 560 (566, 567) (F B) (Compromise: 1885 All W N 125, overruled.) * (1889) 12 Mad 380 (386) (Withdrawal.) * (Vol 25) 1938 Oudh 65 (69) (Relinquishment in appeal.)

[2] Jurisdiction once vested by virtue of S. 17 is not taken away though plaintiff is found to have no title to portion of property within jurisdiction of that Court as alleged unless inclusion of such property is not *bona fide*. (Vol 17) 1930 Nag 189 (191) : 26 Nag L R 103.

SECTION 18 — SYNOPSIS.

1. Allegation of uncertainty.
2. Applicability.
3. Immovable property.

1. Allegation of uncertainty.—[1] Suit for rent of fishery brought in certain Court within district *P*—No notification known of as laying down boundaries of *P*—*Held*, there was reasonable ground of uncertainty as to jurisdiction of Court. (1897) 24 Cal 449 (454).

2. Applicability.—[1] Section does not in terms bind execution creditor. (Vol 7) 1920 Mad 505 (508) : 43 Mad 135.

3. Immovable property.—[1] Suit for rent of fishery is suit for immovable property within S. 18. (1897) 24 Cal 449 (454).

SECTION 19.— SYNOPSIS.

1. "Carries on business".
2. Option to file suit.
3. "Resides".
4. Suits relating to torts.

1. "Carries on business".—[1] Defendant carrying on business at Quetta though resident in the Punjab, can be sued at Quetta, for damage done in Persia. (Vol 13) 1926 P C 88 (89) (P C).

business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations.

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

[1882, S. 18; 1877, S. 18.]

Other suits to be instituted where defendants reside or cause of action arises.

20. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction —

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides,⁵ or carries on business,² or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action,⁷ wholly or in part, arises.⁵

Explanation I. — Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II. — A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

[1882, S. 17; 1877, S. 17: Letters Patent : Bombay, Calcutta and Madras, Cl. 12.]

Objects and Reasons.

Explanation III of section 17 of the Code of 1882 related to the place where a suit arising out of a contract could be instituted. The committee have omitted

this explanation, which has become unnecessary owing to the addition made to sub-cl. (c) of this section of the words 'wholly or in part' in reference to the cause of action.—See S. O. R.

Section 19 (contd.)

[2] Business intended by S. 19 is commercial business and not a business of State or Government. (Vol 14) 1927 Mad 689 (690) : 50 Mad 449.

[3] See also note 6 on S. 20.

2. Option to file suit. — [1] Defendants residing outside Rangoon sued for damages for wrongful seizure of boats — Boats seized in Rangoon — Suit might be brought in Chief Court at Rangoon. (1906) 3 Low Bur Rul 164 (165).

[2] Option to file suit at two places — Institution of suit at one of such places does not deprive plaintiff of his good faith. (Vol 20) 1933 Lah 264 (264).

3. "Resides". — [1] The word "resides" in S. 19 must be taken to refer to natural persons and not to legal entities such as limited companies or Government. (Vol 14) 1927 Mad 689 (690) : 50 Mad 449.

[2] Defamation committed outside British India — Defendant residing in British India — Indian Court has jurisdiction to try suit. (Vol 2) 1915 Mad 1206 (1207) : 39 Mad 433.

[3] Defendant residing outside British India — Damages caused outside British India — Suit for damages

does not lie in British Indian Court. (Vol 6) 1919 Mad 1043 (1043).

4. Suits relating to torts.—See note on S. 20.

SECTION 20 — SYNOPSIS.

1. Acquiescence in jurisdiction.
2. "Actually and voluntarily resides."
3. Temporary or occasional residence.
4. Applicability and scope.
5. "Carries on business".
6. Business through agent.
7. Cause of action—Meaning of.
8. "Wholly or in part arises."
9. Contract, suit arising out of.
10. Place of making contract.
11. Place of breach or non-performance of contract.
12. Place where money is payable.
13. "Leave of the Court."
14. Revision.
15. Suit against corporations.
16. Suit against foreigners.

Section 20 (contd.)

17. Suit between banker and customer.
18. Suit for accounts against agent.
19. Suit for accounts in and dissolution of partnership.
20. Suit for infringement of copy-right and trade-mark.
21. Suit for restitution of conjugal rights.
22. Suit on assigned debts.
23. Suit on negotiable instruments.
24. Suit relating to torts.
25. Suit to set aside decree on ground or fraud.

1. Acquiescence in jurisdiction. — [1] Parties cannot by acquiescence or consent confer upon a Court a jurisdiction which it has not got. (Vol 12) 1925 P C 155 (156) (PC)* Vol 16 1929 Sind 227 (229).

[2] Defendant's waiver does not cure defect in jurisdiction. (Vol 2) 1915 Mad 157 (158).

[3] A suit is filed against three defendants at A or whom one defendant resides at A and the other two at B. The non-resident defendants acquiesced in the institution of the suit. It was held that the suit cannot be said to have been improperly instituted against the two defendants. (1906) 30 Bom 81 (82).

2. "Actually and voluntarily resides." — [1] The words 'actually and voluntarily' must be taken together. Jail is not a voluntary abode. The Court of the District has jurisdiction where the defendant has a house though as accused he was in jail in another district. (1909) 1909 Pun Re No. 77 (Cr) p. 299 (300, 301).

[2] Rules in S. 20 are alternative—Defendant's residence is sufficient to give jurisdiction, in an action *in personam*. (Vol 2) 1915 Mad 157 (168).

[3] Suit for rent can be brought where property is situate or where tenant resides. But a suit for ejectment can be brought only where property is situate. (Vol 10) 1923 Cal 619 (620, 621).

[4] Interest in property at former residence does not give Court jurisdiction under S. 20. (Vol 28) 1941 Cal 670 (671) : 1 L R (1941) 1 Cal 490.

[5] Persons living outside jurisdiction but having ancestral house within jurisdiction — No jurisdiction exists. (Vol 8) 1921 All 193 (193).

[6] Where defendant was found to have lived and carried on business at X for forty years and he never intended to return to his original home at N, his place of residence under S. 20 is at X and not at N, although he had an ancestral abode there and some ancestral land at the latter place. (Vol 4) 1917 Lah 30 (31) : 1916 Pun Re No. 112.

[7] Where a person states that he is having his *sakunat* at a certain place, it does not necessarily mean that he ordinarily resides at that place. (Vol 20) 1933 Lah 851 (851).

[8] Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits lies in British India but should be stayed till the dispute is subsisting out of British India. (Vol 15) 1928 Nag 56 (57, 58) : 23 Nag L R 170.

[9] The words 'actually and voluntarily resides' refer only to natural persons and not to legal entities such as limited companies and Governments. (Vol 17) 1930 Lah 818 (819).

[10] Person residing within jurisdiction of one Court, but occasionally going to another place — Former Court has jurisdiction to try suits — Onus of proof that such Court has no jurisdiction lies on him who alleges it. (Vol 23) 1936 Lah 853 (854).

3. Temporary or occasional residence. — [1] Under S. 20, residence means permanent residence not a

temporary or casual residence as traveller. (Vol 7) 1920 Low Bur 22 (23).

[2] A suit may be instituted in a Court in whose jurisdiction the defendant at the time of such institution actually or voluntarily resides, though the residence may be temporary. (1912) 14 Ind Cas 573 (573) (Mad).

[3] Person having permanent dwelling at one place and temporary residence at another — Cause of action arising at place of temporary residence — Suit can be brought at both places. (Vol 20) 1933 Lah 120 (121)* (Vol 13) 1926 Mad 1207 (1207, 1208)* (Vol 17) 1930 Cal 347 (347) : 57 Cal 65.

[4] Defendant has his family home at A, which he occasionally visits. He cannot be deemed to reside at A if he actually and voluntarily resides and carries on business at B. (1900) 2 Bom L R 605 (606).

4. Applicability and scope. — [1] Rule of residence in S. 20 is subject to limitations of Ss. 16 to 18. (Vol 18) 1931 Mad 705 (706, 707).

[2] Explanation 3 of S. 17 of the 1882 Code should not be read in S. 20 (c). (Vol 6) 1919 Cal 1014 (1015).

[3] Plaintiff has right to choose his own Court for his suit and in cases of disputes about property the Court where property is situate is *prima facie* the better Court. (Vol 3) 1916 All 255 (255)* (Vol 1) 1914 Low Bur 37 (39) : 7 Low Bur 129.

[4] A Court, where a suit was originally rightly instituted, continues to have jurisdiction over the suit even if the place where the cause of action arises ceases to be situate within its jurisdiction. (Vol 15) 1928 Mad 746 (747).

[5] This section does not apply to the High Court in the exercise of its original civil jurisdiction : see Section 120.

5. "Carries on business". — [1] "Carrying on business" is not personally working — Firms in different places constituted differently may yet be the same legal entity. (Vol 9) 1922 All 367 (368, 369).

[2] Carrying on business — Defendant firm held to carry on business at its sub-office at Amritsar and suit instituted there against firm held rightly instituted. (Vol 20) 1933 Lah 11 (12) : 14 Lah 42.

[3] The carrying on of business must be personal on the part of the defendant, if it is sought to bring him within the jurisdiction of a Court on the ground of carrying on business there. (1882) 8 Cal 678 (686).

[4] Ginning factory of one person remaining dormant under special contract of combination with other factories — Owner continuing to derive profit from contract — Owner is deemed to be carrying on business of ginning factory. (Vol 19) 1932 Nag 114 (115) : 28 Nag L R 118.

[5] Company's agency at Madras acting merely as post office and having no discretion either to conclude, vary, or enter into, contracts — Company cannot be said to carry on business in Madras. (Vol 16) 1929 Mad 347 (348).

[6] The word 'business' means commercial business and not the business of Government. (Vol 17) 1930 Lah 818 (819).

6. Business through agent. — [1] Where money deposited with the Hindu Mutual Relief Fund is payable on the death of S at Lahore but S died at Lyalpur, where the fund had carried on business through an agent, the Court at Lyalpur has jurisdiction to entertain a suit. (Vol 5) 1918 Lah 320 (320, 321) : 1918 Pun Re No 98.

[2] A defendant cannot be said to carry on business at a place where he keeps no office but sends agent to canvass. (Vol 10) 1923 Lah 427 (427) * (Vol 23) 1936 Sind 121 (122, 123) : 29 Sind L R 292 * (Vol 24) 1937 Sind 17 (17, 18) (Agent getting only commission and

Section 20 (contd.)

authorised merely to take orders and transmit them to office for acceptance).

7. Cause of action — Meaning of. — [1] Section 20 (c) has not altered the law as to what is the cause of action in suits arising out of contract. (Vol 6) 1919 Nag 16 (18).

[2] The expression "cause of action" has been used in this section in a restricted as well as in some respects in an elastic sense so as to include the facts constituting the infringement of the right, but not necessarily all those constituting the right itself. (1903) 25 All 48 (52).

[3] Cause of action must be antecedent to the suit and so no cause of action can be founded on any allegations made in the proceedings. (Vol 16) 1929 Cal 830 (830, 881) * (Vol 4) 1917 Mad 221 (223) (Per *Krishnan J.* — The expression "cause of action" in S. 20 (c) means the cause of action as it was at the time when the right to sue arose for the first time.) * (Vol 6) 1919 Pat 507 (510) : 4 Pat L Jour 387.

[4] Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to prove. (Vol 19) 1932 All 543 (545) : 54 All 525 * (Vol 21) 1934 All 226 (229) * (Vol 29) 1942 Cal 99 (111) : I L R (1941) 2 Cal 477 * (Vol 22) 1935 Cal 160 (167) : 61 Cal 1023 * (Vol 8) 1921 Mad 664 (665) * (Vol 6) 1919 Mad 883 (884) * (Vol 9) 1922 Oudh 109 (111) * (Vol 20) 1933 Sind 179 (180, 181) : 27 Sind L R 230.

[5] Cause of action has no relation to defence by defendants. (Vol 19) 1932 Bom 42 (43) * (Vol 6) 1919 Cal 194 (194) : 46 Cal 520 * (1889) 16 Cal 98 (102) : 15 Ind App 156 (P C) * (Vol 4) 1917 Nag 1 (4).

[6] Right to possess immovable property and right to enjoy profits thereof are distinct causes of action. (Vol 4) 1917 Nag 19 (21).

[7] Contract of agency for collection of dues — General enquiry for accounts and not each separate act of collection is the cause of action. (Vol 17) 1930 Bom 150 (152) : 54 Bom 192.

[8] Seeking execution of the decree affords plaintiff cause of action. (Vol 2) 1915 All 163 (164) : 37 All 189.

[9] The title under which the defendant professes to hold possession, does not affect the cause of action of the plaintiff suing in ejectment. If the plaintiff's right has been infringed by one act or transaction that infringement gives him the cause of action against all persons interested in the infringement. (1913) 20 Ind Cas 347 (348) (Cal).

[10] Cases based on contract of insurance—Cause of action does not include damage to insured property. (Vol 11) 1924 Rang 2 (7, 8) : 1 Rang 231.

[11] In cases of mutual dealings an oral settlement of accounts may give rise to a cause of action. (Vol 4) 1917 Mad 622 (622).

[12] Suit for divorce—Finding of cruelty in previous litigation cannot furnish any cause of action. (Vol 9) 1922 Oudh 109 (111, 112).

8. "Wholly or in part arises".—[1] A Court has jurisdiction to entertain a suit if the cause of action arose even partly within its jurisdiction. (Vol 2) 1915 All 53 (54) * (Vol 9) 1922 Lah 36 (37).

[2] Suit on policy of insurance—Death of assured is part of cause of action. (Vol 6) 1919 Cal 1014 (1015).

[3] Plaintiff residing at J making offer by post to defendant at K for purchase of goods — Defendant accepting offer by letter posted from K — No part of cause of action for suit by plaintiff for damages for breach of contract arises at J. (Vol 32) 1945 Lah 260 (263, 264).

[4] Suit by reversioner for cancellation of will executed by widow—Situation of property will give a cause of action. (Vol 10) 1923 Mad 109 (110, 111).

[5] A, resident of M, insured with a company having its office at C with a condition that any dispute between them should be referred to arbitration. A filed application for his claim at M. It was held that as the contract was accepted at C a part of cause of action arose at C and suit at C was competent. (Vol 24) 1937 All 208 (213) : I L R (1937) All 234.

[6] Suit on fire insurance—Part of cause of action arises where fire occurs. (Vol 15) 1928 Nag 305 (306).

[7] Suit for declaration of title to and confirmation of possession of land on the allegation that defendant had threatened to take possession thereof cannot be dismissed for want of cause of action. (Vol 6) 1919 Cal 1063 (1063).

[8] Debtor and creditor—Appropriation of payment. A suit was brought to recover certain amount due for supply of goods. The Court disallowed part of the claim as arising outside its jurisdiction — Held that the Court ought not to have disallowed part of the claim as there was no plea that part of the claim arose outside British India. (Vol 24) 1937 Nag 94 (95).

[9] Agreement by defendant to submit accounts to plaintiff at plaintiff's shop at M — Defendant residing at K—Defendant's residence does not oust jurisdiction given by cause of action accruing within jurisdiction of M. (Vol 2) 1915 Mad 1001 (1002) (F B).

[10] Where money deposited with a Relief Fund is payable on the death of a member at A but that member dies at B, a suit for the recovery of the fund money due to that member can be brought at B on the ground that his death which was a part of the cause of action occurred at B where the defendant Fund carried on its business through an agent. (Vol 5) 1918 Lah 320 (320, 321) : 1918 Pun Re No. 98.

9. Contract, suit arising out of. — [1] In a suit based on contract the cause of action consists of the making of the contract and its breach in the place where it ought to be performed. But if the making of the contract be part of the cause of action, it follows that the act of concurrence of either party which is essential to the contract is itself a part of the cause of action, for without such act of concurrence that contract cannot come into existence. (1897) 21 Bom 126 (134).

[2] A Court within whose jurisdiction the defendant does not reside and no part of the contract was entered into, cannot entertain a suit on the contract. (1911) 9 Ind Cas 824 (824) (All).

[3] A suit on contract such as for recovery of a dower debt from the assets of a deceased Mahomedan, is subject to provisions of this section. (1896) 18 All 400 (403).

[4] A suit for damages on a breach of contract can be instituted in a Court where the contract was made though it has to be performed elsewhere. (Vol 5) 1918 Lah 52 (52) : 1918 Pun Re No. 26 * (Vol 9) 1922 Lah 100 (101) * (Vol 7) 1920 Nag 161 (162) : 17 Nag L R 1.

[5] Suit on contract can be instituted where contract is to be performed. (Vol 17) 1930 Rang 216 (218) * (Vol 12) 1925 Sind 132 (134) : 19 Sind L R 207.

[6] Place of contract not within jurisdiction—Court can try suit if place where contract was to be performed or money was payable is within jurisdiction. (Vol 5) 1918 Upp Bur 17 (18) : 3 Upp Bur 83.

[7] Contract for sale of goods—Suit for price can be brought where seller resides. (Vol 10) 1923 All 465 (465).

[8] A Karachi Court can entertain a suit to file an award based on a contract entered outside Karachi, whereby the goods purchased are examined and passed as to quality, weight, condition, and admixture, in

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Karachi. (1909) 3 Sind L R 164 (165) * (Vol 1) 1914 Sind 146 (147) : 8 Sind L R 107 (Court where part of cause of action arose has jurisdiction to file award.)

[9] In the absence of stipulation in the contract itself, the intention of the parties to it must guide the Court in determining the place of its performance. (1887) 11 Bom 649 (653).

[10] In a suit arising out of a contract regarding purchase of goods in order to fix the jurisdiction of the Court three points require to be decided: (a) the place of the contract, (b) the place where the goods were to be delivered, and (c) the place where the payment of the goods was to be made. (Vol 29) 1942 Lah 252 (252).

[11] Suit for two reliefs based on two independent causes of action — Court having jurisdiction in respect of one only—Mere fact that plaintiff has sued in one plaint for two reliefs would not give jurisdiction to Court in respect of other cause of action. (Vol 26) 1939 All 163 (164) : I L R (1939) All 167.

[12] Liquidator of Society at Midnapore sending registered letter to member residing at Alipore demanding money due by him to Society — Suit by member in Alipore Court claiming that he long ago ceased to be a member—Cause of action held arose within jurisdiction of Midnapore Court, as in order to succeed, member had only to show that demand made by Liquidator was wrong—Alipore Court held had no jurisdiction. (Vol 24) 1937 Cal 643 (645).

[13] Contract for sale of goods in Bombay—Delivery in Allahabad—Goods found defective on delivery—Suit in Allahabad — Plaintiff returned without recording evidence — Held evidence as to whether delivery was essence of contract should have been taken. (Vol 4) 1917 All 365 (365) : 39 All 368.

[14] The making of an offer may be a part of the cause of action in a suit upon a contract which has resulted from that offer. (Vol 24) 1937 Mad 571 (573) : I L R (1937) Mad 990.

10. Place of making contract. — [1] Making of contract is part of cause of action. (Vol 5) 1913 Lah 52 (52) : 1918 Pun Re No. 26* (Vol 6) 1919 All 295 (297) : 41 All 602.

[2] Court where final offer was made and not where negotiations took place has jurisdiction. (Vol 7) 1920 Mad 314 (314)* (Vol 25) 1938 Nag 186 (188).

[3] Acceptance of offer by post — Cause of action arises at the place where letter of acceptance is posted. (Vol 30) 1943 Mad 471 (473) : I L R (1944) Mad 95* (1909) 6 All L Jour 213 (214) * (Vol 6) 1919 Lah 26 (27) : 1 Lah 203 * (Vol 5) 1913 Sind 1 (3) : 12 Sind L R 93* (Vol 16) 1929 Sind 227 (228).

[4] Offer made and accepted through post — Part of cause of action arises where letter accepting offer is posted and part where it is delivered. (Vol 29) 1942 Mad 13 (14, 15) : I L R (1942) Mad 243* (Vol 10) 1923 Nag 167 (168).

11. Place of breach or non-performance of contract.—[1] Suit for breach of contract can be filed at place where contract was made or where breach occurred or where contract has been performed or its performance completed. (Vol 19) 1932 Sind 9 (12) : 26 Sind L R 167.

[2] Suit can be brought where breach of contract actually took place. (Vol 29) 1942 Oudh 250 (252) : 17 Luck 733* (Vol 11) 1922 Nag 18 (19)* (Vol 14) 1927 Mad 1150 (1150)* (1922) 65 Ind Cas 812 (813) (Pat)* (1904) 27 Mad 494 (496)* (Vol 4) 1917 Lah 12 (12) : 1916 Pun Re No. 93.

[3] Breach of contract — Suit to recover balance of price of goods supplied and damages — Cause of action arises partly at place of delivery. (Vol 21) 1934 All 740

(751) : 56 All 828 * (Vol 11) 1924 Lah 349 (350) * (1913) 1913 Pun L R No. 45 p. 175.

[4] Cause of action for a suit for breach of contract and damages arises at the place where the offer was accepted. (1909) 12 Oudh Cas 17 (19, 20)* (Vol 6) 1919 Mad 1043 (1043)* (Vol 4) 1917 All 121 (122).

[5] An action for damages for breach of contract for carriage of goods by a railway can be brought either where the breach was committed or where the contract was made. (Vol 6) 1919 Lah 272 (272).

[6] Sale of goods — Delivery to railway company is delivery to buyer—Place of delivery is the place where cause of action arises. (Vol 9) 1922 Lah 474 (474) * (Vol 28) 1941 Lah 223 (224)* (Vol 12) 1925 Lah 555 (556)* (Vol 7) 1920 All 142 (143) : 42 All 480 (Purchase of goods at one place to be delivered at another place.)* (Vol 1) 1914 Mad 311 (311).

[7] Contract and place where goods should be sent in Bengal—Place of despatch in Azamgarh—No cause of action arises in latter place. (Vol 9) 1922 All 448 (448).

[8] Where a contract was to be performed at a certain place, the Court of that place has jurisdiction to entertain a suit for damages for breach of contract. (1912) 16 Cal W N 325 (326)* (Vol 20) 1933 Bom 179 (180, 181) : 57 Bom 306* (Vol 7) 1920 Lah 412 (413)* (Vol 15) 1931 Mad 115 (116)* (Vol 81) 1944 Sind 70 (71) : I L R (1943) Kar 384* (1911) 5 Sind L R 97 (99).

[9] Treatment of a patient by doctor under an agreement made at A where fees were payable — Patient treated also at A — Cause of action for recovery of fees of doctor arises at A. (Vol 21) 1934 All 549 (550). (Trial actually at another place — Held, no failure of justice and hence no interference under S. 115.)

[10] Place of performance—Court must be guided by intention of parties—No inference as to intention being possible, recourse may be had to presumptions. (Vol 6) 1919 Nag 135 (136).

[11] Place of performance is where goods are to be sent although by V. P. P. (Vol 21) 1934 Mad 581 (582)* (Vol 7) 1920 All 6 (8) : 42 All 619.

[12] Suit on breach of promise — Suit can be filed where part of cause of action arises. (Vol 22) 1935 Bom 283 (283) : 59 Bom 365.

[13] Where an indent form provides that all disputes in connection with the indent are to be settled in a particular place, the Civil Court of that place will have jurisdiction to try such a dispute. (1913) 1913 Pun L R No. 96 p. 357 * (Vol 16) 1929 Sind 227 (229) * (Vol 21) 1934 Lah 44 (44, 45).

12. Place where money is payable. — [1] If an agreement to pay money is to be performed without demand by the creditor and no place is fixed for performance it is open to the creditor to fix a reasonable place and he can sue at the place where he resides. (1912) 6 Sind L R 181 (182).

[2] Price of goods or debt must be paid at seller's or lender's residence. (Vol 16) 1929 Lah 863 (868) * (Vol 7) 1920 Mad 146 (148).

[3] Payments actually made by debtor at place other than where creditor resides, resists presumption that parties when entering into contract intended to make payments where creditor resides. (Vol 17) 1930 Lah 818 (820).

[4] Where money is advanced and the place of repayment is not known, *Held*, that the money was presumably repayable at S, where it was advanced and where the parties resided at the time of the transaction. (1912) 16 Cal L Jour 279 (280, 281).

[5] Place where money is expressly or impliedly payable is a forum of action. (Vol 33) 1946 Mad 300 (301, 304) * (1908) 31 Mad 223 (224) * (Vol 20) 1933 All 147 (148) * (Vol 20) 1933 Lah 599 (599)* (Vol 17) 1930 Nag 90 (91).

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[6] Contract to supply goods — Breach — Suit for damages at place where price was payable is maintainable. (Vol 12) 1925 Nag 408 (409) * (Vol 22) 1935 Mad 663 (664) (F B) * (Vol 11) 1924 Nag 308 (309).

[7] Primary transaction of sale and purchase at one place — Execution of promissory notes in respect of unpaid price at another place — Cause of action to recover price accrues at place of primary transaction. (Vol 16) 1929 Oudh 91 (92) : 4 Luck 347.

[8] Loan borrowed at S but repayable at H — Defendant residing at H — S Court has no jurisdiction to try suit. (Vol 12) 1925 P C 290 (292) : 53 Ind App 58 : 53 Cal 88 (P C) * (Vol 8) 1921 Lah 213 (214) * (Vol 28) 1941 Mad 695 (696) * (1910) 6 Ind Cas 111 (112) (Sind).

[9] Payment is due at creditor's place in absence of express or implied specification. (Vol 12) 1925 Oudh 209 (210) * (Vol 13) 1926 All 477 (478):48 All 310*(1906) 30 Bom 167 (170) * (Vol 23) 1936 Cal 97 (98, 100) : 63 Cal 726* (Vol 24) 1937 Nag 39 (40) : ILR 1937 Nag 97 * (Vol 11) 1924 Mad 789 (790) * (1941) 22 Pat L Tim 282 (283) * (Vol 24) 1937 Rang 433 (434) (Suit can be instituted at place where cause of action from non-payment arises.) * (1913) 20 Ind Cas 583 (583) (Low Bur).

[10] A creditor can bring a suit for recovery of money against his debtor in the Court within whose territorial jurisdiction he has paid the money on his debtor's behalf. (1909) 1909 Pun L R No. 96 Page 357 (359).

[11] If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties and where this cannot be determined a presumption as to the place may be drawn. (Vol 6) 1919 Nag 135 (136).

[12] A promise by a debtor to repay a loan at a certain place for creditor's convenience does not in itself entitle the creditor to sue at that place unless the promise is one with consideration or it falls under S. 25 (2), Contract Act. (Vol 5) 1918 Low Bur 101 (102) : 9 Low Bur 75.

[13] Insurance payable on death — Court of place of death of assured has jurisdiction to entertain suit for money under policy. (Vol 21) 1934 Sind 76 (76, 78) : 28 Sind L R 192 * (Vol 5) 1918 Mad 635 (635) * (Vol 30) 1943 Cal 199 (201, 202): ILR (1943) 1 Cal 564* (Vol 6) 1919 Cal 1014 (1015) * (Vol 19) 1932 Bom 392 (393).

[14] Property in thing purchased passing to vendee at one place — Price paid partly at another place — Vendee can sue at latter place for return of purchase-money on ground of breach of warranty. (Vol 13) 1926 Cal 100 (101).

[15] Allegations in plaint and not pleas do determine jurisdiction claimed on agreement (basis of suit) — Court should allow evidence on merits before deciding question of jurisdiction. (Vol 21) 1934 Lah 803 (803).

[16] Suit on handnote Place of suing is either where contract is made or where it is agreed to be performed — In the absence of plea to the contrary by defendant, it may be taken that money was to be repaid where the transaction was made. (Vol 26) 1939 Pat 294 (294, 295).

[17] Suit for refund of overcharge demanded by a foreign railway — Cause of action partly arises at place where goods were consigned (Vol 12) 1925 All 823 (823).

[18] Carriage by sea. Short delivery — Excess freight illegally collected — Suit for return — Claim for general average contribution — Suit brought in Court where excess freight was collected — That Court held to have jurisdiction. (Vol 6) 1919 Mad 883 (884).

[19] A suit for dower on the ground of divorce, will be entertained by a Court in whose jurisdiction the divorce, out of which the cause of action arose, took place. (1908) 32 Cal 146 (150).

13. "Leave of the Court." — [1] Leave cannot be given arbitrarily and when the defendants who reside outside the jurisdiction do not appear the Court is bound to consider their position. This obligation is in no way lessened when they do appear and object and especially when the objecting defendant seems to be the real person proceeded against. (Vol 25) 1938 Nag 262 (263) : I L R (1940) Nag 502.

[2] Preliminary issue on question of jurisdiction decided — Subsequent application for leave under S. 20(b) — It should not be refused merely on the ground that it ought to have been made before the decision on the preliminary issue. (Vol 20) 1933 Sind 179 (180) : 27 Sind L R 230.

[3] Debt contracted outside jurisdiction — Assignment in Calcutta — Leave is generally granted — It should not be refused merely on suspicion (Vol 21) 1934 Cal 175 (176).

[4] There is no reason to read cl. (b) of S. 20 as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India — It makes no difference whether defendants are residents of British India though outside the local limits of the Court's jurisdiction or they are persons residing outside British India. (Vol 25) 1938 Mad 781 (783) : I L R (1938) Mad 1080.

[5] Held, that the order of the District Judge granting leave to the plaintiff to sue in a Court within whose jurisdiction only one out of three defendants resided was strictly within S. 20 (b). (Vol 4) 1917 Mad 404 (405).

[6] Some defendants living outside jurisdiction — Leave not given — Suit cannot go on. (Vol 9) 1922 Bom 152 (153) : 48 Bom 229.

[7] One of the defendants not living in Madras — Leave to sue need not be applied for before suit is filed. (Vol 22) 1935 Mad 219 (219) : 53 Mad 511.

[8] Suit was brought against three defendants at A — One defendant out of them did not reside at A — Leave to sue was granted after institution of the suit — It was held that the leave though subsequent was good. (1906) 30 Bom 570 (574).

[9] Discretion exercised by trial Judge should not be lightly interfered with in appeal. (Vol 20) 1933 Sind 179 (180) : 27 Sind L R 230.

[10] Leave granted without notice under S. 20 (b) — Court can hear objections under S. 151. (Vol 20) 1933 Lah 266 (266, 267).

[11] Cause of action indubitably arising within jurisdiction — No leave is necessary. (Vol 16) 1929 Sind 170 (171, 172) : 23 Sind L R 365.

14. Revision. — [1] No hard and fast rule as to revision from decisions of questions of jurisdiction under S. 20 can be laid down. (Vol 10) 1923 Lah 565 (566).

[2] High Court can interfere with order passed on investigating objection as to place of suing. (Vol 6) 1919 All 295 (296) : 41 All 602.

[3] Leave granted under S. 20 (b) without notice to opposite party — Order is not open to revision nor can S. 107, Government of India Act, be invoked. (Vol 20) 1933 Lah 266 (266) * (Vol 25) 1938 Pesh 15 (17) (Objections against such leave cannot be heard under S. 151, as opposite party could resort to S. 23.)

[4] District Court can consider order of First Court under S. 105 — High Court cannot interfere under S. 115. (Vol 4) 1917 Mad 404 (405).

15. Suit against corporations. — [1] Corporation having branch office shall be deemed to carry on business there. (Vol 30) 1943 Cal 199 (203) : I L R (1943) 1 Cal 564* (Vol 31) 1944 Cal 1 (3) : ILR (1944) 1 Cal 101* (Vol 5) 1918 Pat 126 (128) : 4 Pat L Jour 141. (If a corporation such as a bank has 50 branch offices it has fifty separate and distinct jurisdictions.)

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[2] Whole Punjab Province cannot be regarded as single place for purposes of Expl. 2 and so it cannot be claimed that the Punjab Government can be sued at any place within the limits of the Province. (Vol 17) 1930 Lah 818 (819).

16. Suit against foreigners.—[1] Foreigners are not excepted from jurisdiction of British Indian Courts. (Vol 14) 1927 All 413 (414).

[2] Court cannot pass decree against a person, subject of foreign Government, which cannot be enforced against him. (Vol 14) 1927 Sind 160 (161) : 23 Sind L R 46 * (Vol 15) 1928 Nag 295 (296) : 24 Nag L R 95. (Partition suit — Defendant living out of British India — No decree can be passed with regard to moveables with him.).

[3] Under S. 20, British Indian Courts have got jurisdiction against non-resident foreigners if cause of action arises against them in British India. (Vol 21) 1934 All 740 (743) : 56 All 828 * (1901) 25 Bom 528 (534) * (Vol 17) 1930 Bom 150 (151) : 54 Bom 192 * (Vol 22) 1935 Mad 545 (546) * (1906) 29 Mad 69 (71) * (Vol 6) 1919 Mad 883 (884).

[See also (1896) 20 Bom 133 (143). (Court has jurisdiction under Cl. 12, Letters Patent.)]

[4] British Indian Court has jurisdiction over foreign subjects if subject-matter is in British India. (Vol 2) 1915 Mad 116 (116).

[5] A non-resident foreigner who carries on business through his agent within the jurisdiction of British Indian Court is subject to the jurisdiction of civil Court under this section. (1900) 23 Mad 453 (461) * (1893) 17 Bom 662 (668). (12 Bom 507 disapproved.)

[See also (1903) 26 Mad 544 (552) : 30 Ind App 220 (P O).]

17. Suit between banker and customer. — [1] Banker and customer — Fixed deposit — In absence of contract in regard to the place of repayment deposit is not repayable at the place where depositor resides and makes demand — Court where depositor resides, therefore, has no jurisdiction to entertain claim for return of deposit which was made at other place. (Vol 27) 1940 All 243 (244) : I L R (1940) All 207. [(Vol 4) 1917 All 128 explained.]

18. Suit for accounts against agent.—[1] Suit between principal and agent — Cause of action arises where contract is made or is to be performed, and where refusal to account takes place. (Vol 13) 1926 Sind 238 (241) : 22 Sind L R 43 * (Vol 23) 1936 Rang 251 (252) * (Vol 7) 1920 Low Bur 48 (48). (Fact that the moneys have to be sent from a particular place by the agent does not form a part of the cause of action.) * (Vol 27) 1940 Lah 85 (86, 87) * (Vol 12) 1925 Lah 387 (389) : 6 Lah 153.

[2] Contract for sale and purchase of cotton under *palla arhat* system between plaintiffs of Bareilly and defendants, commission agents of Bombay—Agreement to render account at Bareilly—No evidence of contract given—Bombay Courts held to have jurisdiction. (Vol 4) 1917 All 152 (153).

[3] Suit by principal for accounts against agent residing elsewhere — Cause of action cannot be said to arise at place where principal resides. (Vol 27) 1940 Mad 588 (588) * (Vol 22) 1935 Lah 68 (69) * (Vol 16) 1929 Lah 605 (607).

[4] Suit by principal against commission agent—Suit should be brought where the commission agent carries on business. (Vol 15) 1928 Lah 297 (298) : 9 Lah 455 * (Vol 27) 1940 Lah 171 (172) * (1912) 34 All 49 (52).

[5] Commission agency — Cause of action arises where contract takes place or where money is to be paid. (Vol 19) 1932 Bom 291 (299) : 56 Bom 324.

[6] Principal cannot ask agent doing business elsewhere to make payment at principal's place of business. (Vol 11) 1924 Lah 593 (593).

[7] Agency agreement entered at Calcutta — Statements of accounts made and sent from Calcutta — No place fixed for payments which were sometimes made in Bombay — *Held*, that no material part of cause of action had arisen in Bombay. (Vol 19) 1932 Bom 42 (44).

[8] Pakka Adhatia as an agent has to render account at the place where business is transacted and not at the place where principal resides. (Vol 11) 1924 All 530 (530, 531) : 46 All 465.

[9] Pakka Adhatia contract — Place of entering into contract or payment of moneys not known — Contract to be performed in A — Goods sent from B — B Court cannot try suit for the agency account. (Vol 15) 1928 Bom 548 (549) * (Vol 19) 1932 Bom 42 (44) (Principal and agent — Negligence by agent — Cause of action arises where negligence occurred.)

[10] Goods supplied by agent to principal—Agent can file suit for recovery of amount due to him in respect of his business at place where he carries on business. (Vol 24) 1937 Sind 317 (318) * (Vol 13) 1926 Lah 287 (288).

[11] Agreement to employ as agent — Deposit by agent as security becomes on breach of agreement as debt due to agent by employer—Agent can sue for deposit at his place of residence. (Vol 20) 1933 Bom 179 (181, 182) : 57 Bom 306.

[12] Suit by principal charging agent with misconduct and negligence and for damages — Cause of action arises where acts of negligence or misconduct are committed. (Vol 13) 1926 Sind 238 (241) : 22 Sind L R 43.

19. Suit for accounts in and dissolution of partnership.—[1] In the absence of an agreement that account should be taken elsewhere, a suit for the taking of the accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried on. (Vol 6) 1919 All 402 (403). * (Vol 1) 1914 Oudh 314 (315).

[2] Where a partnership was entered into to carry on business at a certain place, a suit for its dissolution can be brought only at the place of business and not at any other place where capital for the concern might have been subscribed. (Vol 3) 1916 Lah 260 (261) : 1916 Pun Re No. 42. * (Vol 23) 1936 Pat 6 (7).

[3] Partnership commenced and carried on in foreign territory—Defendant resident within jurisdiction—Suit for dissolution of partnership can be brought. (Vol 8) 1921 Bom 460 (460, 461) : 45 Bom 1228.

[4] Cause of action partly arises where partnership is entered into. (Vol 16) 1929 All 236 (236).

[5] Business carried on in two places — Courts in both places can entertain a suit for dissolution of partnership. (Vol 13) 1926 Mad 427 (427).

20. Suit for infringement of copy-right and trade-mark.—[1] A suit for damages for infringement of a copy-right and injunction must be instituted in a Court within the local limits of whose jurisdiction the defendant resides, or the infringement has taken place. (1911) 83 All 24 (26).

[2] Suit for infringement of copyright against hirer — Part of cause of action arises in place where hiring is completed and Court therein has jurisdiction. (Vol 29) 1942 Mad 659 (659, 660).

[3] Infringement of trade-mark — Cause of action arises partly where advertisement is published and distributed. (Vol 2) 1915 All 262 (262) : 37 All 446.

21. Suit for restitution of conjugal rights. — [1] The cause of action for a suit for restitution of

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conjugal rights against wife arises where husband resides. (Vol 6) 1919 All 96 (96)* (Vol 23) 1936 Mad 288 (289); 59 Mad 392. (Reversing (Vol 21) 1934 Mad 407.)* (1894) 18 Bom 316 (318).

[2] Suit for restitution of conjugal rights—Permanent residence of husband or arising of cause of action within jurisdiction gives jurisdiction. (Vol 7) 1920 Low Bur 22 (23).

[3] The Bombay High Court has no jurisdiction to grant a decree for restitution of conjugal rights either against a Parsi husband or a husband not in the Presidency. (Vol 1) 1914 Bom 211 (213) : 38 Bom 125.

22. Suit on assigned debts.—[1] *Bona fide* voluntary assignment affords valid cause of action to assignee to sue in the Court within whose jurisdiction assignment is made. (Vol 20) 1933 Sind 179 (182) : 27 Sind L R 230* (Vol 4) 1917 Mad 221 (222) (Promissory note.)* (Vol 20) 1933 Lah 940 (941).

[2] Suit on hundi can be brought where it is endorsed—Endorsement is part of cause of action. (Vol 15) 1928 Sind 86 (87) : 22 Sind L R 305* (1895) 22 Cal 451 (453).

[3] Assignment of pronote saying that money should be paid where assignee resides does not entitle assignee to sue in Court where he resides (Vol 16) 1929 Cal 306 (307).

23. Suit on negotiable instruments.—[1] Hundi executed for balance of amount due in respect of certain transactions—Suit on hundi—Transactions do not form part of cause of action. (Vol 3) 1916 Bom 227 (227) : 40 Bom 478.

[2] The cause of action on a negotiable instrument generally arises where the instrument is drawn. It may some times happen that a promissory note is executed in one place but delivered to the promisee at another place and that moneys due thereunder are payable at a third place. In such case cause of action arises partly at any one of these places and a suit may be filed at any one of these places. (Vol 29) 1942 Bom 251 (253) : I L R (1942) Bom 620* (Vol 3) 1916 Oudh 105 (106) (Suit against acceptor lies in the place where hundi was drawn.)* (1905) 28 Mad 19 (21) (Suit in place of drawing.)* (Vol 7) 1920 Mad 146 (148)* (Vol 24) 1937 Lah 800 (801) (Suit at place of delivery.)* (Vol 24) 1937 Nag 241 (242); I L R (1938) Nag 301. (Place where pronote was payable on demand.)* (Vol 11) 1924 Mad 464 (465) : 47 Mad 403 (Suit where money is payable.)* (Vol 2) 1915 Lah 481 (482) : 1916 Pun Re No. 2 (Place where payment of pronote was to be made.)* (Vol 7) 1920 Cal 718 (720) : 47 Cal 583 (S B). (Place of acceptance and payment of hundi.)* (Vol 26) 1939 Lah 498 (498) (Amount on pro-note to be paid in Delhi—Defendant residing in U. P. and governed by U. P. Agriculturists' Relief Act—Suit on pronote can be brought in Delhi though it contravenes the provisions of S. 7 of the Act.).

[3] Pro-note not specifying any place at which payment was to be made—Presumption is that it was to be made at usual place of business of creditor. (Vol 26) 1939 Lah 18 (19).

[4] Where a promissory note is executed in the place where the debtor resides and no place of payment is mentioned, the suit must be filed in the Court within whose jurisdiction the debtor resides. (Vol 22) 1935 Nag 144 (144).

24. Suit relating to torts.—[1] According to Ss. 19 and 20 the residence of the defendant within the territorial limits of a Court will give jurisdiction to it even in respect of torts committed outside the local

limits of the Court. (Vol 2) 1915 Mad 1206 (1208) : 39 Mad 433* (Vol 15) 1928 Cal 887 (888, 889) (Suit for damages for conversion of land.)

[2] Subsequent aggravation does not furnish fresh cause of action. (Vol 17) 1930 Pat 528 (529).

[3] Where a person purchased a ticket for journey by railway at Agra but fell out of the train and was injured owing to the neglect of the railway company at B, the cause of action for a suit for damages arises at B and not at Agra. (Vol 6) 1919 All 419 (420) : 41 All 488* (Vol 23) 1936 Sind 229 (231, 232) : 30 Sind L R 182. (Encashment of a stolen hundi—Suit where tort was committed.)* (1889) 13 Bom 178 (183). (Place where injury and damage complained of have been inflicted.)

[4] Malicious prosecution—Criminal proceedings started at D against person residing at C—Summons served at C and damages occurring at C—Court at C has jurisdiction to entertain suit for damages. (Vol 20) 1933 Cal 706 (708); 60 Cal 918* (1905) 29 Bom 368 (372) (Place where extradition proceedings were taken.)

[5] Persons alleged to be excommunicated—Cause of action in their favour arises at the place where order of excommunication is handed over by defendant to executive body of the community. (1910) 7 Mad L Tim 42 (43).

25. Suit to set aside decree on ground of fraud.—[1] Inferior Court has jurisdiction to set aside decree of superior Court obtained by manifest fraud. (Vol 5) 1918 Mad 711 (712) : 41 Mad 213.

[2] Decree obtained by committing fraud—Suit to set aside lies in Court where fraud is committed or decree is passed. (Vol 2) 1915 All 163 (164, 165) : 37 All 189.

[3] Save under special circumstances, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. (1907) 29 All 418 (422)* (Vol 1) 1914 All 93 (94) : 36 All 564.

[4] Suit for setting aside decree obtained by fraud and for damages for wrongful arrest—Court to which decree was sent for execution should try suit to set aside decree and for damages for wrongful arrest. (Vol 4) 1917 All 176 (177) : 39 All 607* (Vol 20) 1933 Cal 274 (277) : 60 Cal 98 (Suit can be entertained by transferee Court.)* (Vol 11) 1924 Lah 398 (399) (Cause of action arises where the decree is transferred for execution.)* (Vol 14) 1927 Lah 778 (779)* (Vol 15) 1928 Oudh 88 (88) : 3 Luck 142.

[5] Bombay decree to be executed within jurisdiction of Amritsar Court—No action taken at Amritsar—No cause of action lies within Amritsar Court's jurisdiction for declaration that decree is nullity. (Vol 16) 1929 Lah 449 (453)* (Vol 27) 1940 Pat 444 (446)* (Vol 7) 1920 Lah 290 (290, 291).

[6] If cause of action did not occur within the jurisdiction of the Court it cannot entertain a suit that a decree granted by another Court does not bind plaintiff. (Vol 11) 1924 Pat 831 (832).

[7] Proper and convenient course to set aside decree is to go to the Court that granted the decree and to get it set aside by that Court. (Vol 11) 1924 Pat 831 (832).

[8] The Court within whose jurisdiction plaintiff ordinarily resides has jurisdiction to try a suit to set aside an *ex parte* fraudulent decree obtained against plaintiff in another Court by suppressing summons. (Vol 4) 1917 Pat 598 (599).

[9] Relief consisting of declaration that decree was fraudulent and injunction restraining attachment and sale of property—Court within whose jurisdiction property is situate can try the suit. (Vol 13) 1926 Lah 277 (278) : 7 Lah 61.

21. No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

[*cf.* 1882, S. 16-A (2); *See* ss. 16-20; S. 99, Civil P. C. and S. 11, Suits Valuation Act.]

SECTION 21 — SYNOPSIS

1. Applicability and scope.
2. Execution proceedings.
3. Failure of justice.
4. Foreign Courts.
5. Insolvency proceedings.
6. Objections to place of suing.
7. Suit to set aside decree on ground of jurisdiction.
8. Waiver.

1. Applicability and scope.—[1] Section 21 applies to all objections based on the alleged infringement of the provisions of Ss. 16 to 18, Civil P. C., as regards the institution of suits relating to immovable property, an appellate or revisional Court being precluded by S. 21 from allowing an objection as to the place of suing unless it was taken in the original Court and even then unless there was a consequent failure of justice. (Vol 7) 1920 Mad 1019 (1023, 1024, 1025) : 43 Mad 675 (F B). [*See* (Vol 27) 1940 Sind 150 (2) (153) : I L R (1941) Kar 79. (Non-compliance with provisions of Ss. 15 to 20 does not render decree passed by competent Court mere nullity.)]

[2] Section 21 does not apply to cases of want of pecuniary jurisdiction or exclusive jurisdiction — Its application is confined only to objections regarding want of territorial jurisdiction. (Vol 24) 1937 All 515 (525) : I L R (1937) All 670 * (Vol 33) 1946 Sind 103 (107) : I L R (1945) Kar 445.

[3] Where the objection is not an objection to the place of suing, but an objection going to the nullity of the order on the ground of want of jurisdiction S. 21 does not apply and the objection can be taken at any time. (Vol 6) 1919 P C 150 (152) : 42 Mad 813 : 46 Ind App 151 (P C). (Overruling (Vol 4) 1917 Mad 198.) * (Vol 21) 1934 All 139 (141). (Plea of jurisdiction not raised in revenue suit — District Judge in appeal can consider and decide such question.) * (Vol 19) 1932 Bom 42 (45, 46) * (1890) 13 Mad 273 (274) (Act done without jurisdiction is of no legal effect and must be set aside when the illegality is made apparent.) * (Vol 23) 1936 Nag 1 (3) : 31 Nag L R (Sup) 57 (Court competent to try suit—Parties going to trial without objection as to jurisdiction—Defendant cannot subsequently dispute jurisdiction — S. 21 applies — Decree by Court having no jurisdiction over subject-matter of action is wholly void — Failure to object does not give jurisdiction — S. 21 does not apply.) * (Vol 22) 1935 Nag 250 (256) : 31 Nag L R (Sup) 43 (F B). (Section 21 does not apply to inherent incompetency of Court to deal with cause affecting immovable property outside its jurisdiction.) * (Vol 27) 1940 Oudh 245 (247).

[*See* (1885) 7 All 230 (243). (If irregularity of procedure on Court's part affects its jurisdiction then the plea of want of jurisdiction can be entertained for the first time at any stage provided that there were on the record sufficient material to substantiate it.) * (Vol 13) 1926 All 650 (652). (Judgment of a Court with incompetent jurisdiction is not *res judicata*.)]

[4] Where there is entire absence of jurisdiction, no action on part of plaintiff and no inaction on part of defendant can confer jurisdiction on Court, because jurisdiction cannot be created by waiver or consent.

(Vol 5) 1918 Cal 946 (946). * (1888) 11 Mad 26 (36) : 14 Ind App 160 (P C).

[5] Section 21, Civil P. C., and S. 11, Suits Valuation Act, are exceptions to fundamental rule of law that judgment of Court without jurisdiction is nullity and that want of jurisdiction cannot be waived. (Vol 25) 1938 Mad 257 (259, 261).

[6] The principle underlying S. 21 has been applied to cases which do not strictly fall within its terms. (Vol 13) 1926 Mad 421 (422) : 49 Mad 746. * (Vol 20) 1933 Nag 318 (321, 322) : 29 Nag L R 342. (Principles under S. 21 apply to proceedings other than original suits such as appeals.) * (Vol 28) 1941 Nag 36 (44, 45, 50) : ILR (1941) Nag 1 (F B). (Section 21 is not limited to appeals and revision in same suit.)

[7] High Court exercising original jurisdiction which it does not possess under its Letters Patent—S. 21 does not apply. (Vol 22) 1935 Rang 517 (520). * (1936) 164 Ind Cas 907 (910) (Cal) * (Vol 19) 1932 Bom 291 (300) : 56 Bom 324.

[8] No leave obtained as to property out of jurisdiction under Calcutta Letters Patent, Cl. 12 — Objection as to jurisdiction can be taken for first time at appellate stage — High Court has no jurisdiction as to such property. (Vol 16) 1929 Cal 353 (364) : 56 Cal 940.

[9] Principle of S 21 is applicable to *ex parte* decree. (Vol 17) 1930 All 873 (874) : 52 All 947.

[10] Suit for transaction outside jurisdiction on allegation that contract entered within — Failure to prove contract ousts jurisdiction — S. 21 being retrospective applies to suit filed before Act—As no failure of justice was caused objection to jurisdiction was held not tenable. (Vol 1) 1914 Lah 385 (387, 388) : 1914 Pun Re No. 87.

[11] When it is found that a suit ought to have been instituted in some other Court the Court should return the plaint for proper presentation even if the plea is raised at a later stage but in the original proceedings. The question of delay mentioned in S. 21, Civil P. C., is only applicable to appeals and revisions. (1910) 4 Sind L R 264 (266).

[12] The jurisdiction of the Court trying a remanded case depends entirely on the order of remand. Any objection to its jurisdiction can be given effect to as neither S. 21 in terms nor the principle underlying it applies to such a case. (Vol 10) 1923 Mad 351 (351, 352).

[13] Irregularities in initial procedure such as if objected to would lead to dismissal of suit—If Court competent to try and parties join issue on merits without objection no subsequent objection on the ground can be allowed. (Vol 18) 1931 Cal 327 (328) * (Vol 21) 1934 All 740 (757) : 56 All 828 * (1888) 11 Mad 26 (36) : 14 Ind App 160 (P C) * (Vol 21) 1934 Sind 1 (2) : 27 Sind L R 280.

[14] Jurisdiction question must be decided first. (Vol 20) 1933 Oudh 191 (192) : 8 Luck 676.

[15] Suit filed in British Indian Court—Question regarding Court's jurisdiction to try suit should be decided by aid of Civil Procedure Code (Vol 21) 1934 All 226 (230).

[16] Question of jurisdiction if of law depending upon public documents can be raised in appeal for first time—*Held* Quetta was not part of British India as defined in General Clauses Act (1897), S. 3 (vii). (Vol 21) 1934 Sind 123 (125, 129) : 28 Sind L R 54.

[17] Trial Court dismissing suit as against person on ground of want of jurisdiction as against such person—

Section 21 (contd.)

On appeal by other defendant, Appellate Court passing decree as against person against whom it was dismissed—*Held* decree could not be passed and review could be allowed as S. 21 did not cure defect of jurisdiction as objection was in fact taken in the trial Court. (Vol 22) 1935 Cal 153 (153).

[18] Submission of defendants residing at Lahore to Court at Shikarpur without objection—Such defendants cannot raise in appeal question of jurisdiction. (Vol 21) 1934 Sind 123 (128, 129) : 28 Sind L R 54* (Vol 6) 1919 Mad 242 (244).

[19] The failure to take notice of the provisions of S. 21 bears analogy to a mistake apparent on the face of the record and is ground for review. (Vol 16) 1929 Nag 73 (74) : 25 Nag L R 104.

2. Execution proceedings. — [1] Section 21 does not apply to execution proceedings. But the principle applies. (Vol 15) 1928 Mad 746 (759)* (Vol 7) 1920 Mad 1019 (1023) : 43 Mad 675 (F B). (Objection to jurisdiction is not maintainable in execution unless taken in trial Court.) * (Vol 11) 1924 Mad 457 (458)* (Vol 7) 1920 Mad 505 (508) : 43 Mad 135 * (Vol 10) 1923 Cal 619 (620, 621). (Execution sale without jurisdiction—Section does not apply.)

[See also (1940) 42 Pun L R 374 (376). (Section 21 applies to execution proceedings in view of the provisions of S. 141, Civil P. C.)]

[But see (Vol 32) 1945 All 309 (311) : I L R (1945) All 217.]

[2] Waiver of objection before final decree in mortgage suit does not imply waiver of right in execution. (Vol 14) 1927 Mad 627 (630) : 50 Mad 892 * (Vol 23) 1936 Nag 1 (3) : 31 Nag L R 57 (F B).

[3] An execution sale after confirmation cannot be avoided on the ground that the Court had no territorial jurisdiction over the property. (1913) 24 Mad L Jour 70 (72) * (Vol 21) 1934 Mad 573 (575). (Execution transferred by District Judge to N Court—N Court having territorial jurisdiction over one property but not over two others—Sale of all three by N Court—Omission to raise objection before sale—Objection held could not be raised later.)

[4] Jurisdiction cannot be conferred on Court by consent of parties. Therefore failure to raise plea as to want of jurisdiction in trial Court does not preclude party from raising objection in executing Court. (Vol 21) 1934 Lah 652 (656).

[5] The judgment-debtor under foreign decree sought to be executed in British Indian Court can raise objections to the decree. (Vol 12) 1925 Mad 788 (790).

3. Failure of justice.—[1] Appellate Court cannot interfere on ground of lower Court's want of jurisdiction unless defendant shows that he was prejudiced by trial in particular jurisdiction. (Vol 24) 1937 Mad 571 (574) : I L R (1937) Mad 990* (Vol 22) 1935 Mad 574 (576). (Trial Court having no jurisdiction to try suit—But no consequent failure of justice—Defendant *ex parte* for no satisfactory reason—Revisional or appellate Court will not interfere.)* (Vol 21) 1934 All 226 (230). (Jurisdiction of trial Court doubtful—Appellate Court will not interfere in absence of prejudice.)* (Vol 18) 1931 All 556 (557)* (Vol 6) 1919 Cal 1014 (1015). (High Court refused to interfere in revision as there was no prejudice even though the objection was raised in trial Court.)* (1933) 40 Pun L R 234 (234). (Cannot be allowed in revisional Court.)* (Vol 21) 1934 Lah 233 (233)* (Vol 7) 1920 Nag 92 (92)* (Vol 20) 1933 Pat 555 (557). (Proceedings in respect of immovable property challenged on ground of want of jurisdiction—Defendant must show that property is clearly within jurisdiction of another Court and that there was failure of justice.)

[2] In order to satisfy the Court under S. 21 it is necessary to show not merely that the suit was wrongly decided but that the wrong decision was in some measure due to its having been instituted in a wrong local jurisdiction. (Vol 9) 1922 Oudh 124 (126).

[3] Objection as to jurisdiction decided against defendant—He refusing to produce evidence on merits—Defendant cannot contend that there has been failure of justice and objection as to place of suing cannot be raised in appeal. (Vol 17) 1930 Lah 1016 (1016).

[4] Whole of the merits in the suit ought to be gone into to find out if there has been a consequent failure of justice. (Vol 8) 1921 All 66 (67, 68).

[5] Objection not set forth in grounds of appeal—Appellate Court under O. 41, R. 2 has discretion to allow objection and ordinarily would not object to its being raised and argued if respondent is not likely to suffer thereby—Objection to territorial jurisdiction neither raised in trial Court nor mentioned in grounds of appeal—Objection held on facts of case could not be allowed to be raised—But in view of large stakes involved and possibility of case proceeding further it was proper that objection be dealt with on merits. (Vol 28) 1941 Mad 129 (135).

4. Foreign Courts. — [1] Section 21 cannot be construed, as either legislating for foreign tribunals or codifying any rules of international law. The section does not apply to cases of foreign judgments sought under provisions of S. 44, Civil P. C., to be executed in British Indian Courts. (Vol 12) 1925 Mad 788 (789).

[2] Suit in British Indian Court against non-resident foreigner on a cause of action out of British India—Section 21 has no application. (Vol 15) 1928 Lah 297 (298) : 9 Lah 455.

[3] Goods ordered from Kumbakonam to be supplied at Sagaram in Mysore—Goods not ordered sent with goods ordered—Whole parcel returned—Suit for price of goods ordered and damages caused by negligence in re-sending goods not ordered—Suit for price for goods ordered lay in Kumbakonam, but not for damages as it was caused in Mysore—Section 21 does not help to assume jurisdiction for cause of action arising out of British India. (Vol 6) 1919 Mad 1043 (1043).

5. Insolvency proceedings. — [1] Proceedings under the Provincial Insolvency Act 3 of 1907—Objection to jurisdiction can be taken for first time in appeal as S. 47 of that Act does not make applicable S. 21 to such proceedings. (Vol 1) 1914 Cal 350 (352).

6. Objections to place of suing.—[1] Objection as to place of suing cannot be allowed unless taken at earliest opportunity and has caused failure of justice. (Vol 3) 1916 Low Bur 44 (45)* (Vol 6) 1919 All 82 (83) : 42 All 74* (Vol 18) 1931 Lah 142 (143)* (Vol 6) 1919 Lah 217 (217)* (Vol 12) 1925 Mad 171 (172)* (Vol 11) 1924 Mad 697 (698, 700). (Absence of objection to local jurisdiction which was transferred by notification precludes party from objecting on appeal (Wallace, J. *Contra*).)

[2] Objection to the place of suing must be taken before passing of the original decree. (Vol 15) 1928 Pat 324 (326) : 7 Pat 216* (Vol 20) 1933 Pat 104 (107) : 12 Pat 117.

[3] The expression 'place of suing' simply means venue of trial and has no reference to the competency of the Court in the sense of its general authority to adjudicate on any matter in controversy. (Vol 28) 1941 Nag 36 (51) : I L R (1941) Nag 1 (F B).

[4] An objection that a suit is of small cause nature is not an objection to the place of suing and can be entertained in second appeal. (Vol 18) 1931 Oudh 411 (411).

[But see (Vol 18) 1931 Oudh 136 (136, 137).]

[5] No objection as to jurisdiction regarding the place of suing can be taken for the first time in second

22. Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

[1882—S. 22.]

Section 21 (contd.)

appeal. (*Mullick J.*) (Vol 4) 1917 Pat 598 (599) * (Vol 6) 1919 Cal 1077 (1078) * (Vol 17) 1930 Mad 541 (542).

[6] Suit for accounts against agent — Objection to jurisdiction overruled — Preliminary decree passed — Section 21 held no bar to appellate Court reversing preliminary decree as trial had not proceeded beyond the issue of jurisdiction. (Vol 27) 1940 Lah 171 (172).

7. Suit to set aside decree on ground of jurisdiction.—[1] Jurisdiction—Absence of—Consent or waiver does not legalize jurisdiction — Section 21 does not bar agitation of such question by independent suit. (Vol 18) 1931 All 454 (456, 457) : 53 All 560 * (Vol 13) 1926 Bom 481 (483) * (Vol 24) 1937 Cal 738 (739). (Suit to set aside *ex parte* decree.)

[2] The principle underlying the section, viz., that of waiver of jurisdiction, is also applicable to a separate suit to set aside a decree passed without jurisdiction. (Vol 12) 1925 Mad 117 (123) * (Vol 16) 1929 Lah 449 (452) * (Vol 25) 1938 Mad 257 (261) * (Vol 6) 1919 Mad 242 (244). (Party residing outside, but raising no objection—*Ex parte* decree cannot be set aside on that ground if summons is served and no objection raised.) * (Vol 28) 1941 Nag 36 (40, 45, 51) : I L R (1944) Nag 1 (F B) (Decision in (Vol 22) 1935 Nag 250 : 31 Nag L R (Sup) 43 (F B) must be deemed as overruled.) * (Vol 20) 1933 Pat 104 (108) : 12 Pat 117. (Cannot be re-opened collaterally.) * (Vol 9) 1922 Pat 322 (333, 334). (Do.)

8. Waiver.—[1] Court possessing jurisdiction over subject-matter—Procedure prescribed not complied with — Defect may be waived. (Vol 6) 1919 Lah 27 (29) : I Lah 158 * (1909) 36 Cal 193 (202).

[2] A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. (Vol 2) 1915 Cal 62 (63).

[3] Suit instituted in Court without jurisdiction — Parties consenting to its transfer to competent Court — Defence of jurisdiction raised before fixing of issues and afterwards throughout insisted on—*Held* that defendant cannot be said to have waived his right to set up this defence only because he had personally agreed to the transfer and hence suit must be dismissed as it was incompetently brought. (1887) 9 All 191 (204, 205) : 13 Ind App 134 (P O).

SECTION 22 — SYNOPSIS.

1. Applicability and scope.
2. Application when to be made.
3. Grounds of transfer.
4. Notice.
5. Proper Court.

1. Applicability and scope. — [1] The provisions of S. 22 are mandatory. (Vol 12) 1925 Lah 175 (175). [2] Transfer of case is quite different from return of plaint for presentation to another Court. (Vol 3) 1916 Nag 31 (33) : 13 Nag L R 81.

[3] Provisions of S. 22 can apply only if the suit in its entirety is cognizable by either of the two Courts.

(Vol 29) 1942 All 387 (388) : ILR (1942) All 862 * (Vol 1) 1914 All 351 (352). (Where the jurisdiction of one of the Courts is denied, an application for transfer does not lie under this section.) (Vol 10) 1923 Lah 288 (289).

[4] In an application for transfer under Ss. 22 and 23, the question of want of jurisdiction of the trying Court cannot be raised. (Vol 7) 1920 Pat 138 (140).

[5] Transfer to original side of a High Court from a Court subordinate to High Court is not governed by Ss. 22 and 23. (Vol 11) 1924 Lah 306 (306, 307).

[6] Question whether suit is to be tried by subordinate Court or High Court or Chief Court — Ss. 22 and 23 have no application — But High Court can under S 151 exercise powers similar to those contemplated by Ss. 22 and 23. (Vol 21) 1934 All 14 (16) : 56 All 201.

[7] Section 151 does not empower Court to wholly ignore provisions of S. 22. (Vol 3) 1916 Lah 95 (96) : 1917 Pun Re No. 11.

[8] Decision of Court that suit shall proceed in certain Court amounts to transfer of proceedings to that Court. (Vol 27) 1940 Nag 145 (148) : I L R (1941) Nag 311.

[9] Transfer of case—Courts have got unfettered discretion in the matter but it should be exercised very cautiously. (Vol 11) 1924 Lah 249 (250).

[10] High Court or District Court has jurisdiction to order transfer of case pending in subordinate Court no matter whether such Court has jurisdiction or not to entertain suit. (Vol 21) 1934 All 569 (571).

[11] A defendant in a suit who takes objection to the jurisdiction of the Court in which it has been instituted to try that suit cannot maintain an application for its transfer to another Court under S. 22, Civil P. C. (Vol 5) 1918 Oudh 441 (442) : 21 Oudh Cas 217 * (Vol 28) 1941 All 27 (28) : I L R (1940) All 737.

[12] A High Court's order under S. 22 has the effect of staying further proceedings in the Court from which the transfer has been ordered. (1909) 4 Ind Cas 814 (815) (Upp Bur).

2. Application when to be made.— [1] Application should be made at or before settlement of issues. (Vol 12) 1925 Lah 175 (175).

[2] Application for transfer—Issues settled — Delay in application renders it incompetent. (Vol 3) 1916 Lah 95 (95, 96) : 1917 Pun Re No. 11 * (Vol 12) 1925 Lah 322 (322).

[3] Party taking transfer proceedings in trial Court and then approaching High Court is not guilty of delay. (Vol 15) 1928 Mad 15 (15, 16).

3. Grounds of transfer. — [1] No transfer ought to be made unless such an order is absolutely necessary in the interest of justice. The Court will not transfer a suit properly laid, except under special circumstances. (1909) 10 Cal L Jour 308 (211, 212).

[2] A suit can be transferred only upon two grounds, viz : (a) that there will not be an impartial trial by the trying Court or (b) that there is a manifest preponderance of convenience to the petitioner if the suit is transferred to the other Court. The convenience of the plaintiffs and their witnesses has also to be considered particularly as they have in the first instance the right to choose the venue in which they would prosecute their

To what Court application lies.

23. (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

[1882—Ss. 22, 23, 24; 1877, Ss. 23 and 24; 1859, S. 13.]

Objects and Reasons.

"Clause 23. — We have omitted the proviso, which compelled applications to the High Courts under this

clause to be made through the District Court. This in our opinion merely duplicates applications and is undesirable."—S. C. R.

Section 22 (contd.)

suit. (Vol 7) 1920 Pat 138 (140, 141)* (Vol 22) 1935 All 979 (980). (Preponderance of balance of convenience should be considered.)* (Vol 9) 1922 All 65 (66) : 44 All 278* (Vol 8) 1921 Cal 210 (211) : 48 Cal 53 * (1909) 10 Cal L Jour 208 (211, 212). (Convenience must be clearly established.)* (Vol 15) 1928 Lah 183 (184). (Defendant would feel convenient at K is not sufficient ground for transfer.)* (Vol 15) 1928 Lah 159 (159, 160). (Convenience of both parties must be looked to.)* (Vol 14) 1927 Lah 14 (15). (Plaintiff is to choose Court.)* (Vol 10) 1923 Lah 383 (383). (Balance of convenience should be looked to.)* (Vol 27) 1940 Nag 145 (149) : I L R (1941) Nag 311* (Vol 11) 1924 Oudh 410 (411). (Defendant is entitled to transfer on grounds of convenience and expense being in his favour.)* (Vol 10) 1923 Oudh 30 (31).

[3] Transfer is unnecessary if the suit will be more expeditiously and more economically decided in the original Court. (Vol 15) 1928 Oudh 89 (89).

[4] Sections 22 and 23 — Mere inconvenience is not sufficient ground — Whether sufficient grounds exist depends upon the facts of each case. (Vol 11) 1924 Lah 304 (305).

[5] Expression of opinion of the Judge regarding the character of the plaintiff or of his paper is no ground for transfer when that was elicited by the conduct of the plaintiff himself. (Vol 3) 1916 Mad 763 (763).

[6] No bias for or against any party—Merely taking erroneous view is not sufficient for transfer. (Vol 21) 1934 All 37 (39).

[7] Question of jurisdiction decided against defendant—Application for transfer is not absolutely barred—But where application is a mere attempt to evade the decision of the question of jurisdiction it will not be allowed. (Vol 14) 1927 Lah 183 (184, 185).

[8] Allegations of plaintiff should be considered rather than those of defendant. (Vol 15) 1928 Mad 15 (16).

[9] Case should not be transferred to another Court merely on ground that defendant has all his evidence at that place. (Vol 7) 1920 Lah 381 (382) : 1919 Pun Re No. 167 * (Vol 1) 1914 Sind 147 (147) : 8 Sind L R 43 * (Vol 5) 1918 Oudh 441 (442) : 21 Oudh Cas 217. (Inconvenience of defendant's witnesses is not good ground for transfer.)

4. Notice. — [1] Provision requiring notice to be given to opposite party prior to filing of the application is mandatory and if no such notice is given the petition under S. 22 does not lie. (1928) 107 Ind Cas 593 (593) (Lah).

[2] The words "after notice to the other parties" in S. 22 mean notice prior to the making of application. (Vol 3) 1916 Lah 95 (95, 96) : 1917 Pun Re No. 11 * (Vol 22) 1935 All 979 (980). (But notice given even after making transfer application is sufficient.)

[3] Order of transfer without notice to parties is not legal as it is a matter in which convenience of parties is of great importance. (Vol 3) 1916 Cal 859 (859).

5. Proper Court. — [1] The Court of Subordinate Judge is subordinate to the District Court, for S. 23, though it may not be the 'forum' of appeal in the particular case, for the transfer of which the application is made. (1909) 10 Cal L Jour 208 (211, 212).

[2] Suit pending on original side of High Court — Application to transfer suit should be made to that Court—It has power to pass order under S. 151. (Vol 21) 1934 Rang 265 (266) : 12 Rang 548 (FB).

[3] A plaintiff has the right to choose his own Court for his own suit and in cases of disputes about property the Court where the property is situated is *prima facie* the better Court. (Vol 3) 1916 All 255 (255).

[4] Plaintiff has a right to bring a suit in any Court allowed to him by law, and to overrule his right of selection of Court, a strong case based on some ground of expense or convenience must be made out. (Vol 3) 1916 Oudh 208 (208).

SECTION 23—SYNOPSIS.

1. "Appellate Court."
2. "Application shall be made"—Sub-section (3).
3. High Court.
4. Power of High Court to transfer.
5. Subordinate Court.

1. "Appellate Court."—[1] The words 'appellate Court' in sub-ss. (1) and (2) mean the Court to which ordinarily appeals will lie from the Court in which the suit has been filed. (Vol 10) 1923 Rang 22 (22) : 11 Low Bur Rul 446. (Overruled on another point in (Vol 21) 1934 Rang 265 : 12 Rang 548 (FB).)

2. "Application shall be made" — Sub-section (3). — [1] *Ex parte* decree passed by Calcutta Court—Execution of decree sought at Surat Court — Suit for declaring the decree to be null and void is maintainable in Surat Court — Suit cannot be stayed under S. 151—Application ought to be made under S. 23 (3). (Vol 14) 1927 Bom 79 (80) : 51 Bom 26.

[2] An application contemplated by sub-s. (3) is to be made only when it is ascertained, or admitted, that different Courts subordinate to different High Courts actually have jurisdiction. Where one of such Courts has no jurisdiction, the application will not lie. (1909) 1909 Pun L R No. 77, p. 278 (279).

3. High Court. — [1] Expression "High Court" in S. 23 includes Chief Court of Oudh. (Vol 21) 1934 All 14 (15) : 56 All 201.

4. Power of High Court to transfer. — [1] Section 22 provides that the Court to which an application for transfer of a case is made shall 'determine in which of the several Courts having jurisdiction the suit shall proceed'. It has been held in the following cases that

24. (1) On the application of any of the parties¹³ and after notice⁹ to the parties and after hearing such of them as desire to be heard, or of its own motion¹⁰ without such notice, the High Court or the District Court may, at any stage,⁴—

- General power of transfer and withdrawal.*
- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent⁵ to try or dispose of the same, or
 - (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.¹¹

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[1882, S. 25; 1877, Ss. 15 and 25; 1859, latter part of S. 6.]

Objects and Reasons.

"Clause 24. — The words "at any stage" have been added to remove the difficulty created by the view that

a suit cannot be transferred after the hearing has once commenced, as to which there is a conflict of decisions."—S. O. R.

Section 23 (contd.)

this power to determine includes the power to transfer the case. Hence a High Court has power to transfer a suit pending in a Court within its appellate jurisdiction to a Court within the jurisdiction of another High Court. (Vol 14) 1927 Bom 79 (80) : 51 Bom 26*(Vol 27) 1940 Nag 145 (148) : ILR (1941) Nag 311. ((Vol 3) 1916 Nag 31 : 13 Nag L B 81 Overruled.) * (Vol 7) 1920 Pat 138 (141).

[2] This power to transfer has been denied in certain other cases which have, however, held that the High Court can declare that the suit is to be proceeded with in the other Court, the effect of which declaration will be to stay the suit in the Court from which the transfer is desired. And on such a declaration the transferor Court will return the plaint for presentation to the proper Court. (1883) 5 All 60 (61, 62) * (1910) 5 Ind Cas 588 (589) (All) * (1913) 20 Ind Cas 758 (758, 759) (Oudh) * (Vol 15) 1928 Pat 640 (640) * (1909) 4 Ind Cas 814 (815) (Upp Bur).

[3] The High Court on whose original side a suit is pending has inherent power to transfer it to a Court subordinate to a different High Court. (Vol 21) 1934 Rang 265 (266) : 12 Rang 548 (F B).

[4] Where a suit is pending in a Court subordinate to a High Court such High Court has inherent power to transfer it for trial to the original side of another High Court. (Vol 21) 1934 All 14 (17) : 56 All 201.

[5] Where the plaintiff has chosen a forum in utter disregard of the convenience of both parties, for some ulterior object and in abuse of his position as *dominus litis*, the High Court can, in the exercise of its inherent power, determine which of the two Courts have jurisdiction to try the suit. (Vol 21) 1934 All 14 (16) : 56 All 201.

5. Subordinate Court. — [1] The Judge sitting on the original side of the High Court is not subordinate to the High Court for the purpose of transfer applications. (Vol 14) 1927 Cal 290 (291) * (Vol 11)

1924 Lah 306 (306) * (Vol 2) 1915 Mad 608 (611) * (Vol 7) 1920 Pat 365 (365) * (Vol 21) 1934 Rang 265 (265) : 12 Rang 548 (F B). ((Vol 10) 1923 Rang 22 : 11 Low Bur Rul 446, overruled.)

[See (Vol 27) 1940 Nag 145 (146) : I L R (1941) Nag 311.]

[But see (Vol 15) 1928 Lah 183 (184).]

[2] Even if this section does not apply to the High Court, the High Court in which the suit is pending has inherent power to transfer the case. And the application is to be made to the original side of the High Court in which the suit is pending. (Vol 21) 1934 Rang 265 (266) : 12 Rang 548 (F B).

[3] The Court of Subordinate Judge is subordinate to the District Court, for the purposes of S. 23. (1909) 10 Cal L Jour 208 (210).

SECTION 24 — SYNOPSIS.

1. Appeal.
2. Applicability and scope.
3. "Application of parties."
4. "At any stage."
5. Competent Court.
6. District Court — Powers of.
7. Grounds of transfer.
8. Jurisdiction.
9. Notice necessary.
10. "Of its own motion."
11. Procedure of transferee Court.
12. Revision.
13. Small Cause Court — Transfer from and to — Effect of.
14. Subordinate Courts.
15. Sub-section (1), Clause (b).
16. Suit, appeal or other proceedings.

Section 24 (*contd.*)

1. Appeal. — [1] Order of High Court under S. 24 is not appealable. (Vol 22) 1935 Rang 267 (273): 13 Rang 457 (FB) ((Vol 16) 1929 Rang 41 : 6 Rang 703 (FB) overruled.) * (Vol 5) 1918 Upp Bur 14 (14): 3 Upp Bur 61.

[2] High Court's order of transfer is not a judgment within the meaning of Letters Patent (Rangoon) cl. 13, and hence is not appealable. (Vol 22) 1935 Rang 267 (272) : 13 Rang 457 (FB).

[3] Decision of the Court to which case is transferred is appealable in same manner as its other decisions. (Vol 8) 1921 Mad 687 (687).

2. Applicability and scope. — [1] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see S. 8. The provisions of sub-rule (1) of O. 18, R. 15 shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under this section.

[2] Section 24 contemplates transfer of case of one existing Court to another existing Court and not from Court which has ceased to exist. (Vol 24) 1937 Oudh 398 (399) : 13 Luck 369 * (Vol 18) 1931 All 574 (579): 54 All 171 (FB).

[3] The power granted by S. 24 is untrammelled by any such conditions as are laid down in S. 22 and can be exercised even with respect to suits triable by one Court alone. (Vol 21) 1934 All 569 (571).

[4] Section 24 does not intend to limit the power of the District Court to cases in which it itself had territorial jurisdiction. (Vol 31) 1944 Mad 145 (148).

[5] High Court can direct transfer of a case where District Judge has refused transfer. (Vol 13) 1926 Cal 326 (327) * (Vol 14) 1927 Pat 383 (384).

[6] High Court Judge has jurisdiction to transfer case from one Court to another independently of S. 24. (Vol 22) 1935 All 750 (750).

[7] High Court in insolvency jurisdiction cannot withdraw insolvency proceedings pending with a Sub-Judge in the presidency. (Vol 12) 1925 Bom 543 (545) : 49 Bom 788.

[8] High Court cannot transfer a petition for setting aside an election under S. 19 (1), Bombay Local Boards Act before an Assistant Judge. (Vol 32) 1945 Sind 9 (11) : I L R (1944) Kar 388.

[9] Section 150 relates to transfer of general business of Court — S. 24 contemplates transfer of particular case or cases pending. (Vol 4) 1917 Mad 272 (273).

[10] There is a clear distinction between orders of transfer and administrative orders allocating business to particular Judges. When once a Judge has taken cognizance of a suit any order removing the suit from his file is an order of transfer. (Vol 28) 1941 Bom 69 (71) : I L R 1941 Bom 131.

[11] Section 24 is exhaustive of the judicial power to transfersuits and no Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it and even a High Court has no power to compel its institution in any Court beyond its jurisdiction. This power is entirely different in character and legal effect from the one in case of an order returning the plaint with a view to its presentation in the proper Court. (Vol 3) 1916 Nag 31 (32, 33) : 13 Nag L R 81.

[12] The powers of transfer under S. 23, Bombay Civil Courts Act, are controlled by S. 24, Civil P. C., and are limited to administrative orders allocating business. Hence an order of transfer (under S. 23, cl. 5, Bombay Civil Courts Act), after another Subordinate Judge has taken cognizance is incompetent. (Vol 26) 1939 Bom 485 (486) : I L R (1939) Bom 472.

[13] Interlocutory application pending before the District Munsif to punish the defendant for disobedience of

an *ad interim* injunction granted by the Munsif, cannot be transferred by the District Judge or the High Court. Section 24 does not apply. (1911) 21 Mad L Jour 829 (831).

[14] Sections 24 and 141, Civil P. C., and S. 107, Government of India Act, are inapplicable to Legal Practitioners Act. (Vol 3) 1916 Pat 115 (116, 117) : 1 Pat L Jour 576 : 18 Cri L Jour 132.

[15] Madras City Civil Court not competent to try small cause suit — Chief Justice of High Court has power to transfer small cause suit to City Civil Court not under S. 24, but only under Madras City Civil Court Act (1892), Ss. 3, 5. (Vol 5) 1918 Mad 483 (483).

[16] Transfer of Judge with Small Cause powers pending suit — Successor not invested with such powers — Order of Additional District Judge to successor drawing his attention that certain small cause cases be disposed by him under S. 35, Provincial Small Cause Courts Act — Order held was not an order of transfer within meaning of S. 24, Civil P. C., but to be one under Provincial Small Cause Courts Act (1887), S. 35. (Vol 18) 1931 All 574 (577, 578) : 54 All 171 (FB).

[17] Decree cannot be transferred for limited purpose, i. e., to share in rateable distribution of sale proceeds. (Vol 4) 1917 Pat 221 (222).

3. "Application of parties". — [1] High Court having refused to transfer on its own motion can do so on an application therefor. (Vol 10) 1923 All 153 (158).

[2] If the application for the transfer of a case, made to a District Court, proves ineffective, the High Court can transfer the case on application. (1910) 11 Cal L Jour 218 (219).

[3] Application to transfer suit from Court of Small Causes to City Civil Court can be entertained. (Vol 27) 1940 Mad 9 (9) : I L R (1940) Mad 251.

[4] Certain suits tried analogously and governed by same judgment — Appeals pending in High Court from some of these suits — Appellant wanting transfer of rest of appeals pending in lower Appellate Court to High Court for analogous trial of them with those pending in High Court can do so by one application. (Vol 27) 1940 Cal 84 (85) : I L R (1939) 2 Cal 264 * (Vol 6) 1919 Pat 376 (377) : 4 Pat L Jour 13.

[5] Application to withdraw petition under Provincial Insolvency Act from Subordinate Judge and transfer to High Court is not maintainable. (Vol 15) 1928 Mad 1091 (1092) : 52 Mad 57.

[6] "Parties" means parties to the suit, appeal, or proceedings, the transfer of which is sought. (Vol 3) 1916 Nag 123 (126) : 13 Nag L R 203.

[7] The creditor who has received notice in insolvency proceedings is a party entitled to apply for transfer. (1898) 22 Bom 778 (782).

[8] Application under S. 24 frivolous — Opposite party must be allowed substantial costs. (Vol 32) 1945 Oudh 233 (235) : 20 Luck 382.

4. "At any stage". — [1] The cases decided under the old Code show a conflict (a) as to whether a suit could be withdrawn or transferred after the hearing had once commenced; (b) as to whether the District Court could re-transfer a case once withdrawn or transferred; and (c) whether it could transfer or withdraw a case remanded by the High Court. By the addition of the words 'at any stage' and the addition of cl. (1) (b) (iii) this conflict is now set at rest.

[2] District Court's power to transfer cases is wider than under old law. (Vol 1) 1914 All 236 (238).

[3] District Judge can transfer case remanded by High Court for disposal according to law. (Vol 9) 1922 All 35 (36) : 44 All 211.

[4] Where an Appellate Court remands a suit for fresh disposal on the merits by the Court which first decided

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it, the District Judge can transfer it to his own file and decide it. (1913) 9 Nag L R 40 (41).

[5] High Court remanding appeal to District Judge—Transfer by latter to Sub-Judge—Jurisdiction as to disposal by Sub-Judge not objected to—Irregularity—Decision on merits not affected—Power for transfer much wider under the new Code. (Vol 2) 1915 Mad 446 (447).

[6] Judge arriving at findings on evidence—Decree set aside and case remanded on appeal—High Court can exercise power of transfer. (Vol 20) 1933 Oudh 154 (155): 8 Luck 347.

[7] Chamber Judge has power to transfer case under Ss. 302 and 303, Succession Act, to his own Court at any stage. (Vol 26) 1939 Lah 463 (465).

[8] High Court has power to transfer part-heard case from one Court to another. (1908) 26 Mad 595 (596).

5. Competent Court. — [1] A Court is not competent to try the suit unless it has jurisdiction to do so. The jurisdiction of a Court depends not merely upon the nature of the subject-matter of the suit but also, in the case of most subordinate Courts, upon the pecuniary value of the suit, and in the case of all upon the local limits of their jurisdiction. (Vol 7) 1920 Pat 29 (30): 5 Pat L Jour 588.

[2] The word "competent" refers to pecuniary jurisdiction only. (Vol 19) 1932 All 660 (661): 54 All 824* (Vol 19) 1932 Bom 486 (487): 56 Bom 387.

[3] "Competent" does not include competence as to territorial jurisdiction. (Vol 20) 1933 Oudh 154 (155): 8 Luck 347.

[4] Transfer of case under S. 24 — Two Courts need not have concurrent territorial jurisdiction. (Vol 19) 1932 All 660 (661): 54 All 824. (136 Ind Cas 384, Dis-sented from)

[5] Suit can be transferred only from one competent Court to another. (Vol 17) 1930 Lah 195 (196).

[6] Small Cause suit can be transferred to regular Court having pecuniary jurisdiction — "Competent to try" means having jurisdiction to do so—Section 24 is saving clause to Provincial Small Cause Courts Act (9 [IX] of 1887), S. 16. (Vol 19) 1932 Mad 683 (683, 684): 55 Mad 960.

[7] District Judge cannot transfer case to Sub-Judge unless latter is competent to try suit. (Vol 22) 1935 All 696 (696): 58 All 85*(1910) 34 Bom 411 (415, 416).

[8] Transfer of revenue case in Sub-Judge's Court to another Court is competent. (Vol 18) 1931 All 28 (29): 53 All 62.

[9] Provincial Small Cause Courts Act is no bar to exercise of power of transfer by District Judge under S. 24 — Two suits arising out of contract of opposite parties—One filed in Small Cause Court and another in Munsif's Court as regular suit—District Judge transferring both cases to Sub-Judge to be tried as regular suits —Subordinate Judge not having Small Cause powers — Order is valid and Subordinate Judge has jurisdiction. (Vol 21) 1934 All 530 (530).

[10] Where a Sub-Judge to whom a suit is, on remand from the High Court, transferred by the Judge who had originally tried it, tries the suit with the consent of the parties his decision cannot be questioned, as it is only a case of irregular assumption of jurisdiction by a competent Court. (Vol 1) 1914 Cal 638 (640). (3 Cal W N 763, *disting.*)

[11] Section 24 applies to execution proceedings—Competency does not refer to territorial or pecuniary competency — There may be other kinds of incompetency so far as executing Court is concerned. (Vol 13) 1926 Mad 421 (425): 49 Mad 746.

[12] Court to which execution is transferred has jurisdiction to execute. (Vol 4) 1917 Pat 221 (223).

[13] Under S. 31 (b), Presidency Small Cause Courts

Act the Civil Court to which a decree might be transferred for execution must be competent to deal with it. (1910) 37 Cal 574 (578).

[14] Court newly constituted and empowered to try cases presented to it is not competent to try and dispose under cl. (1) (b) (2). (Vol 5) 1918 Mad 100 (101).

[15] Application for review — Section 24 does not contemplate transfer to Court other than that by which judgment was pronounced. (Vol 6) 1919 Nag 143 (143, 144).

6. District Court—Powers of.—[1] District Judge can transfer suit remanded to one Court by Additional District Judge to another Court under his control. (Vol 20) 1933 Lah 29 (31): 13 Lah 806.

[2] District Judge can transfer small cause suit from Small Cause Court to another Court not exercising small cause powers. (Vol 22) 1935 All 350 (351) * (Vol 22) 1935 All 690 (691) * (Vol 19) 1932 Nag 49 (49): 27 Nag L R 307.

[3] Senior Subordinate Judge can transfer case from one Subordinate Judge to another for administrative convenience — But if he takes cognizance of case, only District Judge or High Court can transfer it. (Vol 22) 1935 Bom 286 (287): 59 Bom 466.

[4] Power to transfer cases can be delegated by District Judge to Subordinate Judge—It must be exercised in accordance with law and in regard to cases pending in Subordinate Courts. (Vol 6) 1919 Lah 27 (28): 1 Lah 158.

[5] Subordinate Judge has no jurisdiction to transfer suits unless power is conferred under the Punjab Courts Act (1914), Ss. 37 and 44. (Vol 4) 1917 Lah 37 (38).

7. Grounds of transfer. — [1] Transfer of suit—Rules of equity, justice and good conscience should be followed. (Vol 3) 1916 All 255 (255).

[2] The transfer of a case from one Court to another is an extraordinary procedure; and some good cause must be shown before it is granted. (Vol 1) 1914 All 318 (318).

[3] Case may be sometimes transferred on ground of convenience, but it is no test by which transfer should be determined. (Vol 6) 1919 All 897 (897, 898): 41 All 381.

[4] Convenience of parties is the basis of statutory jurisdiction. (Vol 14) 1927 Nag 219 (220).

[5] Convenience of parties is a good ground for transfer. (Vol 10) 1923 Oudh 30 (31) * (Vol 9) 1922 All 65 (66): 44 All 278.

[6] An application to transfer a case from one city to another should not be granted if there is no balance of convenience on the side of the trial in the other city nor there are grounds to suppose that greater justice would be done by the transfer. (1910) 8 Ind Cas 449 (451) (Low Bur)* (1883) 5 All 60 (62). (Where there was no balance in favour of either justice or convenience on the side of the Court to which the suit was desired to be transferred, held no transfer.)

[7] A transfer of a suit will not be ordered, when no great inconvenience will be caused to the defendant by the trial of the suit in the Court in which it is filed. (1909) 1909 Pun L R No. 77, p. 278 (279).

[8] Defendant's convenience is no ground for transfer — Suit for dower pending at R—A's counter to it suit for restitution of conjugal rights filed by husband at S — Transfer of suit at R was allowed. (Vol 20) 1933 Lah 635 (636).

[9] Delay of 12 days in applying for transfer is not sufficient to warrant refusing a remedy which should ultimately be convenient to both parties. (Vol 25) 1935 Mad 745 (746).

[10] Plaintiff has right to choose his forum—Applicant under S. 24 must make out strong case for transfer — Court should not interfere unless expense and diffi-

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culties are so great as to lead to injustice. (Vol 17) 1930 Lah 944 (944) * (Vol 18) 1931 Lah 115 (115, 116). (Burden to make out strong case for transfer is on applicant.) * (Vol 3) 1916 All 255 (255) * (Vol 2) 1915 Mad 608 (610) * (Vol 7) 1920 Pat 365 (365, 366). (Abuse of process of Court is good cause.)

[11] Reasonable apprehension that petitioner will not get fair trial is necessary. (Vol 21) 1934 Lah 762 (763) * (Vol 10) 1923 Lah 564 (565) * (1903) 1903 Pun Re No. 88 p. 386 (389).

[12] Court discussing suit, pending before it, outside Court with relation of party — Case should be transferred. (Vol 21) 1934 All 448 (449).

[13] Daughters of Judge married to plaintiff's son and his brother's sons respectively — Relationship is close — It is fit case for transfer under S. 24. (Vol 19) 1932 Sind 206 (207).

[14] Suit for value below Rs. 500 rightly instituted in Honorary Munsif's Court — Munsif informing District Judge that he was related to one of parties — District Judge transferring case to Munsif, not being Small Cause Court — No second appeal lies from decision of Munsif. (Vol 22) 1935 All 574 (575) * (1884) 10 Cal 915 (917). (An officer, who exercises judicial and executive functions, having himself dealt with a certain matter and formed and expressed an opinion upon its merits in his executive capacity and having further advised and directed litigation in support of his view is disqualified from dealing as a Judge with the same question when it comes into Court, and has to be dealt with judicially.)

[15] The mere fact that the main question in the two cases is the same is no reason for transferring the appeal pending in the District Court to the High Court. (Vol 31) 1944 Lah 440 (440).

[16] The fact that the case will involve difficult questions of law is not alone a sufficient ground for transfer. (1910) 8 Ind Cas 444 (444) (Low Bur).

[17] Order of removal from office of ghatwal passed by Commissioner — Declaratory suit in Subordinate Judge's Court — Mere fact that Subordinate Judge is subordinate to Commissioner in his executive capacity is no ground for transfer of suit. (Vol 20) 1933 Pat 638 (639).

[18] Fact that Judge has decided point of law in previous case is no reason for transfer in subsequent case involving same point. (Vol 25) 1938 Nag 126 (127); 1 L R (1939) Nag 631 * (Vol 17) 1930 Lah 176 (176) * (Vol 8) 1921 Lah 357 (357).

[19] The fact that a subordinate Judge took an erroneous view of law in a case analogous to the one is no ground for the District Judge to withdraw the suit and transfer it to his file. The District Judge ought not to withdraw the suit and take it on his file to dispose of it on a preliminary point; he cannot do so under S. 24, if he does not wish to try it finally. (1912) 15 Ind Cas 569 (569) (Cal.).

[20] Decision by Judge in previous case on question of fact arising in subsequent case before same Judge is no ground for transfer of subsequent case. (Vol 31) 1944 Lah 400 (401).

[21] Expression of opinion on certain points in a previous case is not a ground for transfer. (Vol 13) 1926 Lah 345 (345).

[22] Prejudice of Judge against party's pleader is no ground for transfer unless it is likely to affect judicial attitude of Judge towards the party or the case. (Vol 13) 1926 Mad 359 (359, 360).

[23] Execution proceedings ordered to be stayed by High Court — Order not actually reaching subordinate Judge — Party putting in affidavit stating order had been passed by High Court — Judge ordering issue of

warrant for arrest in spite of such affidavit — Party is justified in thinking that Judge was prejudiced against him and is entitled to ask for transfer. (Vol 20) 1933 Lah 915 (915).

[24] Mere incidents between Judge and party's counsel do not justify transfer. (Vol 21) 1934 Lah 593 (593).

[25] Refusal of pleaders to accept brief may be sufficient ground to transfer a case to another Court but not to transfer to another place. (Vol 11) 1924 Oudh 372 (373) : 27 Oudh Cas 401.

[26] Expression of opinion by a Judge is not sufficient ground for transfer when it was elicited by the conduct of the plaintiff himself. (Vol 3) 1916 Mad 763 (763).

[27] Party having influence in the town is no ground for transfer of case. (Vol 14) 1927 Lah 80 (80).

[28] Question that *P* was married to *C* decided in one appeal — Same question necessary to be decided in another appeal — Latter appeal should be transferred to another Court. (Vol 21) 1934 Lah 539 (540) * (Vol 20) 1933 Lah 1033 (1033).

[29] Where the point involved in several appeals is the same but only some of those appeals lie as of right to the Chief Court, it is competent to the Chief Court to direct that all the appeals should be heard in the Chief Court without the formality of a transfer from the lower appellate Court. (1912) 1912 Pun L R No. 189, p. 596 (598).

[30] Suits relating to same transaction and involving common questions of fact and desirable to be heard by one Judge — Suits can be transferred to one Court. (Vol 19) 1932 Nag 49 (49) : 27 Nag L R 307 * (Vol 13) 1926 Cal 326 (327).

[31] Same parties filing suits against each other in different Courts on same cause of action — Suits should be tried by the same Court. (Vol 25) 1938 Mad 745 (745).

[32] Three suits tried by the same Court and decided by one judgment — Two appeals filed before District Judge and one before High Court — Application to transfer all appeals to High Court rejected because one of the issues was raised specifically in the appeal before the District Judge and no great hardship was caused to the parties. (Vol 23) 1936 Pat 345 (346).

[33] Removal of a case against plaintiff's will from a Court where he lodged it should be supported by good cause. The only good cause depending on the parties is where the parties are both willing and jointly ask for removal. (Vol 6) 1919 All 397 (397, 398) : 41 All 381.

[34] Transfer is unnecessary if the suit will be more expeditiously and more economically decided in the original Court. (Vol 15) 1928 Oudh 89 (89).

[35] Petition for transfer not found to be *bona fide* — Case can be retransferred. (Vol 25) 1938 Lah 95 (96).

8. Jurisdiction. — [1] Jurisdiction is not restricted to place of suing. (Vol 19) 1932 Sind 215 (215) : 26 Sind L R 277.

[2] Original Court must be one having jurisdiction. (Vol 15) 1928 Mad 400 (400) * (Vol 3) 1916 Cal 456 (458) * (Vol 27) 1940 Oudh 164 (169) : 15 Luck 619 * (Vol 6) 1919 Pat 345 (348) * (Vol 21) 1934 Sind 95 (95) * (Vol 19) 1932 Sind 215 (215) : 26 Sind L R 277.

[3] Suit filed in proper Court — Jurisdiction of Court changing — District Judge can transfer suit to Court having proper jurisdiction. (Vol 23) 1936 All 335 (336).

[4] A District Judge cannot transfer a case to a Court whose local jurisdiction does not include an area in which the cause of action arose. The mere fact of a transfer of a case by District Judge from one Subordinate Court to another similar Court does not confer jurisdiction on the latter unless it is competent to try

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the suit originally. (Vol 7) 1920 Pat 29 (30):5 Pat L Jour 588.

[5] Suit instituted in District Court — Subsequent Government notification empowering First Class Subordinate Judge to hear such suits — Held notification was *ultra vires* and that District Judge had no power to transfer case to such Subordinate Judge. (Vol 22) 1935 Bom 172 (174) : 59 Bom 412.

[6] It is not open to District Court to transfer a revenue appeal to a Subordinate Judge as the latter has no jurisdiction to try it. (Vol 22) 1935 All 440 (441): 57 All 785 : 36 Ori L Jour 1231.

[7] High Court or District Court has jurisdiction to order transfer of case pending in a Subordinate Court, whether such Court has or has not jurisdiction to entertain it. (Vol 21) 1934 All 569 (571).

9. Notice necessary. — [1] Order of transfer without notice to parties is not legal. (Vol 3) 1916 Cal 859 (859) * (Vol 20) 1933 All 178 (178) : 53 All 916 * (Vol 7) 1920 All 249 (249) * (Vol 4) 1917 Lah 37 (38) * (Vol 3) 1916 Nag 123 (125, 126) : 13 Nag L R 203.

[2] Transfer of case at the request of one party without notice to other party is material irregularity. (Vol 13) 1926 All 17 (18) * (1931) 1931 All L Jour 1061 (1061).

[But see (Vol 10) 1923 Oudh 240 (240) : 26 Oudh Cas 62.]

[3] Transfer without notice is a mere irregularity if it does not prejudice the opposite party. (Vol 19) 1932 Cal 265 (266) * (1910) 21 Mad L Jour 829 (830, 831).

[4] Notice before institution of application is not necessary under S. 24. (Vol 20) 1933 Lah 635 (636).

[5] Notice is not necessary when Court acts *suo motu*. (Vol 3) 1916 Nag 123 (125, 126) : 13 Nag L R 203.

[6] The Chief Court need not issue notice to the opposite party or state reasons for doing so. (1912) 1912 Pun L R No. 162, page 507 (508).

[7] Court can dismiss transfer application without giving notice or hearing parties. (Vol 30) 1943 Pesh 71 (72).

[8] Order of transfer without notice to other party can be set aside in revision. (Vol 12) 1925 Lah 189 (189).

[9] Where the plaintiff had no notice of his case being transferred to another Court and the other Court dismissed the suit for his non-appearance, plaintiff is entitled to have his suit restored under O. 9, R. 9. (Vol 20) 1933 Lah 558 (559) : 14 Lah 240.

[10] Transfer without notice—Party may well plead that he did not know in what Court he had to appear. (Vol 10) 1923 Lah 444 (445).

[11] Application for transfer of suit—Only notice to respondent to appear issued—Applicant has right to be heard first. (Vol 3) 1916 All 255 (256).

[12] Where a defendant took trial in the Court to which the case was transferred, though no notice was issued to him, he must be deemed to have waived the objection and any defect in the jurisdiction of transferred Court must be held to have been cured. (1890) 13 Mad 211 (213).

10. "Of its own motion." — [1] High Court has ample jurisdiction to pass *suo motu* order of transfer under S. 24. (Vol 20) 1933 Lah 671 (675) : 14 Lah 779.

[2] Action on application of person erroneously believed to be party is one *suo motu*. (Vol 3) 1916 Nag 123 (125) : 13 Nag L R 203.

[3] Suit valued at Rs. 205 filed in the Court of first class Subordinate Judge—By District Judge's administrative order, the case was sent to extra joint second class subordinate Judge, who was one of the four Judges attached to the first class Court—Suit becoming

one beyond his jurisdiction sent to first class Court with a report to the District Judge who granted his sanction — Held, on reference by the first class Court to High Court under O. 46, R. 1, that neither O. 46, R. 1 nor O. 7, R. 10 was applicable — Held further, that there was no legal objection to the High Court transferring the case under S. 24 to the Court of the first class subordinate Judge. (Vol 28) 1941 Bom 69 (70, 71) : I L R (1941) Bom 131.

11. Procedure of transferee Court. — [1] Execution petition pending in one Court transferred to another Court — Latter Court has jurisdiction to issue warrant for delivery of possession of property in jurisdiction of former Court. (Vol 29) 1942 Oudh 1 (8, 9) : 17 Luck 249.

[2] Mortgage suit or its execution proceeding transferred by High Court from one Court to another Court — Latter Court can order sale of property lying outside its territorial jurisdiction. (Vol 27) 1940 Rang 133 (134).

[3] Where a District Judge transferred to his own file a suit commenced by subordinate Judge and disposed it, as it came to him without taking evidence afresh, it was held that the District Judge had not tried the case. (1885) 7 All 342 (342).

12. Revision. — [1] Order of transfer without notice to other party can be set aside in revision. (Vol 12) 1925 Lah 189 (189) * (Vol 13) 1926 All 17 (18). (Transfer of case at the request of one party without notice to the other party is material irregularity.) * (Vol 7) 1920 All 249 (249). (Failure to issue notice and transfer without hearing parties.)

[But see (Vol 25) 1938 Lah 95 (95, 96). (No revision lies—But if application for transfer be not a *bona fide* one, case can be retransferred.)]

13. Small Cause Court—Transfer from and to — Effect of. — [1] The words "Courts of Small Causes" in sub-section (4) includes a Court invested with the powers of a Court of Small Causes. (Vol 4) 1917 All 62 (64) : 39 All 214 * (Vol 4) 1917 All 484 (485) : 38 All 425 * (Vol 19) 1932 Bom 486 (487) : 56 Bom 387 * (1907) 31 Bom 314 (318). (Case under S. 203 of old Code.) * (Vol 16) 1929 Cal 354 (356) : 56 Cal 588 * (Vol 5) 1918 Cal 187 (187). (Dissenting from 31 Cal 1057.) * (Vol 27) 1940 Mad 9 (9) : I L R (1940) Mad 251 * (Vol 3) 1916 Mad 891 (894) : 38 Mad 25 * (Vol 5) 1918 Oudh 160 (161) : 20 Oudh Cas 350.

[But see (1899) 23 Bom 382 (384).]

[2] Where a small cause suit is transferred to another Court that Court is to be deemed to be a Court of Small Causes for the purpose of such suit; its procedure is governed by the provisions of the Provincial Small Cause Courts Act. (Vol 4) 1917 All 484 (485) : 38 All 425 * (1894) 18 Bom 61 (64) * (Vol 12) 1925 Lah 561 (562, 563) * (1899) 1899 Pun Re No. 69 p. 308 (310) * (1889) 1899 Pun Re No. 77 p. 293 (294) * (Vol 17) 1930 Nag 133 (134).

[3] Where the trial of the suit after its transfer is under the Small Cause Courts Act, no appeal will lie from the decision therein. (Vol 15) 1928 All 609 (609). (Revision lies.) * (Vol 26) 1939 All 452 (453) * (Vol 18) 1931 All 574 (578, 579) : 54 All 171 (F B). (If the case is tried under S. 35, Provincial Small Cause Courts Act, this result will not follow.) * (Vol 16) 1929 All 50 (51) : 50 All 810 * (Vol 5) 1918 All 290 (292) : 40 All 525 * (Vol 4) 1917 All 484 (485) : 38 All 425 * (Vol 4) 1917 All 62 (64) : 39 All 214 * (1883) 5 All 274 (275) * (Vol 16) 1929 Cal 354 (357) : 56 Cal 588 * (1903) 1903 Pun Re No. 83 p. 366 (369) * (1897) Pun Re No. 58 p. 257 (258) * (Vol 3) 1916 Mad 891 (894) : 38 Mad 25. (Express direction by District Judge that suit is to be tried as regular suit — Such order is without jurisdiction.) * (Vol 22) 1935 Nag 42 (42) : 31 Nag L R 170 * (1897) 10 C P L R 94 (95) * (1899)

25. (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the ^a[Provincial Government] ^b[which] may, by notification in the ^c[Official Gazette,] transfer such suit, appeal or proceeding to any other High Court :

^d[Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the Provincial Government of the Province in which that High Court has its principal seat.]

Section 24 (contd.)

2 Oudh Cas 143 (144)* (Vol 10) 1923 Pat 49 (50) : 1 Pat 696* (Vol 6) 1919 Pat 376 (377) : 4 Pat L Jour 13 (Where there is no Small Cause Court at the time of filing the suit, the transferred suit can only be tried as ordinary civil suit.)

[4] As the word 'suit' in this section includes execution proceedings, a Court to which such proceedings are transferred from a Court of Small Causes is a Court of Small Causes for the purpose of such proceedings. (Vol 13) 1926 Lah 465 (465).

[5] Where the transfer is made under any other provision of law and not under this section, the Court to which the proceeding is transferred cannot be deemed to be a Court of Small Causes. Its decision is appealable. (Vol 22) 1935 All 765 (766) : 57 All 957. (Case under U.P. Honorary Munsif's Act, S. 8)* (Vol 22) 1935 All 141 (141). (Do.) (Vol 11) 1924 All 761 (762) (Do.) * (Vol 2) 1915 All 219 (221) : 37 All 450. (Transfer of case to regular side.)* (1909) 31 All 1 (2)* (Vol 1) 1914 Bom 302 (302) : 38 Bom 190. (Judge having Small Cause as well as regular jurisdiction — Transfer of Small Cause case to regular side — Decree is appealable.)* (1884) 8 Bom 230 (234)* (1921) 64 Ind Cas 335 (336) (Lah). (Transfer under S. 23, Provincial Small Cause Courts Act.)* (Vol 4) 1917 Oudh 104 (104).

[6] Where a suit is transferred from the original side to the small cause side of a Court, the suit retains its character as an original suit and will have to be tried as such. (Vol 22) 1935 Mad 284 (285).

[7] Where the Court from which a suit is transferred is not a Small Cause Court, the fact that the suit is of a nature cognisable by a Small Cause Court does not make sub-section (4) applicable; and if the Court to which the suit is transferred is not a Small Cause Court, its decision will be appealable. (Vol 22) 1935 All 574 (575).

[8] If the Small Cause Court in which the suit was instituted ceases to exist or the officer invested with Small Cause Court powers is transferred from the district and there is no other officer possessing such powers, sub-section (4) does not apply. In such cases if the suit is tried by an ordinary Court, the decision of such Court will be appealable. (Vol 23) 1936 Lah 883 (885)* (Vol 24) 1937 Oudh 398 (399) : 13 Luck 369. ((Vol 18) 1931 All 574 : 54 All 171 (F B) relied on)* (Vol 28) 1941 Mad 103 (105, 106).

14. Subordinate Courts.—[1] A Munsiff's Court is subordinate to the High Court within the meaning of S. 24. (1910) 11 Cal L Jour 218 (219).

[2] Senior Subordinate Judge empowered by notification under S. 39 (3), Punjab Courts Act, to hear appeals lying to District Judge does not cease to be subordinate to District Judge for the purpose of S. 24. (Vol 26) 1939 Lah 578 (579, 580).

[3] Suit remanded to District Court as sub-Court not then functioning—Transfer of suit by District Court to sub-Court when re-established is legal. (Vol 31) 1944 Mad 569 (570).

[4] District Judge can transfer suit under S. 92 to Additional District Judge. (Vol 6) 1919 Oudh 311 (313) : 22 Oudh Cas 933 (1912) 1912 Pun L R No. 14 p. 39(40).

[5] Section 24 (1) (a) does not make the Divisional Court a subordinate Court to the High Court so as to transfer the petition for alimony on a dissolution of marriage to the Divisional Court. (Vol 2) 1915 Bom 261 (261) : 40 Bom 109.

[6] Junior Subordinate Judge is not subordinate to a senior Sub-Judge for the purpose of S. 24. (Vol 6) 1919 Lah 27 (28, 29) : 1 Lah 158.

[7] High Court can transfer to its own file a suit pending in a Small Cause Court, which is subordinate to it. Single Judge on the original side also can exercise this power. (1905) 7 Bom L R 143 (143, 144).

[8] Original side of the High Court cannot transfer insolvency case from one Court to another. (Vol 14) 1927 Rang 105 (107) : 4 Rang 554.

[9] Judicial Commissioner's Court — Transfer from Subordinate Court to Court not subordinate is *ultra vires*. (Vol 11) 1924 Nag 152 (152).

[10] Divisional Court in matrimonial jurisdiction is not subordinate to High Court. (Vol 2) 1915 Bom 261 (261, 262) : 40 Bom 109.

15. Sub-section 1, cl. (b).—[1] Section 24 (1) (b) is wide enough to enable the District Court to withdraw a transmitted execution proceeding and dispose of it. (Vol 2) 1915 Mad 920 (920) : 39 Mad 485.

[2] Court transferring decree for execution can recall it. (Vol 13) 1926 Bom 271 (272) : 50 Bom 439.

[3] A District Court can re-transfer a suit to the file of subordinate Court from which it had taken it to its own file. (1909) 36 Cal 193 (204).

[4] High Court can re-transfer, in revision, to original Court even before the suit was filed in the Court to which it had been transferred. (Vol 10) 1923 All 249 (249).

[5] Letters Patent Madras Cl. 13 — Cl. 13 does not enable the High Court to quash interim objection order in a case recalled to itself and re-transfer it to the original Court. That power is conferred by S. 24. (Vol 32) 1945 Mad 69 (70) : I L R (1945) Mad 389.

16. Suit, appeal or other proceedings.—[1] "Suit" includes execution proceedings. (Vol 12) 1925 All 276 (277) : 47 All 57 * (1898) 22 Bom 778 (782) * (Vol 2) 1915 Mad 920 (920) : 39 Mad 485.

[2] Execution application may be validly transferred under S. 24. (Vol 12) 1925 All 276 (277) : 47 All 57.

[3] The word 'suit' occurring for the second time in sub-section (2) includes 'proceedings'. (Vol 23) 1936 Pesh 56 (57).

[4] Phrase "other proceeding" in S. 24 covers transfer of disposal of claim under U. P. Encumbered Estates Act from Court of one Special Judge to another — Transfer in sub-cl. (iii) of cl. (b) covers retransfer of decided case from transferee Court. (Vol 25) 1938 Oudh 217 (218) : 14 Luck 272.

[5] Transfer of suit implies transfer of all proceedings arising out of suit. (Vol 28) 1941 All 140 (143) : I L R (1941) All 295.

[6] A High Court can call and transfer winding up proceedings under the Companies Act to its own file. (1887) 9 All 180 (182).

[7] Section 24 does not apply to proceedings under Criminal P. C., S. 476. (Vol 14) 1927 All 469 (469, 470) : 49 All 460.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

[*cf.* 1882, Ss. 20, 21.]

[*a*] *Substituted* by A. O. for "Governor-General in Council". [*b*] *Substituted, ibid.*, for "who". [*c*] *Substituted, ibid.*, for "Gazette of India". [*d*] *Inserted, ibid.*

Objects and Reasons.

"*Clause 25.*—Clause 25 of the Bill as introduced has been rendered unnecessary by the omission of clause 22. We have accordingly taken it out and have put in its place a new clause taking power for the Governor-General in Council to transfer cases from one High Court to another under certain circumstances. We think that

the exercise of such a power may sometimes be necessary and it has been brought to our notice that the absence of any provision on the point in the existing Code has given rise to difficulty. The new clause proceeds on the analogy of section 527 of the Code of Criminal Procedure, 1898."—S. C. R.

INSTITUTION OF SUITS.

Institution of suits. 26. Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

[1882, S. 48; *see* O. 4, R. 1.]

SUMMONS AND DISCOVERY.

Summons to defendants. 27. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

[1882, S. 64; 1877, Ss. 64 and 68; 1859, S. 41. *see* O. 5.]

Service of summons where defendant resides in another province. 28. (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

[1882, S. 85; 1877, S. 85; 1859, S. 59.]

29. Summonses ^a[and other processes] issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they ^b[were summonses] issued by such Courts :

Service of foreign summonses.

Section 26 — Note 1.

[1] A suit commences with the presentation of a plaint. (Vol 16) 1929 Mad 480 (480)* (1899) 22 Mad 256 (258)* (1896) 23 Cal 723 (729). (Proceeding not commencing with plaint is not a suit.)* (Vol 19) 1932 Lah 374 (376): 13 Lah 672. (Do.)

[2] A suit is instituted in ordinary cases when the plaint is presented to the proper officer. Its return for amendment and subsequent presentation and acceptance by the Court will not constitute a fresh institution of the suit. (1878-80) 2 All 832 (834).

[3] Where a Judge accepts a plaint presented to him outside Court and after the usual office hours, the suit must be deemed to have been instituted on the day on which the plaint was so presented. (Vol 11) 1924 Mad 448 (448): 47 Mad 312 (F.B.)* (1912) 34 All 482 (486)* (Vol 9) 1922 Nag 167 (167) : 19 Nag L R 23.

[4] Suit is instituted when plaint is filed and not when it is registered. (Vol 8) 1921 Cal 277 (279).

[5] Where the plaint is returned to be presented in proper Court of competent jurisdiction, the suit is to be considered as instituted on the date of such re-presentation. (Vol 15) 1928 Bom 421 (422) : 52 Bom 548.

[6] The presentation of plaint or appeal means that it shall be delivered to the proper officer of the Court either by the appellant or his pleader. (1892) 15 Mad 187 (188).

[7] Sending of plaint by post to Revenue Officer, who is on tour, and compliance of his order such as paying batta within a fixed date, held was proper institution of suit. (1885) 8 Mad 411 (412).

[8] A plaint means a private memorial tendered to a Court in which the person sets forth his cause of action; it is the exhibition of an action in writing. (1899) 22 Mad 494 (502).

[9] A writtens tatement claiming a set-off will be deemed to that extent to be a plaint. (1892) 15 Mad 29 (34).

[10] *See* also O. 4, R. 1.

Section 27 — Note 1.

[1] After registration of plaint, summons should be issued to the defendant. (1898) 22 Bom 971 (972)* (1897) 14 Cal 204 (207).

[2] When the order rejecting the plaint is made, no summons should be issued, since S. 27, Civil P. C., only provides summons to issue where suits have been *duly* instituted. (Vol 9) 1922 Cal 234 (235).

[3] As to the method of issue and service of summons *see* O. 5; as to summonns to witness, *see* section 31.

Section 28 — Note 1.

[1] It is for the Court which originally issued summons to decide whether the service of summons is sufficient or not by the Court to which it has been sent for service. (1895) 22 Cal 889 (891).

[But *see* (1911) 33 All 649 (651, 652)* (1886) 10 Bom 202 (204).]

[2] The affixing, taken by itself, is certainly not effectual complete service of summons. Court should decide whether the summons is duly served by such affixing or not and if it decides in the negative, then a new summons must be issued, or substituted service directed. (1886) 10 Bom 202 (204).

[3] As to summonns to witness, *see* section 31. *See* also Order 5, Rules 21 and 23.

^c[Provided that the Courts issuing such summonses ^d[or processes] have been established or continued by the authority of the Central Government or of the Crown Representative, or that the Provincial Government ^e[of the Province in which such summonses or processes are] to be served has by notification^f in the Official Gazette declared the provisions of this section to apply to ^g[such Courts].]

[1882, S. 650A.]

[a] *Inserted* by the Code of Civil Procedure (Amendment) Act, 1940, (34 [XXXIV] of 1940), S. 2. [b] *Substituted* by S. 2, *ibid.*, for "had been". [c] *Substituted* by A. O. for the original proviso. [d] *Inserted* by Act 34 [XXXIV] of 1940, S. 2. [e] *Substituted* by S. 2, *ibid.*, for "by whose Courts a summons is." [f] For the notifications issued by the Governor-General in Council under this proviso as it stood before 1st April 1937, see General Rules and Orders Supplement Vol. I, pp. 751 to 775. [g] *Substituted* by Act 34 [XXXIV] of 1940, S. 2, for "Courts of the Province".

30. Subject to such conditions and limitations as may be prescribed the Court may, *Power to order discovery and the like.* at any time, either of its own motion or on the application of any party, —

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit.

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to *Summons to witness.* produce documents or other material objects.

32. The Court may compel the attendance of any person to whom a summons has been *Penalty for default.* issued under section 30 and for that purpose may —

- (a) issue a warrant for his arrest;
- (b) attach and sell his property;
- (c) impose a fine upon him not exceeding five hundred rupees;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

[See O. 16, Rr. 10 to 13, 17 and 21.]

Objects and Reasons.

Thinking it unnecessary to impose penal consequences for a default of the class indicated in this section, the Committee have omitted the last paragraph of S. 136 of the Code of 1882, which provided that any party

failing to comply with any order under Chap. III of that Code, to answer interrogatories or for discovery, production, or inspection, which has been served personally upon him, shall be deemed guilty of an offence under S. 188 of the Penal Code.—See S. O. R.

JUDGMENT AND DECREE.

33. The Court, after the case has been heard, shall pronounce judgment, and on such *Judgment and decree.* judgment a decree shall follow.

[1882—S. 198; 1877, S. 198; 1859, S. 183. See O. 20.]

Section 30 — Note 1.

[1] The conditions and limitations referred to in this section are to be found in Orders 11, 12, 13, 16 and 19.

Section 32 — Note 1.

[1] Jurisdiction to impose fine vested by S. 32 can be exercised only in manner laid down by O. 16. (Vol 16) 1929 All 850 (852).

[2] Fine can be imposed only upon persons not appearing in obedience to summons to give evidence and required to give evidence and not on persons not required subsequently to produce evidence. (Vol 16) 1929 All 850 (853).

[3] Section 32 applies only when a person has failed to comply with a summons to attend Court and not to the case of a party who fails to produce documents

which he has been ordered to produce. (Vol 16) 1929 Pat 181 (183); 5 Pat L Jour 550.

SECTION 33 — SYNOPSIS.

1. "Pronounce judgment".

2. Decree to follow judgment.

1. "Pronounce judgment". — [1] Decision must be founded on pleadings or on case consistent therewith. (Vol 18) 1931 Rang 177 (177).

[2] A Judge who has not heard any part of the evidence and before whom no part of the proceedings had taken place cannot pronounce judgment till he has given parties an opportunity of stating their respective cases. (1904) 1904 Pun Re No 91, p. 345 (347) * (1886) 1886 Pun Re No. 110, p. 261 (262) * (Vol 7) 1920 Lah 246 (247). (Case transferred after arguments — Judgment

INTEREST.

34. (1) Where and in so far as a decree is for the payment of money,³ the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree,⁴ in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit,⁵ with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

[1882, S. 209 ; 1877, S. 209; 1861, S. 10.]

Objects and Reasons.

"Clause 34.—The words 'not being a decree for the enforcement of a mortgage or charge' have been omitted in this clause and elsewhere in order to make it

clear that a decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge."—S. C. R.

Section 33 (contd.)

pronounced without giving opportunity to parties to address any fresh argument — Judgment is liable to be set aside.)

[3] For the method of pronouncing judgment and making decree, see O. 20.

2. Decree to follow judgment.—[1] It is the duty of the Court to draw up a decree in accordance with judgment. No adverse inference as to right to appeal can be drawn against a party omitting to ask the Court to draw up a decree. (Vol 1) 1914 Bom 23 (25) : 33 Bom 331 * (Vol 6) 1919 Lah 53 (54) : (1919) Pun Re No 66 * (Vol 11) 1924 Nag 271 (274) : 20 Nag L R 181.

[2] In the case of an original civil suit the decree must be quite distinct from the judgment. (Vol 7) 1920 Lah 395 (396) : 1 Lah 223.

[3] After the judgment is pronounced the High Court has no power to stop the preparation of decree merely because proper court-fee is not paid. (Vol 19) 1932 Pat 228 (231) : 11 Pat 582.

[4] Where subsequent to the delivery of judgment by High Court on appeal, an application for scaling down of debt is filed, the practice of remitting such application to the lower Court for enquiry and report and drawing the decree in accordance with such report is contrary to law. (Vol 28) 1941 Mad 929 (931, 932) : 1 L R (1942) Mad 346 (F B). ((Vol 27) 1940 Mad 478, overruled.)

[5] Section 33 is qualified by Succession Certificate Act (1889), S. 4 — Decree cannot be passed till a certificate is produced. (Vol 7) 1920 Nag 148 (149).

[6] Section 33 does not preclude the Court from following the practice of preparing a decree when an application is made; and it does not preclude the High Court from making a rule that where a decree is unnecessary no decree be prepared. (Vol 21) 1934 Pat 266 (269) : 13 Pat 371.

[7] Decree for more than what is claimed in plaint cannot be granted without amending plaint. (Vol 19) 1932 Rang 141 (142).

[8] No decree should be passed by the Courts which on the face of it is improper. (Vol 5) 1918 Nag 224 (226) : 14 Nag L R 97.

[9] For the contents of decree, see O. 20, R. 6.

SECTION 34 — SYNOPSIS.

1. Applicability and scope.
2. Decree for payment of money.
3. Decree silent as to interest.
4. Interest pendente lite and future.
5. Interest prior to suit.

6. Mortgage suits.

7. Rule of dampnat.

1. Applicability and scope. — [1] Section 34 bears no analogy to S. 2 (12), and O. 20, R. 12 dealing with mesne profits. Interest may be awarded under S. 34 as an inducement to prompt satisfaction of the decree and as a penalty for non-compliance with it. Such interest is no part of the claim or relief granted, as in the case of mesne profits. (1906) 33 Cal 1232 (1235).

[2] Claim for interest from date of institution of suit until payment is like future mesne profits which do not fall under S. 7 of Court-fees Act (VII of 1870) and hence no additional stamp is required. (1893) 17 Bom 41 (42).

2. Decree for payment of money. — [1] It has been held in the following cases that the words "decree for payment of money" include claim for unliquidated damages: (Vol 27) 1940 Bom 369 (377, 378) : 1 L R (1941) Bom 71 * (Vol 12) 1925 Bom 547 (556). (Interest on damages—Where a party improperly delays the ascertainment of damages for a long time he should be penalized by awarding interest from date of suit.) * (Vol 11) 1924 Cal 637 (638). (Court should state its reasons for awarding interest on damages.) * (Vol 13) 1926 Mad 1021 (1023) * (1911) 9 Ind Cas 221 (222) (Oudh). (Interest on sum claimed for use and occupation.)

[2] But a contrary view is taken in the following cases: (Vol 18) 1931 Bom 386 (387) * (Vol 7) 1920 Cal 737 (739) * (Vol 18) 1931 Sind 121 (124) : 25 Sind L R 104.

[3] Decree for partition and for accounts — Section does not apply. (Vol 12) 1925 Bom 406 (409) : 49 Bom 282.

3. Decree silent as to interest. — [1] Where a decree is silent with respect to further interest from date of decree to the date of payment the Court must be deemed to have refused to give interest unless it can be shown that its silence was due to oversight or mistake and a separate suit will not lie for its recovery. (Vol 5) 1918 Low Bur 136 (137) : 9 Low Bur Rul 78 * (1913) 37 Bom 326 (338, 339) : 40 Ind App 68 (PC) * (1896) 23 Cal 357 (360). (Interest not allowed in the order of Her Majesty in Council, cannot be given by Court in this country.) * (Vol 27) 1940 Mad 29 (30). (Omission even if accidental cannot be rectified.) * (Vol 25) 1938 Mad 522 (523). (Vol 11) 1924 Rang 275 (277). (Court has no inherent power to grant interest).

[See also (Vol 25) 1936 Rang 141 (144). (Suit for account of money, received by defendant—Interest before decree not claimed nor granted by Court in preliminary

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decree — It cannot be allowed in working out final decree.]

[2] It is illegal for Court to decree claim for interest by way of amendment of its decree. Order so amending decree is open to revision. (1893) 15 All 121 (122, 123).

[3] Where future interest is not mentioned in decree, it is not recoverable by execution proceedings. (1877-78) 3 Cal 602 (609) : 5 Ind App 78 (P.C.)

[4] Non-mention by appellate Court as to interest granted by lower Court amounts to refusal. (Vol 11) 1924 Mad 102 (103).

4. Interest pendente lite and future.—[1] Interest *pendente lite* and future is governed by S. 34. (Vol 22) 1935 All 505 (506) (F B).

[2] Court can give interest after suit whether claimed in plaint or not. (Vol 18) 1931 Bom 549 (549) : 55 Bom 657 * (Vol 19) 1932 Bom 319 (325, 326) * (Vol 8) 1921 Lah. 125 (126) : 2 Lah 256 * (Vol 30) 1943 Nag 240 (242) : I L R (1943) Nag 555.

[3] Award of such interest in money decree is discretionary. (Vol 20) 1933 Lah 352 (353, 354) : 14 Lah 591 * (Vol 19) 1932 Lah 312 (314) * (Vol 15) 1928 Lah 954 (955) * (Vol 17) 1930 Mad 721 (723) : 53 Mad 475 * (Vol 23) 1936 Pat 191 (193, 194) * (Vol 21) 1934 Pat 99 (104) : 12 Pat 869. (Widow not entitled to interest on sum claimed as maintenance under Hindu law — Interest can however be granted from date of suit under S. 34.) * (Vol 23) 1936 Rang 141 (144).

[4] Discretion should be exercised on judicial principles. (Vol 6) 1919 Cal 144 (150) * (Vol 22) 1935 Lah 307 (311). (Limitation unnecessarily prolonged — Claim for interest is just.) * (Vol 8) 1921 Pat 367 (369).

[5] Interest pending suit should not be refused in the absence of proper reasons. (Vol 6) 1919 Cal 144 (150) * (Vol 6) 1919 All 1 (5) : 42 All 230. (When amount charged and claimed exceeds one-third of principal, interest after suit may be refused.) * (Vol 32) 1945 Lah 35 (43) : I L R (1944) Lah 578 (Re-sale of goods—Unreasonable delay — Interest should be disallowed.) * (Vol 21) 1934 Lah 93 (94) (Delay in filing suit due to assurances given by defendant to pay — Interest from date of institution to date of decree should not be disallowed.) * (Vol 21) 1934 Lah 32 (33) * (Vol 20) 1933 Lah 440 (441) (Hundis not carrying interest — Future interest need not be allowed.) * (Vol 1) 1914 Lah 926 (327) (Delay in the decision of case wholly due to plaintiff's erroneous act— Court justified in not awarding further interest from date of suit up to realisation.) * (Vol 3) 1916 Mad 918 (918) * (Vol 15) 1928 Nag 115 (116) * (Vol 13) 1926 Nag 109 (115) : 22 Nag L R 49 * (Vol 22) 1935 Pesh 58 (59) (Rate charged rather below than above ordinary rate—Transaction not usurious—Altering substantially character of transaction by refusing future interest would create unsatisfactory precedent.)

[6] A Court has discretion under S. 34 of the Code to award interest *post litem motam* at a reasonable rate. (Vol 2) 1915 Lah 113 (114, 115) : 1915 Pun Re No. 92 * (Vol 9) 1922 P C 46 (48) (P.C.) * (1895) 17 All 511 (517) : 22 Ind App 199 (P.C.) * (1891) 18 Cal 164 (180) : 17 Ind App 201 (P.C.). (The benefit of order under S. 34 can go only to the judgment-debtor who is party to suit.) * (Vol 18) 1931 Nag 91 (93). (Two per cent. is not extortionate — Compound interest; at that rate if stipulated should be allowed.) * (Vol 16) 1929 Nag 6 (8). (Interest pendente lite at Re. 1-8 per cent. (compound) is not excessive.) * (Vol 28) 1941 Pat 276 (286). (Nine per cent. per annum held fair rate.)

[7] A plaintiff is not entitled as of right to the contract rate of interest from the date of suit to the date of decree. But the Court should not refuse to allow the contract rate without assigning any reasons. (Vol 3) 1916 Mad 918 (918) * (1881) 3 All 91 (107) : 7

Ind App 196 (P.C.) * (1886) 12 Cal 569 (580) * (1926) 96 Ind Cas 310 (311) (Lah.). (Court has power to award interest at the contractual rate.) * (Vol 17) 1930 Lah 733 (734) * (Vol 12) 1925 Lah 128 (129). (Interest agreed upon at Rs. 2 per cent. — Court allowed As. 8 per cent.) * (Vol 19) 1932 Mad 109 (110) : 55 Mad 458 * (Vol 18) 1931 Nag 91 (92). (Compound and post diem interest should be allowed when clearly so stated in the deed.) * (Vol 21) 1934 Pat 134 (139) : 13 Pat 200 * (Vol 20) 1933 Pat 207 (208).

[8] Court can give compound interest under S. 34. (Vol 21) 1934 Bom 86 (89).

[9] Interest can be allowed even if money carried no interest or, prior to suit, interest had ceased to run due to rule of damdupat or other reason. (Vol 11) 1924 Nag 348 (352) * (Vol 16) 1929 Nag 355 (356).

[10] In a suit for dissolution of partnership, until the accounts are taken it is impossible to say what, if anything, is due from any partner ; interest, therefore, should only be allowed to the plaintiff from the date of the final decree and not from the date of the plaint. (Vol 17) 1930 P C 185 (187) : 57 Ind App 245 : 24 Sind L R 328 (P.C.).

[11] Future interest is discretionary — No improper exercise of discretion—Appellate Court will not interfere. (Vol 12) 1925 Lah 308 (309) * (Vol 19) 1932 All 245 (246) * (1878-79) 3 Bom 202 (203). (High Court will not interfere.) * (1913) 37 Bom 326 (339) : 40 Ind App 68 (P.C.) * (Vol 20) 1933 Oudh 128 (129) : 8 Luck 315.

[12] Interest till realization not allowed—No reasons recorded by trial Court for refusing interest—Appellate Court can consider question. (Vol 30) 1943 Nag 240 (242, 243) : I L R (1943) Nag 555.

[13] Where the lower Court has not considered the question of interest, the appellate Court may grant it. (Vol 14) 1927 Lah 679 (680).

[14] Interest from date of plaint to date of decree can be only on principal sum due and not on the suit amount which includes interest. (Vol 30) 1943 Mad 216 (217).

[15] Future interest at 12 per cent. from date of decree till realization is excessive in absence of special reason. (Vol 20) 1933 Lah 1011 (1013).

[16] Interest on decretal amount is generally allowed at 6 per cent. unless special reason exists for giving higher rate. (Vol 20) 1933 Lah 780 (780).

[17] Where the rate charged and decreed was 24 per cent., interest after decree was not allowed. (Vol 15) 1928 Lah 811 (811).

[18] Sale confirmed—Decree-holder claiming interest during period between date of receipt of money into Court and actual payment of same to him — Aforesaid interest can be claimed only if action on judgment-debtor's part prevents or postpones payment — Decree-holder held not entitled to interest as claimed as no blame could be attached to judgment-debtor. (Vol 29) 1942 Mad 442 (443, 444).

[19] Judgment-debtor depositing decretal amount in Court and applying not to pay to decree-holder without security during pendency of his appeal — In appeal amount of decree reduced—Decree-holder cannot claim interest since date of deposit, nor judgment-debtor on surplus amount deposited by him. (Vol 16) 1929 Lah 316 (316, 317).

[20] Discretion to award future interest in suit for arrears of rent is not controlled by Oudh Rent Act (22 [XXII] of 1886), S. 141. (Vol 6) 1919 Oudh 248 (248, 249) : 22 Oudh Cas 287 * (Vol 21) 1934 Oudh 239 (240) : 10 Luck 357.

5. Interest prior to suit.—[1] The question whether interest can be granted for the period prior to the institution of the suit depends upon substantive law and not upon the Civil Procedure Code. (Vol 25) 1938

COSTS.

35. (1) Subject to such conditions and limitations^{7a} as may be prescribed, and to the provisions *Costs.* of any law^{7b} for the time being in force, the costs of and incident to all suits⁶ shall be in the discretion¹⁷ of the Court, and the Court shall have full power to determine by whom⁵ or out of what property and to what extent¹¹ such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event,⁸ the Court shall state its reasons in writing.

(3) The Court may give interest on costs¹³ at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

[1882, Ss. 218 to 222; 1877, Ss. 219 and 220; 1859, S. 187, R. S. C., O. 65, R. 1; Jud. Act, 1890, S. 5.]

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P C 67 (70) : 65 Ind App 66 : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (P C) (1910) 7 Mad L Tim 108 (108).

[2] Interest for the period prior to the date of suit may be awarded if there is an agreement for the payment of interest or it is payable by the usage of trade having the force of law or under the provision of any substantive law entitling the plaintiff to recover interest. (Vol 25) 1938 P C 67 (70) : 65 Ind App 66 : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (P C).

[8] Interest pending suit as also interest after decree can be granted but not interest prior to suit under S. 34. Interest cannot be decreed upon unliquidated damages prior to suit. (Vol 7) 1920 Cal 737 (739) * (Vol 18) 1931 Bom 386 (387).

[4] In the following cases it has been held that Court cannot allow interest merely because money is detained: (Vol 29) 1942 All 96 (101) : I L R (1941) All 777 * (Vol 28) 1941 Nag 273 (277) : I L R (1942) Nag 294 * (Vol 29) 1942 Oudh 311 (313) * (Vol 33) 1946 Pat 154 (155).

[5] It has been held in the following cases that interest can be awarded by way of damages in such a case. (Vol 22) 1935 Cal 39 (67, 68) : 61 Cal 711 * (Vol 17) 1930 Cal 357 (360) : 57 Cal 953 * (Vol 18) 1931 Pat 394 (402) : 10 Pat 528. (Suit for contribution — Interest reduced on the amount decreed from 12 per cent. per annum to 6 per cent. per annum allowed from date of institution of suit.)

[See also (Vol 13) 1926 Nag 363 (364). (Damages for breach of contract for payment of money — Interest as damages, 6 per cent. may be proper.)]

[6] Defendant not withholding money due to plaintiff but ready and willing to pay — Interest can be allowed only from date of suit. (Vol 30) 1943 Mad 62 (66) : I L R (1943) Mad 430.

[7] Lessee knowing lessor's inability to put him in possession instituting suit for possession after long period is not entitled to interest on premium or rent paid by him. (Vol 17) 1930 Cal 385 (387) : 57 Cal 114.

[8] A widow is not entitled to claim interest on the sum which she claims as maintenance under the general Hindu law. (Vol 21) 1934 Pat 99 (104) : 12 Pat 869.

[9] Arrears of maintenance—Widow herself creating ill-feelings between her and her husband's adopted son and leaving husband's house—No demand for payment of arrears made in writing — No damages proved to result from withholding of maintenance — Plaintiff is not entitled to interest on arrears of maintenance on equitable principle—But she is entitled to *pendente lite* and future interest under S. 34. (Vol 28) 1941 All 43 (48) : I L R (1940) All 739.

[10] In a suit for accounts of moneys received by defendant, interest before date of suit may be awarded. (Vol 23) 1936 Rang 141 (143).

[11] Interest may be allowed when there is an implied agreement to pay interest. (Vol 17) 1930 Lah 985 (991) : 12 Lah 239.

[12] From entries in pass-book acquiesced in by defendant (businessman) evidence of agreement to pay interest at monthly rests was presumed. (Vol 19) 1932 Cal 521 (522) : 59 Cal 662.

[13] Interest Act (32 [XXXII] of 1889), S. 1—Suit for money representing depreciation in value of goods supplied not being "debt" nor "sum certain" interest cannot be claimed during pendency of suit. (Vol 7) 1920 Cal 737 (739).

[14] Interest was not allowed where written notice demanding it had not been given. (Vol 13) 1926 Nag 64 (65).

[15] Bihar and Orissa Municipal Act (7 [VII] of 1922), Ss 130 and 123 — Suit for arrears of tax by municipality — Claim for interest prior to suit must be disallowed if there was no demand by the municipality prior to suit. (Vol 29) 1942 Pat 417 (419).

[16] Interest allowed by trial Court according to contract of parties — High Court will not interfere in absence of clear evidence justifying interference. (Vol 20) 1933 Cal 786 (787).

6. Mortgage suits. — [1] As to the payment of interest in a suit for foreclosure, sale or redemption, *see* O. 34, R. 11.

7. Rule of *damdupat*. — [1] The rule of *damdupat* applies to a matter of contract and not when it has passed into the realm of a decree of Court. (1913) 40 Cal 710 (714, 715).

[2] Contractual obligation to pay interest allowed by rule of *damdupat* coming to end before filing of suit—Court has discretion to award interest from date of suit in addition to interest allowed by rule. (Vol 16) 1929 Nag 355 (356) * (Vol 11) 1924 Nag 348 (352).

[3] The discretionary power to award interest conferred on the Courts by S. 34 may be exercised without reference to the rule of *damdupat*. (1898) 22 Bom 86 (87).

SECTION 35—SYNOPSIS.

1. Account suits.
2. Administration suits.
3. Appeal, revision and review.
4. Arbitration cases.
5. Costs by whom payable.
6. "Costs of and incident to all suits."
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- 7a. Costs, subject to conditions and limitations.
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8. Costs when shall not follow event.
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13. Interest on costs.
14. Maintenance suits.
15. Mortgage suits—See O. 34, R. 10.
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17. Principles governing award of costs.
18. Privy Council practice.
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20. Representative suits.
21. Return of plaint—Costs.
22. Separate costs.
23. Separate suit for costs.
24. Stamp cases.
25. Suits by or against minors.
26. Suits for construction of wills.
27. Suits for damages.
28. Trustee cases.

1. Account suits. — [1] Suit for accounts — Defendants disputing liability to accounts—Defendants held liable for costs of suit. (Vol 30) 1943 Pat 218 (227) : 22 Pat 114 * (Vol 7) 1920 Cal 428 (431).

[2] Successful party can get costs even in preliminary decree. (Vol 30) 1943 Pat 218 (227) : 22 Pat 114 * (Vol 17) 1930 All 72 (72).

[3] Suit for accounts—Defendant admitting liability as to part—Suit proceeding for remaining claim—Costs depend upon result of inquiry. (Vol 7) 1920 Cal 428 (432).

[4] Where defendant resisted plaintiff's claim for an account in a suit for accounts, costs were awarded to the plaintiffs up to and including the hearing by the decree directing reference for an account. (Vol 4) 1917 Cal 557 (558).

[5] Commission for taking accounts — Plaintiff succeeding is entitled to costs of commission. (Vol 16) 1929 Cal 719 (723).

2. Administration suits. — [1] Administration suit—Litigation effect of deceased's act—Costs should come out of estate. (Vol 18) 1931 Sind 17 (23) : 25 Sind L R 72.

[2] In an administration suit official referee directing payment of costs of reference cannot direct that they are to be paid out of particular property, the subject-matter of the suit. (Vol 26) 1939 Rang 108 (109) : 1938 Rang L R 252.

[3] Administration—Suit for—Order for costs should be so made as to relieve persons with unencumbered share. (Vol 16) 1929 Cal 477 (478) : 56 Cal 447.

[4] Administration suit — Person intervening for possible personal benefit — Claimant is not liable for intervenor's costs. (Vol 8) 1921 Cal 222 (224) : 48 Cal 352.

3. Appeal, revision and review. — [1] Appeal against order for costs accepting decision on main point is not competent. (Vol 17) 1930 Bom 445 (447)* (Vol 1) 1914 Mad 418 (419)* (Vol 5) 1918 Upp Bur 14 (14) : 3 Upp Bur 61.

[2] No appeal lies against order passed by Judge directing how costs are to be taxed. (Vol 12) 1925 Bom 432 (432).

[3] Court must make some order as to costs—Failure to do so can be corrected in appeal. (Vol 10) 1923 Oudh 155 (156) : 25 Oudh Cas 885.

[4] Appeal Court can disallow costs in cases apparently coming under S. 22 of the Presidency Small Cause Courts Act. (Vol 11) 1924 Bom 422 (425) : 48 Bom 531.

[5] Parties to bear own costs—Appellate Court cannot make appealing party pay non-appealing party's costs in trial Court. (Vol 18) 1929 Lah 177 (178).

[6] In ordinary cases an appeal for costs will only lie when a question of principle is involved, when the discretion has not been judicially exercised or when the order has been passed in consequence of some misapprehension of law or fact. (Vol 26) 1939 Mad 654 (655)* (Vol 20) 1933 All 299 (301) * (Vol 18) 1931 All 126 (128)* (Vol 10) 1923 Bom 206 (206, 207) : 47 Bom 559. (Discretion not properly exercised—Appellate Court will interfere.)* (Vol 16) 1929 Bom 63 (65) : 53 Bom 178. (Discretion not properly exercised — Appeal lies.)* (Vol 33) 1946 Cal 249 (258) : I L R (1944) 2 Cal 487* (Vol 7) 1920 Cal 1009 (1011, 1013)* (Vol 17) 1930 Lah 234 (234)* (Vol 9) 1922 Lah 229 (230)* (Vol 27) 1940 Mad 589 (589) * (Vol 20) 1933 Nag 49 (49) : 29 Nag L R 8* (Vol 2) 1915 Nag 65 (66) : 11 Nag L R 189* (Vol 31) 1944 Oudh 57 (59)* (Vol 24) 1937 Oudh 282 (288) : 13 Luck 171* (Vol 32) 1945 Pat 184 (185) : 23 Pat 927* (Vol 21) 1934 Pat 397 (398)* (Vol 29) 1942 Pesh 39 (40) * (Vol 8) 1921 Upp Bur 20 (21) : 4 Upp Bur Bul 8* (Vol 24) 1937 Sind 159 (160)* (1912) 6 Sind L R 226 (227).

[7] Order for costs—Second appeal lies where lower Courts apply wrong principles or there is error of law in awarding costs. (Vol 27) 1940 Mad 589 (589) * (Vol 13) 1926 All 419 (420) * (Vol 6) 1919 All 214 (216) : 41 All 254 * (Vol 6) 1919 Cal 947 (947) * (1912) 13 Ind Cas 201 (203) (Cal) * (Vol 7) 1920 Lah 164 (164) * (Vol 6) 1919 Lah 418 (418) * (Vol 4) 1917 Mad 876 (877) * (Vol 27) 1940 Oudh 310 (312) : 15 Luck 526 * (Vol 21) 1934 Oudh 259 (260) * (1912) 15 Ind Cas 429 (430) (Low Bur).

[8] Letters Patent (Madras) Cl. 15—When costs are incidental to judgment appeal lies. (Vol 1) 1914 Mad 418 (419).

[9] An order passed on motion in a suit for recovery of costs against a solicitor, who acts for a non-existing party is an appealable order within the meaning of Letters Patent, Cl. 15. (Vol 20) 1933 Bom 317 (321) : 58 Bom 1.

[10] A mistake committed by a Court on the point of costs is hardly a ground for revision. (Vol 13) 1928 Lah 800 (802).

[11] Discretion properly exercised—High Court will not interfere in revision. (Vol 32) 1945 Pat 184 (185) : 23 Pat 927 * (Vol 17) 1930 Mad 72 (74).

[12] Court passing decree can adjust costs before it even though the decree is appealed against and the appeal dismissed. (Vol 13) 1926 Bom 367 (367).

[13] Discretion of Taxing Master is not generally interfered with by the Court unless he is wrong in principle or clearly wrong in detail. (Vol 8) 1921 Bom 87 (87) : 45 Bom 1234.

4. Arbitration cases. — [1] Court has full power to grant costs of arbitration when award contains no sufficient provision concerning them and the question has not been referred to arbitration. (Vol 19) 1932 All 183 (184) : 54 All 122.

[2] Court holding that reference to arbitration was not valid—Court cannot pass order as to costs of award. (Vol 15) 1928 Mad 370 (370, 371).

[3] Costs of litigation prior to reference to arbitration referred to arbitration — Court cannot deal with it. (Vol 19) 1932 All 183 (184) : 54 All 122.

[4] Arbitrator's fees are part of costs of arbitration. The Court has power to award arbitrator's fees. (Vol 27) 1940 Sind 190 (190) : I L R (1940) Kar 34.

5. Costs by whom payable. — [1] No relief asked against party — Costs cannot be granted against such party. (Vol 17) 1930 Mad 195 (197).

[2] Defendant's costs should be on plaintiff who had no just claim. (Vol 18) 1931 Cal 76 (78, 79) : 58 Cal 561* (1931) 32 Pun L R 540 (541).

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[3] Court exercises its discretion properly in saddling real contesting defendants with costs. The discretion is absolute. (Vol 23) 1936 Lah 607 (608) : 17 Lah 520.

[4] Suit abating on ground that deceased defendant's representative has not been brought on record—Plaintiff is not liable to pay costs to defendant's heirs. (1912) 22 Mad L Jour 439 (440).

[5] Court can award costs against all or any of defendants to suit. (Vol 3) 1916 Oudh 30 (37)* (Vol 21) 1934 Lah 739 (739).

[6] Two defendants—Only one made liable for plaintiff's "costs of this suit" — Costs are to include costs in respect of other defendant against whom no relief was obtained. (Vol 20) 1933 Bom 106 (107) : 57 Bom 589.

[7] Plaintiff claiming relief against either of two defendants who disputed their liability — Unsuccessful defendant should bear other defendant's costs. (Vol 4) 1917 Sind 47 (50) : 11 Sind L R 1.

[8] Appeal by defendant against plaintiff and defendant 2 which was municipality - Appeal allowed—Plaintiff ordered to bear costs of appellant and municipality even though it supported plaintiff. (Vol 33) 1946 Nag 152 (159) : I L R (1946) Nag 73.

[9] Surviving appellant not solvent to pay costs — Costs can be ordered against estate of deceased appellant. (Vol 21) 1934 All 1 (4) : 55 All 687.

[10] Privy Council appeal presented but not prosecuted — Costs on petition for leave to appeal to Privy Council are to be paid by appellant. (Vol 12) 1925 Bom 471 (472).

[11] Secretary of State unsuccessful in litigation—He is liable to pay costs. (Vol 7) 1920 Pat 182 (185) : 5 Pat L Jour 321 : 21 Cri L Jour 475.

[12] In test cases there should be no order for costs. (Vol 26) 1939 Rang 432 (433) : 1939 Rang L R 504.

[13] As an ordinary rule, only the parties to a litigation can be made liable for costs, but in exceptional cases a Court may make a stranger to a suit liable for costs. (1912) 16 Ind Cas 381 (382) (Cal)* (Vol 29) 1942 All 233 (234) : I L R (1942) All 832 (FB)* (Vol 17) 1930 All 225 (241) : 52 All 619* (Vol 20) 1933 Bom 317 (321) : 58 Bom 1* (Vol 29) 1942 Oudh 279 (281)* (Vol 17) 1930 Mad 577 (579) : 53 Mad 708* (Vol 28) 1941 Mad 198 (199)* (Vol 21) 1934 Nag 250 (250).

6. "Costs of and incident to all suits." — [1] Suit abating on cause of action not surviving death of plaintiff — Court can award costs to defendant out of plaintiff's estate — Words "costs of and incident to all suits" are wide enough to cover such case. (Vol 7) 1920 Mad 289 (290) : 43 Mad 284.

[2] Costs of interlocutory application ordered to be costs in cause—Party getting general costs of the action is entitled to such costs—Judge hearing the case cannot interfere with the order. (Vol 13) 1926 Bom 596 (598, 599) : 50 Bom 430. (25 Bom 230, overruled.)

[But see (Vol 11) 1924 Bom 398 (398).]

[3] Words "costs would abide the result" do not mean that costs will follow the result—Discretion of Court is not fettered by the expression. (Vol 3) 1916 Mad 621 (621) : 39 Mad 476 *(Vol 1) 1914 Mad 304 (304) : 39 Mad 476n.

[4] Words "costs to abide and follow the result" mean that successful party must be given costs. (Vol 6) 1919 Mad 757 (796) *(Vol 3) 1916 Mad 621 (621) : 39 Mad 476.

[5] Pleader asked to admit genuineness or otherwise of document is entitled to consult his client—Pleader requesting short adjournment for the purpose should not be burdened with costs. (Vol 23) 1936 Lah 705 (706).

[6] Section 35 which refers to costs of and incident

to all suits is wide enough to cover court-fees. (Vol 18) 1931 Mad 249 (251) : 53 Mad 716.

7. Costs shall follow event.—[1] The ordinary rule is that costs should follow the event unless there is some ground which would be sufficient to deprive the successful party of his costs. (Vol 15) 1928 Mad 346 (348)* (Vol 32) 1945 All 197 (201) : I L R (1945) All 109* (Vol 18) 1931 All 23 (25) : 52 All 991* (Vol 31) 1944 Bom 205 (210)* (Vol 23) 1936 Cal 277 (279)* (Vol 16) 1929 Bom 63 (65) : 53 Bom 178* (Vol 7) 1920 Cal 1009 (1018)* (Vol 20) 1933 Lah 329 (330)* (Vol 13) 1926 Lah 464 (464)* (Vol 30) 1943 Mad 552 (553)* (Vol 30) 1943 Nag 287 (289) : I L R (1943) Nag 511* (Vol 32) 1945 Oudh 233 (235) : 20 Luck 382* (Vol 3) 1916 Oudh 279 (281)* (Vol 10) 1923 Pat 420 (422)* (Vol 23) 1936 Rang 316 (317)* (Vol 20) 1933 Rang 160 (161)* (Vol 24) 1937 Sind 159 (160)* (Vol 23) 1936 Sind 52 (53).

[2] That amount claimed as costs is paltry and suit was uncontested is no ground for disallowing costs. (Vol 32) 1945 Pat 184 (185) : 23 Pat 927.

[3] That claim was exaggerated is no ground for refusing costs. (Vol 3) 1916 Oudh 279 (281)* (Vol 17) 1930 All 225 (244) : 52 All 619 (F B)* (Vol 7) 1920 Cal 1009 (1020)* (Vol 11) 1924 Mad 692 (693). (Exaggerated claim justifies award of proportionate costs).

[4] Defendant *ex parte*—Costs cannot be disallowed against him. (Vol 12) 1925 Cal 569 (570).

[5] Trial Court dismissed plaintiff's suit with costs—Upon appeal the decision was reversed—Plaintiff's claim was decreed with costs — Defendants preferred special appeal—Appeal was dismissed but without costs as no one appeared for the respondent. (1886) 12 Cal 197 (199).

[6] Evidence partly false—Costs need not necessarily be disallowed. (Vol 14) 1927 Mad 474 (475).

[7] Defendant offering sum considerably less than due in full satisfaction — Refusal of plaintiff does not disentitle him to costs. (1909) 4 Ind Cas 820 (820) (U B)

[8] The fact that plaintiff did not issue notice to defendant before suit cannot deprive plaintiff of costs. (Vol 29) 1942 All 331 (333).

[9] Defendant succeeding on technical plea — He is entitled to costs. (Vol 1) 1914 Cal 746 (751)* (Vol 29) 1942 Mad 713 (714).

[But see (Vol 31) 1944 Bom 59 (63).]

[10] Where the contention which succeeded in the High Court was not a meritorious one, the successful party was not given costs either in the High Court or in the Court below. (Vol 31) 1944 Nag 145 (146) : I L R (1944) Nag 419.

[11] Questions of law raised not easy of solution—No ground for disallowing costs. (1918) 23 Mad L Jour 638 (645).

[But see (Vol 30) 1943 Pesh 65 (66). (Legal question was not free from doubt — Both parties were directed to bear their own costs in all Courts).]

[12] Plaintiff not accepting suggestion which he might have reasonably accepted—No reason for disallowing costs. (Vol 26) 1939 Cal 131 (134) : I L R (1938) 2 Cal 337.

[13] A party who succeeds on particular issue must ordinarily get his costs of that issue. (Vol 5) 1918 Cal 307 (310, 311)* (1920) 2 Lah L Jour 310 (312).

[14] Party failing on important issues and succeeding on only one — Court is right in ordering that it should get only half costs from other party. (Vol 19) 1932 Mad 470 (471) : 55 Mad 636 *(Vol 31) 1944 Mad 511 (512).

7a. Costs, subject to conditions and limitations. — [1] As to the conditions and limitations regarding the power of the Court to award costs : see O. 11 R. 3, O. 12 Rr. 2 and 4; O. 19 R. 3 (2); O. 21 R. 72 (3); O. 23

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R. 1 (3); O. 24 R. 4; O. 27A R 3; O. 32 Rr. 4 (4) and 5 (2); O. 33 Rr. 10, 11 and 16; O. 34 R. 10 and O. 35 R. 8.

7b. Costs under provisions of any other law.—

[1] Administrator-General's Act, 1913, section 40 provides that a creditor suing the Administrator-General shall be liable to pay the costs of the suit unless he had applied in writing to the Administrator-General in the manner required by that section.

[2] Land Acquisition Act, 1894, S. 27 provides that if the award of the Collector is not upheld, the costs shall be paid by the Collector except in the circumstances set forth in that section. But where the award is upheld, the Court can, in the exercise of its discretion under S. 35, Civil P. C., order the payment of costs to the Collector. (See S. 53, Land Acquisition Act.) (Vol 28) 1941 Mad 198 (199, 200).

[3] Legal Practitioners Act, 1879, Ss. 14 and 15—Petition against pleader charging him with professional misconduct dismissed—Subordinate Court has no power to award costs—High Court, however, can award costs when case comes before it under S. 15. (Vol 30) 1943 Mad 250 (251, 252); I L R (1943) Mad 385 (S B).

[4] Presidency Small Cause Courts Act, 1882, S. 22 provides that in certain suits specified therein no costs shall be allowed to the plaintiff.

[5] Specific Relief Act, 1877, S. 18 (d) provides that where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, and to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let. However, the Court can under S. 35, Civil P. C., decline to award the defendant his costs in the light of his conduct in the suit, even though the vendor's suit is dismissed. (Vol 27) 1940 Mad 739 (743).

8. Costs when shall not follow event. — [1] Rule that costs follow event may be departed from in proper case according to its circumstances. (Vol 13) 1926 Bom 189 (194).

[2] When costs do not follow event, reasons must be given. (Vol 12) 1925 Bom 527 (528, 529) * (1909) 11 Bom L R 1187 (1192) * (Vol 7) 1920 Cal 1009 (1020). (Reasons must be in writing.) * (Vol 29) 1942 Mad 713 (714). (Mere reference to circumstances of case with no further detail is not sufficient.) * (Vol 15) 1928 Nag 171 (171, 172) * (Vol 15) 1928 Oudh 224 (225).

[3] Section 35 (2) is not applicable when suit is not decided on merits. (Vol 6) 1919 Pat 257 (258).

[4] Suits based on immoral contracts—Costs should not be allowed. (Vol 15) 1928 Sind 173 (174).

[5] Costs disallowed as interest claimed was very high. (Vol 10) 1923 Oudh 8 (8).

[6] Where the costs of the suit have been seriously aggravated by the defendant's claim which is unfounded, he ought not to have the costs which otherwise would have been awarded to him. (1692) 19 Cal 253 (267); 19 Ind App 48 (P C) * (1911) 33 All 344 (356); 38 Ind App 104 (P C). (Raising inconsistent pleas.) * (1940) 42 Bom L R 563n (564n). (Plaintiff making allegation which he could not support.) * (1913) 15 Bom L R 130 (172) * (1910) 14 Cal W N 1031 (1033) * (Vol 17) 1930 Lah 240 (241). (Carelessness of applicant in revision.) * (Vol 27) 1940 Mad 739 (743). (Untrue contentions.) * (Vol 20) 1933 Mad 166 (168); 56 Mad 447. (Bad conduct.) * (Vol 17) 1930 Mad 154 (158). (Conduct not creditable and straightforward.) * (Vol 31) 1944 Nag 282 (283); I L R (1944) Nag 638. (Conduct not fair — Costs disallowed.) * (Vol 30) 1943 Pat 403 (405). (Party succeeding—Conduct of, harass-

sing — Costs ordered to be borne by each party.) * (Vol 21) 1934 Oudh 10 (11).

[7] Everything that increases litigation and places on defendant unnecessary burden is good ground for depriving plaintiff of costs. (Vol 7) 1920 Cal 1009 (1013, 1014) * (Vol 11) 1924 All 808 (809); 46 All 733. (Decision not appealable but bad on merits — Costs not allowed.)

[8] A successful party ought to be deprived of his costs if he has needlessly protracted the trial. (Vol 3) 1916 P C 110 (113); 44 Cal 186; 43 Ind App 249 (P C) * (Vol 18) 1931 P C 289 (293); 58 Ind App 881; 55 Mad 93 (P C) * (Vol 8) 1921 P C 6 (7); 45 Bom 718; 48 Ind App 181 (P C).

[9] Case decided on point not taken at early stage—Costs refused. (Vol 33) 1946 Nag 203 (204, 206); I L R (1946) Nag 425 * (Vol 20) 1933 All 120 (122); 55 All 68 * (Vol 30) 1943 Bom 362 (365) * (Vol 31) 1944 Lah 126 (127) * (Vol 20) 1933 Lah 104 (104) * (Vol 16) 1929 Lah 246 (246) * (Vol 31) 1944 Mad 429 (430) * (Vol 27) 1940 Nag 8 (13) * (Vol 20) 1933 Rang 38 (38) * (Vol 16) 1929 Rang 148 (150); 7 Rang 75.

[10] Suit brought without necessity — Costs should not be saddled on defendant. (Vol 23) 1923 Bom 342 (343).

[11] False defence — Costs disallowed to defendant. (Vol 3) 1916 Cal 675 (676); 43 Cal 190.

[12] Suit based on law since overruled—Costs should not be allowed. (Vol 7) 1920 Mad 567 (568); 43 Mad 61 * (Vol 17) 1930 All 167 (168).

[13] Failure to present case properly — Costs refused (Vol 17) 1930 Mad 218 (221); 53 Mad 480 * (Vol 20) 1933 All 216 (217) * (1910) 12 Cal L Jour 368 (375) * (Vol 19) 1932 Lah 452 (455); 13 Lah 375. (Inartistic drafting of plaint.) * (Vol 14) 1927 Lah 723 (724) * (Vol 13) 1926 Mad 642 (643). (Omission to point out correct law.)

[14] Defendant forcing plaintiff into litigation is not entitled to costs. (Vol 4) 1917 P C 80 (84) (P C).

[15] Government added party at its own request is not entitled to costs though successful as objection about validity of Act failing. (Vol 33) 1946 Lah 6 (9).

[16] Plaintiff's suit for ejectment decreed—No order as to costs as ejectment proceedings could have been taken in Small Cause Court. (Vol 8) 1921 Bom 34 (35); 45 Bom 1236.

[17] Successful party ordered to pay costs of other party. (Vol 12) 1925 Oudh 561 (565); 28 Oudh Cas 203 * (Vol 5) 1918 Cal 464 (465) * (Vol 4) 1917 Cal 469 (477).

[18] In the following cases costs were not allowed to either party: (Vol 1) 1914 Mad 218 (219). (Both parties blamed for litigation.) * (Vol 17) 1930 Lah 789 (790). (Court making order *suo motu*.) * (Vol 2) 1915 Lah 310 (810). (Both parties making false allegations.) * (Vol 32) 1945 Mad 253 (255). (Both parties failing and succeeding in part.) * (1913) 25 Mad L Jour 199 (204) (P C). (Act of Court induced by mistake of parties — Act set aside—No order as to costs.)

[19] In the following cases each party was ordered to bear his costs: (Vol 31) 1944 Nag 279 (279, 280); I L R (1944) Nag 749. (Each party responsible for confusion.) * (Vol 31) 1944 Cal 385 (386) * (Vol 7) 1920 Cal 669 (673); 47 Cal 524. (Suit caused by conduct of returning officer.) * (Vol 31) 1944 Lah 158 (159). (Divergence of opinion.) * (Vol 27) 1940 Lah 182 (183). (Case turning upon construction of Act.) * (Vol 31) 1944 Nag 98 (99); I L R (1944) Nag 170. (Plaintiff's suit dismissed — Whole trouble due to defendant 5 — Costs of defendants 1 to 4 were ordered from defendant 5 and defendant 5 and plaintiff were to bear own costs.) * (Vol 30) 1943 Nag 299 (302); I L R (1944) Nag 90. (Plaintiff failing — Defendant's act dishonest.) * (Vol 30) 1943 Sind 242

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(247) : I L R (1943) Kar 315. (Appellant, whose appeal was allowed, asking for leave to amend plaintiff.)

9. Decree as to costs — Construction and execution.—[1] Decree for costs without indicating proportions—Decree imposes joint and several liability on all judgment-debtors. (Vol 20) 1933 Pat 24 (25) (Vol 10) 1923 Pat 215 (216).

[2] Two defendants jointly represented by one pleader—Suit against one dismissed with costs and as against other decreed with costs—Judgment silent as to apportionment of costs—Court should be held to have allowed half counsel's fee to successful defendant. (Vol 6) 1919 Lah 30 (31) : 1919 Pun Re No 92.

[3] Order as to costs should not be interpreted as personal order in absence of specific provision. (Vol 17) 1930 Oudh 167 (168) : 5 Luck 595.

[4] Decree directing that defendants would be entitled to half their costs from plaintiff — Costs to be first charge on sale proceeds of certain property—Costs held could be recovered personally from plaintiff as decree gave personal decree to defendants with charge upon sale proceeds. (1937) 1937 Mad W N 292 (293).

[5] Reversal of decree in part does not entitle the defendant to recover costs unless the Court directs. (Vol 14) 1927 Cal 906 (907).

[6] Decree of appellate Court silent as to costs of trial Court—Decree of trial Court as to costs can be executed. (Vol 7) 1920 Low Bur 118 (121) : 10 Low Bur Rul 280 (1912) 16 Ind Cas 381 (382) (Cal).

[7] Where a consent decree provides that costs of one of the parties should be paid to the solicitors, the solicitors, though not parties to the suit, can enforce the decree. (Vol 19) 1932 Bom 378 (384).

[8] A decree in a probate case directing that the costs of both the parties should be paid out of the estate and that joint letters of administration should be issued to both the parties cannot be executed by one party against the other but the proper course is to sell or mortgage a sufficient portion of the estate to pay off the costs of the parties. (Vol 1) 1914 Cal 827 (828).

[9] Execution of decree as to costs awarded in preliminary decree in partition suit need not be stayed till the passing of final decree. (Vol 13) 1926 Lah 605 (606).

10. Divorce cases. — [1] Divorce—Husband must pay wife's costs even if her defence fails. (Vol 9) 1922 All 243 (243).

[2] Suit for judicial separation—Parties professing Jewish religion—Wife praying for order on her husband to pay her costs—Costs cannot be paid—Case held governed not by Letters Patent (Calcutta), Cl. 35, but by Cl. 12. (Vol 17) 1930 Cal 558 (558, 559) : 57 Cal 1089.

11. Extent of costs. — [1] Ordinarily costs should be awarded to parties according to success or otherwise in the litigation. (Vol 12) 1925 Cal 297 (299) (1910) 5 Ind Cas 121 (121) (All). (Suit withdrawn without contest — Only half of pleader's fee allowed) (1903) 30 Cal 213 (217). (Plaintiffs' claim allowed in part—Parties will pay and recover costs in proportion) (1903) 30 Cal 536 (538) (Vol 33) 1946 Lah 6 (9) (Vol 15) 1928 Mad 16 (17). (Suit by Hindu reversioner against alienees—Costs should be proportionate to each alienee's interest.) (Vol 31) 1944 Oudh 65 (77, 78) : 19 Luck 320. (Original value at 11 lacs amended to one lac and half — Costs to be on amended value) (Vol 29) 1942 Oudh 392 (394) (Vol 1) 1914 Oudh 118 (122). (Court-fee on part of claim withdrawn cannot be included in costs) (Vol 12) 1925 Sind 275 (280) (Suit overvalued—Costs will be allowed on proper valuation).

[2] Defendant resisting just demand of plaintiff for considerable time—Plaintiff can get full costs. (1910) 1910 Pun L R No. 76 p. 228 (229, 230).

[3] Plaintiff rejected at early stage—Excessive costs should not be allowed. (Vol 1) 1914 Lah 268 (269) : 1914 Pun Re No 35.

[4] Plaintiff finding difficulty in valuing his claim—He is entitled to full costs. (Vol 16) 1929 All 214 (218) : 51 All 509.

[5] Costs on special scale should not be granted save in very exceptional cases. (Vol 8) 1921 Cal 185 (190, 191) : 48 Cal 427.

[6] Contract of indemnity—Suit on—Plaintiff should be awarded actual costs incurred if reasonable. (Vol 8) 1921 Mad 544 (545) : 43 Mad 898.

[7] Case decided on preliminary point—No examination of witnesses and argument also not very long—Held full *ad valorem* costs were excessive. (Vol 20) 1933 Rang 337 (338).

[8] Court ought to give successful party such costs as are necessary to enable him to place his case properly before the Courts. (Vol 8) 1921 Bom 71 (72) : 45 Bom 1177 (Vol 17) 1930 Bom 24 (27) : 54 Bom 62.

[9] Discretion under S. 35 extends in many instances to the question whether a particular item should be allowed as costs of a party and, if so, for what sum. (Vol 32) 1945 Pat 184 (185) : 23 Pat 927.

[10] Charges incurred in procuring attendance of witnesses whether summoned through Court or not can be included. (Vol 15) 1928 Lah 800 (801) (Vol 10) 1923 Cal 315 (315). (Travelling expenses of witnesses).

[11] Witnesses summoned but not examined — Costs cannot be claimed by the party summoning them. (Vol 23) 1936 Lah 681 (681) (Vol 17) 1930 Oudh 432 (433).

[See however (Vol 16) 1929 All 873 (874, 875). (Witnesses attending but not examined — Still diet money can be charged when defence is not disclosed).]

[12] Respondent lodging a case but absent at hearing — Appeal dismissed — Costs up to lodging should be allowed. (Vol 12) 1925 P C 169 (170) : 47 All 459 (P C).

[13] Person continuing appeal under O. 22, R. 10 — Dismissal of appeal — Such person is liable for full costs of respondents and not costs incurred from date of his application under O. 22, R. 10. (Vol 20) 1933 Mad 411 (413) : 56 Mad 469.

[14] One plaintiff alone appealing making the other respondent — Decree reversed with costs — Appellant alone must get appeal costs. (Vol 10) 1923 All 119 (120).

[15] Several defendants — Suit dismissed against all — Each defendant is entitled to costs on the basis of suit valuation. (Vol 12) 1925 Bom 432 (432).

[16] Costs recovered by decree-holder from some defendants—Remaining defendants are liable not jointly but only to the extent of their respective shares. (Vol 20) 1933 Lah 960 (960).

[17] Suit by or against Government—Costs awarded to Government — Bill of costs must be taxed without reference to arrangement existing between Government and its legal advisers regarding their remuneration. (Vol 3) 1916 Bom 258 (260) : 40 Bom 588.

[18] Land acquisition cases—Calculation of—Costs should be in same way as in ordinary suits. (Vol 4) 1917 Lah 337 (338) : 1916 Pun Re No 126.

12. Insolvency and winding-up proceedings.—[1] Application by creditor for liquidation of company made not bona fide — He should be saddled with costs of liquidation. (Vol 21) 1934 Lah 746 (750).

[2] Unsuccessful proceeding by liquidator in winding up — Costs are payable out of company's assets and in priority to costs of liquidation. (Vol 15) 1928 Bom 252 (259, 260) : 52 Bom 477.

[3] Receiver is personally liable to pay costs to the other side. But he can get himself reimbursed out of insolvent's estate. (Vol 18) 1931 Nag 143 (144) (Vol 19) 1932 All 288 (289) : 54 All 444 (Vol 16) 1929 Mad 105 (106) : 52 Mad 263.

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[4] Petitioning creditor's petition dismissed with costs — No set off is permissible to petitioning creditor to extent of debtor's attorney's lien for costs. (Vol 17) 1930 Bom 516 (517) : 55 Bom 377.

13. Interest on costs. — [1] Power of awarding interest on costs is discretionary. (Vol 3) 1916 All 303 (304).

[2] Interest should not be allowed to run on costs until such costs have been actually incurred. (1921) 60 Ind Cas 345 (346) (Lah).

[3] Judgment not allowing interest on costs — Court can include such interest in decree. (Vol 3) 1916 All 303 (304).

[4] Court executing decree cannot allow interest on costs if not mentioned in decree. (1871) 6 Beng L R (App) 33 (33).

[5] The costs of the Privy Council do not carry interest unless such interest is specially mentioned. (Vol 21) 1934 Pat 192 (194) : 13 Pat 21.

[6] Costs bear interest *ipso facto* at the court rate until realisation. (1910) 14 Cal W N 1093n (1095n).

[7] High Court will refuse to allow interest on costs, where the decree is silent. (1877-78) 3 Cal 351 (352).

[8] Court can award decree-holder interest on costs which judgment-debtor may be liable to refund to him. (Vol 5) 1918 Oudh 119 (120) : 20 Oudh Cas 327.

[9] Judgment directing decree to be given for certain sum with proportionate costs and future interest till realisation—Interest held was payable only on principal sum decreed and not on costs. (1921) 60 Ind Cas 345 (346) (Lah).

14. Maintenance suits. — [1] Costs in maintenance suits—Court should see whether claim was *prima facie* exaggerated — Plaintiff claiming Rs. 40 per month — Court decreeing Rs. 31 per month—Claim held was not exaggerated so as to order plaintiff to pay defendant's costs on portion disallowed. (Vol 17) 1930 Mad 479 (483).

[2] Maintenance suit in *forma pauperis* by Hindu widow — Plaintiff alone should be awarded costs in proportion of success. (Vol 7) 1920 Mad 890 (892).

[3] Hindu widow kept back from information of family income and hence claiming maintenance at a rate found to be excessive — Defendants coparceners putting vexatious pleas to defeat her claim — Direction to defendants to pay plaintiff's all costs is proper. (Vol 15) 1928 Mad 216 (222, 223).

15. Mortgage suits. — See O. 34, R. 10.

16. Partition suits. — [1] Costs in partition suit up to preliminary decree—Parties should bear their own costs—But the institution fee should be borne proportionately by all. (Vol 10) 1923 Bom 464 (466)* (Vol 2) 1915 Cal 618 (619) : 42 Cal 451* (1909) 10 Cal L Jour 503 (516).

[2] It is incorrect that in partition suits, parties should bear their own costs up to the preliminary decree. The question depends upon the nature of the dispute raised. (Vol 29) 1942 Pat 76 (77) * (Vol 17) 1930 Pat 336 (336) : 9 Pat 773. (Defendants not contesting plaintiff's case — Plaintiff is not entitled to costs up to preliminary decree.)

[3] Partition suit — Costs up to preliminary decree should come out of estate. (Vol 7) 1920 Mad 149 (150).

[4] In a suit for partition, the Court has a discretion to award costs against a party who raises a vexatious contention and fails. (1913) 21 Ind Cas 746 (748) (Mad) * (Vol 18) 1931 Cal 573 (574)* (1909) 10 Cal L Jour 503 (516)* (Vol 17) 1930 Lah 229 (230).

[5] Suit for partition and mesne profits—Preliminary decree directing enquiry into mesne profits — Final decree directing payment of mesne profits — Plaintiff paying court-fee at time of execution and seeking to

recover same from defendants — Direction for court-fee held implied and plaintiff held entitled to recover same from defendant. (Vol 30) 1943 Mad 689 (689, 690).

17. Principles governing award of costs. — [1] The theory on which costs are now awarded to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in Court and consequently the party to blame pays costs to the party without fault. (Vol 8) 1921 Cal 185 (190, 191) : 48 Cal 427.

[2] Court while awarding costs is not confined to the consideration of the conduct of the parties in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation. (Vol 12) 1923 Cal 569 (570)* (1911) 13 Cal L Jour 404 (411).

[3] Award of costs is in the discretion of Court. (Vol 33) 1946 Cal 249 (258) : I L R (1944) 2 Cal 487 * (Vol 29) 1942 All 233 (237) : I L R (1942) All 832 * (Vol 20) 1933 All 311 (311, 312)* (Vol 28) 1941 Bom 16 (17) : ILR (1940) Bom 837* (Vol 20) 1933 Bom 304 (305) * (Vol 3) 1916 Cal 126 (135) * (Vol 20) 1933 Lah 585 (587).

[4] Discretion is a judicial discretion to be exercised on general principles and not arbitrarily. (Vol 32) 1945 Pat 184 (184) : 23 Pat 927* (1903) 7 Cal W N 647 (648, 649)* (Vol 7) 1920 Cal 1009 (1013) * (Vol 7) 1920 Lah 164 (164)* (1904) 27 Mad 341 (342).

[5] Discretion should not be limited by artificial rules. (Vol 7) 1920 Mad 567 (568) : 43 Mad 61.

[6] Discretion to be exercised must be subject to limitation prescribed in other parts of the Code. (Vol 24) 1937 Mad 145 (145).

[7] Costs by way of disciplinary action are not permissible. (Vol 17) 1930 All 225 (249, 250) : 52 All 619 (F B).

[8] Sometimes costs may be of penal nature. (Vol 29) 1942 All 233 (237) : I L R (1942) All 832 (F B).

18. Privy Council practice.—[1] Privy Council rarely interferes with costs. (Vol 19) 1932 P C 13 (21) : 59 Ind App 1 : 6 Luck 556 (P C).

19. Probate cases.—[1] Probate action—Defendant making unfounded allegations against propounder — Defendant ordered to pay all costs of propounder. (1910) 7 Ind Cas 301 (313, 314) (Bom).

[2] Plaintiff seeking to establish will under which he was given legacy. The will was not attacked but the plaintiff merely put to proof of it. Costs should be awarded to both parties out of estate. (Vol 28) 1941 Mad 502 (504).

[3] Application for letters of administration failing as will was not properly attested — Costs should come out of estate dealt with in will. (Vol 16) 1929 Pat 401 (404) : 8 Pat 419.

20. Representative suits.—[1] If the representative party alone is to bear the costs he should be named in the order. If the representative and the party he represents are to bear the costs, then the order should clearly specify that. (Vol 4) 1917 Bom 141 (148) : 42 Bom 556.

21. Return of plaint.—Costs — [1] Court returning plaint for presentation to proper Court should itself make order as to costs. (Vol 32) 1945 Mad 168 (169) * (Vol 29) 1942 Mad 85 (35).

22. Separate costs — [1] Two sets of defendants—One counsel engaged—Oneset of costs should be allowed. (Vol 32) 1945 Sind 21 (32) : I L R (1944) Kar 364 * (1887) 9 All 205 (210) * (1894) 4 Mad L Jour 281 (281) * (Vol 21) 1934 Rang 259 (260).

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[2] Separate appearance of respondents or defendants found unreasonable — Only one set of costs should be allowed. (Vol 28) 1941 Bom 16 (17) : I L R (1940) Bom 837.

[3] Separate defendants—Defendant having independent case engaging separate pleader is entitled to separate costs. (Vol 29) 1942 Bom 284 (288, 289) : I L R (1942) Bom 782 * (Vol 28) 1941 Bom 307 (309) * (Vol 3) 1916 Mad 575 (577, 578) * (Vol 16) 1929 Oudh 536 (538).

[See however (1873) 11 Beng L R 158 (170) (P C). (Respondents having same interests, but severed in their defences—Only one set of costs allowed and that to respondents who first entered appearance.)]

[4] Two objections under O. 21, R. 58 — Questions common but judgment-creditors not connected in any way—Two sets of costs should be allowed on objections being dismissed. (Vol 30) 1943 Sind 23 (24) : I L R (1942) Kar 153.

[5] Object of plaintiff that if one party was not liable other was liable — Two sets of costs can be properly awarded. (Vol 20) 1933 All 466 (468).

[6] Expression "suit dismissed with costs" means that plaintiff is to pay costs of all defendants, i. e., two or more sets if separate costs have been incurred. (Vol 29) 1942 Bom 284 (288) : I L R (1942) Bom 782 * (Vol 28) 1941 Bom 16 (17) : I L R (1940) Bom 837.

[7] Where more than one plaintiff appear in a suit, they are entitled to one set of costs only as between them and not to separate sets. (Vol 26) 1939 Rang 108 (111) : 1938 Rang L R 252.

23. Separate suit for costs. — [1] Costs awarded by an executable decree — No suit lies to recover costs so awarded. (Vol 19) 1932 Lah 257 (257) : 13 Lah 551. (Such suit will be barred under S. 47.)

[See however (Vol 12) 1925 Mad 279 (280, 281): 48 Mad 482.]

[2] Costs incurred but not awarded by Court having jurisdiction to award costs — Separate suit to recover such costs is barred. (1877-78) 2 Bom 360 (362).

[3] Per *Mears, C. J.* — If under any particular proceeding the Court is not empowered to grant costs, no costs can be granted in an independent action by any other Court. (Vol 9) 1922 All 143 (144).

[But see (1886) 8 All 452 (461). (Per *Mahmood J.* — Where the former Court is not entitled to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit.) * (1870) 6 Mad H C R 192 (193) (F B). (District Court having no power to grant costs in a suit to compel registration of document — Action for recovery of costs lies.)]

[4] Suit by benamidar — Failure of defendant to raise question of liability of real plaintiff for costs precludes him from raising that question by separate suit. (Vol 29) 1942 All 233 (234) : ILR (1942) All 832 (F B).

[5] Recovery of costs awarded against a solicitor who acts for a non-existent party can be made by an application in the suit itself, though a separate suit is competent. (Vol 20) 1933 Bom 317 (321): 58 Bom 1.

[6] Person not party objecting to attachment and under erroneous decision ordered to pay costs of other side — He can recover sum so paid as damages in separate suit. (Vol 6) 1919 Oudh 31 (32).

[7] In a suit for damages for breach of covenant for title plaintiff can claim costs of litigation in which he was damaged. (Vol 7) 1920 Mad 615 (618).

[8] Failure of party to disclose in reply to notice evidence which he was not under obligation to disclose regarding his defence — Suit filed as a result—Defence found to be valid — Other party is not entitled to pro-

ceed with suit only as to costs. (Vol 17) 1930 Bom 152 (152).

24. Stamp cases. — [1] Where a person, whose duty is to have supplied the proper stamp, has failed to do so, the Court is justified in saddling him with costs and penalty. (Vol 32) 1945 Nag 178 (179) : I L R (1945) Nag 928.

25. Suits by or against minors. — [1] Guardian ad litem when a party to suit can be ordered to pay costs — O. 32, R. 11 does not restrict S. 35. (Vol 15) 1928 Mad 590 (591).

[But see (Vol 16) 1929 All 18 (25) : 50 All 733.]

[2] Guardian ad litem not a party — Still costs can be ordered against him. (Vol 16) 1929 Mad 782 (782).

[3] Ordinarily next friend must be ordered to pay successful defendant's costs with liberty to reimburse himself from minor's estate. (Vol 31) 1944 Bom 100 (102) : I L R (1944) Bom 12.

[4] Suit by next friend in *forma pauperis* dismissed as false — Next friend can be ordered to pay costs and court-fee personally. (Vol 30) 1943 Nag 329 (329, 330) : ILR (1943) Nag 775 * (Vol 18) 1931 Mad 249 (250, 251): 53 Mad 716.

[5] Institution of suit unreasonable or improper — Next friend can be made liable for costs. (Vol 22) 1935 Mad 886 (887) : 59 Mad 415.

[6] No express direction in decree to next friend to pay costs — Direction against next friend is not to be imported. (Vol 31) 1944 Bom 100 (102, 104) : I L R (1944) Bom 12.

[7] Minor defendants contesting suit—Direction that non-contesting defendants only should pay costs cannot be justified — Minor defendants should bear costs recoverable from their coparcenary interest in the property. (1935) 18 Nag L Jour 323 (324).

[8] Minor attaining majority but guardian continuing to represent him — Guardian is liable for costs. (Vol 16) 1929 Mad 782 (782).

[9] Unsuccessful infant plaintiff can be ordered to pay costs out of his estate. (Vol 21) 1934 Cal 474 (477): 61 Cal 227.

[10] Charitable society unsuccessfully seeking to be made a guardian was held not entitled to costs as expense was not for welfare of minor or protection of his estate. (Vol 17) 1930 Cal 397 (402) : 58 Cal 15.

26. Suits for construction of wills.—[1] Litigation due to vagueness of testamentary directions — Costs of all parties should come out of testator's estate. (Vol 12) 1925 Sind 195 (201) : 19 Sind L R 220 * (Vol 1) 1914 Mad 304 (304) : 39 Mad 476n.

[2] Special difficulties in construction of will — Successful appellant was ordered to pay all costs of respondent. (Vol 1) 1914 P C 60 (62): 38 Bom 399 (PC).

[3] Construction of will — Attitude of respondent correct and proper — Cause of petitioner justifiable — Costs of both parties ordered to be paid out of testator's estate. (1909) 9 Cri L Jour 214 (218) (Bom).

27. Suits for damages. — [1] Mere fact that plaintiff claims more than he gets is no ground for depriving him of costs unless costs have been increased by claim. (Vol 7) 1920 Cal 1009 (1013) * (Vol 16) 1929 Lah 129 (134) : 10 Lah 816.

[2] Defendant purchasing property from plaintiff undertaking to pay part of price to his creditors—Default by defendant—Suit for damages—Defendant satisfying claim after suit — Plaintiff held entitled to costs. (1911) 34 Mad 479 (480, 481).

[3] Costs for claim of moral damages—It is very difficult to assess a claim for moral damages, and therefore it is hardly right to order proportionate costs. (Vol 16) 1929 Mad 493 (495).

28. Trustee cases.—[1] Trustee is normally entitled to his costs out of estate. But if trustee is guilty of mis-

^a[35A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned, or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees :

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.]

[a] *Inserted by the Civil Procedure Amendment Act, 1922 (9 [IX] of 1922), S. 2, which under S. 1 (2) thereof may be brought into force in any Province by the Provincial Government on any specified date. It has been so brought into force in Bombay, Bengal, U. P., Punjab, Bihar, C. P., Assam, Orissa and Sind.*

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conduct in claiming against trust, he is not so entitled. (Vol 28) 1941 Bom 307 (309, 310) * (Vol 31) 1944 All 281 (281). (Suit under S. 92, C. P. C. — Mutwalli needlessly denying execution of documents knowing them to be genuine — Mutwalli was ordered to pay half costs of suit out of his own pocket.) * (1913) 15 Bom L R 13 (14, 15) (P C) * (Vol 29) 1942 Bom 125 (128) : I L R (1942) Bom 293. (Suit by trustee not complying with S. 92—He is not entitled to costs out of trust estate.) * (Vol 4) 1917 Cal 795 (796) * (Vol 5) 1918 Mad 816 (821) * (Vol 26) 1939 Nag 274 (277).

[2] Trustee suing as plaintiff and incurring liability to costs is personally liable for the same unless Court orders otherwise. (Vol 22) 1935 Mad 5 (5).

Section 35A — Note 1.

[1] Costs are to be compensatory and not penal. (Vol 18) 1931 Lah 509 (511).

[2] Suit filed in Civil Court by witness in criminal case for recovery of additional expenses — Suit not vexatious but only misconceived—S. 35A has no application. (Vol 24) 1937 Pat 477 (479).

[3] Plaintiff having no possible ground for claiming possession conducting suit till end—Order under S. 35A against him is justified. (Vol 23) 1936 Oudh 67 (72) : 11 Luck 436.

[4] Next friend of plaintiff can be ordered to pay compensatory costs under S. 35A. (Vol 31) 1944 Mad 81 (81) * (Vol 17) 1930 All 577 (578) : 52 All 907.

[5] False or vexatious suits brought by plaintiff at instigation of defendant A against other defendants—A supporting plaintiff's claim—Suit dismissed — Compensatory costs can be awarded against both plaintiff and defendant A. (Vol 32) 1945 Mad 84 (85) : I L R (1945) Mad 407.

[6] Valuation of suit Rs. 1800 — Plaintiff awarded Rs. 2275 for counsel's fee — Costs under S. 35A held

should not be allowed. (Vol 25) 1938 All 266 (271) : I L R (1938) All 370.

[7] Dismissal for default under O. 9, R. 8 after warning and on account of subsequent extremely reprehensible conduct on part of plaintiff amounts to abandonment of claim—Court can order compensation under S. 35A. (Vol 18) 1931 Lah 509 (511).

[8] Compensation under the section can be awarded only after objection by the opposite party. (Vol 13) 1926 Lah 472 (472) * (Vol 30) 1943 Mad 286 (288).

[9] Order under S. 35A has to be passed only after recording reasons for holding claim or defence to be false or vexatious. (Vol 30) 1943 Mad 286 (288).

[10] Provisions of Provincial Insolvency Act, (1920), S. 76 are not mandatory — Court exercising discretion in matter of costs may apply S. 35A, Civil P. C. (Vol 22) 1935 Nag 207 (208) : 31 Nag L R 365.

[11] Small Cause Court Judge not vested with jurisdiction up to Rs. 250 cannot grant costs unless empowered by High Court. (Vol 13) 1926 All 554 (555).

[12] Appeal lies with District Judge from an order of Small Cause Court awarding costs under S. 35A. (Vol 13) 1926 All 554 (555) * (Vol 20) 1933 Oudh 477 (478).

[13] An order under this section is appealable ; see S. 104 (ff)—But the appellate Court shall not make any order under this section in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order ; see O. 41, R. 33, Proviso.

[14] Order for costs made in case to which section does not apply — Order is without jurisdiction and will be set aside in revision. (Vol 24) 1937 Pat 477 (479).

[15] Order under S. 35A by Small Cause Court — Even though appeal lies to District Judge, High Court can consider order in revision and interfere if necessary. (Vol 20) 1933 Oudh 477 (478).

PART II. EXECUTION.

["Clauses 36-74. — The bulk of the provisions as to execution will be found in the Rules, but the main provisions as to the Courts by which decrees may be executed, the question to be determined by Courts executing decrees, the limit of time for execution, transferees and legal representatives, procedure in executing, arrest and attachment, the relegation to Collectors of power to execute certain decrees, the distribution of assets and resistance to execution have been retained in the body of the Bill."—S. O. R.]

GENERAL.

36. The provisions of this Code relating to the execution of decrees shall, so far as they are *Application to orders.* applicable, be deemed to apply to the execution of orders.

[Compare 1882, S. 649, para. 1.]

37. The expression "Court which passed a decree," or words to that effect, shall, in relation to the *Definition of Court which* execution of decrees, unless there is anything repugnant in the subject *passed a decree.* or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[1882—S. 649, para. 2 ; 1877—S. 649 ; 1859—S. 296.]

Section 36 — Note 1.

[1] This section applies to all orders that can be included in the definition of the term 'order' given in S. 2 (14). (Vol 21) 1934 Bom 452 (457) : 59 Bom 10 (Order obtained by attorney against his client for payment of costs.) * (Vol 23) 1936 Lah 696 (698) (Order passed in execution proceeding.) * (Vol 2) 1915 Mad 1222 (1223) (Orders granting day costs.)

[2] An order made after the dismissal of a partition suit directing the plaintiff to deposit in Court a certain sum of money as remuneration for work done by the commissioners of partition is an order within the meaning of S. 2 (14); it may be executed as a decree. (Vol 12) 1925 Cal 57 (58, 59) : 52, Cal 269.

[3] The following orders can, by virtue of this section, be executed as decree :—

(a) Order for recovery of amount drawn by Court Commissioner in excess of his dues. (1910) 6 Ind Cas 386 (387) (Cal).

(b) Court sale subsequently set aside — Order for refund of money to purchaser. (Vol 6) 1919 Mad 894 (895).

(c) An order under O. 20, R. 11 (2) can be executed as if it were a decree. (Vol 12) 1925 Rang 189 (191) : 2 Rang 673.

(d) On a judgment on admission decree need not be drawn — Plaintiff may enforce payment as on order in execution by reason of S. 36. (Vol 13) 1926 Sind 119 (120) : 20 Sind L R 216.

(e) Decree that respondents should have all costs, but not mentioning certain costs for which order passed subsequently—Order is executable. (Vol 8) 1921 Sind 13 (15) : 15 Sind L R 11.

[4] Section 36 is not limited to orders made only under Civil Procedure Code. (Vol 21) 1934 Bom 452 (457) : 59 Bom 10 (Section applies to order on a notice of motion passed by a Chartered High Court.)

[5] An order passed against guardian under S. 34, Guardians and Wards Act (8 of 1890) is not executable as it is not one contemplated by S. 2, Civil P. C. (Vol 5) 1918 Mad 889 (890) : 41 Mad 241.

[But see (Vol 12) 1925 All 457 (457).]

[6] The District Judge, acting under a scheme of management, framed by a Court, is not acting in a judicial capacity—He merely acts as '*persona designata*.'

Hence, an order for costs made by him, though legal, is not capable of execution. (Vol 29) 1942 Bom 97 (98).

[7] Where an order is passed in favour of a dead person, it is not altogether a nullity — If a party is dead, the records stand good so far as the living parties are concerned and that any disposal of the case notwithstanding the death of one of the parties will be valid, subject to its being vacated at the instance of the legal representatives of the dead. (Vol 16) 1929 Cal 527 (527).

SECTION 37—SYNOPSIS.

1. Court ceases to have jurisdiction to execute.

1a. Court has ceased to exist.

2. "Court which passed a decree".

3. "To include".

4. Proper Court.

5. Scope and applicability.

1. Court ceases to have jurisdiction to execute.

—[1] When once a Court gets jurisdiction to entertain a suit it does not ordinarily lose such jurisdiction by reason of subsequent events. (1886) 10 Bom 200 (202). (Amount due under money decree increased by accumulation of interest—This amount beyond jurisdiction of Court —Court does not cease to have jurisdiction.) * (1882) 6 Bom 582 (583) * (Vol 20) 1933 Cal 684 (687).

[2] It was argued that Court which passed a decree ceased to have jurisdiction to execute it because after the passing of the decree a party (e. g., Court of Wards) was added in execution who, had he been a party when the suit, wherein the decree was passed, was instituted would have deprived the Court of its jurisdiction : Held that notwithstanding the fact the Court could proceed with execution. (Vol 1) 1914 Bom 180 (181); 38 Bom. 662.

[3] Mortgage decree for sale in respect of properties both within and without jurisdiction—Court has jurisdiction to sell in execution properties outside jurisdiction. (Vol 20) 1933 Lah 687 (687) : 14 Lah 457 * (Vol 26) 1939 Cal 403 (409) : 1 L R (1939) 1 Cal 493 * (1887) 14 Cal 661 (672) * (Vol 13) 1926 Mad 421 (424) : 49 Mad 746.

[4] Specially empowered Munsif of Court A passing decree for over Rs. 1000—Succeeding Munsif having jurisdiction up to Rs. 1000 does not lose jurisdiction to—

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execute the decree passed by his predecessor. (Vol 3) 1916 Pat 3 (3) : 2 Pat L Jour 113.

[5] A Court does not cease to have jurisdiction by the transfer to a different Court by the Provincial Government of the area in which the property in respect of which the decree was passed is situate. (1907) 30 Mad 537 (539).

[6] The transfer by the District Judge of the business of the Court to another Court does not entail the loss of jurisdiction of the former Court. (1898) 25 Cal 315 (316, 319) (1900) 27 Cal 272 (274, 275) (1895) 22 Cal 871 (874, 875) (Vol 8) 1921 Pat 152 (154) : 6 Pat L Jour 304.

[7] Assignment of business to another by District Judge under S. 13 (2) of Bengal, Agra and Assam Civil Courts Act is only arrangement for distribution of civil business and does not in any way curtail jurisdiction of Court which passed the decree. (Vol 29) 1942 Cal 321 (323) : I L R (1942) 1 Cal 289.

[8] Where a decree is passed in respect of a certain property and subsequent thereto the area within which such property is situate is transferred to the jurisdiction of another Court, the Court which passed the decree does not cease to have jurisdiction to execute it. Hence it can entertain an application for its execution. (Vol 29) 1942 Cal 321 (323) : I L R (1942) 1 Cal 289 (Vol 12) 1925 Bom 414 (414) (Vol 7) 1920 Mad 427 (F B), *Approved.*) (Vol 18) 1931 Cal 312 (316, 317) : 58 Cal 882 (1908) 35 Cal 974 (978) (1901) 28 Cal 238 (240, 241) (Vol 22) 1935 Mad 935 (935) (Vol 7) 1920 Mad 427 (433) : 42 Mad 821 (In so far as the decisions in (Vol 1) 1914 Mad 162 : 37 Mad 462 ; (Vol 2) 1915 Mad 602 ; (Vol 5) 1918 Mad 401 ; (Vol 4) 1917 Mad 257 hold that the original Court cannot even entertain an application for execution, they are deemed to have been overruled.) (Vol 6) 1919 Mad 192 (193) : 42 Mad 461 (1928) 107 Ind Cas 195 (197) (Nag) (1906) 9 Oudh Cas 281 (283) (Vol 21) 1934 Pat 192 (194) : 13 Pat 21.

[9] Court passing decree relating to property—Area in which property was situate subsequently transferred to jurisdiction of another Court—Court passing decree though can entertain execution application yet cannot sell the property. (1890) 17 Cal 699 (703, 704) (F B). (15 Cal 667, overruled.) (1893) 20 Cal 105 (106) (Decree should be transferred to the Court having jurisdiction.) (1881) 6 Cal 513 (515, 519) (Do.) (Vol 14) 1927 Mad 627 (629) : 50 Mad 882 (No jurisdiction to sell—Case of mortgage suit—Note :—This case is overruled on another point by (Vol 19) 1932 Mad 418 : 55 Mad 801 (S B).) (Vol 11) 1924 Mad 457 (457) (Transfer under S. 39 is necessary.) (Vol 7) 1920 Mad 505 (506, 508) : 43 Mad 135 (Vol 4) 1917 Mad 272 (273). (Suit for partition—Decree should be transferred to Court having territorial jurisdiction) (Vol 17) 1930 Oudh 305 (308, 309).

[10] The Court to which the local area is transferred subsequent to the passing of the decree relating to property can also entertain an application to execute the decree. (1881) 6 Cal 513 (515, 519) (1901) 28 Cal 238 (240, 241) (25 Cal 315, distinguished).

[See however (Vol 80) 1943 Mad 449 (450, 453) : I L R (1943) Mad 804.]

[11] Section 150 confers upon the Court of the transferred area power to entertain an application for execution. (Vol 7) 1920 Mad 427 (432) : 42 Mad 821 (F B). (Per Wallis, C. J.) (Vol 11) 1924 Mad 32 (32) (1906) 9 Oudh Cas 281 (283) (Vol 12) 1925 Bom 414 (414).

[12] The Court of the transferred area has no jurisdiction to entertain an application for execution. (Vol 19) 1932 Mad 418 (419) : 55 Mad 801 (S B). (The transferee Court can execute only after transmission of decree.

(Vol 14) 1927 Mad 627 : 50 Mad 882, overruled.) (Vol 22) 1935 Mad 935 (935) (Vol 15) 1928 Mad 746 (751).

[13] Temporary Court established for one year and continued thereafter—Its character as Court passing the decree is not lost. (Vol 22) 1935 Mad 849 (849) : 58 Mad 1009.

[14] Political Agent having jurisdiction only over Sirdars—Political Agent passing decree against Sirdar—Thereafter Sirdar dying leaving heirs who were not Sirdars : Held Political Agent ceased to have jurisdiction to execute the decree. (1893) 17 Bom 162 (164).

[15] Where the Subordinate Judge of B became a Court within the jurisdiction of the newly constituted Province of Orissa, it was held on a consideration of the Government notification that the Court ceased to have jurisdiction to execute the decree but that it did not cease to exist. (Vol 26) 1939 Mad 463 (464).

[See also (1881) 6 Cal 513 (519).]

1a. Court has ceased to exist—[1] Court in Madras Presidency transferred to new Orissa Province—Decree-holder filing execution in Court in Orissa Province which passed decree—Execution held not properly filed since by Government notification, the Court passing the decree ceased to exist, when that territory was transferred to another province. (Vol 30) 1943 Pat 423 (424).

[2] Court passing decree ceasing to exist—Decree should be executed by Court having jurisdiction to try suit. (Vol 6) 1919 Pat 367 (368).

[3] A Court that is abolished can be revived (Vol 13) 1926 Pat 209 (210) : 4 Pat 688.

[4] Where the Court which passes the decree is abolished but is subsequently re-established, it can execute the decree provided it would have jurisdiction to try the suit to which the decree relates if it were instituted at the time of the application for execution. (Vol 13) 1926 Pat 209 (209) : 4 Pat 688.

[5] Withdrawal of special jurisdiction vested in Court—Court ceases to exist. (Vol 6) 1919 Pat 237 (238). (Case under Land Acquisition Act) (1896) 19 Mad 445 (448) (Jurisdiction under Small Cause Courts Act).

2. "Court which passed a decree"—[1] A Court other than the one which passed the decree, is contemplated by the definition of "Court which passed the decree" in S. 37. A Court, which ceases to exist does not exhaust that definition, it still leaves room to include a Court, still existing but ceasing to exercise jurisdiction within the meaning of the definition. (Vol 31) 1944 Sind 173 (175) : I L R (1944) Kar 33.

[2] "Court which passed a decree" merely includes another Court besides the Court which originally passed the decree and a Court does not cease to be so merely because the local limits of its jurisdiction are altered or the headquarters of such Court are removed to another place. (1881) 6 Cal 513 (515, 519) (Vol 9) 1922 Mad 10 (11) : 46 Mad 1.

[3] The High Court to which the Privy Council transmits its decree, in receiving and filing it does merely a ministerial act and the District Court does not thereby cease to be the Court which passed the decree for the purpose of recognizing the transferee decree-holder. (Vol 1) 1914 Mad 222 (224) : 38 Mad 832.

3. "To include."—[1] The word "includes" as used in S. 37, though it extends the meaning of the expression "Court which passed the decree" in one sense, does, in another sense, restrict it, under the circumstances specified in cl. (a) and cl. (b) of the section, and substitute for it another Court, which, for purposes of the section, is to be regarded as the only Court which passed the decree. (Vol 29) 1942 Cal 321 (322) : I L R (1942) 1 Cal 289.

[2] Term "shall be deemed to include" is of extensive and not of restrictive jurisdiction—Jurisdiction of

COURTS BY WHICH DECREES MAY BE EXECUTED.

Court by which decree may be executed.

38. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

[1882—S. 223, para. 1 ; 1877—S. 223, para. 1 ; 1859—Parts of Ss. 285 and 286.]

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Court passing decree to execute same is not taken away. (Vol 7) 1920 Mad 427 (431) : 42 Mad 821 (FB).

4. Proper Court. — [1] Jurisdiction to try suits under S. 92 was also conferred on First Class Subordinate Judge's Court after amendment of S. 92 and therefore such Court would be proper Court for executing the decree, within the meaning of S. 37 (b). (Vol 31) 1944 Bom 300 (301, 302).

[2] Order for costs by High Court while refusing application for leave — Order can be executed only by Court to which it is transferred by High Court—Transferee Court cannot transfer it to another Court. (Vol 31) 1944 Cal 301 (301).

[3] Delay in issuing a notification to the effect that the powers of the Judge of a Court have been raised retrospectively from a certain previous date does not affect his authority to dispose of a matter which he disposed of in the interim period. (Vol 2) 1915 Oudh 170 (170).

[4] A preliminary decree for nearly Rs. 2000 was made in a mortgage suit by a Munsif having power to try suits up to Rs. 2000. The Munsif being transferred and his successor not being vested with the same power the final decree was made by the Sub-Judge. Execution was, however, taken out in the Court of the Munsif who in the meantime was vested with jurisdiction. *Held*, that the Munsif's Court could execute the decree under S. 150, though not under Ss. 37 and 38. (Vol 7) 1920 Cal 532 (532) : 47 Cal 1100.

[5] Where the decree which was being executed was a decree of the Calcutta High Court in a suit which arose within the present jurisdiction of the Patna High Court, it was the latter Court which had power to supervise the execution of the decree. (Vol 5) 1918 Pat 352 (354) : 3 Pat L Jour 435.

[6] Court not having jurisdiction at the time execution application is presented, but obtaining jurisdiction before passing order—Court is not bound to dismiss application on the ground that it had no jurisdiction at the time when the petition was filed. (Vol 21) 1934 Mad 283 (286) : 57 Mad 795.

[7] In general, appellate decree if properly drawn is the one to be executed. But there may be cases in which the general and ordinary rule cannot and should not be invariably enforced. In particular circumstances it may be incumbent on the Courts to permit execution of the original Court's decree. (Vol 8) 1921 Low Bur 37 (42) : 11 Low Bur 163.

5. Scope and applicability.—[1] The jurisdiction of a Court resulting from the application of S. 37 (b) in the case of a decree made in a suit filed under S. 92 is not limited or nullified by the provisions of S. 15. (Vol 31) 1944 Bom 300 (302).

[2] Section 37 (b) specifically relates to execution proceedings. Where, therefore, there is transfer of territorial jurisdiction, jurisdiction should not be limited only to suits to the exclusion of execution proceedings. (Vol 31) 1944 Sind 173 (176) : I L R (1944) Kar 33.

[3] The terms of the section are general and draw no distinction as to the nature of the cause which puts an end to the jurisdiction. (1893) 17 Bom 162 (164).

[4] Section 37 has no reference to transferee Court. (Vol 23) 1936 Rang 184 (186).

[5] Section 37 does not take away powers conferred under S. 38. (Vol 31) 1944 Sind 173 (175, 176) : I L R (1944) Kar 33.

[6] Where the Court is one and the same but is

presided over by several Judges, the decree passed by one can be executed by the other. Section 37 (b) does not apply to such a case. (1941) 73 Cal L Jour 351 (353)* (Vol 6) 1919 Pat 367 (369).

SECTION 38 — SYNOPSIS.

1. Applicability and scope.
2. Executing Court—Powers of.
3. Jurisdiction.
4. Powers of transferor Court after transfer of decree. See Notes on S. 42.
5. Simultaneous execution.
6. What decrees may be executed.

1. Applicability and scope. — [1] Section is not exhaustive — Execution application may be transferred under S. 24. (Vol 12) 1925 All 276 (277) : 47 All 57.

[2] Though S. 38 is general in its wording, power of transferring a decree to another Court must be exercised subject to the conditions contained in S. 39. (Vol 5) 1918 Mad 17 (17).

[3] Unless the decree is sent for execution under S. 38 a suit to set aside sale in execution cannot be treated as proceedings in execution under S. 47 (2). (Vol 9) 1922 Nag 189 (191).

[4] If two Subordinate Judges had the same local jurisdiction assigned to them, it is competent for the District Judge to distribute business among the two officers, but that would not empower him to make any order in contravention of S. 38 directing the decree passed by one of the officers be executed by the other. (1941) 73 Cal L Jour 351 (354).

[See however (Vol 6) 1919 Pat 367 (368, 369).]

[5] Court of Deputy Commissioner of Garro Hills is Court within meaning of S. 38. (Vol 24) 1937 Cal 557 (558) : I L R (1937) 2 Cal 734.

[6] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see S. 8.

2. Executing Court—Powers of.—[1] Executing Court has no power to go into disputed questions of fact which would take away its jurisdiction to execute, if the facts are proved. (Vol 24) 1937 Mad 134 (136) : I L R (1937) Mad 329 ((Vol 22) 1935 Mad 647, Reversed.)

[2] An executing Court must proceed on the assumption that there is a valid decree capable of execution. (1911) 15 Cal W N 725 (728).

[3] Executing Court cannot go behind decree. (Vol 20) 1933 Mad 197 (198)* (Vol 19) 1932 Mad 7 (7)* (1928) 1928 Mad W N 227 (227) (Refusal to execute on the ground that the minor was not properly represented in the suit is improper.) * (Vol 21) 1934 Pat 203 (203) : 13 Pat 17.

[4] Objection as to executability of decree cannot be entertained by transferee Court. (Vol 17) 1930 Oudh 305 (308, 309).

[5] Decree without jurisdiction — Executing Court can go into question of jurisdiction. (Vol 30) 1943 Bom 404 (406) : I L R (1943) Bom 665 * (Vol 17) 1930 Cal 327 (328) : 57 Cal 931 (Decree passed against a dead person.) * (Vol 3) 1916 Mad 656 (656) : 38 Mad 682 (Do.) * (Vol 20) 1933 All 751 (752).

[But see (Vol 17) 1930 Bom 141 (143) : 54 Bom 96.]

[6] Transferee Court cannot question transferor Court's power to transfer. (Vol 21) 1934 Mad 266 (266).

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[7] A Court executing a decree may, in certain circumstances, come to the conclusion that the decree is a nullity. But those are cases where the want of jurisdiction of the Court which passed the decree is apparent on the face of the record. (Vol 29) 1942 Pat 152 (156).

[8] Executing Court cannot complete or construe decree. (Vol 2) 1915 All 233 (234).

[9] Decree for possession with mesne profits to be ascertained in execution — The executing Court can award mesne profits exceeding its pecuniary jurisdiction. (1913) 40 Cal 56 (62, 63).

[10] An executing Court cannot sell a property which is situate outside its jurisdiction. (Vol 26) 1939 Pat 532 (533) : 18 Pat 670 * (Vol 5) 1918 Mad 17 (17) (Even in cases the decree is transferred by a Court of competent jurisdiction.)

[11] Mortgage decree — Sale of mortgaged property even though property is beyond jurisdiction can be ordered — But Court has discretion in matter. (Vol 29) 1942 Lah 123 (124)* (Vol 12) 1925 Pat 139 (139)* (Vol 3) 1916 Mad 632 (632).

[12] Court can issue a notice to judgment-debtor living outside its jurisdiction if an application had been made for attachment of his property lying within jurisdiction. (Vol 26) 1939 Rang 433 (434) : 1939 Rang L R 587.

[13] Transferee Court should not order personal arrest. (Vol 17) 1930 Lah 199 (201).

[14] Execution by the very Court which passed the decree — Objection as to territorial jurisdiction of the Court which passed the decree not allowed in execution. (Vol 19) 1932 Cal 380 (380).

[15] Transferee Court cannot question jurisdiction of transferor Court passing decree. (Vol 19) 1932 Lah 601 (601). [See also notes on O. 21, R. 7].

[16] When there is no want of jurisdiction apparent on the face of the decree the party in execution cannot raise a disputed point of fact which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter. (Vol 20) 1933 Mad 362 (363).

[17] Executing Court cannot add to or alter the decree. (Vol 11) 1924 Pat 263 (264) : 3 Pat 221.

[18] See also Notes on S. 47.

3. Jurisdiction. — [1] Territorial jurisdiction is condition precedent to a Court executing a decree. (Vol 18) 1931 Cal 312 (314) : 58 Cal 832 * (Vol 16) 1929 Cal 818 (818) : 57 Cal 67. (Attachment before judgment does not make any difference — O. 21, R. 64 does not apply.) * (Vol 5) 1918 Mad 17 (17) * (Vol 4) 1917 Mad 272 (273, 274) (A Subordinate Judge who passed a decree in a transferred suit cannot execute the decree against properties lying beyond his jurisdiction.)

[2] Court losing jurisdiction over property during execution cannot proceed with it. (Vol 11) 1924 Mad 457 (458).

[3] Sections 38 to 43 nowhere lay down that a decreeing Court is deprived of its jurisdiction by the mere act of transfer of the darkhast. (Vol 16) 1929 Bom 418 (419) : 53 Bom 844.

[4] Where once a Court has acquired jurisdiction in a suit, such jurisdiction will continue in execution proceedings also. (1892) 19 Cal 13 (15) (Suit on mortgage.)

[5] Amount actually due under decree though it may exceed pecuniary jurisdiction of the Court will not affect its jurisdiction to execute it. (1886) 10 Bom 200 (202).

[6] A Court to which decree is transferred can execute transferred decree to extent of its pecuniary jurisdiction even if transferred decree exceeds its pecuniary jurisdiction. (Vol 33) 1946 Sind 103 (106, 107) : I L R (1945) Kar 445.

[7] The value of the property may greatly exceed the value of the decree yet, the executing Court must decide the objection to attachment. (Vol 3) 1916 Lah 377 (378) : 1915 Pun Re No. 101.

[8] An objection to the jurisdiction of an executing Court to order sale of immovable property based on another Court's decree will not be heard for the first time during the hearing of an appeal. (Vol 4) 1917 Mad 591 (591).

[9] High Court on its original side can appoint receiver by way of execution in respect of property situated outside territorial jurisdiction. (Vol 17) 1930 Cal 502 (505, 508) : 57 Cal 964.

[10] Rule that sale in execution of immovable property should be carried out by Court having territorial jurisdiction has primary reference to execution as defined in S. 51 (b) and is not applicable to sales by receivers — But the principle would apply for appointment of receiver when main purpose is to effect sale in execution. (Vol 17) 1930 Cal 502 (503, 504) : 57 Cal 964.

4. Powers of transferor Court after transfer of decree — See Notes on section 42.

5. Simultaneous execution. — [1] Court passing the decree transferring it to another Court for execution — Decree-holder is entitled to make an application to Court transferring decree — Concurrent jurisdiction is permissible — No bar for execution in one Court against property and in another by other means. (Vol 23) 1936 All 655 (655, 656)* (Vol 4) 1917 All 129 (130)* (Vol 22) 1935 Cal 268 (270)* (1882) 8 Cal 687 (690)* (Vol 17) 1930 Lah 199 (201)* (Vol 4) 1917 Mad 591 (591)* (Vol 1) 1914 Mad 435 (435, 436):37 Mad 231 (Certificates of satisfaction not returned but permission for simultaneous execution granted.)* (Vol 10) 1923 Pat 224 (225) : 2 Pat 328. (Rule is no bar to simultaneous executions.)* (Vol 14) 1927 Rang 258 (261) : 5 Rang 397* (Vol 26) 1939 Rang 433 (434) : 1939 Rang L R 587* (Vol 27) 1940 Sind 11 (13) : I L R (1940) Kar 46 (Certificates of satisfaction and decree not returned.)

[But see (Vol 10) 1923 Pat 334 (334) : 2 Pat 247. (Note : This case is of doubtful authority.)]

[2] Simultaneous execution should be allowed only under exceptional circumstances when necessary in the interest of executing creditor without causing hardship to judgment-debtor. (Vol 1) 1914 Mad 435 (435, 436 437) : 37 Mad 231 (Affirmed in (Vol 3) 1916 P C 16 : 39 Mad 640 : 43 Ind App 238 (PC).)

[3] Simultaneous execution against the same property cannot be allowed. (1910) 11 Cal L Jour 69 (73).

[4] Where there was merely an order of transfer but the decree was not actually transferred no question of simultaneous execution arises. (Vol 20) 1933 Sind 78 (80) : 27 Sind L R 109.

[5] An order permitting simultaneous execution is a judicial order and must be passed after proper hearing. (Vol 26) 1939 Bom 258 (259).

6. What decrees may be executed. — [1] Decree reversed or modified or affirmed on appeal — Decree capable of execution is the appellate decree. (1889) 11 All 267 (274) (F B) * (1889) 11 All 346 (347, 348) * (Vol 18) 1931 Pat 27 (29) : 9 Pat 829 (Application to execute trial Court's decree mentioning affirmance on appeal — Sufficient compliance.)

[2] Where the appellate judgment without affirming the decree of the lower Court, simply dismisses the appeal, Court should allow execution of the decree of the original Court. (Vol 8) 1921 Low Bur 37 (42) : 11 Low Bur Rul 163.

[3] Execution of trial Courts' decree — Execution stayed under O. 41, R. 5 — Appeal dismissed and stay order discharged — Decree-holder can apply to executing Court to resume execution proceedings — Fresh application is not necessary even where trial Court's decree is

39. (1) The Court which passed a decree may, on the application of the decree-holder, send *Transfer of decree.* it for execution to another Court,—

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or
- (d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[1882—S. 223, paras. 2, 3; 1877—S. 223, paras. 2 and 3; 1859—Parts of Ss. 235 and 286. See Section 20, O. 21 Rr. 35, 36, 82 to 103 and Order 34.]

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affirmed—Trial Court's decree is not wiped out for all purposes. (Vol 29) 1942 Oudh 84 (87).

[4] Test to determine whether a decree is executable is whether there is a direct and definite order to a definite person to do or to refrain from doing a definite thing. (Vol 21) 1934 Mad 680 (680, 681).

[See also (Vol 29) 1942 Oudh 1 (3) : 17 Luck 249 (Compromise decree — Executability — If the compromise is mentioned in the operative part of the decree, it is capable of execution.) & (Vol 28) 1941 Oudh 587 (589, 590) : 17 Luck 121.]

[5] Every decree to be executed must, as a rule, be a subsisting decree. (1903) 30 Cal 718 (721) & (1906) 29 Mad 175 (176) (Attachment when *ex parte* decree had been set aside — Void.)

SECTION 39 — SYNOPSIS.

1. Application for transfer.
2. Execution application.
- 2a. Notice.
3. Scope.
4. Sub-section (1) (b).
5. Sub-section (2).
- 5a. To what Court decree can be transferred — Question of competency.
6. Transferor and transferee Courts — Powers of.
7. Transmission of decree.

1. Application for transfer. — [1] An application for transfer under S. 39 need not be in any particular form and is not required to give same particulars as one under O. 21, R. 11. (Vol 24) 1937 All 397 (399).

[2] Application for transfer need not specify how certificate should be sent. (Vol 7) 1920 Pat 174 (175).

[3] A mere clerical error in writing the name of a party in an application for transfer under S. 39 is not such a flaw as to make the application invalid — If sufficient particulars are given to indicate with precision the decree to be transferred the application must be considered as in order. (Vol 24) 1937 All 397 (398).

[4] Transfer of decree.—Application for transferring the same decree to third Court can be made to the Court passing the decree. (Vol 14) 1927 Nag 367 (367).

[5] Application for execution made in transferee Court — Application dismissed — Application to the transferring Court which passed the decree for another transfer order— Such transfer application held was made to proper Court and would be deemed step-in-aid. (Vol 24) 1937 Nag 305 (308) : ILR (1937) Nag 440.

[6] Application for transfer of decree to the District Court A—Judgment-debtor resident in district B—The District Judge of A having jurisdiction over districts both A and B—The application is in order. (Vol 15) 1928 Cal 265 (266).

[7] An application for the transfer of the decree is an application which involves a question relating to the execution of decree and an appeal, therefore, lies from an order rejecting such an application. (1904) 8 Cal W N 575 (577).

[8] An order of transfer of decree, made on an application which fails to state that the judgment-debtor has property or resides within the jurisdiction of the Court to which the applicant desires transfer, is not proper. (1939) 41 Pun L R 186 (187).

[9] Court considering application for transfer must go into question of limitation. (Vol 16) 1929 Mad 199 (200).

[10] Rule 2 Ch. 17 of the Rules of the Calcutta High Court permits an application under O. 21, R. 16 to be combined with an application for transmission of a decree for execution. (Vol 19) 1932 Pat 168 (168, 169) : 11 Pat 94.

[11] Decree sent to another Court for execution on decree-holder's application — Question of pecuniary jurisdiction of Court to which it is sent does not arise — It can be sent to any Court. (Vol 1) 1914 Mad 206 (206).

2. Execution application. — [1] An application for execution has to be made to the Court to which decree has been transferred and not to the Court which passed the decree. (Vol 3) 1916 P C 16 (18) : 39 Mad 640 : 43 Ind App 238 (PC).

[2] When execution application is filed in transferring Court before transfer of decree it is not necessary to file a fresh application in transferee Court. (Vol 18) 1931 Cal 312 (316); 58 Cal 832 & (Vol 11) 1924 Pat 120 (121) : 2 Pat 909.

[3] The transferee Court has jurisdiction to entertain application for execution from the date of the passing of the order of transfer. (Vol 27) 1940 Mad 214 (214).

[But see (Vol 15) 1928 Mad 496 (497) & (Vol 18) 1931 Mad 103 (104).]

[4] Transmission for execution to Sub-Court—Transferee Court and not the District Court has jurisdiction to entertain application for execution—Decree has to be sent to the District Court under O. 21, R. 5 only for transmission. (Vol 27) 1940 Mad 214 (214).

2a. Notice. — [1] Transfer of decree being a ministerial act, proceedings are not vitiated by want of notice to judgment-debtors. (Vol 30) 1943 Pesh 87 (88).

Section 39 (contd.)

(Vol 4) 1917 Pat 70, Not followed)* (Vol 23) 1936 Mad 99 (99).

[But see (Vol 22) 1935 Cal 268 (269, 270) (Court can issue certificate of non-satisfaction even when execution is pending — But order for transfer can be made only after issuing notice to judgment-debtor.)* (Vol 4) 1917 Pat 70 (71).]

3. Scope.—[1] Provisions of S. 39 are permissive and not mandatory. (Vol 24) 1937 Cal 570 (572)* (1892) 19 Cal 13 (16) (Section is directory.)

[1a] Word "Court" means Court in British India. (Vol 28) 1941 Mad 309 (311) : I L R (1941) Mad 574 (FB).

[2] The use of the word 'may' does not take away from Court the power to execute its own decree conferred by previous sections, but rather gives it a discretion either to execute the decree itself or on the application of the decree-holder to send it to another Court for execution. (1888) 15 Cal 667 (670)* (1895) 22 Cal 871 (876)* (Vol 19) 1932 Cal 213 (214, 215) : 59 Cal 199 (The discretion is controlled by the provisions of the section.)* (Vol 26) 1939 Cal 651 (654) (Discretion given by S. 39 must be judicially exercised.)* (Vol 31) 1944 Mad 73 (74) (Judgment-debtor not liable to arrest — Still decree can be transmitted to Court where he resides.)

[3] Transfer may be made when any one of the four conditions laid down in the section are satisfied. (Vol 27) 1940 All 331 (331) : I L R (1940) All 318.

[4] Small Cause Court must adopt the procedure mentioned in the section where execution is sought against the person or property outside its local jurisdiction and, as such, cannot attach the salary of a public officer, which is disbursed outside its local jurisdiction. (1884) 6 All 243 (248) (FB).

[5] The test of the applicability of the section is whether the provisions of the Code regulate the procedure of the Court which makes the decree, as also of the Court to which it is transferred for execution. (1907) 34 Cal 576 (582).

[6] Proceedings which are without jurisdiction are not proceedings that can be transferred. (1910) 37 Cal 574 (578).

[7] When Court passes decree and there is decree in appeal therefrom, for all purposes of execution there is only one decree, viz., the original decree as amended by appellate Court — It is only this decree that is transferred. (Vol 20) 1933 Mad 872 (873).

[8] Section does not apply to a decree under the Presidency Small Cause Courts Act. (Vol 15) 1928 Cal 265 (266).

[9] No transfer of a decree should be made for execution so as to evade the provisions of the limitation Act or to validate an invalid application. (Vol 6) 1919 Mad 192 (193) : 42 Mad 461.

[10] It is the decree itself which a Court can transfer for execution under S. 39. The Court cannot, either of its own motion or at the bidding of another Court transfer the *darkhast* or a suit pending before it, unless an order for transfer is duly passed either by District Judge or by High Court. (Vol 26) 1939 Bom 468 (470).

[11] Court which can execute award can transfer it for execution. (Vol 9) 1922 Bom 377 (377, 378) : 46 Bom 128.

[12] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see section 8.

4. Sub-section (1) (b).—[1] Ground for transfer one under sub-s. 1 (b)—Execution will be limited to execution against judgment-debtor who satisfies condition set out in sub-s. (1) (b). (Vol 23) 1936 Cal 521 (523) : 63 Cal 1210.

[2] It would be necessary for the decree-holder to satisfy Court that judgment-debtor has not sufficient property within local limits of jurisdiction of Court which passed the decree sufficient to satisfy decree. (Vol 16) 1929 Cal 529 (529) : 56 Cal 1176.

[3] Court passing decree having within its jurisdiction property sufficient to satisfy decree is not necessarily precluded from transferring decree. (Vol 12) 1925 Oudh 481 (481) : 28 Oudh Cas 199.

[4] Decree transferred for execution by sale to Court within whose jurisdiction part of property covered by decree lies—Such Court can proceed with execution. (Vol 5) 1918 Lah 63 (64) : 1918 Pun Re No. 43.

[5] The jurisdiction of a Court is circumscribed by and co-extensive with its territorial limit. Where property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, it must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. (Vol 5) 1918 Pat 126 (127) : 4 Pat L Jour 141.

[6] Decree for sale—Sale held by Court A — Decree-holder purchaser obstructed in taking possession—Decree may be transferred to Court B for removal of obstruction — Clause (d) need not be considered at all in such cases. (Vol 23) 1936 Sind 11 (13) : 30 Sind L R 290.

5. Sub-section (2).—[1] Section 39 (2) refers to a "Subordinate Court," and one Subordinate Court is not subordinate to another. (Vol 31) 1944 Sind 173 (174, 175) : I L R (1944) Kar 33.

5a. To what Court decree can be transferred — Question of competency.—[1] Meaning of "competent jurisdiction" in sub-s. (2) unmistakably points to the conclusion that it is not open to any and every Court to execute a decree irrespective of its pecuniary jurisdiction and that the competence of the Court to execute a particular decree must be determined by reference to its competence to try a suit of similar valuation in which the decree under the section was passed. (Vol 26) 1939 All 57 (59) : I L R (1939) All 97 [(1884) 7 Mad 397 and (1894) 17 Mad 309, held no longer good law.]* (1940) 1940 Nag L Jour 244 (251) * (1910) 37 Cal 574 (577)* (1889) 16 Cal 457 (464)* (1888) 12 Bom 155 (157).

[But see (1884) 7 Mad 397 (399)* (1894) 17 Mad 309 (311, 314).]

[2] A Court passing a decree cannot send of its own motion to any Court subordinate to it for execution when the value of the subject-matter of the suit of the decree exceeds the pecuniary jurisdiction of that Subordinate Court. (1911) 12 Ind Cas 27 (28) (Low Bur) * (Vol 9) 1922 Pat 188 (189) : 1 Pat 651.

[3] Words 'competent jurisdiction' in sub-section (2) refer to territorial and pecuniary jurisdiction to deal with decree and do not mean competency to try original suit. (Vol 26) 1939 Lah 253 (253, 259) : I L R (1939) Lah 551.

[4] Award under Arbitration Act can be enforced only by District Judge, and it cannot be transferred by him to any other than a District Judge. (Vol 21) 1934 Pesh 107 (109).

6. Transferor and transferee Courts.—Powers of.—[1] Small Cause Court cannot by transferring execution application to its regular side confer upon itself jurisdiction to proceed against immovable property. (Vol 25) 1938 Pesh 70 (71, 72).

[But see (1884) 8 Bom 230 (334) (A Subordinate Judge invested with small cause powers may, for any good reason to be recorded in writing, transfer the decree passed under small cause jurisdiction to the other branch of the same Court, as it might to a different

40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

41. The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

[1882—S. 223, para. 4 ; 1877—S. 223 (4) ; 1859—S. 294.]

Section 39 (contd.)

Court, without requiring a certificate under section 20 of Act XI of 1865.)]

[2] Decree transferred for execution to Court of Government Agent of Vizagapatam—Transmitting Court cannot be presumed to request the Agent's Court to execute against property outside its jurisdiction nor has the latter the power to do so. (Vol 11) 1924 Mad 144 (144).

[3] A District Munsif, receiving by transfer a decree of a village Court under S. 66 of Madras Act I [I] of 1889 or withdrawing execution of a decree to his own file under S. 67 has no jurisdiction to transfer it for execution to another District Munsif under S. 39. (Vol 10) 1923 Mad 651 (652) : 46 Mad 734.

[4] Application for execution to Court passing decree—Such Court can transmit decree to Court where immovable property sought to be sold is situate along with papers required by O. 21, Rr. 3 and 6. (Vol 23) 1936 Cal 267 (269).

[5] Where a decree is transferred to another Court for execution, the transferring Court retains jurisdiction only for limited purposes, namely, for dealing with applications for recording assignment of decrees under O. 21, R. 16 and applications against legal representatives of judgment-debtor. (Vol 20) 1933 Cal 906 (908) : 60 Cal 1176.

[6] Clauses of S. 39 do not limit the powers of the transferee Court—Decree transferred under clause (b)—Transferee Court can order *arrest* of judgment-debtor. (Vol 25) 1938 Mad 27 (29).

[7] Application for bringing legal representatives on record must be made to Court passing decree—Court to which decree is transferred has no jurisdiction to entertain it. (Vol 7) 1920 Nag 174 (175).

[8] Objections to execution should be taken in the Court passing the decree and not in transferee Court. (Vol 14) 1927 Nag 31 (32).

[9] See also Note 3 on S. 41 and Notes 2 and 3 on S. 42.

7. Transmission of decree.—[1] Entire decree and not part of it should be sent for execution to other Court. (Vol 22) 1935 Cal 118 (119) (Vol 4) 1917 Pat 70 (71).

[2] Decree cannot be transferred to another Court for a limited purpose only, i. e., to enable the decree-holder to share in the rateable distribution of assets. (Vol 4) 1917 Pat 221 (222, 223).

[3] Decree can be sent for execution to more than one Court. (Vol 14) 1927 Rang 258 (261) : 5 Rang 397.

[4] Transmitting a decree for execution is a ministerial act. (Vol 23) 1936 Mad 99 (99) (Vol 30) 1943 Pesh 87 (88).

[See however (Vol 16) 1929 Mad 199 (200) (Order for transfer of decree after hearing judgment-debtor's objections is not ministerial.)]

[5] An order for sending a decree to another Court for execution is not an order for execution. An execution application on which such an order has been made will not save limitation for subsequent application. (Vol 22) 1935 Pat 485 (486).

[6] Transmission for execution can be made *ex parte*. (Vol 15) 1928 Rang 40 (42) : 5 Rang 775.

[7] A certificate of transfer of a decree need not be

signed by the Judge who passed it. (Vol 23) 1936 Lah 369 (369).

Section 40—Note 1.

[1] Courts in British India have no authority to send their decrees for execution to Courts not in British India. (1888) 12 Bom 230 (231) (1907) 34 Cal 576 (582).

[2] Decree transferred for execution—Law of limitation applicable for its execution is that applicable to Court which passed decree. (1913) 36 Mad 108 (111, 112) (1897) 24 Cal 473 (491) (1890) 17 Cal 491 (497).

[3] Rules applicable to executions in the Punjab are the rules which apply in execution of decrees sent from anywhere outside province. (Vol 25) 1938 Lah 126 (127, 128) : I L R (1938) Lah 264.

[4] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see section 8.

SECTION 41—SYNOPSIS.

1. Certificate under S. 41.

2. Scope of section.

3. Transferee Court.

1. Certificate under S. 41.—[1] Formal certification by the executing Court to the Court transferring the decree is very necessary. (Vol 11) 1924 Bom 359 (359, 360).

[2] No particular method is prescribed for the certificate under S. 41. (Vol 10) 1923 Bom 371 (371).

[3] Transferee Court dismissing execution and directing that transferor Court should be informed—Certified copy of this order, together with decree-holder's application for transfer, filed in transferor Court—*Held*, this was sufficient compliance with S. 41. (Vol 24) 1937 Cal 557 (559) : I L R (1937) 2 Cal 734.

[4] Once a certificate is given by the transferee Court, the original Court is competent to re-transfer to the same transferee Court on proper application being made. If at the time of application, the certificate of non-satisfaction had not been granted by the transferee Court the defect is cured by the certificate being received subsequently. (Vol 13) 1926 Lah 113 (114).

2. Scope of section.—[1] Madras Civil Rules of Practice, R. 161 (a), is not inconsistent with S. 41, nor is it *ultra vires*. (Vol 13) 1926 Mad 1209 (1209).

[2] Where a Subordinate Judge is invested with Small Cause Court powers and from the small cause side a decree is transferred to original side for execution and comes before the same Judge, then it is impossible to apply S. 41 strictly because that section clearly contemplates different Courts, not different branches of the same Court. (Vol 10) 1923 Bom 371 (372).

[3] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see S. 8.

3. Transferee Court.—[1] The transferee Court retains its jurisdiction to execute the decree either until the execution has been withdrawn from it or until it has fully executed the decree or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. There should be a complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure. (Vol 10) 1923 Bom 396

42. The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

[1882—S. 228; 1877—S. 228; 1859—S. 294; see O. 21 R. 9 and Sch. III, C. P. C.]

Section 41 (contd.)

(396) & (1898) 20 All 129 (132) (Mere striking off an application for some informality in making it does not terminate its jurisdiction, nor is it necessary for it to certify the same to the transferor Court.) & (1909) 9 Cal L Jour 443 (452). & (Vol 20) 1933 Lah 149 (150) & (Vol 17) 1930 Lah 508 (511) & (Vol 12) 1925 Oudh 492 (492) : 28 Oudh Cas 169 & (Vol 19) 1932 Pat 286 (287) : 11 Pat 513 & (Vol 7) 1920 Pat 128 (129).

[See however (Vol 9) 1922 Nag 210 (212) : 18 Nag L R 178.]

[2] The transferee Court cannot grant certificate of non-satisfaction to another Court. It can only execute the decree itself and certify the result to the original Court. (Vol 21) 1934 Lah 330 (331).

[3] Court to which decree is transferred for execution ceases to have jurisdiction after it has taken action under S. 41. (Vol 13) 1926 Pat 274 (275) : 5 Pat 398.

[4] After issue of certificate whether rightly or wrongly the Court to whom the decree is transferred cannot deal with execution matters. (Vol 12) 1925 All 179 (179).

[5] The mere fact that an execution proceeding has been struck off does not indicate the final determination of the execution proceedings in that Court. (1909) 9 Cal L Jour 443 (452) & (Vol 25) 1938 All 412 (413).

[6] Transfer of decree — Judgment-debtor granted time under compromise — Executing Court ordering record to be filed but attachment to subsist — Certificate purporting to be under section 41 sent to transferor Court—Fresh application for execution to proceed and for rateable distribution on judgment-debtor's failure to pay — Certificate sent held unnecessary and was not properly under section 41 — Jurisdiction of executing Court held had not ceased. (Vol 24) 1937 All 766 (768).

[7] Even after issue of certificate under S. 41, transferee Court has jurisdiction to decide objections relating to anything done in the course of its proceedings (Vol 16) 1929 Oudh 76 (77) : 4 Luck 209.

[8] Where a decree has been sent to another Court for execution and no report has been sent to the original Court under section 41, so as to deprive the transferee Court of the power to execute the decree any further, an application to the transferee Court for arrest of the judgment-debtor is one made to the proper Court. (Vol 25) 1938 Mad 27 (28).

[9] See also Note 6 on Section 39 and Note 2 on Section 42.

SECTION 42 — SYNOPSIS.

1. Jurisdiction of transferee Court how long continues.
2. Powers of transferee Court.
3. Powers of transferor Court after transfer.
4. "Shall be subject to the same rules in respect of appeal."

1. Jurisdiction of transferee Court how long continues. — [1] Till the Court to which a decree has been sent for execution has made its return to the Court which made the decree, it has jurisdiction to entertain successive applications for execution. (1909) 9 Cal L Jour 443 (451, 452).

[2] Transferee Court retains its jurisdiction to execute decree even though there has been appeal after

transfer and it has been affirmed in appeal—Execution cannot be defeated only because transferor Court did not make fresh order of transfer. (Vol 18) 1931 Pat 27 (30) : 9 Pat 829.

[3] Transfer for execution to another Court—Latter Court certifying failure of execution—Fresh application for execution can be entertained by same Court. (Vol 9) 1922 Nag 210 (212) : 18 Nag L R 178.

[4] Execution transferred—Application under S. 73 can be entertained by original Court. (Vol 21) 1934 Lah 113 (113).

[5] Decree-holder obtaining under O. 21, R. 6 (2) (All), copy of decree and certificate may take same to Court to which they are sent or return it to Court of issue — If so returned, Court of issue becomes seised of the matter and is either asked to grant execution itself or to grant a new certificate for transfer. (Vol 23) 1936 All 369 (369).

2. Powers of transferee Court.—[1] Expression "powers in executing such decree" means "powers in carrying out the purpose of executing such decree". (Vol 23) 1936 Rang 184 (186).

[2] General powers of Court to which decree is transferred for execution are same as those of Court that passed the decree. (Vol 21) 1934 Lah 652 (657) & (Vol 3) 1916 All 293 (294) & (1911) 10 Ind Cas 538 (538) (Cal) & (Vol 31) 1944 Mad 145 (147) & (Vol 7) 1920 Mad 183 (187) : 43 Mad 786 (Decree for rent transferred to Civil Court—Provisions of Code at once become applicable to execution proceedings.) & (Vol 18) 1931 Nag 170 (171) : 27 Nag L R 386 & (Vol 29) 1942 Oudh 1 (S. 9) : 17 Luck 249 & (Vol 2) 1915 Oudh 142 (143) & (Vol 23) 1936 Sind 11 (13) : 30 Sind L R 290.

[3] Transferee Court cannot execute decree in absence of application under O. 21, Rr. 10 and 11. (Vol 11) 1924 Nag 413 (414).

[4] An order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution under O. 21, R. 11. (1911) 35 Bom 103 (109).

[5] Transferee Court has no jurisdiction to consider validity or propriety of order of transfer. (Vol 24) 1937 Rang 477 (480) : 1937 Rang L R 287 & (1885) 7 All 330 (333) & (1897) 21 Bom 456 (458) & (1886) 10 Bom 65 (68) & (Vol 17) 1930 Lah 143 (144) & (1882) 4 Mad 324 (325).

[6] Transferee Court is bound to consider whether execution application made to it is in time. (Vol 24) 1937 Rang 477 (480) : 1937 Rang L R 287 & (Vol 23) 1936 Rang 271 (273) : 14 Rang 550.

[7] Objection that decree is incapable of execution or that execution is barred by limitation should be tried by transferee Court. (Vol 15) 1928 Rang 40 (42) : 5 Rang 775 & (1896) 23 Cal 39 (44) & (Vol 12) 1925 Cal 213 (216).

[8] Where no order for execution has been made by the Court transmitting the decree, the Court to which the decree is transmitted has power to determine whether the execution is barred. But if before the transmission of the decree the Court passes an order for execution that order is binding on parties until reversed on appeal and the Court to which decree is transferred has no power to determine whether execution is barred by limitation. (1891) 15 Bom 28 (29, 30).

Section 42 (*contd.*)

[9] Transferee Court cannot question the jurisdiction of the Court which passed the decree. (1906) 30 Bom 101 (108) & (Vol 21) 1934 Lah 117 (118).

[But see (1904) 28 Bom 378 (389) & (Vol 21) 1934 Lah 652 (656).]

[10] Decree against dead person — Court to whom decree is transferred can also refuse to execute decree being nullity. (Vol 21) 1934 Lah 117 (118).

[11] Transferee Court cannot order simultaneous execution or send decree to another Court for execution. (Vol 25) 1938 Mad 113 (114) : I L R (1938) Mad 326.

[12] Transferee Court is not competent to grant certificate of non-satisfaction to another Court. (Vol 21) 1934 Lah 330 (331).

[13] Transferee Court cannot refuse to execute decree because questions that cannot be decided in execution have been raised by the parties before it. (1887) 11 Bom 528 (532).

[14] Transferee Court cannot go behind decree. (Vol 7) 1920 Mad 183 (187) : 43 Mad 786.

[15] Transferee Court has no power to pass instalment order under O. 20, R. 11 (2). (Vol 21) 1934 Rang 165 (166) : 12 Rang 320 & (Vol 30) 1943 Nag 340 (344) : I L R (1944) Nag 1 (F B).

[16] Transferee Court has no power to refuse to execute except under O. 21, R. 26. (Vol 23) 1936 Rang 184 (187).

[17] Under Ss. 37, 42 and O. 21, R. 29, Court to which the decree has been transferred has power to stay the execution of the decree. (Vol 21) 1934 Cal 4 (4, 5) : 60 Cal 1119.

[18] Transferee Court is bound to stay execution when acquainted with the fact that decree is no longer in existence. (Vol 14) 1927 Rang 104 (105) : 4 Rang 562.

[19] Court to which decree is transferred cannot act under O. 21, R. 16. (Vol 18) 1931 Lah 690 (690, 691) & (1909) 9 Cal L Jour 443 (446) & (Vol 21) 1934 Lah 648 (650) : 16 Lah 63.

[See however (Vol 10) 1923 Nag 195 (197). (Revenue Court in execution of an ejectment decree transferred to it cannot put heirs of decree-holders in possession.)]

[20] Application to substitute names of legal representatives of judgment-debtor can be made to Court to which decree is transferred for execution. (Vol 18) 1931 All 320 (322).

[21] As to whether transferee Court can grant leave under O. 21, R. 50 (2), there is a conflict of opinion for which see (Vol 29) 1942 Mad 501 (502) : I L R (1942) Mad 688 (No.) & (Vol 19) 1932 Pat 323 (324) : 11 Pat 580 (No.) & (Vol 24) 1937 Pesh 96 (97) (No.) & (Vol 18) 1931 Sind 82 (83) : 25 Sind L R 460 (No.) & (Vol 8) 1921 All 192 (200) : 43 All 671 (Yes.) & (1926) 98 Ind Cas 855 (855, 856) (Lah) (Yes) & (Vol 18) 1931 Lah 507 (508) (Yes.) & (Vol 16) 1929 Lah 228 (230) (Yes.)

[22] Mortgage decree transferred for execution — Transferee Court can sell property outside its territorial jurisdiction. (Vol 31) 1944 Mad 145 (147) & (Vol 31) 1944 Mad 446 (447) : I L R (1945) Mad 257 & (Vol 29) 1942 Oudh 1 (8, 9) : 17 Luck 249.

[23] Transferee Court has jurisdiction to execute decree against surety. (Vol 25) 1938 Lah 593 (593) : ILR (1938) Lah 624.

[24] Transferee Court has power of attachment under O. 21, R. 48 (1). (Vol 14) 1927 Oudh 112 (112) : 1 Luck 46.

[25] See also Note 6 on Section 39 and Note 3 on Section 41.

3. Powers of transferor Court after transfer — [1] Decree not sent to transferee Court—Court passing decree does not lose jurisdiction to execute decree. (Vol 9) 1922 Pat 301 (303) : 1 Pat 328 & (Vol 18) 1931 Cal 312 (316, 317) : 58 Cal 832.

[See also (Vol 26) 1939 Rang 433 (434) : 1939 Rang L R 587.]

[2] The Court which passed the decree cannot execute it once it has transferred it for execution to another Court. (Vol 1) 1914 Mad 435 (435, 436, 437) : 37 Mad 231.

[3] Court which passed decree can execute it though it has transferred it to another Court for execution and copy of decree with certificate of satisfaction is not returned to it. (Vol 27) 1940 Sind 11 (13) : ILR (1940) Kar 46.

[4] Transferor Court retains jurisdiction over matters as to the executability of decree and should decide such matter before transfer. (Vol 17) 1930 Oudh 305 (308, 309) & (Vol 23) 1936 Cal 267 (269) & (Vol 18) 1931 Cal 312 (318) : 58 Cal 832 & (Vol 16) 1929 Mad 199 (200).

[5] Questions as to who are legal representatives and as to the bar of limitation must be decided by the Court which passed the decree before it transfers it for execution to another Court. (Vol 13) 1926 Mad 411 (412).

[6] Decree assigned after transfer to another Court—Application under R. 16 can be entertained by original Court before certificate or record is received. (Vol 20) 1933 Mad 110 (112).

[7] Decree for money passed—After non-satisfaction of decree, it was transferred to another Court for execution—Transferee Court attaching property—Court transferring decree is still competent to execute the decree by arrest of judgment-debtor even after transfer — However if value of property attached by transferee Court is greater than decretal amount, transferor Court should not order arrest of judgment-debtor. (Vol 17) 1930 Lah 199 (201).

[8] Vesting of powers in Court to which case is transferred does not divest parent Court of its powers of re-transferring a case—Application for second transfer lies to the parent Court. (Vol 13) 1926 Lah 113 (114) & (Vol 15) 1928 Mad 493 (494). (Application for re-transfer must be made to the transferor Court.) & (Vol 24) 1937 Nag 305 (307) : I L R (1937) Nag 440 & (Vol 14) 1927 Nag 367 (367).

[But see (Vol 12) 1925 Oudh 428 (428) : 29 Oudh Cas 84. (Execution case once transferred — Certificate under S. 41 not received—Court passing the decree cannot transfer it again to different Court.)]

[9] Transfer of decree — Original Court may get decree re-transferred to it but cannot execute it unless transferee Court has returned decree with certificate of non-satisfaction. (Vol 21) 1934 Lah 728 (729) : 16 Lah 80.

[10] Court transferring decree for execution to another Court is entitled to recall it if decree has not been executed. (Vol 26) 1939 Pat 144 (145) : 17 Pat 617 & (Vol 13) 1926 Bom 271 (272) : 50 Bom 439.

[11] The enactment of S. 42 is clearly intended to be of general application and to remove all questions arising out of the decree, such as those dealt with by S. 47 and the like, from the cognisance of the Court which made the transfer. (Vol 11) 1924 All 700 (700) : 46 All 560.

[12] See also Note 6 on S. 39.

4. "Shall be subject to the same rules in respect of appeal."—[1] Small Cause Court decree transferred to ordinary Court for execution — Order in execution by such Court is appealable, in same way as orders in execution of decree passed by itself (Vol 8) 1921 Cal 242 (243) & (Vol 3) 1916 All 293 (294) & (Vol 2) 1915 Cal 237 (237) & (Vol 12) 1925 Mad 1179 (1180, 1181).

[2] Small Cause Court decree transferred to Court of regular jurisdiction—Order in such execution is appealable, but no second appeal will lie. (Vol 6) 1919 Mad 264 (265) & (1898) 25 Cal 872 (874) & (Vol 15) 1928 Bom 534 (537) : 53 Bom 46 & (1911) 2 Mad W N 585 (585).

43. Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the ^a[Central Government or the Crown Representative] in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

[1882—S. 229; 1877—S. 229; 1859—S. 284.]

[a] Substituted by A. O. for "the Governor-General in Council".

^a**44.** The Provincial Government may by notification^b in the Official Gazette declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative, or any class of such decrees, may be executed in the Province as if they had been passed by Courts of British India.]

[1908—S. 44; 1882—S. 229B]

[a] Substituted by A. O. for the original section. [b] For notification issued by the Governor-General in Council under this section, as it stood before 1st April 1937, see General Rules and Orders Supplement Vol. I, pp. 775 to 781.

Section 42 (contd.)

[3] Small Cause Court decree transferred to another Court on regular side — Order of transferee Court that execution is barred by time — Revision under Provincial Small Cause Courts Act, S. 25, does not lie. (Vol 28) 1941 Pat 624 (624, 625).

[4] Execution of Munsif Court's decree — Attachment of Sub-Court's decree — Latter Court ordering payment to attaching decree-holder — Appeal does not lie to High Court, but to District Court. (Vol 5) 1918 Mad 921 (921).

Section 43 — Note 1.

[1] The Court of the Political Agent at Sikkim is a Court established by the authority of the Governor-General in Council within the meaning of S. 43. (1911) 38 Cal 859 (861).

[2] Under the old Code a decree of a Court in a scheduled district in British India, to which the Code was not made applicable, could not be executed by another British Indian Court. (1888) 15 Cal 365 (370) Now the addition of the words 'any decree passed do not extend' in the present section makes it clear that the section applies to Courts in areas in British India to which the Code does not apply.

SECTION 44 — SYNOPSIS.

1. Applicability and scope.
2. Refusal to execute.

1. Applicability and scope. — [1] Decree of Native State is a foreign decree — S. 44 merely alters procedure of its enforcement. (Vol 3) 1916 Bom 307 (308) : 40 Bom 551 & (1891) 15 Bom 216 (219).

[2] Section 44 does not override S. 13. (Vol 18) 1931 All 689 (691) : 53 All 747.

[3] Words 'as if they had been passed by Court in British India' in S. 44 do not control operation of S. 13 (a). (Vol 22) 1935 Lah 551 (551).

[4] Words "may be executed. . . . British India." refer only to mode of execution. (Vol 12) 1925 Mad 788 (789).

[5] Per *Sadasiva Iyer, J.* — A suit does not lie in British India on decrees of Courts of Native States. Such decrees are made executable by notification by Governor-General in Council under S. 44. (1913) 14 Mad L Tim 96 (101, 104). (*Sundar Iyer, J. Contra.* This case went in Letters Patent appeal the decision whereof is reported in (Vol 2) 1915 Mad 486 : 39 Mad 24.)

[6] A decree of a Court of a Native State does not cease to be the decree of a foreign Court simply because a notification under S. 44 has been issued. (Vol 25) 1935 Cal 511 (517) : 68 Cal 1083.

[7] Notice to judgment-debtor is essential when foreign decrees are sought to be executed in British Indian Courts. (Vol 12) 1925 Mad 788 (789).

[8] Transmission of decree for execution to Native State is illegal — Long practice cannot justify such transmission — *Ex parte* order for transmission can be set aside within the time prescribed by Limitation Act (1908), Art. 182. (Vol 5) 1918 Mad 605 (605, 606).

[9] Execution of foreign judgments — S. 21 does not apply. (Vol 12) 1925 Mad 788 (789).

[10] The Law of Limitation governing the execution of foreign decrees in British India is the law in force in British India and not the law in force when the decree was passed. (Vol 3) 1916 Bom 200 (202) : 40 Bom 504 & (1887) 14 Cal 570 (571).

[11] An order for transmission of a decree to British Court cannot be treated as an order for execution. (Vol 3) 1916 Bom 200 (202) : 40 Bom 504.

[12] Decree passed in Pudukottai Court can be executed in Burma. (Vol 25) 1938 Rang 352 (352) : 1938 Rang L R 463.

[13] A Judge of a Presidency Small Cause Court has jurisdiction to execute the decree of a foreign Court transmitted to it under S. 44, but the Registrar of the same Court has no power under S. 13 or Section 35, Presidency Small Cause Courts Act to issue process in execution of a foreign decree. (Vol 5) 1918 Mad 645 (646, 647).

2. Refusal to execute. — [1] A British Indian Court executing a decree passed by a Court in a Native State, in respect of which a notification pursuant to S. 44 has been issued, is competent to go behind the decree and inquire into the question whether the Court which passed the decree had jurisdiction to do so, as a British Court ought not to execute the decree if passed without jurisdiction. (Vol 2) 1915 Mad 486 (487) : 39 Mad 24 (F B) & (Vol 3) 1916 Bom 307 (308) : 40 Bom 551 & (Vol 12) 1925 Cal 955 (956).

[2] Courts may refuse execution — Discretion to refuse is not limited to Ss. 13 and 14. (Vol 12) 1925 Mad 788 (790).

[3] An application for execution under S. 44 may be resisted on any of the grounds mentioned in S. 13. (Vol 4) 1917 Mad 780 (782) : 39 Mad 733.

[4] British Indian Court has ample jurisdiction to refuse to execute decree passed by Native State Court. (Vol 18) 1931 All 689 (691) : 53 All 747 & (1891) 15 Bom 216 (219).

[5] Judgment-debtor can object to execution on the ground that the decree is not conclusive. (Vol 12) 1925 Mad 788 (790).

Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.

^a[44A. (1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 18.

Explanation 1.—"Superior Courts," with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2.—"Reciprocating territory" means any country, or territory, situated in any part of His Majesty's Dominions ^b[* * *] which the ^c[Central Government] may, from time to time, by notification in the ^d[Official Gazette], declare to be reciprocating territory for the purposes of this section; and "superior Courts," with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3.—"Decree," with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.]

[a] This section was inserted by the Code of Civil Procedure (Amendment) Act, 1937 (8 [VIII] of 1937), Section 2. [b] The words "or in India" repealed by A. O. [c] Substituted by A. O. for "Governor-General in Council." [d] Substituted by A. O. for "Gazette of India."

^a[45. So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in any Province to send a decree for execution to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has by notification in the Official Gazette declared this section to apply.]

[1908—S. 45 ; 1882—S. 229A.]

[a]. Substituted by A. O. for the original Section 45.

Section 44 (contd.)

[6] Decree by Native State — Judgment-debtor can object to its validity on ground of want of jurisdiction — He need not ask for review of order in Court of Native State — His remedy is to object to execution in executing Court. (Vol 18) 1931 All 689 (691) : 53 All 747.

[7] If decree is proved to be fraudulently obtained or passed without jurisdiction Court is not bound to execute. (1891) 15 Bom 216 (219).

[8] Defendant submits to jurisdiction of foreign Court — Executing Court shall not require proof for its jurisdiction. (Vol 3) 1916 Bom 307 (308) : 40 Bom 551.

[9] Decree of foreign Court *in absentiam* — Decree is a nullity and unenforceable in British India. (Vol 3) 1916 Bom. 307 (309) : 40 Bom. 551.

[10] Decree of foreign Court against resident in British India — Decree can be executed in British India only if defendant submits to jurisdiction of foreign Court before judgment. (Vol 21) 1934 Mad 434 (434) : 57 Mad 824.

[11] *Ex parte* foreign decree *in personam* against British subject not residing there at date of action will not be executed by British Courts. (Vol 20) 1933 Mad 112 (113).

[12] See also S. 13.

Section 44A — Note 1

[1] Agent claiming his commission to the knowledge of the principal — Latter absent and not represented at hearing — Claim awarded — No appeal nor application to set aside decree — *Held* that principal failed to satisfy that decision was not on merits. (Vol 30) 1943 Cal 42 (44).

Section 45 — Note 1

[1] The Courts contemplated by S. 45 are Courts in the Native Indian States in alliance with the British Government. (Vol 16) 1929 Sind 45(46) : 23 Sind L R 205.

[2] The words "foreign Prince" in S. 45, refer to Courts in Native Indian States in alliance with the British Government. (Vol 29) 1942 Pesh 49 (50).

[3] Khan of Qalat is foreign or Indian Prince within S. 311, Government of India Act. (Vol 29) 1942 Pesh 49 (50).

46. (1) Upon the application of the decree-holder the Court which passed the decree may, *Precepts.* whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Objects and Reasons.

"*Clause 46—Precept.*—Though a system of execution based on precepts is in the opinion of the Committee open to grave objection, they think the idea may be utilised for the purpose of enabling a decree-holder to obtain an *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced Clause 46 into the Bill. They think it expedient to fix a time limit for the continuance of this *interim* attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases.

After careful consideration they have come to the conclusion that notwithstanding attachment under a

precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of a precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect."—S. O. R.

"*Clause 46.*—We think that a decree-holder who has obtained an *interim* attachment should not be required to re-attach the property if before the determination of the attachment he applies for execution against the property, and we have altered this accordingly. There will now be only one attachment."—S. O. R.

Section 45 (*contd.*)

[4] The Courts of British India have no authority to send their decrees for execution to Courts not in British India. (1888) 12 Bom 230 (231) & (1902) 29 Cal 400 (402). (No decree can be sent into Tributary Mahals of Orissa.) & (Vol 5) 1918 Mad 580 (584) : 40 Mad 1069. (No power to send decrees for execution to Courts in Travancore.) & (Vol 29) 1942 Pesh 49 (49, 50). (Court of Political Agent of Quetta is one established or continued by Governor-General in Council.)

[5] Attachment before judgment—Property in Dutch territory — Mandate, issued to British Consul there, cannot be maintained. (Vol 16) 1929 Sind 45 (46) : 23 Sind L R 205.

SECTION 46 — SYNOPSIS.

1. Attachment by precept.
2. Power of Court.
3. Scope and applicability.

1. Attachment by precept. — [1] An order passed by a Court extending the period of attachment always relates back to the date of the petition and has a retrospective effect even though the order was passed after the expiry of the statutory period of two months. It is enough if the application for extension was put in before the expiry of that period. (Vol 4) 1917 Mad 591 (592).

[2] Attachment by precept—Objection to execution based on omission to transfer decree cannot be taken at hearing of appeal. (Vol 4) 1917 Mad 591 (591).

[3] Property in custody of Court—Precept received for attachment — Attachment takes effect from date when it is received by Court holding property. (Vol 22) 1935 Lah 914 (915).

[4] When money is attached in pursuance of a precept under S. 46, it can be paid over to another decree-holder, attaching it, within the statutory period of sixty days. (Vol 23) 1936 Lah 486 (488). ((Vol 22) 1935 Lah 914, reversed.)

2. Power of Court. — [1] Court to which precept is issued for attachment of property can accept money

or security — Neither surety nor judgment-debtor can object to it. (Vol 13) 1926 Lah 433 (433, 434).

[2] Validity of precept cannot be challenged by the Court to which it is sent. (Vol 14) 1927 Cal 581 (588).

[3] Decree transferred for execution — Transferee Court is not competent to issue precept. (Vol 13) 1926 Sind 157 (158).

[4] Decree transferred for execution — Parent Court can issue precept even after the transfer. (Vol 14) 1927 Cal 581 (588).

[5] Court issuing precept cannot attach property itself. (Vol 20) 1933 All 844 (845).

[6] Concurrent execution in transferee Court is permissible. (Vol 10) 1923 Pat 224 (225) : 2 Pat 828.

3. Scope and applicability. — [1] The object of S. 46 is to attach property of the judgment-debtor in another Court in order to prevent him from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for sale of the property in pursuance of execution application can be taken. The section does not contemplate an indefinite order stating that an attachment is made permanently. (Vol 23) 1936 Lah 486 (487, 488).

[2] Application under S. 46 is not application for execution. (Vol 13) 1926 Cal 249 (250).

[3] Court has under S. 46, power to order attachment before judgment of property outside local limits of its jurisdiction and further it is also competent to entertain application for removal of such attachment. [Vol 18] 1931 Rang 279 (280) : 9 Rang 561.

[4] Defendant's property in foreign territory cannot under this section be attached by Indian Courts. (Vol 18) 1931 Lah 723 (724, 725) : 13 Lah 206.

[5] Court cannot attach debt outside its jurisdiction except through precept — Direct attachment is illegal. (Vol 27) 1940 Rang 34 (36) : 1939 Rang L R 694.

[6] Though the property referred to in O. 38, R. 5 (b) must be property within the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (a). Property without local limits of the Courts may be attached before judgment. (1911) 10 Ind Cas 794 (795, 796) (Low Bur).

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

47. (1) All questions arising between the parties to the suit⁶ in which the decree was passed, or their representatives,¹² and relating to the execution, discharge or satisfaction of the decree,²¹ shall be determined⁴¹ by the Court executing the decree⁴⁰ and not by a separate suit.³⁹

(2) The Court may, subject to any objection as to limitation⁴ or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.²⁰

*Explanation.*⁸—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

[1882—S. 244; 1877—S. 244. 1861—S. 11; 1859—S. 283. See S. 2, Cl. (2); Ss. 50, 52, 144, 145.]

Objects and Reasons.

"*Clause 47.*—The Committee have omitted sub-clauses (a) and (b) of Section 244 of the existing Code because they are strongly of opinion that questions regarding the amount of any mesne profits or interest should be determined by the decree and not in execution. If this view is accepted it will be possible to exercise an effective control over the action taken by subordinate Courts in dealing with such matters.

The Committee have re-drafted sub-clause (3) and made it compulsory on the Court to determine questions arising as to representatives of parties. In their opinion it is inexpedient that separate suits should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation.

The Explanation is intended to put an end to a conflict of judicial decisions."—S. O. R.

Section 46 (*contd.*)

[7] An application for an attachment under this section cannot be regarded as an application for execution entitling a decree-holder to rateable distribution of assets under S. 73. (Vol 13) 1926 Cal 249 (250).

[8] After an attachment under a precept there must be an application for execution in the proper form and it is only upon such application that execution can issue. (Vol 27) 1940 Cal 26 (28) : I L R (1939) 2 Cal 370.

SECTION 47—SYNOPSIS.

1. Appeal and revision.
2. Applicability and scope.
 3. Applicability to proceedings under other Acts.
4. Limitation.
5. Question must be between parties or representatives
6. Parties to the suit.
 7. Custodian of attached property. — See Notes on S. 145.
 8. Explanation.
 9. Parties arrayed on same side.
 10. Party sued in representative capacity.
 11. Surety.—See Notes on S. 145.
12. Representative—Who is.
 13. Auction-purchaser—Position of.
 14. Attaching creditor.
 15. Judgment-debtor under attached decree.
 16. Official Assignee or receiver or liquidator.
 17. Transferee from auction-purchaser.
 18. Transferee from party.
 19. Transferee of decree.
20. Whether person is party or representative to be decided by executing Court.
21. Question must relate to execution, discharge or satisfaction of decree.
22. Adjustment of decree.— See Notes on O. 21, R. 2.
23. Agreement against execution.
24. Damages for fraudulent execution.
25. Decree incapable of execution.
26. Excess or deficient execution.
27. Illustrative cases— Questions not relating to execution, etc.
28. Illustrative cases — Questions relating to execution, etc.
29. Liability to attachment and sale.
30. Mesne profits.
31. Pre-decree matters.
32. Property attached if belongs to judgment-debtor.
33. Question arising between preliminary and final decree.
34. Question between parties in which auction-purchaser is interested.
35. Restitution.—See S. 144.
36. Stay of execution.
37. Validity of decree.
38. Whether attached property is ancestral and debts were for legal necessity or tainted with immorality.—See S. 53.
39. Separate suit barred.
40. "Court executing decree"—Meaning of.
41. "Determined"—Meaning of.
42. Power to construe decree.
43. Relief against penalty.
44. Setting aside sales in execution.
 45. Decree obtained by fraud.
 46. Fraud in execution proceedings.
 47. Notice under O. 21, Rr. 16, 22 and 66—Want of.
 48. Other grounds for setting aside sale.
49. Sub-section (2).
 1. Appeal and revision.— [1] All orders in execution proceedings are not orders under S. 47. (Vol 18) 1931 Cal 374 (375); 58 Cal 808 (1936) 164 I C 802 (803) (Cal) (Vol 6) 1919 Cal 806 (807) (Vol 5) 1918 Cal 45 (46) (Vol 6) 1919 Pat 333 (333, 384) : 4 Pat L Jour 461. (Order relating solely to jurisdiction.) (Vol 16) 1929 Rang 161 (161) : 7 Rang 110. (Order of committal to jail passed without jurisdiction—Objection to its legality not taken—No appeal lies.)

Section 47 (*contd.*)

[2] An order in execution can come under S. 47 only when it determines questions relating to the rights and liabilities of the parties with reference to the relief granted by the decree. (Vol 2) 1915 Cal 122 (124).

[3] Only orders falling under S. 47 are appealable. (Vol 13) 1926 Mad 834 (835).

[4] Alternative remedy of suit does not bar appeal under S. 47. (Vol 3) 1916 Mad 1008 (1010).

[5] Right of appeal under S. 47 cannot be taken away by implication. (Vol 3) 1916 Mad 20 (22) : 39 Mad 570.

[6] Order under S. 47—Appeal — Copy of judgment and decree must be filed — Order under S. 47 being decree, appeal therefrom is governed by O. 41. (Vol 5) 1918 All 394 (396) : 40 All 12* (Vol 27) 1940 Oudh 351 (352) : 15 Luck 669.

[7] Order though made under S. 151 held was one under S. 47 and hence appealable. (Vol 32) 1945 Sind 146 (148, 151) : I L R (1945) Kar 116* (Vol 20) 1933 Mad 399 (400)* (Vol 30) 1943 Nag 172 (174) : I L R (1943) Nag 699.

[8] Order under S. 47 must be a decree within S. 2 (2) in order to be appealable. (Vol 14) 1927 All 208 (209)* (Vol 13) 1926 All 401 (401)* (Vol 13) 1926 All 268 (268, 269) : 48 All 260* (Vol 1) 1914 Cal 488 (489)* (Vol 13) 1926 Cal 400 (400)* (Vol 11) 1924 Mad 365 (366)* (Vol 7) 1920 Pat 249 (250) : 5 Pat L Jour 270.

[9] Appealability of orders under S. 47—Test—Whether order is appealable must be decided upon consideration of facts and circumstances in which it was passed. (Vol 27) 1940 All 326 (328) : I L R (1940) All 517 (FB).

[10] Decision is decree provided rights of parties are conclusively determined. (Vol 4) 1917 Pat 126 (128) : 3 Pat L Jour 339* (Vol 24) 1937 Pat 349 (349).

[10a] Order issuing execution or refusing to execute decree is appealable under S. 47. (Vol 2) 1915 Cal 238 (239)* (Vol 20) 1933 All 732 (733) : 55 All 983* (Vol 4) 1917 Cal 182 (182)* (Vol 17) 1930 Oudh 268 (270)* (Vol 3) 1916 Upp Bur I (2) : 2 Upp Bur Rul 119.

[10b] Order determining a party's right to be the representative of a deceased party is decree and appealable. (Vol 12) 1925 All 66 (66)* (Vol 23) 1936 All 479 (480)* (Vol 12) 1925 All 578 (579) : 47 All 865* (Vol 30) 1943 Mad 381 (383) : I L R (1943) Mad 702* (Vol 26) 1939 Sind 284 (235) : I L R (1939) Kar 509.

[11] Objection misdescribed as one under O. 21, R. 58 while really coming under S. 47—Court under mistake dealing with case as under O. 21, R. 58 — Still order is decree and is appealable. (Vol 19) 1932 Lah 376 (377).

[12] Objection in execution treated as one under S. 47 — Appeal lies from order disallowing objection although ultimately it is held that it was not under S. 47. (Vol 19) 1932 All 49 (49).

[13] Rateable distribution order if it decides question covered by S. 47 is appealable. (Vol 11) 1924 Cal 801 (805) : 51 Cal 761* (Vol 14) 1927 Lah 100 (101)* (Vol 3) 1916 Mad 20 (22) : 39 Mad 570.

[14] Appeal lies at the instance of a party to the decree under execution where matter relates to execution, discharge or satisfaction of the decree. (Vol 14) 1927 Mad 842 (843)* (Vol 24) 1937 Bom 111 (112) : I L R (1937) Bom 144* (Vol 7) 1920 Cal 724 (725)* (Vol 5) 1918 Cal 551 (552)* (1911) 15 Cal W N 783 (785)* (1939) 41 Pun L R 186 (187). (Order transferring decree for execution)* (Vol 26) 1939 Lah 177 (178)* (Vol 14) 1927 Lah 651 (652). (Order amending decree.) * (Vol 38) 1946 Mad 383 (384)* (Vol 30) 1943 Mad 381 (383) : I L R (1943) Mad 702* (Vol 27) 1940 Mad 296 (297)* (Vol 9) 1922 Nag 62 (64, 65) : 18 Nag L R 153* (Vol 23) 1936 Oudh 50 (51) : 11 Luck 519* (Vol 15) 1928 Rang 40 (41) : 5 Rang 775.

[See however (Vol 29) 1942 Mad 406 (406). (Dispute between judgment-debtor and stranger auction-purchaser regarding delivery treated and decided as one under S. 47—Appeal from order thereon lies.)]

[15] Order refusing or allowing delivery of possession of property sold in execution even to decree-holder purchaser is not one under S. 47—No appeal lies. (Vol 6) 1919 Cal 368 (369)* (Vol 3) 1916 Pat 216 (218) : 1 Pat L Jour 232.

[16] Application under O. 21, R. 100 fought out between parties to suit—Appeal lies. (Vol 8) 1921 Mad 612 (614)* (Vol 20) 1933 All 57 (59) : 54 All 1031* (Vol 3) 1916 Mad 727 (727, 728).

Interlocutory orders. — [17] Interlocutory orders not conclusively determining rights of parties not appealable. (Vol 30) 1943 Lah 140 (144, 146) (F B)* (Vol 22) 1935 All 502 (502, 503)* (Vol 19) 1932 All 136 (137)* (1912) 34 All 530 (531, 532)* (Vol 28) 1941 Cal 618 (621)* (Vol 12) 1925 Cal 679 (680, 681)* (Vol 17) 1930 Lah 352 (353)* (Vol 16) 1929 Lah 815 (816). (Orders dealing with mere matter of procedure are not within S. 47.)* (Vol 14) 1927 Lah 232 (234). (Such interlocutory order can be attacked in appeal from final order.)* (Vol 23) 1936 Mad 623 (624)* (Vol 20) 1933 Mad 500 (500). (Preliminary objections overruled—No final order — No appeal lies.)* (Vol 20) 1933 Mad 152 (153) : 56 Mad 453* (Vol 12) 1925 Nag 186 (187) : 21 Nag L R 34* (Vol 15) 1928 Oudh 329 (330)* (Vol 12) 1925 Oudh 485 (485) : 28 Oudh Cas 124* (Vol 28) 1941 Pat 616 (616)* (Vol 27) 1940 Pat 75 (76)* (Vol 4) 1917 Pat 575 (575). (Decision of preliminary point.)* (Vol 24) 1937 Rang 157 (159)* (Vol 22) 1935 Rang 500 (501).

[18] Order accepting or refusing security is not appealable. (Vol 19) 1932 Lah 120 (121)* (1928) 106 Ind Cas 866 (867) (Lah)* (Vol 14) 1927 Lah 527 (528)* (Vol 18) 1931 Mad 38 (38) : 54 Mad 237* (Vol 23) 1936 Oudh 369 (369)* (Vol 24) 1937 Pat 380 (381).

[19] Decree-holder ordered to furnish security—Order accepting security and directing delivery of possession is appealable — Order is final and not interlocutory. (Vol 6) 1919 Cal 471 (472).

[20] Mortgage decree — Plea of party to have his property sold last negatived by trial Court — Nothing in judgment fettering discretion of executing Court — Executing Court can fix order of sale — Such order is merely administrative and no appeal lies against it. (Vol 31) 1944 Mad 429 (430)* (Vol 11) 1924 Mad 527 (529).

[21] Order definitely allowing or disallowing plea in execution proceeding is appealable notwithstanding that execution petition is not terminated thereby. (Vol 29) 1942 Mad 688 (689) : I L R (1943) Mad 164 (F B)* (Vol 7) 1920 Cal 534 (535)* (Vol 30) 1943 Mad 346 (347)* (Vol 23) 1936 Oudh 240 (240).

Second appeal. — [22] Case falling under S. 47 — Second appeal lies. (Vol 20) 1933 All 57 (59) : 54 All 1031* (Vol 1) 1914 Cal 893 (893).

[23] A second appeal will not lie in an execution matter if second appeal was incompetent in the suit itself. (Vol 8) 1921 All 55 (55) : 43 All 403* (Vol 5) 1918 Mad 1368 (1368).

[24] Small Cause suit — No second appeal lies from orders in execution thereunder. (Vol 12) 1925 Mad 742 (742).

[25] Where there is an appeal as from an order under S. 2, Civil P. C., it would be difficult to bring that matter under S. 47, so as to allow of a second appeal. (Vol 17) 1930 Cal 249 (250)* (Vol 6) 1919 Cal 1006 (1007). (Order refusing to set aside sale.)* (Vol 4) 1917 Cal 443 (444). (Order setting aside sale under O. 21, R. 90.)

Section 47 (*contd.*)

[26] Conversion of petition into suit under S. 47 (2) — No second appeal lies, but where on respondent's own invitation lower appellate Court sets aside order of executing Court refusing such conversion on footing that it was involved in appeal under S. 47, respondent cannot be allowed to resile and say no appeal lies at appellant's instance to correct error. (Vol 18) 1931 Mad 270 (271).

Revision. — [27] Failure to treat suit as application in execution and dismissing suit—Revision lies. (Vol 8) 1921 Nag 130 (131).

[28] Order granting mortgagee interest on mortgage money for time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. (Vol 16) 1929 Rang 127 (127).

[29] Application to set aside dismissal of previous execution application but without stating provisions of law under which it was made — Application dismissed as being "informal" — Order of dismissal is not appealable—Failure to treat such application as one for review amounts to failure to exercise jurisdiction under S. 115, Civil P. C. (Vol 15) 1928 Lah 811 (812, 813).

[30] Decision of lower appellate Court as to whether certain house attached belonged to judgment-debtor exclusively held not liable to any interference in revision. (Vol 28) 1941 Oudh 101 (103).

[31] Appeal to lower appellate Court under S. 47 — Auction-purchaser applying for revision — No second appeal lies and so revision is not barred. (Vol 16) 1929 Mad 84 (84).

[32] Sale of house by judgment-debtor — Decree-holder applying for attachment of amount left with vendee for payment to vendor's creditors—Court ordering vendee to pay amount left with him to vendor's creditors within certain time or to deposit it into Court — Appeal by decree-holder — Judgment-debtor, vendee and vendor's creditors impleaded as respondents — Appeal held lay against judgment-debtor only—Appeal held may be treated as revision as against vendor's creditors. (Per *Tek Chand J., in Order of Reference*). (Vol 29) 1942 Lah 275 (277) : I L R (1943) Lah 17 (F B).

[33] Order on A's application in lower Court—Appeal to High Court — Order not appealable as not coming under S. 47—High Court's opinion on main question that Court had no jurisdiction to maintain application in which view revision lies—High Court allowed appeal to be converted into revision petition. (Vol 22) 1935 Mad 842 (847) : 58 Mad 972.

[34] An order passed on an application for payment of pre-emption money in compliance with a decree under O. 20, R. 14 is not appealable but can be revised under S. 115. (Vol 2) 1915 Oudh 171 (172).

[35] Highest bidder dying before adjourned sale — Next lower bidder treated as last bidder and ordered to deposit amount — On his failure re-sale ordered—Order for re-sale held void — He cannot appeal under S. 47—Revision lay as order was without jurisdiction. (Vol 7) 1920 Mad 911 (916) : 42 Mad 776.

[36] Order under O. 21, R. 66 — Appeal: *See* O. 21, R. 66.

[37] Order setting aside or refusing to set aside sale. *See* O. 21, R. 92.

2. Applicability and scope. — [1] Section 47 provides only for procedure and forum whereby decision is to be reached. (Vol 23) 1936 Mad 636 (638).

[2] Section 47 is very wide in its terms and should be so interpreted as not to render redundant other provisions in Code. (Vol 24) 1937 All 407 (409).

[3] In order to avoid multiplicity of suits S. 47 has to be liberally construed. (1909) 9 Cal L Jour 358 (360, 361) (When a judgment-debtor accepts the binding

nature of a decree but contends that it should not be executed in consequence of circumstances arising subsequent to the decree the matter should be dealt with under S. 47.) * (Vol 9) 1922 Bom 370 (374) : 46 Bom 529 * (1894) 21 Cal 437 (444) * (Vol 7) 1920 Mad 324 (330) : 43 Mad 107 (FB) * (Vol 25) 1938 Nag 212 (215, 216) : I L R (1938) Nag 593 * (Vol 11) 1924 Nag 246 (247) : 20 Nag L R 90 * (Vol 23) 1936 Pat 289 (294) : 15 Pat 545.

[4] Object of separately numbering the sub-sections of S. 47 is to make the several sub-sections independent of each other. (Vol 3) 1916 Cal 471 (472).

[5] Both sub-ss. (1) and (2) must be read together. (Vol 20) 1933 Mad 166 (167) : 56 Mad 447.

[6] Section 47 presupposes that the questions with which it deals are questions as can be finally determined in the execution proceedings—If they cannot S. 47 does not apply. (1900) 23 Mad 195 (201) (FB).

[7] Section 47 debars a party or his representative to a suit from raising otherwise than in execution proceedings any question of the class described in the section which arises between himself and other party to suit and he cannot raise it either as plaintiff or defendant in any separate suit. (1939) 1939 Oudh W N 653 (655) * (Vol 28) 1941 Cal 530 (532) : I L R (1941) 2 Cal 402.

[8] When there is a decree capable of execution no suit will lie for its enforcement even after the execution is barred by time. (Vol 17) 1930 Nag 17 (18) * (Vol 8) 1921 All 369 (372) : 43 All 170. (Pre-emption decree—(Vol 3) 1916 All 261 overruled.) * (Vol 3) 1916 All 163 (164) : 38 All 509 * (Vol 21) 1934 Cal 327 (327) : 60 Cal 1467. (Money decree creating charge on property.) * (Vol 14) 1927 Cal 411 (412) : 54 Cal 524. (Execution of decree for khas possession barred — Second suit for khas possession is barred.) * (1906) 33 Cal 679 (682) * (1920) 2 Lah L Jour 724 (727, 728). (Compromise decree becoming unexecutable by lapse of time.) (Vol 17) 1930 Lah 74 (75). (Final decree for redemption.) * (Vol 5) 1918 Mad 370 (370) : 41 Mad 641 * (Vol 4) 1917 Mad 177 (177). (Suit for a declaration of satisfaction of decree obtained by defendant against plaintiff and for injunction restraining defendant from its execution is barred by S. 47 (1).) * (Vol 28) 1941 Pat 70 (75, 76) : 20 Pat 223. (Money decree against ward of Court of Wards.) * (Vol 26) 1939 Pat 260 (261) * (Vol 22) 1935 Pat 222 (223, 224). (Suit for possession of property covered by lease—Decree obtained—Suit for demolition of buildings on such property does not lie.)

[9] Section 47 deals with only those matters arising after the decree. (Vol 25) 1938 Pat 41 (42) : 16 Pat 748.

[10] Section 47 applies to proceedings taken after satisfaction of decree also. (Vol 20) 1933 All 429 (431).

[11] Under S. 47 there is no distinction between a money decree and a decree under O. 34. (Vol 16) 1929 Lah 762 (763).

[12] Provisions in O. 21, R. 19 are not exhaustive regarding questions covered by S. 47. (Vol 23) 1936 Cal 409 (411) : I L R (1937) 1 Cal 57.

[13] Section 47 does not apply to a decree of a foreign Court. (1913) 14 Mad L Tim 96 (100).

[14] Section 47 has never been in force in the Ganjam and Vizagapatam Agency tracts. (1913) 36 Mad 128 (130).

[15] As to the applicability of this section to the proceedings of a District Court executing a decree of any of the superior Courts of the United Kingdom or any reciprocating territory, *see* S. 44A (3). As to who may be deemed a party within the meaning of this section for the enforcement of liability of surety, *see* S. 145.

3. Applicability to proceedings under other Acts. — [1] Award under Arbitration Act — Execution —

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Order in—Appeal lies. (Vol 8) 1921 Sind 132 (133) : 16 Sind L R 245 * (Vol 16) 1929 Lah 228 (229).

[2] Order rejecting enforcement of award is appealable as it is governed by S. 47. (Vol 21) 1934 Lah 49 (50).

[3] Agra Tenancy Act (1928), Ss. 79 and 80—Application for ejectment—Order made under S. 80—Order relates to execution of decree—Hence determination of application is determination of question under S. 47. (Vol 19) 1932 All 92 (94) : 53 All 715.

[4] Order under S. 47 in proceedings governed by Agra Tenancy Act is not a decree and no second appeal lies from such order—See S. 248, Agra Tenancy Act. (Vol 21) 1934 All 192 (192).

[5] Decision that judgment-debtors are not debtors within the meaning of Bengal Agricultural Debtors Act, falls under S. 47. (Vol 27) 1940 Cal 257 (258, 259) : I L R (1940) 1 Cal 393.

[6] Sale of judgment-debtor's property in execution—Immediately after sale, executing Court receiving notice under S. 34, Bengal Agricultural Debtors Act, and consequently setting aside sale—Order held fell under S. 47 and hence appealable. (Vol 26) 1939 Cal 334 (334, 335).

[7] Notice under S. 34, Bengal Agricultural Debtors Act, received by executing Court—Still sale held in execution of decree—Judgment-debtor trying to set aside sale on ground of notice—Question relating to execution of decree arises—If question has to be decided between parties to suit or their representatives S. 47 will apply—That auction-purchaser though not party to suit is interested in result does not operate as a bar. (Vol 33) 1946 Cal 45 (46).

[8] Application for holding that decretal amount is paid off in view of Bengal Money-lenders Act is one under S. 47 and order rejecting it is appealable. (Vol 29) 1942 Cal 342 (342).

[9] Application for re-opening decree under Bengal Money-lenders Act is not one under S. 47. (Vol 29) 1942 Cal 324 (325) : I L R (1942) 1 Cal 354.

[10] A question as to whether the execution proceedings under Bengal Public Demands Recovery Act were entirely without jurisdiction is one under S. 47. (1911) 14 Cal L Jour 83 (88).

[11] Appeal lies against an order under S. 173, Bengal Tenancy Act, when the case falls under S. 47. (Vol 12) 1925 Cal 1223 (1224).

[12] Application to set aside the sale under S. 173, Bengal Tenancy Act, involves question relating to execution and S. 47 applies. (Vol 22) 1935 Cal 89 (89).

[13] Order under S. 174, Bengal Tenancy Act, does not fall within S. 47. (Vol 17) 1930 Cal 302 (303).

[14] Appeal by auction-purchaser not party to suit against order setting aside sale under S. 173, Bengal Tenancy Act, is incompetent. (Vol 1) 1914 Cal 177 (177) * (Vol 12) 1925 Cal 1223 (1224).

[15] The petitions under S. 19 as well as under S. 20, Madras Agriculturists' Relief Act, must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and come within the matters covered by S. 47, Civil P. C. (Vol 27) 1940 Mad 131 (132).

[16] Order in execution of decree under S. 77, Madras Estates Land Act, is appealable as one under S. 47, Civil P. C. (Vol 14) 1927 Mad 440 (440, 441).

[17] Order in proceedings under the words in S. 70, Madras Hindu Religious Endowments Act, attract the operation of S. 47. (Vol 20) 1933 Mad 305 (306) : 56 Mad 712.

[18] Malabar Compensation for Tenants Improvements Act (1900), S. 6 (8)—Tenant making improvements after decree—Application for enhancement of

compensation—Application is not for final decree—Order for re-valuation can only be passed by executing Court and order on it is appealable. (Vol 6) 1919 Mad 335 (337, 338).

[19] Application under Orissa Tenancy Act, S. 227(3), for setting aside sale in execution is not one under S. 47. (Vol 14) 1927 Pat 177 (177, 178) : 6 Pat 366.

[20] Section 47 applies to execution proceedings of rent decree also. (Vol 22) 1935 Pat 227 (228).

4. Limitation.—[1] See Notes on Arts. 165, 166, and 181, Limitation Act.

5. Question must be between parties or representatives.—[1] Person raising question relating to decree must be party to suit or representative of party when question is raised. (Vol 18) 1931 All 490 (495, 499) : 54 All 25 (FB) * (Vol 4) 1917 All 460 (461) : 39 All 47. (Legal representative is party within meaning of S. 47.) * (Vol 6) 1919 Pat 396 (397).

[2] Fresh suit relating to execution is barred under S. 47 where plaintiff and defendant have been parties in the former suit. (Vol 18) 1931 Bom 114 (116, 118) * (Vol 4) 1917 All 460 (461) : 39 All 47 * (1909) 33 Bom 39 (42) * (1899) 23 Bom 237 (244). (Question arising from representative of judgment-debtor and decree-holder as to whether property in question belonged to deceased judgment-debtor must be determined by executing Court.) * (Vol 19) 1932 Bom 466 (467) * (Vol 15) 1928 Bom 534 (536) : 53 Bom 46 * (Vol 2) 1915 Cal 570 (571). (Prior mortgagee party to suit—*Ex parte* decree passed—Application by him to prevent execution of *ex parte* decree falls under S. 47.) * (Vol 16) 1929 Lah 762 (763). (Suit by representative of deceased judgment-debtor for declaration of his charge on property sought to be sold under mortgage-decree is barred.) * (Vol 13) 1926 Lah 165 (165) : 7 Lah 1. (Execution sale confirmed—Suit by one of judgment-debtors that property was not saleable does not lie.) * (Vol 16) 1929 Pat 141 (142) : 8 Pat 717. (Objection to attachment by party or his representative will be governed by S. 47, one by third person will be governed by Civil P. C., O. 21, R. 58) * (Vol 6) 1919 Pat 396 (397).

[3] A suit for declaration that only one of the judgment-debtors alone is liable under the decree, on the allegation that the other judgment-debtor was only nominal, cannot be maintained. (1912) 15 Cal L Jour 128 (130, 132).

[4] Where a question arises between a party to the suit or his representatives and a third person it cannot be decided by the executing Court. (Vol 4) 1917 Mad 217 (217). (Order under O. 21, R. 93 setting aside court sale and paying purchase money to third party.) * (Vol 10) 1923 All 292 (292). (Claim by reversioner as third party.) * (Vol 6) 1919 All 377 (378) * (Vol 15) 1928 Cal 792 (794). (Person other than judgment-debtor, in possession of property sold in execution—Executing Court cannot decide his title.) * (1913) 1913 Pun L R No. 134, p. 469 (470) * (Vol 29) 1942 Lah 275 (277) : I L R (1943) Lah 17 (F B). (Question between decree-holder and judgment-debtor's vendee and creditors.) * (Vol 28) 1941 Lah 450 (451) : I L R (1942) Lah 483. (Dispute between decree-holder and court-auctioneer not party to suit regarding latter's commission.) * (Vol 3) 1916 Lah 301 (302). (Objection under O. 21, R. 92 by third party disallowed.) * (Vol 23) 1936 Mad 733 (739, 740) * (Vol 17) 1930 Mad 538 (539) : 54 Mad 581 * (Vol 16) 1929 Mad 850 (851, 852) * (Vol 14) 1927 Mad 240 (241). (Dispute between assignee-decree-holder and purchaser of property.) * (Vol 6) 1919 Mad 554 (554). (Order 21, R. 103 which gives right of suit to a party who is not a judgment-debtor, is not restricted by S. 47.) * (Vol 30) 1943 Nag 320 (321) : I L R (1943) Nag 562 * (Vol 20) 1933 Oudh 146 (147) * (Vol 1) 1914 Oudh 359 (359) : 17 Oudh Cas 374 * (Vol 6) 1919 Pat 454

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(464) * (Vol 4) 1917 Pat 337 (338) : 2 Pat L Jour 219. (Sale in mortgage decree — Objection by puisne mortgagee as purchaser of portion of mortgaged property dismissed—Appeal does not lie as puisne mortgagee is not judgment-debtor.) * (Vol 3) 1916 Pat 315 (316). (Question between the judgment-debtor and his partner.) * (Vol 18) 1931 Rang 24 (24).

[5] Even if a person not a party to the suit applies for recovery of possession of property delivered to the decree-holder and fails he can still bring a regular suit within one year to establish his right to the property. (Vol 6) 1919 Lah 430 (431, 432).

[6] Relief jointly against some persons parties to suit and some not parties—Separate suit not barred. (Vol 10) 1923 Bom 450 (450).

[7] Persons who had no interest in the mortgaged property at the time the decree was passed, the property not being ancestral, could not come in execution to set aside that decree. (Vol 3) 1916 Cal 622 (623).

[8] Person not party to decree sought to be executed impleaded as one of judgment-debtors—He can object to his being impleaded. (Vol 21) 1934 All 1027 (1028).

[9] Person made party to execution proceeding—He cannot claim to be regarded as party to suit for raising objections under S. 47. (Vol 32) 1945 Cal 387 (391) * (1913) 36 Mad 128 (130).

[10] Mortgage by widow of husband's property—Decree for sale—Reversioner substituted as legal representative on widow's death—He can challenge in separate suit legality of mortgage and consequent decree. (Vol 32) 1945 Oudh 314 (316, 317) : 20 Luck 472.

[11] Party impleaded in one capacity — Objections by such party in other capacity—Objections do not fall under S. 47 — Objections should be raised and decided in separate suit. (Vol 23) 1936 Mad 733 (744, 745).

[12] Dispute between two sets of persons who claim to be heirs of deceased judgment-debtor is not one under S. 47 and is not open to appeal. (Vol 21) 1934 All 730 (730).

6. Parties to the suit.—[1] "All questions arising between the parties" in S. 47 means questions relating to or affecting parties. (Vol 14) 1927 Cal 106 (109) : 53 Cal 837.

[2] Party actually impleaded is party for all purposes—But party constructively represented by another party is party in the capacity for which he is so represented. (Vol 14) 1927 Mad 1043 (1044, 1050) : 51 Mad 46 (FB). (24 Mad 658 and 30 Mad 215, overruled.)

[2a] Suit on bond—Person impleaded as defendant on ground that he had no right to amount due under bond is not *pro forma* defendant, but party within S. 47. (Vol 21) 1934 All 699 (700).

[2b] Party against whom no relief claimed if proper party, is party to suit for S. 47—Objections to attachment filed by such party in execution of decree in that suit dismissed under O. 21, R. 58 — Party's remedy is by appeal and not by suit under O. 21, R. 63. (Vol 26) 1939 Lah 207 (208, 209).

[3] Person impleaded without notice—Name removed without his participating in proceedings—Person is not "party". (Vol 8) 1921 Mad 559 (560).

[4] Person originally joined but his name subsequently struck off — Any order passed thereafter in execution is not one in execution etc., within S. 47 with regard to such person. (Vol 15) 1928 Mad 276 (276) * (Vol 12) 1925 Nag 118 (118).

[5] A Hindu son was impleaded as one of the defendants, in a suit for the recovery of a sum of money but his name was removed from the array of defendants and a decree passed against his father but the decree stated that the son was exempted and was to bear his own costs; *Held*, that the son having been expressly excluded

from the former suit was not a party to the suit. (Vol 6) 1919 All 377 (378).

[6] Original attaching creditor of mortgaged property who was impleaded as party, dying—No steps taken to bring his legal representatives on record — Legal representatives sought to be impleaded as judgment-debtors in execution proceedings — They are entitled to be discharged. (Vol 23) 1936 Pat 110 (110).

[7] Suit for foreclosure—Party discharged as claiming paramount title—Decree cannot be executed against him. (Vol 31) 1944 P C 46 (49) : 71 Ind App 65 : I L R (1944) Nag 597 : I L R (1944) Kar P C 185 (P C).

[8] Suit on mortgage—Mortgagee himself purchasing property at auction sale in execution of mortgage decree — Application by prior purchaser of half mortgaged property under O. 21, R. 89—Applicant does not become party to mortgage suit within the meaning of S. 47. (Vol 27) 1940 Sind 251 (254) : I L R (1940) Kar 447.

[9] Mortgage suit—Subsequent purchaser impleaded as party — Application for personal decree against mortgagor — Purchaser not made party to this application—Mortgagee proceeding to attach property in execution of personal decree — Claim by purchaser that property attached was his property held came within S. 47. (Vol 27) 1940 Mad 881 (881, 882).

[10] Subsequent mortgagee impleaded as party, but not preventing or unable to prevent passing of final decree — He cannot prevent sale in execution of decree. (Vol 19) 1932 All 49 (50).

[11] Bidder at auction is not party to suit. (Vol 7) 1920 Mad 911 (916) : 42 Mad 776.

[12] A minor not properly represented by a guardian *ad litem* is not a party to the suit. (Vol 9) 1922 Lah 447 (448) * (1909) 31 All 572 (576, 577) : 36 Ind App 168 (P C) * (Vol 14) 1927 Mad 209 (210). (Valid appointment of guardian *ad litem*—Minor wishing to set aside decree or invalidate proceedings in execution must proceed by application under S. 47.) * (Vol 3) 1916 Mad 33 (34, 35, 36) : 38 Mad 1076 * (Vol 29) 1942 Pat 279 (281).

[But see (Vol 28) 1941 Lah 327 (331).]

[13] Lunatic not properly represented in suit is not a party. (Vol 4) 1917 Cal 844 (847) : 44 Cal 627 * (Vol 6) 1919 All 409 (412).

[14] Decree for costs against minor plaintiffs—Father shown in decree as party only so far as next friend of minors — Decree cannot be executed against him. (Vol 22) 1935 All 359 (360).

[15] A benamidar is neither a party nor the representative of a party. (Vol 13) 1926 Mad 1081 (1081) * (Vol 6) 1919 Cal 921 (922) * (Vol 12) 1925 Mad 701 (702, 703) : 48 Mad 553.

[16] A garnishee is not a party to the suit. (Vol 23) 1936 Rang 77 (80) : 13 Rang 723.

[17] Defendant mortgaging his property to plaintiff and part of consideration left with plaintiff to be paid to decree-holder of defendant — On plaintiff failing to pay, amount attached by decree-holder — Objection of plaintiff rejected — Remedy is appeal—Separate suit is barred under O. 21, R. 63-A (Lahore High Court). (Vol 22) 1935 Lah 26 (27).

[18] A defaulting purchaser at an execution sale is not a party to the suit or representative under S. 47. (1911) 7 Nag L R 134 (135).

[19] Where a person pays down money to avoid an attachment of his property which is by mistake identified with the judgment-debtor's property, he cannot claim the money back in proceedings under S. 47 as he is neither a party nor a representative of a party in the suit but must enforce his claim by a separate suit. (Vol 3) 1916 Sind 22 (22) : 9 Sind L R 213.

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[20] A judgment-debtor who is also a rival decree-holder can raise the objection that the property could not be sold by a Subordinate Judge. (1909) 1 Ind Cas 78 (78) (All).

[21] Questions between same parties but in different capacities are not covered by the section. (Vol 10) 1923 Nag 149 (150).

[22] Direction in decree against particular defendant to pay Government court-fee payable by pauper makes defendant judgment-debtor to that extent and Government a decree-holder, and Government is entitled to priority. (Vol 23) 1936 Mad 602 (603) : 59 Mad 872.

[23] Bengal Court of Wards Act (1879), S. 6 (e) — Proprietor declared disqualified — Execution proceedings against the properties of the proprietor — Objection by Court of Wards is objection by judgment-debtor through manager, Court of Wards. (Vol 12) 1925 Pat 179 (180) : 4 Pat 172.

[24] Decree against legal representatives of deceased person sought to be executed against his property — Application under S. 151 by posthumous son of deceased that he should be brought on record as legal representative — Question does not fall within S. 47. (Vol 23) 1936 Sind 166 (167) : 30 Sind L R 170.

7. Custodian of attached property. — See Notes on S. 145.

8. Explanation. — [1] To determine whether particular defendant against whom suit has been dismissed is or is not party to suit within operation of S. 47, Court should always look into the decree, judgment and pleadings as the question does not entirely depend upon whether his name has been struck off or retained on record. (Vol 17) 1930 Mad 817 (818, 820) : 54 Mad 81 (FB).

[2] Persons party to suit, but no decree against them — Their rights infringed in execution proceedings — Such persons must apply under S. 47. (Vol 17) 1930 Mad 12 (14, 15) * (Vol 20) 1933 All 57 (58) : 54 All 1031 * (Vol 11) 1924 All 513 (513) * (Vol 5) 1918 All 397 (398). (Suit for declaration that son's share could be sold on ground of pious obligation to pay father's debt — Previous decree discharged son, and fresh suit was barred under S. 47.) * (Vol 25) 1938 Cal 113 (114) : I L R (1938) 1 Cal 280 * (Vol 8) 1921 Cal 242 (244). (Widow expressed to be not proper party as she was not an heir — But she being alleged to have deceased's property and treated as proper party.) * (Vol 11) 1924 Lah 589 (590) * (Vol 14) 1927 Mad 253 (254). (One defendant given up but plaint not amended.) * (Vol 12) 1925 Mad 1133 (1133, 1134) * (Vol 5) 1918 Mad 123 (125) : 41 Mad 418 (FB). (Defendant against whom suit is dismissed on account of relinquishment of certain relief.) * (Vol 16) 1929 Nag 179 (180) * (Vol 16) 1929 Pat 472 (472) * (Vol 12) 1925 Pat 482 (483) * (Vol 18) 1931 Rang 314 (316).

[See however (Vol 13) 1926 All 475 (477) : 48 All 574.]

[3] Persons wrongly impleaded as defendants in execution proceedings and who did not prefer any claim to plaintiff's attachment and sale of property therein, were not estopped, by the said circumstance, from making a claim in subsequent suit or proceeding. (1910) 9 Mad L Tim 95.

[4] Person who is not necessary party and is exonerated from suit without his claim being adjudicated is not party within S. 47. (Vol 24) 1937 Mad 268 (270) * (Vol 13) 1926 Lah 202 (202, 203) * (Vol 12) 1925 Nag 118 (118). (Defendant's name struck off at the instance of plaintiff.) * (Vol 2) 1915 Lah 323 (324) * (Vol 26) 1939 Mad 280 (281) * (Vol 20) 1933 Mad 435 (436) * (Vol 17) 1930 Mad 817 (820) : 54 Mad 81 (FB). (Suit dismissed against defendant for misjoinder. Overruling (Vol 13) 1926 Mad 484 : 49 Mad 494 and approving

(Vol 5) 1918 Mad 911 : 40 Mad 964.) * (Vol 30) 1943 Nag 273 (275) : I L R (1943) Nag 462 * (Vol 20) 1933 Nag 246 (247). (But where he is retained on record and suit is dismissed against him, he is a party.) * (Vol 29) 1942 Pat 432 (433, 434) : 21 Pat 601 * (Vol 14) 1927 Rang 137 (137) : 5 Rang 110.

[5] Suit against A and B — A's name struck off — Plaintiff not wishing to proceed against him — A is a party to the suit under S. 47. (Vol 13) 1926 Mad 687 (688, 689) * (Vol 31) 1944 Lah 273 (276) * (Vol 5) 1918 Mad 123 (125) : 41 Mad 418 (FB) * (1928) 1928 Mad WN 601 (601).

[But see (Vol 21) 1934 Lah 737 (738) * (Vol 31) 1944 Lah 294 (295, 297, 302) : I L R (1944) Lah 479 (FB).]

[6] Mortgage suit — Party setting up paramount title, discharged, is not party to suit for purpose of S. 47. (Vol 7) 1920 Nag 278 (279) * (Vol 14) 1927 All 378 (379) : 49 All 379. (Party claiming adverse title.) * (Vol 6) 1919 Nag 120 (121) : 15 Nag L R 146.

9. Parties arrayed on same side. — [1] "Parties" in the expression "between parties to the suit" mean parties opposed to one another and not necessary plaintiff and defendant. (1913) 24 Mad L Jour 477 (478) * (Vol 23) 1936 Lah 116 (119) * (Vol 24) 1937 Lah 592 (593). (Section applies even where parties are both judgment-debtors and decree-holders.) * (Vol 12) 1925 Mad 853 (854) * (Vol 21) 1934 Pat 627 (628).

[2] A puisne mortgagee impleaded as a defendant along with the mortgagor in a mortgage suit for sale and the mortgagor are parties within the meaning of S. 47, in the sense of being opposed to each other. (Vol 19) 1932 Cal 126 (128, 129) : 59 Cal 117.

[3] In order that S. 47 may apply the contest must be between the opposing parties in the suit or their representatives-in-interest. (Vol 30) 1943 Mad 407 (408) * (Vol 24) 1937 Cal 177 (178) * (1907) 6 Cal L Jour 437 (437).

[4] Where the dispute is merely between co-decree-holders in which the judgment-debtor has no concern, S. 47 does not apply. (Vol 30) 1943 Mad 407 (408) * (1929) 113 Ind Cas 776 (777) (Lah) * (Vol 11) 1924 Mad 518 (519) * (Vol 12) 1925 Nag 186 (187) : 21 Nag L R 34.

[But see (Vol 24) 1937 Cal 730 (731) : I L R (1938) 1 Cal 175.]

[4a] Two decree-holders proceeding against same property — Decision by executing Court that one is not entitled to priority over other is no bar to regular suit for establishing priority. (Vol 21) 1934 Lah 478 (479).

[5] Conflict between judgment-debtors *inter se* — S. 47 does not apply. (Vol 16) 1929 All 291 (292, 293) : 51 All 752 (Per Sen J.; Niamatullah J. dissenting.) * (Vol 22) 1935 Mad 714 (715) * (Vol 4) 1917 Mad 218 (219).

[See however (1913) 18 Ind Cas 312 (313, 314) (Oudh). (Decree for sale on a mortgage against A and B providing that possession to be delivered on payment of mortgage money — A depositing whole amount and getting possession from executing Court — Order held under S. 47 and therefore B could appeal from the order.)]

[6] Controversy between persons each claiming as decree-holder — S. 47 applies. (Vol 31) 1944 Pat 307 (308) : 23 Pat 410. (Controversy between legal representative of benamidar decree-holder and real decree-holder.)

[7] A dispute as to possession between rival auction-purchasers of the same property in execution of different decrees does not fall within the scope of S. 47. (Vol 6) 1919 Mad 949 (949, 950).

[8] Parties — S. 47 applies to disputes also between co-plaintiffs or co-defendants. (Vol 14) 1927 Rang 45 (46) : 4 Rang 418 * (Vol 11) 1924 Mad 365 (366).

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[9] No conflict between co-defendants in suit—Dispute between them in execution does not fall under S. 47. (Vol 33) 1946 Mad 90 (92) : ILR (1946) Mad 640.

[10] Mortgage suit—Dispute between decree-holder auction-purchaser and judgment-debtor as to what passed under sale and arising in application for possession is neither between parties to suit nor relating to execution. (Vol 24) 1937 All 742 (743, 751) : ILR (1937) All 921 (FB).

[10a] Dispute between judgment-debtor and auction-purchaser does not fall within S. 47. (Vol 17) 1930 Rang 281 (282).

[11] Dispute is not between parties when it is dispute between one party and his own representative. (Vol 24) 1937 All 742 (747) : I L R (1937) All 921 (F B) * (Vol 28) 1941 Mad 161 (169, 170) : I L R (1941) Mad 438 (FB) * (Vol 5) 1918 Sind 63 (64) : 11 Sind L R 74.

[12] Scope—Dispute between persons having rival claims to be accepted as legal representatives on one side only—S. 47 does not apply. (Vol 28) 1941 Lah 342 (342) * (Vol 23) 1936 Lah 116 (120). (Dispute between representatives of one party—Other parties having no interest—Decree satisfied—S. 47 is not applicable.) * (Vol 28) 1941 Mad 161 (169, 170) : I L R (1941) Mad 438 (FB) * (Vol 19) 1932 Pat 329 (329).

[13] An order under S. 73 determining question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47 and is not appealable. (Vol 18) 1931 Bom 252 (253, 254) * (Vol 18) 1931 Bom 350 (351) : 55 Bom 473 * (Vol 2) 1915 Cal 658 (659) : 42 Cal 1 * (Vol 19) 1932 Lah 96 (96) * (Vol 23) 1936 Mad 136 (136, 137) : 59 Mad 399 * (1885) 8 Mad 494 (495). (Question as to interest on rateable share detained in Court at instance of rival decree-holder.) * (Vol 23) 1936 Oudh 277 (277) : 12 Luck 720 * (Vol 8) 1921 Pat 401 (402) : 5 Pat L Jour 415 * (Vol 28) 1936 Pesh 52 (53) * (Vol 28) 1941 Rang 113 (114) : 1940 Rang L R 718 * (Vol 24) 1937 Rang 134 (135).

[14] Order of rateable distribution affecting not only decree-holders *inter se* but also judgment-debtor—Order falls under S. 47 and is appealable. (Vol 26) 1939 Bom 463 (469) * (Vol 26) 1939 Bom 112 (114) : I L R (1939) Bom 133 * (Vol 25) 1938 Pesh 63 (64).

[15] Question of rateable distribution when between parties to suit comes within S. 47. (Vol 21) 1934 Pat 350 (351).

[16] Order deciding matter in execution although ostensibly relating to rateable distribution is appealable as one falling under S. 47. (Vol 22) 1935 Lah 302 (303) 16 Lah 990 * (Vol 5) 1918 Mad 1322 (1323).

[17] When decision under S. 73 is in respect of invalidity of execution or non-liability of fund for distribution such decision is virtually under S. 47 between particular decree-holder and judgment-debtor and as such appeal lies. (Vol 5) 1918 Mad 1322 (1323, 1324).

[18] Question arising in execution between parties to partition suit regarding rateable distribution is covered by S. 47. (Vol 12) 1925 Mad 1265 (1266).

[19] An order allowing or refusing execution in favour of one of the decree-holders where an objection is raised by the judgment-debtor is one falling under S. 47. (Vol 27) 1940 Pesh 24 (25).

[20] When order refusing decree-holder's request to be paid certain share out of fund is between that decree-holder and his judgment-debtor, it is appealable whether such order affects third parties or not. (Vol 5) 1918 Mad 1322 (1324, 1325).

[21] Money deposited by judgment-debtor to satisfy A's decree—B applying for the money to be paid towards his decree—Order to pay money towards B's

decree is not one under S. 47. (Vol 13) 1926 Mad 1104 (1105).

[22] One of two joint decree-holders purchasing at court sale—Sale set aside by paying five per cent.—Question whether purchasing decree-holder alone is entitled to this money is not appealable. (Vol 14) 1927 Pat 288 (289) : 6 Pat 386.

[23] Dispute between decree-holder and assignee does not come under S. 47—Separate suit relating to validity of assignment is competent—Assignee of decree realizing decretal amount from judgment-debtor—Decree-holder executing decree—Assignee applying that decree is satisfied—Executing Court dismissing application finding assignment not valid—Suit by judgment-debtor to realize amount paid to assignee, making decree-holder and assignee defendants—S. 47 does not bar assignee from defending his assignment. (Vol 24) 1937 Lah 465 (467).

[24] Where a decree passed against one defendant in a suit does not affect another defendant, nor decides the title to property set up by him, then on attachment of the property in execution against the former, it is competent to the latter as well as his transferee to maintain a separate suit for establishing his title to the attached property. (1909) 23 All 346 (353).

10. Party sued in representative capacity.—[1] B obtaining decree against co-widows of deceased Hindu for unpaid purchase money in respect of property purchased by deceased—During execution senior widow adopting C and applying for name of herself and her co-widow being struck off from execution petition as she had adopted C—Properties sought to be sold not transferred in C's name—Execution still proceeded with against widows and properties sold in auction to B—Deceased's estate held sufficiently represented by widows in execution proceedings so as to make sale binding on C. (Vol 32) 1945 Bom 435 (437).

[2] Where a judgment-debtor claims property not in his personal capacity but as a *shebait* of an idol who was not a party to the suit S. 47 does not apply and no appeal lies. But where he is a party to the suit both in his personal capacity as well as a *shebait* S. 47 applies and an appeal will lie. (Vol 1) 1914 Cal 321 (322).

[3] Decree passed against person in his representative capacity—His objection, in his own capacity, regarding property against which decree is being executed must be raised in execution proceedings and not by separate suit. (Vol 27) 1940 Rang 27 (29) * (Vol 6) 1919 Cal 623 (624).

11. Surety.—See Notes on S. 145.

12. Representative—Who is—[1] Section 47 does not help to decide what is meant by the term representative. (Vol 30) 1943 Oudh 354 (355) : 19 Luck 1 (FB).

[2] The tests for determining whether a person is a representative of a party to the suit within S. 47 are first whether any portion of the interest of the decree-holder or judgment-debtor which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law vested in the person who is sought to be treated as a representative and secondly if there has been a devolution of interest whether, so far as such interest is concerned that person is bound by the decree. (Vol 32) 1945 Cal 387 (392) * (1909) 9 Cal L Jour 485 (488, 489). (Son is representative of father in joint Hindu family.) * (Vol 20) 1933 Lah 352 (353) : 14 Lah 591 * (Vol 22) 1935 Sind 214 (215) : 29 Sind L R 251.

[3] The word "representative" in S. 47 has a much wider meaning than the words "legal representative" in S. 50. It includes not only legal representative but any representative-in-interest i. e. any transferee of the interest of a party whether by assignment, succession or otherwise who so far as such interest is concerned is

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bound by the decree. (Vol 31) 1944 Oudh 314 (318) : 20 Luck 226 * (1904) 26 All 447 (460) (FB). (Auction-purchaser at judicial sale in execution of simple money decree is representative.) * (1940) 42 Bom L R 1123 (1132, 1134). (Representative includes transferee by operation of law.) * (1897) 24 Cal 62 (71) (F B). (Purchaser of judgment-debtor's interest is his representative.) * (Vol 22) 1935 Lah 306 (307). (Expression "representatives" is wider than words "legal representative" and includes a purchaser of equity of redemption.) * (Vol 29) 1942 Mad 714 (715). ('Representative' is not confined to legal representative.) * (Vol 28) 1941 Mad 161 (174) : I L R (1941) Mad 438 (FB). (The term 'representative' in S. 47 should be understood as referring to one who stands in the shoes of another and as meaning more or less the same thing as the expression "claiming under" used in other sections of the Code, e. g., Ss. 11 and 146.) * (Vol 7) 1920 Mad 324 (333) : 43 Mad 107 (FB). (Term "representative" is not same as legal representative in S. 2 (11). Auction-purchaser is always representative either of decree-holder or judgment-debtor.) * (Vol 26) 1939 Nag 183 (184, 185, 186) : I L R (1939) Nag 543 * (Vol 30) 1943 Oudh 354 (358) : 19 Luck 1 (FB). (Word "representative" in S. 47 includes not only a legal representative of the judgment-debtor on his death but any representative in interest.) * (Vol 27) 1940 Pat 615 (615, 616). (Expression "representative" in S. 47 includes person on whom interest has devolved by assignment, transfer or otherwise.) * (Vol 21) 1934 Pat 413 (419) : 13 Pat 735. (Representatives include also representative-in-interest such as purchasers at private sale or court sale who are bound by decree but not purchasers who will not be bound by decree.) * (Vol 5) 1918 Pat 306 (307). ("Representatives" means also representatives in interest.) * (Vol 22) 1935 Sind 214 (215) : 29 Sind L R 251. (Person attaching money lying in Court to the credit of the judgment-debtor and getting the money subject to the conditions under which it was lying in Court held to be representative of the judgment-debtor.)

[4] Vendee in pursuance of contract to sell is not representative of vendor within meaning of S. 47. (Vol 23) 1936 Nag 163 (166) : I L R (1936) Nag 172.

[5] Subsequent mortgagee during pendency of suit on first mortgage is representative of mortgagor. (Vol 23) 1936 All 479 (480).

[6] An unrecorded co-sharer in a tenancy is not a representative in interest of the recorded tenant within S. 47. (1911) 13 Cal L Jour 257 (260).

[7] A person taking the judgment-debtor's share in joint property by survivorship is his representative. (1907) 34 Cal 642 (648) (F B).

[8] Person in possession as intermeddler is representative. (Vol 23) 1936 Pat 126 (127, 128).

[9] A purchaser from a sharer in a partition decree is bound by the decree. (Vol 25) 1938 Pat 478 (479).

[10] Mortgage-decree on portion of holding — Holding sold for arrears of rent — Purchaser is not representative of judgment-debtor in mortgage-decree. (Vol 23) 1936 Pat 561 (561, 562) : 15 Pat 414.

[11] Person taking judgment-debtor's property in partition before his death is his representative. (Vol 18) 1931 Sind 84 (87) : 25 Sind L R 374.

[12] Representatives include assignees or successors to the interest of a party to the decree. (Vol 13) 1926 Cal 798 (808) : 53 Cal 781 (F B).

[13] Hindu widow — Decree against — Reversioners succeeding to her husband's estate; contesting that decree was fraudulent — They are not her representatives. (1912) 1912 Pun L R No. 228, p. 723 (724) : 1913 Pun Re No. 14.

[14] Landlord obtaining rent decree and selling

tenure in execution — Before sale he instituting second rent suit, but obtaining decree after sale in execution of first rent decree — Tenant's mortgagee meantime obtaining decree against tenant and attaching surplus sale proceeds — As second rent decree was obtained after relationship of landlord and tenant between parties had ceased, it was not binding on mortgagee of tenant and so he was not representative within S. 47. (Vol 18) 1931 Cal 202 (204).

[15] Usufructuary mortgagee from judgment-debtor is his representative. (Vol 25) 1938 Cal 390 (392) : I L R (1938) 2 Cal 125.

[16] Certain persons obtaining possession of property on relinquishment by female limited owner expressly agreeing to pay decretal debts due against her — They are bound to pay decretal debt — Decree-holder can proceed by way of application under S. 47. (Vol 23) 1936 Cal 67 (68).

[17] Legatee is representative of party. (Vol 14) 1927 Rang 273 (274) : 5 Rang 393.

[18] A decree-holder can never in a suit under O. 21, R. 63 be the representative of his judgment-debtor. (Vol 29) 1942 Mad 128 (129).

[19] A suit on a judgment obtained against the ostensible representatives can be maintained against the real representatives. (Vol 8) 1916 Cal 661 (664).

[20] Field of judgment-debtor sold for arrears of land revenue — Decree-holder attaching balance — Part of balance appropriated for recovery of other dues to Crown under Berar Land Revenue Code, S. 162 — Matter held fell under S. 47, Civil P. C. — Government held representative of judgment-debtor. (Vol 32) 1945 Nag 150 (152) : I L R (1945) Nag 496.

[21] Legal representative of judgment-debtor cannot reopen question as to binding effect of transaction when that question has become final in previous suit between parties. (Vol 28) 1941 Mad 480 (480).

[22] If the claim of a legal representative of a judgment-debtor is really in his own interests as representative of the judgment-debtor, it will come under S. 47 but if it is adverse to his interest as representative, it will not. (Vol 2) 1915 Cal 327 (331) : 42 Cal 440.

13. Auction purchaser — Position of. — [1] The Calcutta, Madras and Allahabad High Courts have held that stranger purchaser in execution of a simple money decree is a representative of the judgment-debtor. (1897) 24 Cal 62 (77) (F B). (Overruling (1889) 16 Cal 355 : 8 Suth W R 304.) * (Vol 21) 1934 Cal 827 (828) : 61 Cal 1068 * (1936) 164 Ind Cas 375 (375) (Cal) * (Vol 28) 1941 Mad 161 (170) : I L R (1941) Mad 438 (F B) * (Vol 7) 1920 Mad 324 (333) : 43 Mad 107 (FB) * (Vol 25) 1938 All 651 (652) * 1904) 26 All 447 (461, 463) (F B).

[2] The Bombay and Lahore High Courts and the Chief Court of Lower Burma hold that he is not the representative of any of the parties to the suit. (Vol 27) 1940 Bom 210 (214) : I L R (1940) Bom 370 * (Vol 10) 1923 Bom 214 (215) * (Vol 21) 1934 Lah 105 (105) * (Vol 12) 1925 Lah 176 (177) * (1911) 9 Ind Cas 472 (473, 474) (Low Bur) * (1909) 5 Low Bur Rul 85 (87).

[But see (Vol 23) 1936 Lah 18 (20).]

[3] The decisions of the High Court of Patna, the Chief Court of Oudh and the Court of the Judicial Commissioner of Nagpur are conflicting. (Vol 29) 1942 Pat 369 (370) * (Vol 28) 1941 Pat 95 (98) : 20 Pat 86 * (Vol 11) 1924 Pat 367 (368). (Purchasers of mortgaged property in a revenue sale — Held, representatives of judgment-debtor.) * (Vol 4) 1917 Pat 495 (496) : 2 Pat L Jour 361. (Not a representative of the parties.) * (1911) 14 Oudh Cas 89 (93). (Representative of judgment-debtor.) * (Vol 2) 1915 Oudh 134 (135). (Not a representative of either.) * (Vol 15) 1928 Oudh 442 (445, 446) : 3 Luck 719. (Depends upon the nature of the question in dispute. In this case, held representative of

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judgment-debtor.)*(1909) 12 Oudh Cas 175 (181). (Not a representative of decree-holder.)*(Vol 5) 1918 Oudh 379 (385). (An auction-purchaser, even if the decree-holder, is representative of the judgment-debtor.)*(Vol 9) 1922 Nag 189 (191). (Representative of judgment-debtor.)*(Vol 10) 1923 Nag 161 (162). (Not a representative of judgment-debtor.)*(Vol 13) 1926 Nag 68 (70). (Representative of decree-holder.)*(Vol 11) 1924 Nag 328 (330): 20 Nag L R 170. (Representative of decree-holder for the purpose of an adjudication between judgment-debtor and auction-purchaser.)

[4] The purchaser in execution of a mortgage decree is a representative of the mortgagor. (Vol 24) 1937 Nag 59 (59): I L R (1937) Nag 156*(Vol 25) 1938 Rang 250 (251): 1938 Rang L R 583. (Decree-holder purchaser)*(Vol 11) 1924 Sind 101 (103, 104): 17 Sind L R 73.

[5] It has been held that the purchaser in execution of a mortgage decree is the representative of both the mortgagor and the mortgagee. (Vol 13) 1926 All 457 (459)*(Vol 16) 1929 Rang 183 (183)*(Vol 9) 1922 All 495 (496): 44 All 488*(Vol 19) 1932 Cal 126 (131): 59 Cal 117*(1893) 16 Mad 121 (125, 126)*(1878) 2 Mad 108 (112)*(1909) 12 Oudh Cas 45 (51) [See also (1896) 20 Bom 390 (393).]

[But see (Vol 8) 1921 Mad 420 (421). (Mortgage decree purchaser is in the same position as a money decree purchaser.)]

[6] The auction-purchaser does not purchase the mortgagee's interest also in the execution sale, but gets the mortgagee's right by virtue of the doctrine of subrogation (Vol 13) 1931 All 466 (480): 53 All 1023 (F.B.). (Vol 24) 1937 All 742 (746): I L R (1937) All 921 (F.B.).

[7] In execution of a money-decree obtained by A, B purchased the property of the judgment-debtor. The sale was set aside on an application by the judgment-debtor under O. 21, R. 90 and the purchase money returned to B. On appeal, however, the lower Court's order was reversed, and the sale was confirmed. B having failed to return the purchase money, A filed a suit against B for the recovery of the purchase money. It was held that the suit was barred by this section. (1905) 27 All 155 (157).

[8] R executed five mortgage-deeds hypothecating different portions of his property in favour of M. M brought a suit on foot of all the mortgages and obtained a consolidated decree for sale for the whole amount. After obtaining an order absolute, M applied for sale of the properties in execution. Meantime, G, the plaintiff who had purchased a portion of the properties in execution of a simple money decree against R objected to the sale but his objection was disallowed. He, thereupon, brought suit for the determination of the same question. It was held that suit was barred by this section. (1904) 26 All 447 (461) (F.B.).

[9] Where the decree-holder himself becomes the purchaser in execution of his decree, it has been held that he retains his character and a question arising between him and the judgment-debtor in respect of the purchase is one "between the parties to the suit." (Vol 30) 1943 Mad 318 (321)*(Vol 23) 1936 Mad 571 (572)*(Vol 13) 1926 Mad 557 (558)*(Vol 13) 1926 Cal 798 (803): 53 Cal 781 (F.B.)*(Vol 15) 1928 Oudh 199 (202): 3 Luck 182 (F.B.)*(Vol 14) 1927 Cal 57 (60)*(Vol 27) 1940 Nag 372 (375)*(Vol 25) 1938 Nag 212 (215, 216): I L R (1938) Nag 583*(Vol 12) 1925 Sind 171 (173): 18 Sind L R 94*(Vol 4) 1917 P C 121 (123): 41 Mad 403: 45 Ind App 54 (P.C.).

[10] A contrary view has been taken in the under-mentioned cases which hold that there is no distinction

between a decree-holder purchaser and a stranger purchaser. (1909) 31 All 82 (90). (Overruling 30 All 72: 5 All L J 285 and 3 All L J 234)*(Vol 15) 1928 All 368 (370): 50 All 670*(Vol 7) 1920 Bom 223 (223): 44 Bom 977*(Vol 11) 1924 Bom 429 (431): 48 Bom 550 (F.B.). (Overruling 35 Bom 452.)*(Vol 27) 1940 Lah 280 (283): I L R (1941) Lah 91. (Mortgagee decree-holder in execution of his decree bringing property to sale and purchasing it himself—Suit by him for possession against person claiming under judgment-debtor is not between parties to suit relating to execution and is not barred by S. 47.)*(Vol 17) 1930 Lah 363 (363)*(Vol 3) 1916 Pat 216 (217, 218): 1 Pat L Jour 232 (F.B.)*(Vol 18) 1931 Pat 241 (252-255): 10 Pat 670 (F.B.). (Same case after Full Bench answer, see (Vol 19) 1932 Pat 80 (86).)

[11] Where the representative character of the decree-holder-purchaser comes in question in a distinct proceeding, his character as decree-holder in one execution proceeding can have no effect on his position in another and he will be in the same position as a stranger purchaser. (Vol 7) 1920 Mad 324 (333): 43 Mad 107 (F.B.)*(1936) 163 Ind Cas 602 (604) (Nag). (Mortgagee decree-holder-purchaser is representative of judgment-debtor in proceedings for execution of rent decree against mortgagor.)*(Vol 25) 1938 Pat 216 (220). (Decree-holder-purchaser is representative of judgment-debtor in execution proceedings against same judgment-debtor by another decree-holder.)*(Vol 23) 1936 Pat 289 (293): 15 Pat 545. (Decree-holder-purchaser is representative of judgment-debtor in regard to another decree-holder executing against same judgment-debtor.)

[12] A stranger auction-purchaser can apart from the summary remedy provided by O. 21, Rr. 95 to 102, agitate a dispute as to delivery of possession between him and the judgment-debtor in a separate suit and if he avails himself of the summary remedy, no appeal would lie from an order passed in such proceedings. (Vol 28) 1941 Mad 161 (170): I L R (1941) Mad 438 (F.B.). (Suit for possession by auction-purchaser against private purchaser from judgment-debtor is not barred.)*((Vol 20) 1933 Mad 598: 56 Mad 808: 25 Mad 383 and (Vol 21) 1934 Mad 181: 57 Mad 457, Overruled)*(Vol 15) 1928 Mad 806 (809)*(Vol 13) 1926 All 730 (732)*(Vol 13) 1926 All 509 (509, 510). (Overruled by (Vol 22) 1935 All 243: 57 All 658)*(1837) 14 Cal 644 (649)*(1886) 12 Cal 169 (173) (9 Cal 602 followed.)*(Vol 8) 1921 Nag 59 (60)*(1911) 14 Oudh Cas 70 (73)*(Vol 17) 1930 Pat 311 (313): 9 Pat 775.

[But see (Vol 8) 1921 Mad 420 (421).]

[13] A question relating to delivery of possession is one relating to the execution, discharge or satisfaction of the decree, and the remedy of the decree-holder auction-purchaser for possession from the judgment-debtor is only by way of application under O. 21, R. 95 and a separate suit is barred. (Vol 30) 1943 Mad 318 (321)*(Vol 26) 1939 Mad 369 (370): I L R (1939) Mad 456 (S.B.). (Reversing (Vol 23) 1936 Mad 571 on another point.)*(Vol 13) 1926 Cal 798 (803-807): 53 Cal 781 (F.B.)*(Vol 20) 1933 Cal 680 (680): 60 Cal 832*(Vol 14) 1927 Nag 294 (295)*(Vol 25) 1938 Nag 212 (215): I L R (1938) Nag 583*(Vol 20) 1933 Nag 369 (370). (Application by decree-holder purchaser under R. 95—Resistance offered—Application under R. 97 held barred by limitation—Fresh application for possession by decree-holder-purchaser held not barred—But suit would be barred.)*(Vol 12) 1925 Sind 171 (173): 18 Sind L R 94*(Vol 23) 1936 Sind 11 (13): 30 Sind L R 290.

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[But see (Vol 20) 1933 Mad 482 (484)* (1892) 15 Mad 226 (228)* (Vol 19) 1932 Nag 140 (141) : 28 Nag L R 250 * (Vol 23) 1936 Pesh 85 (86).]

[14] A contrary view has been taken in the under-mentioned cases holding that upon the judgment-debtor's property being sold and the amount due under the decree being realised the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be considered, and that, whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purposes of the decree. According to this, the decree-holder auction-purchaser has an additional remedy by way of suit. (1909) 31 All 82 (92, 93, 94) (F B) * (Vol 24) 1937 All 742 (750) : I L R (1937) All 921 (F B) * (Vol 11) 1924 Bom 429 (431) : 48 Bom 550 (F B). (Overruling 35 Bom 452.) * (Vol 17) 1930 Bom 375 (377) : 54 Bom 479 * (Vol 3) 1916 Pat 216 (216) : 1 Pat L Jour 232 (F B) * (Vol 18) 1931 Pat 241 (243 to 247, 252, 255, 261, 262, 263) : 10 Pat 670 (F B). (Same case after Full Bench answer: See (Vol 19) 1932 Pat 80 (86) : 10 Pat 670.) * (Vol 27) 1940 Lah 280 (233) : I L R (1941) Lah 91 * (Vol 26) 1939 Lah 211 (212) : I L R (1939) Lah 295. ((Vol 24) 1937 Lah 145 disapproved.) * (Vol 17) 1930 Rang 61 (62) : 8 Rang 162 * (Vol 23) 1936 Rang 298 (299) * (Vol 15) 1928 Oudh 199 (203) : 3 Luck 182 (F B) * (Vol 3) 1916 Oudh 111 (112) : 18 Oudh Cas 345.

[But see (Vol 22) 1935 Lah 144 (145) * (1888) 1888 Pun Re No. 58, p. 142 (143).]

[15] Where the decree-holder purchaser obtains possession under the sale and is thereafter dispossessed again by the judgment-debtor, a suit for possession by the decree-holder is not barred under this section inasmuch as the matter in dispute in such a case arises after the satisfaction of the decree and does not relate to the execution, discharge or satisfaction of the decree. (Vol 23) 1936 Rang 298 (299).

[16] A dispute between the decree-holder purchaser and a third party in possession does not come within S. 47. (Vol 23) 1936 Mad 738 (740).

14. Attaching creditor.—[1] Under O. 21, R. 53, cl. (3), the holder of a decree sought to be executed by the attachment of another decree shall be deemed to be the representative of the holder of the attached decree. Such an attaching creditor is therefore a representative of the decree-holder within the meaning of S. 47. See Notes under O. 21, R. 53.

[2] Question as to genuineness of purchase of decree between purchaser, applying for execution on substitution of his name as decree-holder and judgment-creditor of decree-holder, attaching decree and opposing application, comes under S. 47. (Vol 3) 1916 Cal 471 (472).

15. Judgment-debtor under attached decree.—[1] Decree sold in execution of another decree—Judgment-debtor can plead in the execution proceeding that decree was already satisfied—Court must enquire into the plea under S. 47. (Vol 12) 1925 Oudh 225 (226) : 27 Oudh Cas 277.

[2] In execution of decree, judgment-debtor's decree attached, executed and satisfaction entered—Judgment-debtor got decree against him set aside and applied for execution of his decree—He can do so under S. 47—Whatever remedy he may have against his decree-holder separate suit against his judgment-debtor was barred. (Vol 7) 1920 Cal 543 (544).

[3] Preliminary decree in favour of M for sale—Judgment-debtor F obtaining certain other decree against M and attaching M's decree—M transferring his decree to R—Application for execution by F of attached decree—Objection to execution by R—R's

objection held came under S. 47. (Vol 24) 1937 Oudh 365 (366) : 13 Luck 237.

16. Official assignee or receiver or liquidator.—[1] Receiver appointed in suit under O. 40, R. 1 is not representative of any party within S. 47. (Vol 32) 1945 Cal 387 (392, 393).

[2] The Official Assignee is a representative of the insolvent judgment-debtor, within the meaning of S. 244, Civil P. C., 1882. (1901) 28 Cal 419 (422).

[3] Whether Receiver in insolvency is representative for purposes of S. 47, depends on the purpose and nature of the application made by the Receiver. (Vol 32) 1945 Cal 387 (392) * (Vol 19) 1932 Cal 203 (204).

[4] Official Receiver objecting to attachment of insolvent's property on ground that it had vested in him—Objection is one under O. 21, R. 58 and not under S. 47—Order passed is not appealable. (Vol 22) 1935 Mad 151 (152) : 58 Mad 403 * (Vol 28) 1941 Mad 262 (264, 265).

[5] Receiver in insolvency objecting to sale on ground that property had vested in him for benefit of creditors is not representative of judgment-debtor. (Vol 19) 1932 Cal 203 (204). (Application to set aside sale under O. 21, R. 90.) * (Vol 23) 1936 Cal 573 (574) : I L R (1937) 1 Cal 264.

[6] Sale of insolvent's property in execution of decree—Application by Receiver to have sale set aside can be treated as one under S. 47—Second appeal is competent. (Vol 22) 1935 Cal 503 (504) : 62 Cal 457 * (Vol 28) 1941 Mad 606 (607). (Application by Official Receiver to set aside sale on ground that notice under O. 21, R. 22 was not served on him.) * (Vol 29) 1942 Mad 415 (415) : I L R (1942) Mad 614. (Question between decree-holder auction-purchaser and Receiver in insolvency falls under S. 47.)

[7] Receiver for execution of decree is representative of both parties. (Vol 16) 1929 Bom 279 (282).

[8] Order raising attachment of money in the hands of Receiver does not fall under S. 47 and is not appealable. (Vol 23) 1936 Sind 2 (3) : 30 Sind L R 288.

[9] Liquidator proceeding against judgment-debtor is not his representative within S. 47. (Vol 21) 1934 Nag 201 (203) : 30 Nag L R 240.

[10] Liquidator of the decree-holder is his representative—Liquidator buying property of judgment-debtor at auction sale—Suit by judgment-debtor for declaration that sale is void is barred. (Vol 15) 1928 Lah 666 (669).

17. Transferee from auction-purchaser.—[1] A purchaser from the decree-holder auction-purchaser is a representative of the decree-holder. (Vol 13) 1926 Mad 857 (858) * (1905) 28 Mad 87 (90).

[But see (Vol 3) 1916 Mad 430 (430) * (Vol 9) 1922 Low Bur 18 (21, 22) : 11 Low Bur Rul 17.]

[2] A purchaser of property from an auction-purchaser at rent sale has no *locus standi* to come in and object to the execution of a mortgage decree against the property as he is neither a party to the mortgage suit, nor his representative. (1909) 6 Mad L Tim 290 (290).

[3] Transferee from an auction-purchaser can recover possession of property from the transferee of the judgment-debtor by a regular suit and not by application under S. 47, Civil P. C. (1909) 2 Ind Cas 454 (455) (All).

[4] Executing Court's order recalling previous order of delivery of possession to auction-purchaser's transferee is not one under S. 47 and is not appealable. (Vol 2) 1915 Cal 137 (139, 140).

18. Transferee from party.—[1] Purchaser of attached property is representative of judgment-debtor—Question relating to execution between such purchaser and decree-holder must be determined by executing Court under S. 47—Separate suit is barred. (Vol 33) 1946 Lah 134 (137, 140, 141) (F B) * (Vol 15) 1928

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Cal 94 (95, 96) : 54 Cal 1064* (Vol 13) 1926 Lah 134 (135) : 6 Lah 544* (Vol 19) 1932 Mad 86 (89) : 55 Mad 495. ((Vol 14) 1927 Mad 450 reversed.)* (1911) 34 Mad 450 (451)* (Vol 5) 1918 Nag 102 (103).

[2] A purchaser of the property of the judgment-debtor during an attachment subsequently set aside, is not representative of the judgment-debtor and, therefore, a suit against such purchaser by the decree-holder is not barred by S. 244, Civil P. C. (1882). (1910) 32 All 129 (131, 132).

[3] Sale by judgment-debtor before attachment — Vendee does not become representative of judgment-debtor. (Vol 14) 1927 Mad 450 (452) * (1912) 14 Ind Cas 40 (43); 1912 Pun Re No 64. (Donee from judgment-debtor before attachment.)

[4] Purchaser from ostensible owner of property — Fact that ostensible owner is judgment-debtor does not make purchaser his representative. (Vol 8) 1921 Bom 45 (46) : 45 Bom 812.

[5] Purchaser of property not affected by decree is not legal representative of judgment-debtor. (Vol 4) 1917 Mad 705 (705) * (1911) 15 Cal W N 711 (712) * (Vol 7) 1920 Nag 205 (205). (Purchaser from discharged defendant.)

[6] Property sold after order for attachment but before actual attachment — Purchaser applying under O. 21, R. 58 — Purchase held to be *bona fide* and for consideration and attachment raised — Suit by decree-holder for declaration that property is liable to be attached in execution, is not barred under S. 47. (Vol 26) 1939 All 264 (267) : I L R (1939) All 354.

[7] *Ex parte* decree before attachment before judgment made absolute — Execution — Objection by purchaser from judgment-debtor after decree — Order though holding that objector had no *locus standi* to maintain objection, giving him relief by making it necessary upon decree-holder to attach property before sale and to issue notice under O. 21, R. 22, on judgment-debtor — Action is under S. 47 and appeal by decree-holder is maintainable. (Vol 25) 1938 Cal 236 (236, 237).

[8] Transfer by party before decree — Transferee is not his representative. (Vol 26) 1939 Bom 496 (498)* (Vol 8) 1921 Pat 189 (190). (Transferee of holding before passing of rent decree.)

[9] A collusive purchaser from the judgment-debtor is not a representative of the judgment-debtor and cannot object to the execution of a mortgage decree. (Vol 5) 1918 Cal 510 (510).

[10] Purchaser of portion of equity of redemption cannot under S. 47 object to sale in execution. (Vol 5) 1918 Cal 110 (111).

[11] Ejectment of tenant on legal grounds is binding on sub-tenant—His only cause of action is as representative of tenant within S. 47. (Vol 2) 1915 Nag 122 (123) : 11 Nag L R 106.

[12] Purchaser of non-transferable holding is representative of judgment-debtor — He is not entitled to object to sale under O. 21, R. 100. (Vol 5) 1918 Pat 483 (484) : 3 Pat L Jour 579 * (1909) 3 Ind Cas 39 (40) (Cal) * (Vol 2) 1915 Cal 268 (271) * (Vol 2) 1915 Cal 242 (248) : 42 Cal 172 (F B). (Purchase without landlord's consent.)*(Vol 24) 1937 Pat 562 (563). (Execution of rent decree — Purchaser dispossessed — Remedy is under S. 47 and not under O. 21, R. 100.)

[13] Transferee from defendants *pendente lite* is representative of defendant within S. 47 — Decree-holder can execute decree against him in same manner and to same extent as against defendant. (Vol 33) 1946 Lah 142 (146) (F B)* (Vol 24) 1937 P C 260 (261) : 31 Sind L R 652 (P C). (Transfer of mortgaged property pending

foreclosure suit—Transferee taking actual possession of same—Transferee is representative-in-interest of mortgage judgment-debtor and is bound by mortgage decree — Mortgagee decree-holder can proceed to execute decree against transferee for recovery of possession.) * (1900) 22 All 243 (246). (Mortgagee taking mortgage when suit on it is pending is a representative of the mortgagor within the meaning of S. 47.) * (Vol 20) 1933 All 201 (202) : 55 All 235. (Application of decree-holder for delivery of possession as against transferee *pendente lite* is one under O. 21, R. 11 and not under O. 21 R. 97.) * (Vol 25) 1938 Bom 367 (369) : I L R (1938) Bom 649 * (Vol 21) 1934 Cal 145 (145). (Lessee from judgment-debtor *pendente lite*.) * (Vol 24) 1937 Mad 580 (580, 581). (Person purchasing mortgaged property *pendente lite*—Mortgagee decree-holder aware of this—Question regarding delivery of mortgaged property between decree-holder and purchaser falls under S. 47—Separate suit against purchaser for possession is barred.)

[But see (Vol 15) 1928 Bom 65 (66) : 52 Bom 208. (Transferee *pendente lite* is not representative of the transferor for all purposes — Separate suit against him is maintainable.)*(Vol 8) 1921 Mad 559 (560). (Transferee *pendente lite* from judgment-debtor — Transfer inoperative under decree — Transferee is not judgment-debtor's representative (Ramesan, J., *contra*).]

[14] Absolute occupancy land mortgaged to M and a portion of that land was mortgaged to S — In execution of decree obtained by S on his mortgage, portion sold and its possession obtained by landlord — In execution proceedings of decree obtained by M landlord's application to have portion excluded was allowed and remainder of land ordered to be sold. Appeal against such order does not lie as application cannot be considered under S. 47. (Vol 17) 1930 Nag 199 (200) : 26 Nag L R 187.

[15] Mortgage suit — Subsequent purchaser party to suit but no personal decree passed against him — He is still party to suit and objection by him to attachment of his property in execution of personal decree — Objection is under S. 47 and appeal lies from order on objection. (Vol 31) 1944 Pat 105 (106) : 22 Pat 678. -

[16] Private purchaser with consent and authority of executing Court given under O. 21, R. 83 is a representative of judgment-debtor under S. 47. (1901) 23 All 116 (118).

[17] A mortgagee of judgment-debtor is his representative for the purposes of S. 47 and is bound by all the equities enforceable against judgment-debtor so that he cannot take objections which the judgment-debtor is incompetent to raise. (Vol 7) 1920 Pat 710 (711) * (Vol 13) 1926 Cal 356 (357). (Mortgagee of patni interest is representative of judgment-debtor *patnidar*.)

[18] A mortgagee whose mortgage was subsequent to a mortgage decree on property is a representative of the judgment-debtor within S. 47 and an order on an application by him to have the first mortgagee satisfied out of properties other than those mortgaged to him, is a decree within S. 2. (Vol 1) 1914 Cal 828 (829, 830) : 41 Cal 418.

[19] Transferee from judgment-debtor *pendente lite* added as party under S. 47 — Effect is to make it obligatory on him to take any objection that he may wish to raise in the execution proceedings. (Vol 27) 1940 Pat 615 (616).

[20] Mortgagees or tenants at will holding prior to the decree cannot be regarded as representatives of the judgment-debtor but even if they could be so regarded they are bound by the decree. (Vol 4) 1917 Lah 388 (389).

[21] A person who claims the property sought to be attached by virtue of an assignment which has been found to be invalid and against whom the prohibitory

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order is issued is a necessary party and has right of appeal. (Vol 7) 1920 Pat 651 (652).

[22] Attachment — Objections to by transferee from deceased judgment-debtor's donee fall under O. 21, R. 58 and not under S. 47 inasmuch as the transferee cannot be said to be the representative of the judgment-debtor. (Vol 28) 1941 Pat 394 (394).

[23] Alienee of land from widow can demand proof of his being her legal representative from decree-holder in execution of money decree against widow. (Vol 17) 1930 Mad 688 (692) : 53 Mad 750.

[24] Execution cannot issue against transferee from judgment-debtor merely because he takes up position of representative. (Vol 19) 1932 Cal 423 (424).

[25] Partition decree — Civil Court has to determine whether decree is to be sent to Collector—Court is then to determine under S. 47 as to who are bound by decree — Collector has no jurisdiction to do it — Application to consider whether transferees *pendente lite* are affected by T. P. Act, S. 52 is to be determined by Civil Court under S. 47 — Article 182, Limitation Act, does not apply. (Vol 32) 1945 Nag 86 (88, 89) : I L R (1944) Nag 852.

[26] Objections to attachment allowed — Judgment-debtor obtaining decree for possession against objector — Property re-attached by decree-holder — Objection by judgment-debtor's assignee disallowed — Suit by assignee for possession held not barred. (Vol 5) 1918 Mad 142 (142).

[27] Decree-holder is not entitled to implead purchaser from judgment-debtor as party to execution proceedings without previous application for making him party judgment-debtor in execution — Application is incompetent so far as purchaser is concerned. (Vol 29) 1936 Mad 870 (871).

[28] Mortgagee in execution of his decree against family purchasing property and selling it to A—During pendency of proceeding of decree third person obtaining decree against family and in execution property purchased by B — Application by A against B to remove resistance to possession dismissed — Subsequent suit by A against B for possession held barred by S. 47. (Vol 26) 1939 Mad 944 (945).

[29] If a judgment-debtor does not take appropriate steps to have an irregular sale set aside his transferee also is bound by estoppel and cannot question the sale. (1912) 13 Ind Cas 542 (544) (Cal).

[30] Transfer of execution of decree of sale of ancestral property to Collector — During pendency of execution proceedings before Collector, private sale of property by judgment-debtor — Payment of price to decree-holder certified to Court passing decree — But execution proceedings not withdrawn and consequently sale of property by Collector—Held proper remedy was not suit but application by private purchaser under S. 47 to Civil Court and not to the Collector. (1904) 26 All 101 (104).

[31] X held a mortgage on the holding of Y—Z in execution of his money decree against Y purchased the holding in auction sale—Z as landlord of Y obtained against him two rent decrees — X in execution of his mortgage decree dispossessed Z — Z in execution of his rent decrees bringing the same holding to sale—Objection by X—Held that X was the representative of the judgment-debtor Y and the matter therefore falls under S. 47. (1935) 18 Nag L Jour 274 (278).

[32] Person setting himself up as the representative in interest of the original judgment-debtors because he had purchased their property — Dispute between him and decree-holder is to be decided under S. 47. (Vol 32) 1945 All 22 (23) : I L R (1944) All 496.

22. Transferee of decree. — [1] Transferee of

decree by assignment in writing or operation of law, is a representative. (1894) 16 All 483 (492) * (1899) 26 Cal 250 (252).

[2] Person acquiring only partial interest in the rights created by the decree is not a transferee of the decree. (1905) 28 Mad 64 (66).

[3] Purchaser of property covered by decree is not a representative of decree-holder unless the decree has been assigned to him. (Vol 11) 1924 Bom 426 (427, 428).

[4] Transfer of right pending suit — Assignee not brought on record — Assignee cannot execute the decree passed in the suit though he becomes owner thereof. (Vol 14) 1927 Sind 78 (82) : 22 Sind L R 1.

[5] Application by transferee for substitution is to be made to execution Court. (Vol 6) 1919 All 37 (387) : 41 All 432 * (Vol 25) 1938 Nag 267 (268, 269) : I L R (1939) Nag 54. (Execution application by assignee of decree-holder — Questions regarding the validity of the transfer or relating to execution etc. must be decided in execution proceedings — Separate suit is not maintainable.) * (Vol 24) 1937 All 63 (64). * (Vol 30) 1943 Bom 455 (456) * (1918) 13 Mad L Tim 227 (231) * (Vol 25) 1938 Mad 78 (79) * (Vol 12) 1925 Pat 449 (450) : 4 Pat 120.

[6] But a separate suit by the judgment-debtor that the assignment is invalid as being fraudulent is maintainable. (Vol 16) 1929 Lah 51 (52).

[7] Dispute between the assignee of the decree-holder on the one hand, and the decree-holder or person having charge on the decree, or the beneficial owner of the decree on the other hand does not fall to be decided under S. 47. (Vol 32) 1945 Mad 25 (26) * (Vol 5) 1918 Cal 358 (359) * (Vol 13) 1926 Mad 691 (691).

[8] Application under O. 21, R. 16 — S. 47 is still applicable. (Vol 3) 1916 Cal 471 (472).

[9] Judgment-debtor paying decretal amount to assignee from decree holder — Assignment found to be invalid subsequently — Decree-holder realizing decretal amount — Judgment-debtor can recover amount paid twice over — S. 47 is no bar to such suit. (Vol 24) 1937 Lah 465 (468) : I L R (1937) Lah 162.

[10] Execution application by assignee of decree-holder — Assignment challenged by judgment-debtor but Court upholding it — Held no appeal by judgment-debtor from that order is competent as he has no interest in issue decided. (Vol 22) 1935 Lah 609 (611). (Vol 21) 1934 Lah 328 (2) *Point (b)*, reversed).

[11] Application by assignee of decree-holder for order under O. 21, R. 95 — Objection by judgment-debtor — Application does not thereby become one under S. 47 — Judgment-debtor has no right of appeal. (1907) 6 Cal L Jour 749 (750).

20. Whether person is party or representative to be decided by executing Court. — [1] Question whether person was or was not party to suit to enable Court to proceed against his representative falls under S. 47. (Vol 4) 1917 Pat 623 (623) : 2 Pat L Jour 192 * (Vol 15) 1928 Cal 835 (836). (Decree by a benamidar — Execution by the true owner — Judgment-debtor challenging the ownership — Question should be decided under S. 47.)

[2] Section 47 (3) must be read as ancillary to S. 47 (1)—Sub-s. (3) comes into operation only when question between parties to suit or their representatives arises. (Vol 22) 1935 Lah 384 (384) * (Vol 29) 1942 Bom 309 (309) : I L R (1942) Bom 822 * (Vol 20) 1933 Bom 896 (897) : 57 Bom 641 * (Vol 23) 1936 Lah 116 (119) * (Vol 29) 1942 Oudh 281 (282). (Transferee from decree-holder executing decree—Objection by creditor attaching decree that transferee is not entitled to execute decree does not come under S. 47.)

[3] Whether person is legal representative of party to decree should be decided by executing Court—Separate suit does not lie. (Vol 26) 1939 Nag 147 (148) : I L R

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(1939) Nag 165* (Vol 13) 1926 All 681 (682) : 48 All 429* (Vol 22) 1935 Bom 298 (802) : 59 Bom 417. (Who is preferential heir can only be decided under S. 47*) (1911) 14 Cal L Jour 337 (340, 341). (The question whether or not the decree passed against a *shebait* is capable of execution against the successor is one coming within S. 47.)* (Vol 25) 1938 Cal 818 (820). (Question arising as to whether certain person is representative of party to suit — Question falls under S. 47— Question not arising in execution proceedings and neither raised nor determined — Suit by such person as representative is not barred.)* (Vol 13) 1926 Mad 536 (537)* (Vol 13) 1926 Mad 411 (412)* (Vol 7) 1920 Mad 191 (191)* (Vol 16) 1929 Pat 232 (232)* (Vol 10) 1923 Pat 149 (150). (Objection to liability of legal representative must be decided under S. 47.)* (Vol 13) 1926 Sind 113 (113, 114) : 21 Sind L R 20.

[4] Whether a transferee of a decree is entitled to obtain execution of the decree should be determined under S. 47 and no separate suit will lie. (Vol 2) 1915 Mad 799 (799)* (Vol 22) 1935 Rang 174 (177). (Execution—Proceeding between assignee of decree-holder and judgment-debtor— Objection filed by judgment-debtor— Execution proceeded with assignee substituted as decree-holder—Held assignment was impliedly held valid.)

[5] Appellate stage in proceedings under S. 47 — Question whether particular person is legal representative must be decided by appellate Court. (Vol 21) 1934 Oudh 337 (340).

[6] Decree assigned— Parties to the transaction dead — Rival petitions for execution i. e. one by heir of real transferee and other by heir of alleged benamidar — Question of benami can be gone into in execution proceedings. (Vol 14) 1927 Mad 903 (905, 906) : 51 Mad 219.

21. Question must relate to execution, discharge or satisfaction of decree.— [1] Unless some question of the nature specified in S. 47 is determined, order is not one under S. 47. (Vol 22) 1935 All 502 (503).

[2] Question which forms basis of independent action cannot be questioned under S. 47. (Vol 9) 1922 P C 304 (307) : 49 Ind App 220 : 1 Pat 581 (P C).

[3] To see whether application comes under S. 47, substance of application must be examined and not heading given to it by party. (Vol 22) 1935 All 183 (185)* (Vol 5) 1918 Cal 551 (552). (Application falling under S. 47 though described to be under O. 47, R. 1 must be treated as one under S. 47.)

[4] Every application after passing of decree is not necessarily one in execution. (Vol 15) 1928 Mad 296 (297).

[5] Events subsequent to sale in execution do not form part of execution and remedy for such is by separate suit. (Vol 16) 1929 Pat 559 (560).

[6] Questions as to priority and similar questions can be gone into satisfactorily in regular suit than in execution proceedings. (Vol 19) 1932 All 49 (50).

[7] Application to set aside sale under S. 47 and O. 21, R. 90 is not one for execution—It is miscellaneous proceeding. (Vol 3) 1916 Cal 613 (614).

[8] If against one defendant there is no liability under the decree, any question arising out of the execution against the other defendants is not, as between the first named defendant and the decree-holder, a question relating to the execution of the decree. (1896) 19 Mad 331 (334).

[9] Decree against adult and minor defendants— Execution taken only against adult members and sale of their share fixed — Minor member has no *locus standi* to challenge order. (Vol 22) 1935 Pesh 5 (7).

[10] Auction-purchaser's right to the refund of purchase money where auction sale is set aside for

irregularity is not a question between the parties to the suit or their representatives and relating to the execution of the decree. (1905) 32 Cal 332 (334, 335) (F B)* (Vol 26) 1939 Mad 740 (742). (Reversing (Vol 24) 1937 Mad 779.)

[11] Judgment-debtor can prefer objections under S. 47 at any stage of execution proceedings — Those objections should be determined on their merits unless particular objection had been adjudicated upon earlier. (Vol 26) 1939 Cal 651 (654).

22. Adjustment of decree: See Notes on O. 21, R. 2.

23. Agreement against execution. — [1] Decree can be adjusted or extinguished by executory agreement — Such agreement unless merely varies decree within certain limits cannot be enforced in execution proceedings. (Vol 26) 1939 Sind 343 (344): ILR (1939) Kar 725.

[2] Where it is clearly the intention of the parties to enter into a contract in supersession of the decree, the contract may form the basis of a subsequent suit—S. 47 is no bar. (Vol 24) 1937 P C 256 (259) : 64 Ind App 302 : I L R (1938) 1 Cal 66 : 31 Sind L R 637 (P C). [(Vol 22) 1935 Cal 596 : 62 Cal 28 reversed.]

[3] Decree for immediate payment—Subsequent agreement to pay by instalments — Judgment-debtor also agreeing to pay interest though not given by decree— Person standing surety and agreeing to instalments— Agreement accepted by Court—Still agreement amounted to fresh contract and could not be executed by executing Court. (Vol 20) 1933 Pesh 53 (55, 56).

[4] Purchase of property subject to mortgage decree — Agreement between purchaser and decree-holder not to bring property to sale—Sale held in breach of agreement by decree-holder challenged by purchaser—Matter does not come under S. 47. (Vol 20) 1933 Mad 838 (839).

[5] Judgment-debtor applying under O. 21, R. 90 — On compromise between judgment-debtor and decree-holder purchaser, judgment-debtor agreeing to pay decree-money in instalments and on default, his application was to be dismissed without any evidence and sale confirmed—Payment of decree-money by judgment-debtor but not as agreed—Lower Appellate Court instead of confirming sale, ordering inquiry on merits of judgment-debtor's application—On second appeal, lower Appellate Court's order held was not proper under O. 21, R. 92 and was not one under S. 47. (Vol 24) 1937 Cal 461 (463).

[6] If an agreement to reserve partition of properties of which partition has been decreed be not enforceable under O. 21, R. 2 or O. 32, R. 7 or S. 48, the remedy is to proceed in execution and not by a separate suit. (Vol 5) 1918 Mad 751 (754).

[7] Fair bargain for time in consideration of reasonable rate of interest can be enforced in execution proceedings. (Vol 26) 1939 P C 80 (85, 86) : 14 Luck 192 : ILR (1939) Kar P C 136 : 66 Ind App 84 (P C)* (Vol 30) 1943 Pesh 29 (31).

[8] Application for possession under O. 21, R. 95— Judgment-debtor pleading agreement postponing delivery of possession for a period, by auction-purchaser — Decision of question held was within S. 47. (Vol 1) 1914 Cal 302 (304).

[9] Post-decree agreement—Decree left untouched — Execution merely restrained—Executing Court alone is to determine the matter (Vol 31) 1944 Cal 53 (55).

[10] Compromise during execution of mortgage decree, resulting in postponement of confirmation of sale—Breach of term of compromise—Injured party has remedy by suit. (Vol 24) 1937 Pat 672 (672).

[11] Decretal amount reduced from Rs. 38,726 to Rs. 38,000 to be paid by annual instalments of Rs. 3800 — On default in payment of any instalment decree-holder to take out execution for balance of Rs. 38,000—

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Adjustment held could be dealt with under S. 47. (Vol 29) 1942 Rang 57 (59) : 1941 Rang L R 767.

[12] Decree fixing monthly maintenance—Agreement by decree-holder giving up portion of maintenance is not novation — Decree can be executed. (Vol 29) 1942 Pesh 13 (14).

24 Damages for fraudulent execution. — [1] Suit for damages for fraudulent execution is not barred. (Vol 1) 1914 Mad 640 (640).

[2] Suits by A and B against each other — Consent decrees for equal amounts passed—Parties agreeing that amounts should be set-off against each other and that no execution should be taken out—B in breach of agreement taking execution and recovering amount due to him — Suit by A for damages is not barred by S. 47. (Vol 26) 1939 Mad 499 (500).

25. Decree incapable of execution. — [1] No suit can be brought on the basis of an executable judgment. (Vol 12) 1925 Mad 279 (280) : 48 Mad 482 * (Vol 4) 1917 Lah 11 (12) * (Vol 5) 1918 Mad 370 (371) : 41 Mad 641 * (Vol 17) 1930 Nag 17 (18) * (Vol 24) 1937 Pat 654 (655). (Properties charged with maintenance can be sold in execution without fresh suit for sale.)

[2] Where a new obligation is created by a judgment without provision for execution, a suit can be brought on the basis of judgment. (Vol 12) 1925 Mad 279 (280) : 48 Mad 482.

[3] Prior decree incapable of execution — Suit on decree is not barred. (Vol 10) 1923 Cal 252 (255) * (Vol 26) 1939 Bom 114 (115) * (Vol 22) 1935 Mad 576 (577) * (Vol 12) 1925 Mad 1260 (1263) * (1911) 10 Ind Cas 991 (992) (Upp Bur).

[4] Question whether decree is not capable of execution falls under S. 47. (Vol 20) 1933 Lah 41 (41, 42) : 14 Lah 230 * (Vol 29) 1942 Mad 748 (750) * (Vol 15) 1928 Rang 40 (42) : 5 Rang 775 * (Vol 30) 1943 Sind 11 (15) : ILR (1942) Kar 326.

[5] A suit for declaration that decree is incapable of execution does not lie under S. 47. (Vol 9) 1922 Lah 428 (431) : 3 Lah 319. ((Vol 1) 1914 Lah 427 : 1914 Pun Re No. 42 overruled.) * (Vol 20) 1933 Lah 1051 (1051, 1052) : 15 Lah 75. ((Vol 12) 1925 Lah 54 held not good law.)

[6] Executing Court can go into contention that recital in decree was not enough to make it executable. (Vol 29) 1942 Mad 748 (749, 750).

[7] A vesting of the equity of redemption in a mortgagee is tantamount to a discharge or satisfaction of the mortgage-debt; an execution Court is competent to recognise it and can go into the question of the extent to which the decree has been satisfied. (Vol 7) 1920 All 129 (131) : 42 All 544.

[8] A decree which merely declares the rights of the parties and does not direct any act to be done is incapable of execution. A separate suit and not an application under S. 47 will lie to enforce the rights so declared. (1898) 22 Bom 267 (269, 270) * (1936) 64 Cal L Jour 55 (57) * (1910) 12 Cal L Jour 599 (601) * (Vol 2) 1915 Mad 197 (198) : 37 Mad 29 * (Vol 14) 1927 Oudh 457 (460) * (Vol 12) 1925 Sind 318 (319).

[9] A partition decree not actually allotting shares is incapable of execution; a suit and not an application under S. 47 is the proper remedy to obtain partition by metes and bounds. (Vol 29) 1942 Bom 44 (46) : ILR (1942) Bom 14 * (Vol 26) 1939 Bom 386 (387) * (Vol 15) 1928 Bom 365 (366, 367) * (Vol 7) 1920 Lah 159 (160) : 1 Lah 134 * (1931) 1931 Mad W N 1176 (1176) * (Vol 29) 1942 Mad 364 (365) * (Vol 15) 1923 Mad 474 (475) * (Vol 13) 1926 Mad 232 (233) * (Vol 13) 1926 Pat 154 (155).

[10] Any provision inserted in the part of the decree containing scheme of management is *prima facie* in-

executable although in form it is directory; the rest of the decree can be executed. (1933) 1933 Mad W N 183. (184, 185).

[11] Scheme decree can be executable — Application to Court to enforce the executable part is one in execution and order thereon is appealable. (Vol 15) 1928 Mad 61 (64).

[12] Decree — Direction to deliver trust property to new trustees is correct—It is executable. (Vol 19) 1932 Mad 41 (44) : 54 Mad 345.

[13] Where in a suit by a prior mortgagee impleading the puisne mortgagee as party, the decree does not provide for the working out of the rights of the puisne mortgagee without additions and qualifications which the executing Court has no power to make, the puisne mortgagee can enforce his mortgage by suit of his own unaffected by S. 47. (Vol 6) 1919 Mad 63 (64) * (Vol 6) 1919 Mad 100 (102) : 42 Mad 90.

[14] Where a decree is fully executed the decree is incapable of execution. (Vol 23) 1936 Cal 400 (401). (Suit for rectification of petition of adjustment is not barred.) * (Vol 16) 1929 Cal 670 (672). (Execution case dismissed on certification of satisfaction — Mutual mistake — Order can be re-opened — Unilateral mistake of fact (mistake by decree-holder in calculating amount due)—Order dismissing execution application on decree-holder's certifying full satisfaction cannot be re-opened.) * (Vol 16) 1929 Lah 121 (122, 123). (Application for correction of description of property barred.) * (Vol 7) 1920 Lah 65 (65) * (Vol 7) 1920 Lah 30 (33) * (Vol 22) 1935 Mad 340 (341) * (Vol 3) 1916 Mad 1089 (1090). (Decree for possession — Delivery of possession — Subsequent dispossession — Suit lies.) * (Vol 15) 1928 Nag 100 (101).

[15] Hindu trading family—Decree against karta in his individual capacity and not as representing family business—Decree is inexecutable against other members or their properties. (Vol 29) 1942 Mad 161 (166) : ILR (1942) Mad 204.

[16] A decree not incorporating the relief granted by the Appellate Court against the defendants who are not parties to the appeal, cannot be executed against them. (Vol 2) 1915 All 120 (121).

[17] Payment after date fixed and without extension of time, of sum ordered to be paid as condition precedent for executing decree disentitles decree-holder from executing decree. (Vol 11) 1924 Rang 375 (376).

[18] Decree held absolute and not conditional and plaintiff's remedy is by execution and not by suit. (Vol 7) 1920 Lah 510 (510) : 1919 Pun Re No. 153.

[19] If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. (Vol 3) 1916 All 62 (62).

[20] Decree for joint possession is incapable of being executed and hence a suit for partition and possession of share is not barred by S. 47. (1910) 8 Mad L Tim 379 (379).

[21] Where decree becomes incapable of execution by events subsequent to the decree, decree is incapable of execution. (Vol 17) 1930 Bom 132 (134) : 54 Bom 162.

[22] Appellant giving security for stay of execution of decree in another suit — Order directing security is not executable. (Vol 20) 1933 All 269 (272).

26. Excess or deficient execution. [1] Where in execution, land not included in or covered by the decree or which is in excess of the decree is sold to or taken possession of by decree-holder, the proper remedy is application under S. 47. (Vol 9) 1922 P C 252 (253) : 48 Ind App 155 : 44 Mad 483 (P C). (Land included by mistake in mortgage decree.) * (Vol 25) 1938 Nag 276 (281). (Excess property taken by decree-holder.) * (Vol 3) 1916 All 104 (105, 106) : 38 All 339. (Judgment-debtor dispossessed of land outside decree.) * (Vol 15)

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1928 Lah 936 (937). (Property not covered by decree.) * (Vol 15) 1928 Cal 865 (867). (Some property of decree-holder sold through mistake instead of judgment-debtor's property.) * (Vol 12) 1925 All 551 (552) * (Vol 12) 1925 Cal 1258 (1259) * (Vol 25) 1938 Nag 193 (193, 194, 195) : I L R (1939) Nag 521. (Decree describing wrong property.) * (Vol 17) 1930 Mad 12 (13) * (Vol 15) 1928 Rang 215 (217).

[But see (Vol 16) 1929 Pat 391 (392). (Delivery of possession of wrong property in execution of decree to auction-purchaser—Application objecting to delivery is not covered by S. 47 and O. 21, R. 100 but by S. 151.) * (Vol 15) 1928 All 363 (364) : 50 All 686. (Mortgagee getting mortgagor's property sold in execution of his decree and purchasing it—Property not included in the mortgage also sold—Mortgagor's suit to recover possession of such property is not barred under S. 47.)]

[2] Application for refund of excess money recovered in execution is one under S. 47. (Vol 7) 1920 Bom 208 (209) : 44 Bom 97 * (Vol 17) 1930 P C 86 (90) (P C) * (1900) 22 All 79 (81) * (1878-80) 2 All 61 (63) * (Vol 19) 1932 Bom 96 (97, 98).

[3] Land recovered in excess of share under partition decree—Final decree can be amended, and excess land restored, without separate suit, under Ss. 47 and 151. (Vol 12) 1925 Sind 126 (126) : 19 Sind L R 302.

[4] Prior execution application for less amount—Subsequent one for larger amount—Order to reduce amount not appealed against—Decree-holder held bound by the order. (Vol 1) 1914 Mad 532 (533) : 37 Mad 314.

[5] Party to execution proceedings not challenging sale under provisions of S. 47 on ground that sale certificate included more property than that covered by decree—Sale confirmed and sale certificate granted—Separate suit for possession is not maintainable. (Vol 27) 1940 All 78 (78, 79).

[6] Excess of decree paid to decree-holder under fraud and cheating—Application under S. 47 is the proper remedy and no separate suit lies. (Vol 15) 1928 Cal 776 (777).

[7] Question whether certain land is included in a decree is one under S. 47. (Vol 14) 1927 Cal 614 (615) : 54 Cal 419 * (Vol 31) 1944 Pat 347 (347).

[8] Sale of property outside decree—Suit to set aside sale in part is not maintainable. (Vol 5) 1918 Nag 240 (241).

[9] No order passed specifying items to be delivered to decree-holder—Decree-holder given delivery of items in possession of judgment-debtor's vendee—Vendee can object—Objection is one under S. 47 and not under Civil P. C., O. 21, R. 99 or R. 101. (Vol 13) 1926 Mad 968 (969).

[10] Improper seizure of judgment-debtor's goods by decree-holder—Question falls under S. 47. (Vol 3) 1916 All 104 (105) : 38 All 339.

[11] Application against unlawful dispossession lies even after satisfaction of decree. (Vol 11) 1924 Nag 122 (123).

[12] Complaint about misappropriation of attached property by decree-holder must be inquired into in execution. (Vol 3) 1916 Pat 308 (309) : 1 Pat L Jour 558.

[13] Decree-holder's pleader misled by judgment-debtor's agent giving credit to the extent of Rs. 1000 in excess of that to which judgment-debtor was entitled—Mistake continued in suit register—Decree-holder obtaining information as to extent of decretal amount and applying for execution—Information based on erroneous entries in suit register—On certain payments by judgment-debtor execution case dismissed on full satisfaction—On subsequent discovery of mistake,

decree-holder applying for re-opening execution proceedings—Judgment-debtor held could not be allowed to take advantage of mistake—Court held could re-open proceedings and continue execution. (Vol 29) 1942 Cal 451 (452).

[14] Suit by judgment-debtor for possession of property not sold in auction but wrongly taken by auction-purchaser—Section does not apply. (Vol 12) 1925 Pat 376 (378).

[15] Where moneys are improperly realized by a third party in defiance of Court's order, the question as to refund of such amount is not within S. 47. (1905) 27 All 378 (380). (Order passed for refund is one passed under inherent powers and is not decree—No appeal lies : See 27 All 380 (381).)

27. Illustrative cases—Question not relating to executions, etc.—[1] Scheme framed in a scheme suit under S. 92, Civil P. C.—Orders passed relating to the scheme are not orders in execution. (Vol 12) 1925 P C 155 (156) (P C) * (Vol 14) 1927 Mad 1110 (1110) * (Vol 13) 1926 Mad 655 (655).

[2] Person being subrogated to prior mortgagee's rights by advancing money for paying off his mortgage decree can enforce his rights by suit and not in execution. (Vol 12) 1925 Mad 129 (130, 131) * (1909) 31 All 364 (365).

[3] Objection by prior mortgagee to sale of mortgaged property in execution of puisne mortgagee's decree does not come under S. 47. (Vol 14) 1927 Mad 431 (432) * (Vol 12) 1925 Nag 185 (185, 186).

[4] The enforcement of a right under a declaratory decree is not a question relating to execution, discharge or satisfaction of the decree. (Vol 1) 1914 All 103 (104).

[5] The question whether a pre-emptor has paid the amount fixed by the pre-emption decree within time or not is not a question relating to execution of the decree. (Vol 1) 1914 Oudh 147 (148) : 17 Oudh Cas 14 * (Vol 2) 1915 Oudh 171 (172). (Application for payment of pre-emption money.)

[6] Order refusing execution of a decree on the ground that it has been attached does not fall under S. 47. (Vol 22) 1935 Oudh 272 (273) : 11 Luck 26.

[7] Order on application for setting aside order dismissing execution application for default falls under S. 151—S. 47 does not apply. (Vol 31) 1944 All 218 (219) : I L R (1944) All 381.

[8] Mortgage decree for sale—Receiver appointed—Another decree-holder attaching and requesting payment out of profits made by receiver—Mortgagee decree-holder's objection rejected—Decision is not under S. 47 but one under O. 21, R. 58, Civil P. C. (Vol 5) 1918 Mad 914 (915, 916).

[9] Madras Civil Rules of Practice, Rr. 134 and 179—Rule 179 lays down method for obtaining benefit of attachment—Decision in such case cannot be one under S. 47. (Vol 5) 1918 Mad 914 (915).

[10] Decree-holder applying for attachment of rent to be paid by sub-tenants to judgment-debtor—Objection by sub-tenants that rent was already paid in advance to tenant-in-chief—Objection comes under O. 21, R. 58 and not S. 47. (1938) 1938 All W R (B R) 42 (43).

[11] Question relating to rights of third person subrogated to rights of mortgagee decree-holder by payment at instance of mortgagor does not come under S. 47. (Vol 9) 1922 Lah 358 (360).

[12] Decree in partition suit not engrossed on proper non-judicial stamp—Decree-holder applying to executing Court for having decree engrossed on proper stamp—Order of executing Court does not come under S. 47. (Vol 25) 1938 Mad 307 (313).

[13] Pre-emption decree—Question of title to standing crops is not one under S. 47, when decree does not touch it. (Vol 10) 1923 Nag 327 (328).

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[14] Consent decree on condition that if defendant deposits certain amount within certain time suit shall stand dismissed or else it shall stand decreed — Order extending time fixed by decree is not decision under S. 47. (Vol 16) 1929 All 666 (666, 667).

[15] Suit for declaration of title under a prior pre-emption decree is not barred by S. 47. (Vol 1) 1914 All 440 (441).

[16] Partition decree among co-sharer landlords — One co-sharer collecting rents allotted to another — Suit for such rent collected by co-sharer entitled to it is not barred by S. 47. (Vol 20) 1933 Pat 248 (249).

[17] A pusine mortgagee sued the prior mortgagee for redemption and the mortgagor for possession of the mortgaged premises and in 1893 obtained a decree for redemption and possession. In 1908 he again sued the mortgagor for possession alone, dating his cause of action in 1897, the date of payment of the prior mortgage. *Held*, the suit for possession was not a question relating to the execution, discharge or satisfaction of the decree. (Vol 1) 1914 Lah 24 (25, 26) : 1914 Pun Re No. 12.

[18] Application by minor after attaining majority to set aside sale on ground of negligence of guardian in not properly conducting proceedings for reversal of the sale does not come under S. 47. (1912) 16 Ind Cas 543 (545) (Cal).

[19] Creditor of trustee — Right of subrogation to trustee's right of indemnity can be decided in suit by creditor against trustee but not in execution. (Vol 20) 1933 Cal 668 (672) : 60 Cal 801.

[20] Application for temporary alienation of judgment-debtor's land — Mortgage created and mortgagee given possession but mortgage money not realized from mortgagee — Decree recorded as fully satisfied by mortgage — Subsequent suit by decree-holder against mortgagee for money is not barred by S. 47. (Vol 25) 1938 Lah 214 (216).

[21] Sale confirmed — Order setting it aside on the ground of non-payment of the balance of purchase-money within 15 days and remitting an issue to tribunal under Sikh Gurudwaras Act is not one under S. 47. (Vol 14) 1927 Lah 337 (337).

[22] Order confirming sale set aside—Application by auction-purchaser for compensation for improvements lies under S. 151 and not under S. 144 or S. 47. (Vol 27) 1940 Lah 59 (60, 61).

[23] *C*, on a mortgage decree against *A* obtained a decree for sale of mortgaged property. *B*, who held other decree against *A*, attached the profits of mortgaged property deposited in Court to *C*'s credit and applied for cheque — *Held* that *B*'s remedy was by regular suit. (Vol 5) 1918 Mad 914 (915, 916).

[24] An order on an application under S. 19 of Madras Act 4 [IV] of 1938 made while no proceedings in execution are pending, cannot be considered to be one under S. 47, Civil P. C. (1939) 2 Mad L Jour 609 (609) (FB).

[25] One of two judgment-debtors forced to satisfy decree in full—Suit by him against the other judgment-debtor for contribution does not come under S. 47. (1896) 18 All 106 (107).

[26] Pre-emption — Deduction of money left with vendee for paying creditors from pre-emptive price — Question cannot be raised in execution. (Vol 20) 1933 All 113 (114).

[27] Order amending or refusing to amend decree does not fall under S. 47. (Vol 5) 1918 Lah 63 (63) : 1918 Pun Re No 43. (Order amending decree.) (Vol 25) 1938 Lah 4 (5). (Do.) (Vol 27) 1940 Bom 10 (11) : 11LR (1939) Bom 708. (Order refusing to amend decree.)

[But see (1943) 1943 Pat W N 45 (47). (Mortgage

suit — Application to amend plaint, decree and sale certificate to correct description of properties — Order rejecting falls under S. 47.)]

[28] Infringement of right declared by decree — S. 47 does not apply. (Vol 11) 1924 Lah 405 (407) : 4 Lah 127.

[29] Consent decree—Execution of—Such decree can be executed only in respect of matters covered by it — Separate suit will lie for matters outside it. (Vol 12) 1925 Cal 286 (288).

28. Illustrative cases — Questions relating to execution, etc. — [1] Question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale. (Vol 7) 1920 Oudh 21 (22) (Vol 16) 1929 Lah 449 (452) (Vol 15) 1928 Lah 910 (912). (Irregularity of proceedings.) (Vol 7) 1920 Lah 443 (444, 446, 447). (Collector refusing to interfere under S. 72 on notice being issued to him.) (Vol 17) 1930 Mad 414 (415). (Defect of attachment.)

[2] Question if execution is time-barred. (Vol 11) 1924 Pat 683 (685) (Vol 1) 1914 Lah 415 (416) : 1913 Pun Re No. 110 (Vol 23) 1936 Mad 801 (801).

[3] Question whether execution should proceed or not. (Vol 22) 1935 Mad 647 (648) (Vol 1) 1914 All 288 (289) (Vol 24) 1937 Cal 425 (426) (Vol 7) 1920 Lah 117 (118). (Order negating decree-holder's right to proceed against property.) (Vol 26) 1939 Pat 570 (571) : 18 Pat 694. (Order to execute decree only after reducing decretal amount.) (Vol 9) 1922 Pat 59 (60) (Vol 26) 1939 Bom 258 (260). (Court in which execution is pending issuing certificate to decree-holder granting simultaneous execution to proceed in transferee Court on certain conditions.) (Vol 23) 1936 Pesh 46 47. (Refusing to execute decree as asked for.)

[4] An order recognising or refusing to recognise an assignment of decree. (1910) 8 Mad L Tim 56 (56) (Refusal to recognise assignment.) (Vol 4) 1917 Mad 605 (605, 606) (Vol 9) 1922 Lah 396 (397). (Execution with prayer for dismissal, if assignment is found valid.) (Vol 4) 1917 Mad 293 (293, 294) : 40 Mad 299. (Order recognising assignment.) (Vol 26) 1939 Rang 376 (377).

[5] Decree against legal heir—Objection by executor, that decree cannot be executed against him is one under S. 47 (Vol 21) 1934 Cal 253 (259).

[6] Order on application for transfer of decree. (Vol 26) 1939 Cal 651 (654). (Order on—Objection opposing transfer.) (Vol 27) 1940 Cal 161 (162). (Objection that order of transfer was *ex parte*.)

[But see (1911) 35 Bom 103 (108).]

[7] Mortgage decree — Order that properties should be sold in certain order. (Vol 12) 1925 Pat 484 (485).

[See however (Vol 16) 1929 All 291 (293) : 51 All 752. (Order imposing conditions on order of sale of properties is not one under S. 47.)]

[8] All questions regarding liability to attachment and sale. (Vol 21) 1934 Nag 82 (82) : 30 Nag L R 135. (Objection that property is not liable to attachment.) (Vol 20) 1933 Bom 185 (186). (Order refusing attachment of pay.) (Vol 4) 1917 Cal 182 (182) (Order declining to proceed with an application in execution for sale.) (1911) 1911 Pun L R No. 101, p. 406 (407). (Order staying issue of warrant of attachment up to a certain date.) (Vol 4) 1917 Oudh 96 (98). (Refusal to allow sale of attached debt.) (Vol 10) 1923 Pat 134 (134) (Vol 7) 1920 Sind 14 (15) : 13 Sind L R 210.

[9] Questions relating to enforcement of reliefs granted by decree. (Vol 9) 1922 Pat 407 (407) : 1 Pat 157. (Decree for possession—Possession not got by decree—

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holder—He has to apply under S. 47. (Vol 27) 1940 Cal 82 (83) * (Vol 9) 1922 Bom 880 (881) : 43 Bom 226. (Decree for partition—Properties sold away subsequently—Executing Court should decide as to distribution of sale proceeds.) * (Vol 13) 1926 Oudh 230 (230). (Working out equities in partition decrees.) * (1888) 11 Mad 413 (415) * (Vol 31) 1944 Cal 328 (328). (Question of delivery of possession.) * (Vol 18) 1931 Pat 296 (298).

[10] Order for arrest, or order refusing application for arrest, or order deciding legality of arrest. (1910) 32 All 3 (5, 6). (Order for arrest.) * (Vol 16) 1929 Lah 141 (141). (Order that judgment-debtor is not entitled to benefit of O. 21, R. 40.) * (Vol 11) 1924 Lah 360 (360). (Order issuing warrant of arrest.) * (Vol 9) 1922 Lah 259 (259, 260). (Rejecting application for arrest) * (Vol 6) 1919 Lah 15 (16) : 1 Lah 77 * (Vol 4) 1917 Mad 187 (187). (Order deciding legality of arrest.) * (1910) 20 Mad L Jour 136 (137) * (Vol 23) 1936 Rang 367 (367). (Order directing judgment-debtor to be sent to civil jail.)

[11] Order enforcing decree under O. 21, R. 32. (Vol 6) 1919 Cal 674 (675) : 46 Cal 103 * (Vol 1) 1914 All 105 (106).

[12] Order disallowing attachment under Order 21, R. 42. (Vol 28) 1941 Cal 357 (359) : ILR (1941) 1 Cal 363.

[13] Question as to what was sold at an execution sale. (1910) 7 Ind Cas 91 (92) (Cal).

[14] Order on application to inquire what money was due by judgment-debtor. (Vol 23) 1936 Lah 725 (727) * (Vol 12) 1925 Cal 948 (949). (Objection by decree-holder as to non-mention of interest in application for execution.)

[15] Question regarding right of decree-holder to obtain further sums by way of interest. (Vol 29) 1942 Mad 442 (443).

[16] Order determining substantial question in regard to satisfaction of decree. (Vol 20) 1933 Lah 361 (362) * (Vol 5) 1918 All 339 (341) * (Vol 23) 1936 Cal 537 (539). (Purchase of equity of redemption of one of several properties mortgaged by mortgagee after decree on his mortgage does not amount to *pro tanto* satisfaction of decree.) * (Vol 22) 1935 Cal 645 (645) * (Vol 21) 1934 Cal 761 (761). (Rent decree—Sum paid in part satisfaction not given credit—Objection falls under S. 47.) * (Vol 21) 1934 Lah 535 (536) * (Vol 6) 1919 Mad 840 (841, 843). (Question of decree-holder entering satisfaction while decree under attachment.) * (Vol 30) 1943 Nag 335 (338, 339) : ILR (1944) Nag 370. (Application to strike off full satisfaction of decree on ground of mistake is one under S. 47.) * (Vol 25) 1938 Nag 363 (364). (Decree adjusted by giving dhan to decree-holder and execution case struck off—Subsequent application against order striking off execution on ground that dhan was personal property of minors—Application comes under S. 47.) * (Vol 24) 1937 Oudh 298 (300) * (Vol 11) 1924 Oudh 104 (106) : 26 Oudh Cas 345. (Whether payment was made in time or not.) * (Vol 21) 1934 Pat 202 (202). (Execution dismissed as satisfied—Application by decree-holder to set aside order and confirm sale.) * (Vol 16) 1929 Rang 191 (192). (Order under O. 20, R. 11 (2).) * (Vol 25) 1938 Pesh 12 (14) * (Vol 13) 1926 Rang 192 (192) : 4 Rang 247. (Order for payment by instalment can be passed in execution.) * (Vol 19) 1932 Rang 54 (55) * (Vol 22) 1935 Mad 464 (465). (Order directing receiver, who is also party, to deposit in Court, amount collected is order in execution.)

[17] Question under S. 52 cannot be decided by separate suit but by executing Court. (Vol 24) 1937 Rang 531 (533) * (Vol 5) 1918 Lah 182 (184) * (Vol 12) 1925 Nag 380 (381). (Possession of assets may be decid-

ed in suit or in execution proceedings.) * (Vol 14) 1927 Rang 127 (127) : 5 Rang 44.

[18] Question regarding waste committed by judgment-debtor in possession after decree and question whether judgment-debtor is liable to make good the loss. (Vol 10) 1923 Bom 391 (392) * (Vol 12) 1925 Bom 885 (885) * (Vol 22) 1935 Lah 170 (171) * (Vol 32) 1945 Mad 179 (180) * (Vol 22) 1935 Mad 280 (281) * (Vol 20) 1933 Mad 825 (832) : 57 Mad 49 * (Vol 11) 1924 Pat 362 (364).

[But see (Vol 24) 1937 Mad 879 (880, 881) * (Vol 20) 1933 Lah 168 (168). (*Obiter.*)]

[19] Order enlarging or refusing to enlarge time for payment prescribed by decree. (1902) 26 Bom 121 (124, 125) * (Vol 1) 1914 All 288 (289) * (Vol 11) 1924 Oudh 179 (179).

[But see (Vol 14) 1927 Rang 311 (312) : 5 Rang 615.]

[20] Order refusing to discharge receiver appointed in execution proceedings. (Vol 5) 1918 Pat 60 (61) : 3 Pat L Jour 513.

[21] Enquiry regarding substituted share of judgment-debtor's property or accretions to his property. (Vol 9) 1922 P C 54 (55) : 49 Ind App 139 : 1 Pat 378 (P C) * (Vol 12) 1925 P C 86 (88) : 52 Ind App 137 : 49 Bom 233 (P C). (Accretion.) * (Vol 16) 1929 Oudh 263 (264, 265) * (Vol 4) 1917 Pat 253 (257) : 2 Pat L Jour 496 * (Vol 33) 1946 Sind 99 (102, 103) : I L R (1945) Kar 455.

[22] Question regarding enforcement of security under O. 41, R. 5. (Vol 5) 1918 Mad 442 (442) : 41 Mad 327 * (Vol 17) 1930 Pat 108 (109, 110) : 8 Pat 801 * (Vol 23) 1936 Pat 289 (291) : 15 Pat 545 * (Vol 21) 1934 Rang 231 (233). (*Obiter.*)

[23] Order under O. 21, R. 18 regarding set-off. (Vol 29) 1942 Pat 197 (198).

[24] Order regarding enforcement of default clause in instalment decree. (Vol 16) 1929 Lah 390 (390).

[25] Question as to liability of family property in execution of decree obtained against manager of *tarwad*. (Vol 27) 1940 Mad 165 (166, 167).

[26] Inquiry into area or value of property mentioned in sale proclamation. (Vol 20) 1933 Lah 383 (384) * (1911) 15 Cal W N 713 (714).

[27] Order on application under O. 21, R. 97 or R. 100. (Vol 16) 1929 Mad 757 (761, 762) : 52 Mad 899 (F B) * (Vol 20) 1933 Cal 680 (680) : 60 Cal 832 * (Vol 7) 1920 Mad 508 (509).

[28] Order under O. 21, R. 71. (Vol 12) 1925 Oudh 360 (361) : 29 Oudh Cas 18.

[29] Question whether scheme framed subsequently supersedes consent decree. (Vol 24) 1937 Cal 211 (212) : I L R (1937) 1 Cal 781.

[30] Order setting aside sale owing to insufficiency of stamp. (Vol 28) 1941 Pat 408 (409).

[31] Application under O. 21, R. 22 falls under S. 47. (Vol 25) 1938 Rang 292 (293).

[32] Profits of Ghatwali Estate attached by decree-holder—Order rejecting decree-holder's objection to certain items in budget of estate falls under S. 47. (Vol 26) 1939 Pat 242 (243).

[33] Petition for review of order confirming auction sale is application under S. 47. (Vol 16) 1929 Nag 305 (311).

[34] Application by decree-holder sub-mortgagee for withdrawal of mortgage money in redemption suit. (Vol 16) 1929 Oudh 309 (310).

[35] Mortgage decree—Failure by mortgagor to pay decretal amount within time fixed in decree—Mortgagee in execution of his decree put in possession until payment of decretal amount—Suit by mortgagor for possession on ground that decretal amount was satisfied—Suit is barred by S. 47. (Vol 27) 1940 Nag 336 (337) : I L R (1942) Nag 131.

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29. Liability to attachment and sale. — [1] Application under S. 47 raising question of liability to attachment — No procedure being provided procedure of O. 21, Rr. 58 to 63 applies. (Vol 7) 1920 Mad 206 (207).

[2] Court attaching debt cannot inquire into existence of truth of debt. (Vol 19) 1932 Mad 169 (169).

[3] Claim under O. 21, R. 58 by party to suit and by non-party—Former must appeal under S. 47 and latter sue under O. 21, R. 63. (Vol 21) 1934 Mad 435 (435) : 57 Mad 822 * (Vol 30) 1943 Cal 56 (57). (Objection to attachment taken by mortgagee styled under S. 47, really coming under O. 21, R. 58 — It can be disposed of under latter rule.)

[See (Vol 31) 1944 Oudh 314 (318) : 20 Luck 226. (Objections styled under O. 21, R. 58 — Objections can be treated to have been filed under S. 47.) * (Vol 12) 1925 All 594 (595). (Objection filed under O. 21, R. 58, treated as one filed under S. 47.)]

[4] All objections to attachment and sale in execution of a decree between parties to the suit or their representatives, fall under S. 47. (1912) 17 Ind Cas 126 (126) (Mad.) * (Vol 22) 1935 All 1016 (1017, 1018) : 58 All 360. (Objection to sale of non-saleable property before confirmation.) * (Vol 22) 1935 All 364 (366). (Questions regarding attachment of money and issuing warrant of arrest.) * (Vol 18) 1931 Bom 446 (447). (Objection to sale under S. 60.) * (Vol 28) 1941 Cal 251 (252) : I L R (1940) 2 Cal 226. (Property of judgment-debtor sold in spite of notice under S. 34, Bengal Agricultural Debtors Act.) * (1910) 7 Ind Cas 48 (48) (Cal). (Plea of non-transferability.) * (Vol 26) 1939 Lah 256 (257). (Objections by son that houses belonged to himself and were exempt from attachment under S. 60 fall under S. 47.) * (Vol 17) 1930 Lah 628 (628). (That land could not be attached as the judgment-debtor was agriculturist.) * (Vol 29) 1942 Lah 153 (155) : I L R (1942) Lah 559 (F B). (Objection under S. 60 (1) (c). — Overruling (Vol 26) 1939 Lah 113 : I L R (1939) Lah 103) * (Vol 26) 1939 Nag 147 (149) : I L R (1939) Nag 165 * (Vol 25) 1938 Nag 558 (559, 560) * (Vol 22) 1935 Nag 30 (32) : 31 Nag L R 217. (Suit by judgment-debtor for declaration that sale being of inam lands was void is barred by S. 47.) * (Vol 17) 1930 Oudh 256 (258). (Objection on ground of want of sanction as required under S. 20, Oudh Laws Act.) * (Vol 12) 1925 Oudh 618 (619) : 28 Oudh Cas 397. (Objection on the ground that he has no saleable interest.) * (Vol 28) 1941 Pat 240 (240, 241). (Objection to sale that land was ghatwali tenure.) * (Vol 23) 1936 Pat 256 (257). (Judgment-debtor alleging that land attached was held on behalf of deity.) * (Vol 7) 1920 Pat 710 (711). (Objection as to non-transferability of holding comes under S. 47.) * (Vol 29) 1942 Sind 164 (164, 165) : I L R (1942) Kar 351. (Plea that judgment-debtor was agriculturist within Dekkhan Agriculturists' Relief Act waived during suit can be taken in execution.) * (Vol 29) 1942 Sind 14 (15, 16) : I L R (1941) Kar 474. (Judgment-debtor objecting that property held by him as mutwali.) * (Vol 26) 1939 Sind 22 (23). (Objection that property sought to be sold was wakf.)

[5] Objection to attachment by a party against whom suit has been dismissed, falls under S. 47. (Vol 10) 1923 Bom 381 (382) * (Vol 21) 1934 Pat 281 (282).

[6] Decree-holder and objector to attachment — Colourable transactions — Enquiry as to validity of attachment is one under S. 47. (Vol 10) 1923 Cal 344 (344).

[7] Objection to attachment allowed and dismissal of execution application — Appeal from order as against objector does not lie. (Vol 20) 1933 Lah 421 (421).

[8] On an application by a decree-holder to execute a decree for money by attachment and sale of property,

the judgment-debtor is entitled to make the decree-holder prove whether the property asked to be attached and sold is saleable according to custom and usage. (1900) 27 Cal 187 (189).

[9] Objection to sale by party purchasing property after attachment, purporting to be under O. 21, R. 58 — Executing Court held could enquire into title of purchaser under S. 151 even if S. 47 did not apply. (Vol 26) 1939 Lah 380 (382).

[10] Order refusing to sell agricultural land and authorizing temporary alienation is under S. 47. (Vol 18) 1931 Lah 141 (142).

[11] When no objection is raised, sale must be held to be with jurisdiction — That third party's interests intervene after sale is additional ground for not allowing judgment-debtor to raise objection under S. 60 after auction sale. (Vol 29) 1942 Lah 153 (160) : I L R (1942) Lah 559 (F B). ((Vol 26) 1939 Lah 113 : I L R (1939) Lah 103; (Vol 22) 1935 Lah 942 and (Vol 23) 1936 Lah 930 overruled.)

30. Mesne profits. — [1] Mesne profits are to be ascertained by Court passing decree. (Vol 18) 1931 Pat 1 (4).

[2] Application under O. 20, R. 12 (2) for enquiry into mesne profits is not application under S. 47. (Vol 16) 1929 Mad 785 (786) * (Vol 12) 1925 All 588 (589) : 47 All 543.

[See also (1910) 1910 Pun L R No. 44, p. 105 (106).]

[3] Application for inquiry into mesne profits made by execution petition — Court can treat it as application in suit. (Vol 17) 1930 Mad 30 (31) : 53 Mad 838.

[4] Suit for partition, possession and mesne profits, past and future — Decree not awarding future mesne profits — Second suit to recover mesne profits from first suit or date of decree till delivery of possession is not barred. (Vol 25) 1938 Bom 231 (231, 232) : I L R (1938) Bom 655 (F B). ((Vol 7) 1920 Bom 39 : 44 Bom 954 overruled.)

31. Pre-decree matters. — [1] Objection based on agreement prior to decree is not maintainable in executing Court. (Vol 14) 1927 Rang 48 (48) * (1904) 31 Cal 179 (182) * (1902) 29 Cal 810 (812). (Agreement not to enforce payment of certain instalment.) * (Vol 15) 1928 Rang 36 (37) : 5 Rang 685. (Agreement not to execute decree.) * (Vol 13) 1926 Rang 140 (141, 142) : 4 Rang 118. (Agreement to pay lesser sum.)

[2] Pre-decree agreement that decree when obtained should not be executed can be pleaded in bar of execution. (Vol 29) 1942 Mad 734 (734, 735) : I L R (1943) Mad 225 * (Vol 12) 1925 Mad 591 (592) * (Vol 11) 1924 Mad 611 (611) * (Vol 5) 1918 Mad 1174 (1175, 1177, 1178) : 40 Mad 233 (F B). (Agreement not to execute decree for some time.)

[3] An agreement which does not relate to execution but directly attacks the decree itself, cannot be pleaded in execution. It would be most dangerous to allow a decree itself to be attacked in execution. (Vol 18) 1931 Mad 399 (403) : 54 Mad 184.

[4] Anomalous agreement not to execute — Suit on basis of such agreement for recovery of money realized in execution is barred by S. 47. (Vol 18) 1931 Mad 26 (27).

[5] Where there was an agreement prior to decree providing that the decree-holder should not recover cost which might be granted by the decree, it was held that the existence and validity of the agreement could be determined by the executing Court under S. 47 and no separate suit could lie for it. (1898) 22 Bom 463 (472).

[6] Decree based on award — Amount paid by judgment-debtor after award but before decree cannot be given credit in execution. (Vol 25) 1938 Nag 265 (266).

[7] Suit for accounts — Plaintiff applying for attachment before judgment — Amicable settlement

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embodied in Court's consent order, reached by defendant handing over to plaintiff certain goods to be sold by plaintiff — Plaintiff to keep sale proceeds to be appropriated towards decree in suit in his favour pending suit and final orders with regard to same — Agreement held implied that defendant was to get fair price for goods delivered by him and credit for that price—Question of fair price held though could not be gone into in suit could certainly be decided in execution — Separate suit held not necessary for deciding aforesaid question. (Vol 28) 1941 Sind 103 (104, 106, 107) : I L R (1941) Kar 227.

32. Property attached if belongs to judgment-debtor. — [1] For the purpose of deciding a claim to attached property under S. 47 the Court can go into all the contentions of the parties including that of title. The scope of enquiry is not restricted merely to the question of possession at the time of attachment as under O. 21, R. 58. (Vol 27) 1940 Mad 881 (882).

[2] Greater care should be taken especially on objections by legal representatives. (Vol 11) 1924 Rang 323 (328) : 2 Rang 168.

[3] Legal representative of deceased judgment-debtor brought on record—Objection to attachment by him that property belongs to him is under S. 47 and not under O. 21, R. 58. (Vol 22) 1935 All 183 (184)* (Vol 24) 1937 All 97 (98)* (Vol 21) 1934 Bom 296 (297) : 58 Bom 513* (Vol 22) 1935 Cal 14 (14, 15)* (Vol 3) 1916 Cal 814 (814)* (Vol 8) 1921 Lah 173 (175)* (Vol 24) 1937 Mad 108 (108)* (Vol 22) 1935 Mad 923 (924)* (Vol 18) 1981 Nag 27 (28)* (Vol 13) 1926 Nag 476 (480). * (Vol 20) 1933 Oudh 473 (474). (Legal representative proving his possession—Onus is on decree-holder to prove that property belongs to debtor.)* (Vol 16) 1929 Oudh 21 (21)* (Vol 21) 1934 Pat 188 (190). (Question as to whether decree was of husband or of wife can be determined under S. 47.)* (Vol 9) 1922 Pat 572 (573)* (Vol 24) 1937 Pesh 82 (83). (Widow objecting that property was given to her in dower.)* (Vol 15) 1928 Rang 29 (30) : 5 Rang 659* (Vol 28) 1941 Sind 142 (144) : I L R (1941) Kar 211.

[But see (Vol 26) 1939 Pat 354 (355, 356)* (Vol 12) 1925 Sind 156 (158).]

[4] Person sued as legal representative of deceased—Objection by such representative that property attached belongs to him and not to deceased comes under S. 47. (Vol 21) 1934 Rang 127 (128)* (Vol 25) 1938 Mad 731 (733) : I L R (1938) Mad 1080.

[5] A claim by the legal representative of the deceased judgment-debtor that he has a charge on the property sold in execution should be investigated under S. 47. (1909) 2 Ind Cas 432 (432) (Mad).

[6] Objection by judgment-debtor or his legal representative that he holds property not on his own behalf but as representing third parties or as trustee does not fall under S. 47. (Vol 11) 1924 All 183 (184). (Objection as mutwalli.)* (Vol 2) 1915 Cal 327 (329) : 42 Cal 440. (Objection by judgment-debtor that he holds property sought to be sold as shebait of deity.)* (1911) 39 Cal 298 (302, 303) (FB). (Do.)* (Vol 5) 1918 Mad 1140 (1140, 1141). (Claim by judgment-debtor as trustee.)* (Vol 3) 1916 Mad 789 (789). (Legal representative setting up title on behalf of person not party to suit)* (1908) 31 Mad 125 (127). (Objection by judgment-debtor as trustee.)* (1900) 23 Mad 195 (202) (FB). (Objection as a trustee)* (1911) 12 Ind Cas 411 (412) (Oudh). (That he is in possession as trustee.)* (Vol 9) 1922 Pat 196 (196) : 1 Pat 637. (Objection by judgment-debtor on ground of property being wakf.)* (Vol 17) 1930 Nag 298 (294) : 27 Nag L R 10. (Objection by judgment-debtor as trustee.)

[But see (Vol 14) 1927 Oudh 120 (120, 122) : 2 Luck

145. (Objection by judgment-debtor on ground that property is endowed and he is in possession lies under S. 47 and not under O. 21, R. 58.)]

[7] Executor litigating suit both as executor and trustee—Objection in execution to attachment as trustee comes within S. 47—Suit under O. 21, R. 63 is barred. (Vol 33) 1946 Mad 209 (214).

[8] Final mortgage-decree—Application by mortgagee for sale—Death of mortgagor—Objection by legal representative on ground that property solely belonged to him and mortgagor had no interest therein does not fall under S. 47—Proper remedy is by way of suit. (Vol 27) 1940 Rang 161 (162) : 1940 Rang L R 402* (Vol 26) 1939 Lah 178 (179, 180) : I L R (1939) Lah 493* (1905) 32 Cal 265 (266)* (Vol 22) 1935 Lah 549 (550)* (Vol 28) 1941 Mad 898 (902, 903) : I L R (1942) Mad 271 (FB). (Mortgage decree or decree for specific performance by execution of sale deed—Execution proceedings—Person impleaded as legal representative of deceased party cannot question decree — He is not bound to have his own claims to property in suit decided in execution proceedings — He can file separate suit to establish his claims.)* (Vol 23) 1936 Mad 733 (743). (Mortgage suit — Question of paramount title should not be decided in such suit — Question can be settled in separate suit — S. 47 is no bar to such suit.)

[But see (Vol 23) 1936 Mad 675 (676, 677). (Questions of paramount title can be raised under S. 47.)]

[9] Execution of mortgage decree—Question whether some properties mortgaged did not belong to mortgagor is one within the section. (Vol 10) 1923 All 115 (116).

[10] During sale of property in execution of mortgage-decree against legal representative of mortgagor certain property personally belonging to legal representative wrongly included in property to be sold and sold in execution — No objection raised by legal representative as to wrong description during execution proceedings—Separate suit to recover property is barred. (Vol 26) 1939 All 368 (369) : I L R (1939) All 885.

[11] B dying before suit—Suit against B's daughter's son C as B's sole legatee and decree obtained—Property in daughter's possession sought to be attached — Objection by daughter setting up her title held was as entire stranger and came under O. 21, R. 58 and not S. 47. (Vol 19) 1932 All 263 (264).

33. Question arising between preliminary and final decree.—[1] Section 47 does not apply to proceedings for making preliminary decree final. (Vol 12) 1925 Nag 132 (133) : 22 Nag L R 110* (Vol 6) 1919 Mad 709 (710) : 42 Mad 52.

[2] Partition suit—Preliminary decree — Order appointing commissioner to effect partition—Order is not within S. 47. (1897) 24 Cal 725 (738).

[3] Suit for redemption — Decree nisi allowed to be barred by time—Fresh suit for redemption is not barred under S. 47. (Vol 5) 1918 Bom 1 (2) : 43 Bom 334 (FB)* (Vol 18) 1931 Bom 480 (481)* (Vol 1) 1914 Bom 200 (201) : 39 Bom 41* (Vol 17) 1930 Mad 305 (312, 315) : 53 Mad 805.

[But see (Vol 6) 1919 Bom 34 (35) : 43 Bom 703* (Vol 4) 1917 Bom 162 (164) : 42 Bom 246.]

34. Question between parties in which auction-purchaser is interested.—[1] Mere fact of auction-purchaser being interested in the question relating to execution between decree-holder and judgment-debtor does not render S. 47 inapplicable. (Vol 15) 1928 Mad 806 (807)* (1910) 34 Bom 546 (551, 552).

[2] Question whether mouza could be sold in spite of S. 12A, Chota Nagpur Encumbered Estates Act, must be raised in execution proceedings—It cannot be raised by separate suit even against auction-purchaser. (Vol 29) 1942 Pat 244 (246, 247) : 21 Pat 233.

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[3] Sale under mortgage decree—Property delivered to stranger purchaser—Judgment-debtor alleging wrong delivery should proceed in execution and not by separate suit. (Vol 8) 1921 Mad 420 (422).

35. Restitution. See Section 144.

36. Stay of execution.—[1] Orders refusing to stay or staying execution are one relating to execution and are appealable. (Vol 7) 1920 Low Bur 188 (139); 10 Low Bur Rul 326 * (Vol 14) 1927 Lah 915 (915) * (Vol 11) 1924 Lah 631 (631) * (Vol 11) 1924 Lah 602 (603) * (Vol 12) 1925 Lah 69 (69) * (Vol 11) 1924 Lah 671 (672) * (Vol 10) 1923 Lah 514 (515). (Stay of execution of *ex parte* decree on ground of fraud.) * (Vol 9) 1922 Lah 480 (480).

[2] Order staying execution is order about conduct for execution but not deciding rights of parties and as such is not appealable. (Vol 2) 1915 Cal 122 (124) * (Vol 16) 1929 All 85 (85) * (Vol 11) 1924 All 808 (808, 809); 46 All 733 * (Vol 7) 1920 Cal 71 (72) * (Vol 13) 1926 Cal 880 (830). (Order refusing to stay execution.) * (Vol 1) 1914 Cal 149 (149) * Cal 160 * (Vol 5) 1918 Mad 1174 (1175); 40 Mad 233 (F B) * (Vol 28) 1941 Oudh 609 (610) * (Vol 12) 1925 Rang 225 (225); 3 Rang 255. (Execution stayed—Subsequent order regarding sufficiency of security—S. 47 does not apply.)

[See also (1928) 106 Ind Cas 890 (891) (Lah). (Order for security to stay execution is not within S. 47.)]

[3] Question relating to stay of execution does not fall under S. 47 and no appeal lies. (Vol 20) 1933 Nag 84 (85); 29 Nag L R 121 * (Vol 11) 1924 All 794 (795) * (Vol 18) 1931 Rang 221 (223); 9 Rang 354 * (Vol 25) 1938 Rang 317 (317, 318); 1938 Rang L R 580 * (Vol 8) 1921 Bom 208 (208); 45 Bom 241 * (Vol 14) 1927 Lah 852 (853).

[4] Omission of words "stay of execution" from S. 47 does not indicate that stay of execution is excluded from S. 47. (Vol 4) 1917 Mad 310 (311); 39 Mad 541 * (Vol 5) 1918 Mad 1174 (1177, 1178); 40 Mad 233 (F B).

[5] Court hearing appeal is "not a Court executing a decree" within S. 47—Appellate Court refusing to stay execution of decree appealed—No appeal lies to the High Court. (Vol 2) 1915 Mad 41 (41) * (Vol 26) 1939 Bom 65 (65).

[6] Sale of judgment-debtor's holding in execution—Application by judgment-debtor for setting aside sale—Notice under S. 34, Bengal Agricultural Debtors Act—Executing Court refusing to stay further proceedings and proceeding with application for setting aside sale—Order comes under S. 47. (Vol 28) 1941 Cal 264 (265).

37. Validity of decree.—[1] A Court executing a decree cannot go behind the terms of the decree and must execute it as it stands. (Vol 14) 1927 Lah 894 (895) * (Vol 11) 1924 All 689 (689, 690); 46 All 571 * (Vol 12) 1925 All 652 (652, 653); 47 All 900. (Pension—Saleability decided upon by trial Court—Executing Court cannot question.) * (Vol 12) 1935 Cal 245 (246) * (Vol 19) 1932 Lah 534 (534); 14 Lah 6. (Decree unambiguous.) * (Vol 25) 1938 Mad 809 (809). (Unless there is illegality apparent on the face of record.) * (Vol 22) 1935 Mad 429 (430) * (Vol 22) 1935 Mad 598 (599) * (Vol 11) 1924 Nag 378 (381) * (Vol 11) 1924 Nag 419 (421) * (Vol 29) 1942 Pat 196 (197) * (Vol 21) 1934 Pat 426 (426) * (Vol 19) 1932 Pat 237 (238).

[2] Directions as to execution in decree—Jurisdiction of executing Court must be determined with reference to them. (Vol 5) 1918 Oudh 105 (108) * (Vol 31) 1944 Mad 465 (467). (Execution Court cannot direct sale contrary to its terms of decree.) * (Vol 19) 1932 Mad 41 (45); 54 Mad 345. (Directions as to who is to execute it.)

[3] Executing Court cannot examine validity of decree. (Vol 12) 1925 Cal 276 (277) * (Vol 17) 1930 All 826 (827) * (1899) 21 All 277 (279) * (Vol 31) 1944

Bom 46 (50) * (Vol 8) 1921 Bom 301(2) (302). (Decree on award.) * (Vol 19) 1932 Cal 517 (520) * (Vol 12) 1925 Cal 203 (203) * (Vol 21) 1934 Lah 488 (441); 15 Lah 772 * (Vol 19) 1932 Lah 291 (292) * (Vol 26) 1939 Mad 867 (874); I L R (1940) Mad 123 * (Vol 22) 1935 Mad 236 (238); 58 Mad 752 * (Vol 8) 1921 Mad 85 (86). (Objection that Receiver in insolvency ought to have been impleaded in suit.) * (Vol 30) 1943 Nag 325 (326, 327); I L R (1943) Nag 757. (Consent decree—Fields entered as malik makbuza at instance of parties—Executing Court cannot go into plea that fields are in fact occupancy.) * (Vol 21) 1934 Pat 203 (203); 13 Pat 17. (Compromise decree—Objection as to one of the terms being 'outside the scope of the suit' cannot be entertained by executing Court.) * (Vol 12) 1925 Pat 625 (671); 4 Pat 510 * (Vol 16) 1929 Rang 275 (275) * (Vol 27) 1940 Sind 150 (150, 152, 153); I L R (1941) Kar 79. (On ground of want of territorial jurisdiction.)

[4] Objections impeaching validity of decree of which execution is sought cannot be raised in execution proceedings under S. 47. (1898) 22 Bom 475 (479) * (Vol 17) 1930 All 628 (630); 52 All 217 * (Vol 16) 1929 All 252 (253). (Suit raising such questions is not barred.) * (Vol 13) 1926 All 475 (476); 48 All 574. (Separate suit only will lie.) * (Vol 8) 1921 Bom 228 (228); 45 Bom 503 * (Vol 24) 1937 Mad 268 (270) * (1907) 30 Mad 402 (405) * (Vol 11) 1924 Nag 81 (82); 20 Nag L R 24 * (Vol 11) 1924 Nag 413 (414). (Fraudulent decree—Remedy is by way of injunction.)

[5] Decree nullity—It is incapable of execution. (Vol 30) 1943 Bom 268 (269, 290); I L R (1943) Bom 400.

[6] Court trying suit without jurisdiction—Executing Court can refuse to execute decree passed in the suit. (Vol 12) 1925 Cal 907 (909); 53 Cal 166 (FB) * (Vol 24) 1937 Cal 565 (569) * (Vol 29) 1942 Lah 237 (239); I L R (1948) Lah 553. ((Vol 27) 1940 Lah 280 reversed.) * (Vol 21) 1934 Lah 623 (624). (But a decree passed by a Court on a compromise and relating to a matter extraneous to the suit is not a nullity and can be executed.) * (Vol 21) 1934 Lah 652 (656). (Award.) * (Vol 12) 1925 Mad 788 (790). (Foreign decree—Execution in British India—Objection to decree is allowable.) * (Vol 20) 1938 Nag 211 (212, 213) * (Vol 16) 1929 Nag 357 (357, 358); 26 Nag L R 60 * (Vol 25) 1938 Oudh 213 (214) * (Vol 17) 1930 Rang 337 (340, 341); 8 Rang 544.

[7] Decree *prima facie* being legal—No objection regarding jurisdiction of Court passing it can be raised before executing Court. (Vol 16) 1929 Mad 383 (384) * (Vol 19) 1932 Cal 380 (380) * (Vol 18) 1931 Cal 546 (548) * (Vol 13) 1926 Mad 123 (1) (128) * (Vol 13) 1946 Pat 268 (270) * (Vol 21) 1934 Pat 240 (242); 13 Pat 290.

[8] Question whether decree is nullity for want of jurisdiction falls under S. 47. (Vol 16) 1929 Lah 449 (451) * (Vol 14) 1927 Lah 651 (652) * (Vol 12) 1925 Lah 494 (494); 6 Lah 313.

[9] Decree null and void—Objection that decree being in favour of or against dead person is nullity can be taken in execution. (Vol 14) 1927 Bom 53 (54) * (Vol 8) 1921 All 404 (404); 43 All 328 * (Vol 22) 1935 Cal 130 (131) * (Vol 8) 1921 Lah 219 (220) * (1942) 1942 Nag L Jour 338 (339) * (Vol 26) 1939 Pat 534 (536).

[10] Question whether decree is nullity or not being passed against dead person, does not relate to execution of decree and does not come under S. 47 so as to bar a separate suit. (Vol 18) 1931 All 490 (499); 54 All 25 (F B) * (Vol 21) 1934 Oudh 167 (169).

[11] Decree against person under disability without proper representation cannot be challenged on that ground in execution. (Vol 20) 1933 Cal 85 (89); 60 Cal

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191*(Vol 17) 1930 Pat 480 (484). (Lunatic.) * (Vol 27) 1940 Pat 59 (62). (Minor.) * (Vol 32) 1945 Pesh 21 (22). (Minor.)

[But see (Vol 13) 1926 Mad 429 (430). (Decree against minor—Minor not represented in suit—Executing Court is not bound to execute)]

[12] Objection to validity of decree passed in contravention of O. 32, R. 7 cannot be taken by minor in execution proceedings. (Vol 27) 1940 Pat 59 (61).

[13] Major judgment-debtor described as minor in decree—Executing Court must execute decree as it finds it—It cannot treat decree as nullity. (Vol 29) 1942 Pat 264 (265).

[14] Execution—Decree binding — Executing Court can refuse to execute decree directing sale prohibited on ground of public policy or by law. (Vol 24) 1937 Mad 918 (920) * (Vol 21) 1934 Lah 609 (609) * (Vol 30) 1943 Lah 268 (269) (FB). (Compromise decree—Executing Court can see whether decree conflicts with S. 60 (1).) * (Vol 20) 1933 Lah 397 (399). (Sale prohibited under Punjab Alienation of Land Act, 13 [XIII] of 1900.) * (Vol 21) 1934 Pat 666 (667) (F B).

38 Whether attached property is ancestral and debts were for legal necessity or tainted with immorality—See S. 53.

39. Separate suit barred. — [1] Objections that could be raised in execution under S. 47 cannot be tried in separate suit. (Vol 2) 1915 P C 88 (88) (P C) * (Vol 12) 1925 Mad 1198 (1199). (Order rejecting application under O. 21, R. 95—No suit lies but appeal lies under S. 47.) * (1895) 19 Bom 328 (330) * (Vol 6) 1919 All 192 (193). (Sale in execution—Objection allowed — Section 47 forbids regular suit). * (Vol 22) 1935 Cal 396 (397) * (1909) 6 All L Jour 641 (642) * (Vol 25) 1938 Lah 690 (691) * (Vol 7) 1920 Cal 537 (537, 538) * (1904) 31 Cal 737 (742) * (1894) 21 Cal 437 (461) * (Vol 20) 1933 Mad 825 (833) : 57 Mad 49 * (Vol 20) 1933 Mad 340 (341) * (1910) 33 Mad 423 (427, 428) * (Vol 7) 1920 Pat 750 (751) : 5 Pat L Jour 379.

[2] Objections which can be raised in execution cannot be raised by way of defence in suit. (Vol 16) 1929 Cal 374 (379) : 57 Cal 403 (FB). (Overruling 24 Cal 355: 9 Cal L Jour 464 and (Vol 9) 1922 Cal 311.) * (Vol 22) 1935 All 588 (589) * (1910) 34 Bom 546 (547) * (Vol 18) 1931 Nag 27 (28, 29) * (Vol 18) 1931 Rang 117 (121) : 9 Rang 305 (FB).

[But see (Vol 8) 1921 Mad 279 (280). (Following 24 Cal 355 which is overruled in (Vol 16) 1929 Cal 374 : 57 Cal 403.) * (1909) 32 Mad 242 (252) * (1909) 19 Mad L Jour 1 (2, 3).]

[3] Defendant kept out of knowledge about execution owing to decree-holder's fraud—He can raise objection by way of defence. (Vol 19) 1932 Cal 825 (827) : 59 Cal 1242 * (Vol 16) 1929 Cal 247 (249) : 56 Cal 467.

[4] Where a person has successfully opposed an application under S. 47 on the ground that that section did not apply he cannot subsequently raise a plea in a suit brought by the applicant that the suit was barred by S. 47 (Vol 16) 1929 Nag 79 (80).

[5] Where a Court trying a declaratory suit declaring certain execution application to be void and unlawful has *prima facie* jurisdiction to try it, its failing to take into consideration S. 47 will not render the decree inoperative. (Vol 13) 1926 Oudh 239 (240)

[6] Section cannot bar a suit by decree-holder specifically directed to file by an order under O. 21, R. 58. (Vol 12) 1925 All 240 (240).

[7] Where a question cannot be raised in execution a separate suit is not barred by S. 47. (Vol 5) 1918 Mad 720 (721). (Judgment-debtor paying money to person in consideration of entering satisfaction of decree — Person acquiring assignment of decree and realizing

money under it—Suit for return of money is not barred by S. 47.) * (1931) 60 Mad L Jour 178 (178). (Execution of decree in suit under S. 92—Person not party to suit not entitled to raise objection in execution—His remedy is by way of suit.) * (Vol 28) 1941 Mad 898 (902, 903) : I L R (1942) Mad 271 (F B) (Mortgage decree or decree for specific performance by execution of sale deed—Execution proceedings — Person impleaded as legal representative of deceased party cannot question decree — He is not bound to have his own claims to property in suit decided in execution proceedings— He can file separate suit to establish his claims—7 Mad 255 overruled.) * (1907) 80 Mad 402 (404, 405). (Property in reversioner's hands attached in execution of fraudulent decree against widow—Remedy of reversioner is by way of suit).

40. "Court executing decree"—Meaning of.—[1] A Collector executing a decree transferred to him is not a "Court executing the decree." (Vol 12) 1925 All 146 (149) : 47 All 217.

[2] The Court which sends the decree to the Collector remains 'the Court executing the decree' and hence a question coming under this section can be entertained by such Court even after the decree has been transferred to the Collector for execution. (Vol 25) 1938 Oudh 188 (189) : 14 Luck 213.

[3] Section 47 makes no difference between functions of Court executing simple money decree and decree under O. 34 — But difference exists between decree leaving manner of execution to executing Court and decree specifying property out of which it is to be satisfied. (Vol 21) 1934 Lah 438 (439) : 15 Lah 772.

41. "Determined"—Meaning of.—[1] "Determined" means finally disposed of by granting appropriate relief. (Vol 1) 1914 Mad 91 (93) * (Vol 27) 1940 Pat 420 (422) : 19 Pat 524.

[2] But the matters to be determined must be relevant to execution. (Vol 3) 1916 Mad 604 (604).

42. Power to construe decree. — [1] Executing Court is competent to interpret decree. (Vol 6) 1919 Nag 31 (34) * (Vol 27) 1940 All 107 (108) * (Vol 17) 1930 Mad 688 (690) : 53 Mad 750.

[2] Thus, if there is some ambiguity in a decree, it is always open to the Court executing the decree to interpret it with reference to the judgment. (Vol 29) 1942 Pat 196 (197).

[3] But it should not amend the decree under the guise of interpretation (Vol 4) 1917 Cal 288 (289).

43. Relief against penalty.—[1] Consent decree — S. 74, Contract Act, applies — Whether term in consent-decree is penal — Executing Court can decide. (Vol 30) 1943 Sind 247 (250) : I L R (1943) Kar 245 * (Vol 20) 1933 All 252 (254) : 55 All 334 (FB). [(Vol 11) 1924 All 689 : 46 All 571 overruled.] * (Vol 17) 1930 Pat 234 (236).

44. Setting aside sales in execution. — [1] Application to set aside sale on ground of its nullity when decree-holder is auction-purchaser can be made under S. 47 as such application cannot be made under O. 21, Rr. 89, 90 and 91—Separate suit to set aside sale is barred. (Vol 24) 1937 All 407 (410) * (Vol 21) 1934 All 314 (315) * (Vol 13) 1926 All 457 (459) * (Vol 11) 1924 All 698 (699) * (Vol 32) 1945 Bom 386 (388) * (Vol 8) 1921 Bom 285 (286) . 45 Bom 174 * (Vol 31) 1944 Cal 381 (381) * (Vol 28) 1941 Cal 53 (60) I L R (1940) 2 Cal 334 * (Vol 22) 1935 Mad 438 (438) * (Vol 4) 1917 Mad 877 (879) * (Vol 27) 1940 Nag 372 (375). (Issue cannot be decided by superior revenue Courts.) * (Vol 5) 1918 Oudh 379 (385) * (Vol 6) 1919 Pat 396 (398).

[2] Application to set aside sale—Court should confine itself to that question and cannot consider question as to whether decree has been partly satisfied. (Vol 21) 1934 Pat 664 (665).

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[3] Application to set aside sale by judgment-debtor for material irregularity in conduct of sale—Validity of sale not assailed as being null and void—Application is in substance under O. 21, R. 90 and not under S. 47. (Vol 24) 1937 All 407 (410) * (Vol 21) 1934 Lah 508 (509) : 15 Lah 801 * (Vol 26) 1939 Nag 241 (241). [(Vol 21) 1934 Nag 21 dissented from.]

[4] Prayers under S. 47 and O. 21, R. 90 can be joined in one application. (Vol 15) 1928 Pat 272 (272) : 7 Pat 381.

45. Decree obtained by fraud.—[1] Question whether decree is obtained by fraud or otherwise does not fall under S. 47 — Separate suit lies. (Vol 3) 1916 Mad 792 (793) : 38 Mad 221 * (1899) 26 Cal 328 (333) * (Vol 7) 1920 Lah 164 (2) (165). (Regular suit lies to set aside *ex parte* decree obtained by fraud). * (1886) 9 Mad 80 (82).

[2] Suit to set aside decree and execution sale thereunder on ground of fraud is not barred by S. 47 (Vol 1) 1914 P C 72 (73) : 41 Ind App 267 : 42 Cal 244 (P C) * (1900) 27 Cal 197 (201) (FB).

[3] Property attached in execution of one decree subsequently sold in execution of another decree — Objection to sale on ground that second decree is collusive cannot be made in execution proceedings. (Vol 26) 1939 Lah 380 (381).

46. Fraud in execution proceedings.—[1] Fraud — Whether court sale is vitiated by fraud is question falling under S. 47. (Vol 25) 1938 Oudh 188 (189, 190) : 14 Luck 213 * (Vol 5) 1918 Cal 171 (173) * (Vol 13) 1926 Cal 1219 (1220) * (1910) 14 Cal W N 828 (824) * (1913) 18 Cal L Jour 264 (267, 268) * (Vol 3) 1916 Mad 33 (34, 35, 36) : 38 Mad 1076. (Minor substituted by fraud as legal representative of deceased judgment-debtor without being properly represented.) * (Vol 8) 1921 Pat 54 (57) : 6 Pat L Jour 16 * (Vol 23) 1936 Pat 270 (273) : 15 Pat 422 * (1911) 10 Ind Cas 625 (625) (Cal). (Fraud in not certifying payment.)

[2] Application to set aside execution sale — Objections in respect of whole procedure, starting with illegal attachment — Application is admissible under S. 47. (Vol 4) 1917 Low Bur 80 (81).

[3] Suit by auction-purchaser to set aside sale on ground of fraud is barred by S. 47. (Vol 5) 1918 Nag 245 (247).

[4] Fraud—Old and new Code—No application under S. 47 is maintainable, for recovering land obtained by fraud not concerned with publishing or conducting the sale — A separate suit will lie. (Vol 10) 1923 All 573 (574) * (Vol 1) 1914 All 551 (2) (551, 552). (Suit is for declaration that sale has no effect and not for setting aside sale.)

[5] Application by judgment-debtor to set aside sale under O. 21, R. 90, also relying on S. 12-A, Chota Nagpur Encumbered Estates Act — Application is to be decided under S. 47. (Vol 18) 1931 Pat 97 (98).

[6] Section 47 does not apply to proceedings to set aside execution sale on ground of fraud in conducting sale — In such case order is not a decree—No second appeal lies. (Vol 5) 1918 Pat 297 (298) : 3 Pat L Jour 645 * (1910) 8 Ind Cas 3 (4) (Cal).

[7] Objections to an execution sale on the ground of fraud can only be made under O. 21, R. 90, prior to confirmation. (Vol 6) 1919 Lah 152 (154).

[8] Application to set aside sale made under R. 90 of O. 21 dismissed — Suit to cancel sale on ground of fraud in conducting it does not lie. (Vol 16) 1929 Nag 130 (131) : 25 Nag L R 58.

[9] Dispute as to execution sale — Court should act under S. 47 read with O. 21, R. 90 or with S. 151 — Second appeal does not lie in former case but lies in latter case. (Vol 11) 1924 Mad 778 (779).

47. Notice under O. 21, R. 16, 22 and 66 — Want of.—[1] Question of irregularity or illegality of notice under R. 16 and its effect is one arising between parties to suit and can be properly determined under S. 47. (Vol 7) 1920 Lah 251 (253).

[2] Application to set aside sale on ground of omission to notify under O. 21, R. 22 falls under S. 47. (Vol 18) 1931 All 145 (145, 146) * (1911) 13 Cal L Jour 162 (164) * (Vol 13) 1926 Cal 539 (540) * (Vol 13) 1926 Pat 397 (397) * (Vol 11) 1924 Pat 67 (68).

[3] Application by legal representative of deceased judgment-debtor to set aside sale for want of notice under O. 21, R. 22 — Sale is invalid only to the extent of applicant's share. (Vol 20) 1933 Mad 224 (224).

[4] Sale invalid by reason of non-service of notice under R. 22 — Yet application to set aside sale under R. 90 must be made within 30 days — If under S. 47 then within three years from date of sale — Time may however be extended under Limitation Act, S. 18. (Vol 19) 1932 Cal 381 (381).

[5] Execution sale — Application to set aside sale on ground of failure to issue notice under O. 21, R. 22 — Order of dismissal of the application—Notice found unnecessary — Order is not under S. 47 — No second appeal. (Vol 11) 1924 Pat 111 (112) : 2 Pat 916.

[6] Notice under O. 21, R. 22 served—Case for setting aside sale cannot come under S. 47. (Vol 19) 1932 Cal 627 (629).

[7] Application to set aside auction sale — Want of notice under O. 21, R. 66 — It falls under S. 47 and second appeal lies. (Vol 17) 1930 Mad 489 (489) * (Vol 12) 1925 Mad 1142 (1142) * (Vol 7) 1920 Mad 481 (484).

[8] Fresh sale proclamation settled—Notice to judgment-debtor not given—Sale is not nullity—Judgment-debtor can apply under S. 47 to have sale set aside. (Vol 32) 1945 Mad 499 (500).

48. Other grounds for setting aside sale. — [1] Sections 47, 144 and 151 — *Ex parte* decree set aside—Sale in execution of decree can be set aside—Application to set aside sale can be treated as one under S. 47, or S. 144 or S. 151. (Vol 6) 1919 Bom 175 (176) : 43 Bom 235 * (Vol 7) 1920 Bom 12 (12) : 44 Bom 702.

[2] Purchase by decree-holder without permission — Sale can be set aside upon application under S. 47. (Vol 9) 1922 P C 336 (338) : 49 Ind App 312 : 1 Pat 733 (P C) * (1900) 22 All 108 (110, 111). (Separate suit is barred.) * (1893) 16 Mad 287 (289). (Do.)

[3] Executing Court holding sale in spite of stay order of Appellate Court — Application by judgment-debtor to set aside sale as being without jurisdiction held came within S. 47 and not O. 21, R. 90 — Second appeal is competent. (Vol 29) 1942 Pat 146 (147).

[4] Decree transferred for execution to Collector — Date of sale fixed—Application for stay of sale made to the original Court — Sale held before stay order was communicated to him — Application to set aside sale—Application for stay ought to be made to Collector and not to original Court — The application is not under S. 47. (Vol 15) 1928 Bom 189 (190) : 52 Bom 290.

[5] Where mortgage-decree against two persons is set aside against one in appeal, objection by successful defendant that judgment-debtor had no interest in property sought to be sold must be tried in execution proceedings. (Vol 11) 1924 All 313 (313).

[6] Mortgage decree—Executing Court cannot entertain objection that property ordered to be sold in execution is not saleable. (Vol 13) 1926 Pat 202 (203) : 4 Pat 696.

[7] Sale contravening express direction of Court — Court has power to set it aside *suo motu*. (Vol 18) 1931 Lah 344 (1) (344) : 12 Lah 602.

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[8] Sale in contravention of terms of decree can be set aside on application under S. 47.—Separate suit does not lie. (Vol 4) 1917 Mad 877 (879).

[9] Execution sale.—Wrong property sold at a court sale — Mistake of plaintiff — Sale is not a nullity.—Suit to recover property sold without setting aside sale does not lie. (Vol 10) 1923 Bom 62 (62) : 46 Bom 914.

[10] Sale wholly without jurisdiction and consequently void — Application by judgment-debtor to have it declared void falls under S. 47. (Vol 28) 1941 Pat 566 (568).

[11] Sale void — Application to set aside is under S. 47. (Vol 29) 1942 Mad 509 (511).

[12] Unconditional permission to bid granted to decree-holder — Permission modified without notice to decree-holder — Sale can be set aside at instance of decree-holder under S. 47. (Vol 12) 1925 Oudh 381 (382).

[13] Want of attachment before sale.—Question falls under S. 47 and not under O. 21, R. 90. (Vol 11) 1924 Rang 124 (124) : 1 Rang 533.

[14] Application by receiver of insolvent's estate to set aside sale on ground of prior adjudication is application under S. 47. (Vol 4) 1917 Mad 924 (925).

[15] Application to set aside sale on ground that decree had been satisfied previous to sale is one under S. 47. (1911) 9 Ind Cas 452 (452) (Low Bur) (1912) 36 Bom 156 (161, 162, 163).

[16] Sale confirmed.—Remedy to set aside is only by suit and not under S. 47. (Vol 9) 1922 Mad 63 (1) (63).

[17] A deposit by the judgment-debtor to set aside a sale can only be made under O. 21, R. 89 and it does not come under S. 47. (1910) 6 Ind Cas 573 (573) (Cal).

49. Sub-section (2).—[1] Court can treat a proceeding under S. 47 as a suit or a suit as a proceeding. (Vol 17) 1930 Mad 12 (13). (Suit as proceeding.) * (Vol 13) 1926 All 387 (388, 389) : 48 All 362. (Proceedings as a suit.) * (1887) 14 Cal 605 (609).

[2] Object of sub-s. (2) is to avoid claim being defeated on technical pleas. (Vol 10) 1923 Nag 94 (95).

[3] Section 47 (2) is intended to correct *bona fide* mistake. (Vol 18) 1931 Mad 270 (271).

[4] Power to treat application as suit is discretionary — It cannot be claimed as of right. (Vol 2) 1915 Oudh 134 (136) * (Vol 6) 1919 Cal 674 (675) : 46 Cal 103.

[5] Proceeding cannot be treated both as suit and application. (Vol 2) 1915 Mad 226 (227).

[6] In the following cases suits were treated as proceedings. (Vol 3) 1916 Pat 299 (300) : 1 Pat L Jour 43. (Suit for restitution of property wrongly sold in execution held could be treated as proceeding.) * (Vol 25) 1938 Pat 216 (220). (Plaintiff landlord in possession of lease holding as purchaser in execution of his rent decree — Defendant co-sharer landlord obtaining decree for rent concerning same lease holding — Execution proceedings by defendant landlord — Objections under O. 21, R. 58 by plaintiff dismissed not on merits but as filed late — No appeal against dismissal — Title suit by plaintiff can be treated as application under S. 47 — Rule of constructive *res judicata* does not apply.) * (Vol 3) 1916 Mad 429 (429). (Suit as proceeding.—Dismissal of suit is bad.) * (1900) 22 All 121 (123). (Suit to set aside sale in execution treated as application under S. 47.) * (Vol 22) 1935 Cal 15 (17). (Suit for setting aside court sale in respect of properties not included in mortgage.) * (Vol 18) 1931 Mad 588 (590). (In execution of decree obtained against Y, X getting possession of house property No. 1 — Decree reversed on appeal — Restitution applied for.—X building wall on property No. 2 thereby obstructing passage to house — Court ordering possession of house to be secured to Y but making no order as regards wall.—Y suing for recovery

of both properties Nos. 1 and 2.—Suit as regards property No. 1 held incompetent.—But Court should treat suit as proceeding so far as it related to house.) * (Vol 17) 1930 Mad 12 (13, 14). (The circumstance that a higher court-fee has been paid for filing the plaint should not be a ground for not treating the suit as an application under S. 47.) * (1932) 35 Mad L W 103 (104). (Dismissal of prior execution petition is no bar.) * (Vol 17) 1930 Oudh 468 (470). (Suit by decree-holder for declaration that property is liable to be attached and sold in execution of his decree — Plaint can be treated as step-in-aid within Art. 182, Limitation Act.)

[7] In the following cases, a proceeding was treated as a suit. (Vol 13) 1926 All 387 (388) : 48 All 362. (Objection by the minor that a decree was not binding on him by an application in execution proceedings.) * (Vol 3) 1916 Mad 655 (1) (655). (Partition suit.—Application for inclusion of rents collected subsequent to suit must be treated as a suit and additional court-fee is leviable.) * (Vol 25) 1938 Lah 177 (178). (Partition proceedings — Award declaring rights of parties without giving possession — Decree in accordance with award — *Dona fide* application for execution claiming possession with alternative prayer to treat application as suit.) * (Vol 12) 1925 Pat 16 (17) : 3 Pat 344. (Case between rival assignees of decree.—Converted by Court into suit.) * (1913) 1913 Pun L R No. 40, p. 158 (159). (Where the decree in a suit for specific performance of a contract of sale was satisfied by execution of a sale and the decree-holder took out execution for possession. Held, that under S. 47 (2) the applicant should be allowed to convert his application into a plaint for possession.) * (1912) 16 Ind Cas 543 (545) (Cal). (Proceedings by minor after attaining majority to set aside sale on the ground of negligence of his guardian in the prosecution of the application put in by him to set aside sale.) * (Vol 18) 1931 Oudh 45 (46) : 6 Luck 452. (M, a Mahomedan, mortgaging a plot to P—P obtaining decree for sale in execution — M's son objecting to sale — P contending that M's son could not object — M's son could object to the sale treating the proceeding as a suit.)

[8] Court in which suit sought to be converted into proceedings is brought, must have jurisdiction to execute the decree. (Vol 83) 1946 Lah 184 (141) (F B) * (Vol 21) 1934 All 699 (700). (Party to suit in Small Cause Court objecting to attachment of property in execution of decree in same Court — Objection dismissed and declaratory suit filed in Munsif's Court — Munsif's Court cannot treat suit as application under S. 47 and suit must be dismissed.) * (Vol 3) 1916 All 184 (185) * (Vol 13) 1926 Lah 165 (165, 166) : 7 Lah 1 * (Vol 22) 1935 Mad 923 (925) * (1909) 32 Mad 425 (427, 428) * (Vol 1) 1914 Cal 691 (692).

[9] A suit cannot be treated as execution application if the application would be barred by limitation on the date of institution of the suit. (Vol 5) 1918 Mad 180 (181, 182) * (Vol 12) 1925 Mad 1198 (1200).

[10] Option under S. 47 (2) cannot be exercised merely to bring application within limitation — Option under S. 47 (2) must be exercised when the suit or application is filed. (Vol 25) 1938 Nag 534 (536) : 1 L R (1940) Nag 334.

[11] Appellate Court can treat proceedings on application as proceedings in suit. (Vol 13) 1926 All 387 (388) : 48 All 362 * (Vol 27) 1940 Oudh 27 (32).

[12] Words "the Court" in S. 47 (2) refer to the Court specified in S. 47 (1) and not to Court trying separate suit. (Vol 25) 1938 Nag 534 (537) : 1 L R (1940) Nag 334.

[13] Objection to execution — If proceeding is to be treated as suit, objector should pay court-fee and not decree-holder. (Vol 21) 1934 Pat 9 (11).

LIMIT OF TIME FOR EXECUTION.

48. (1) Where an application to execute a decree⁴ not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made *Execution barred in certain cases.* upon any fresh application presented after the expiration of twelve years from—

- (a) the date of the decree sought to be executed,¹³ or,
 - (b) where the decree or any subsequent order¹⁴ directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods¹⁰ the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.
- (2) Nothing in this section shall be deemed—
- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has, by fraud or force⁶ prevented the execution of the decree at some time within twelve years immediately before the date of the application : or
 - (b) to limit or otherwise affect the operation of article ³[183 of the First Schedule to the Indian Limitation Act, 1908.]

[1882—S. 230, paras. 3, 4; 1877—S. 230 paras. 3, 4 and S. 231; 1859—S. 207.]

a. *Substituted* for the words "180 of the Second Schedule to the Indian Limitation Act, 1877" by the Code of Civil Procedure (Amendment) Act, 34 [XXXIV] of 1940, Section 3.

PROVINCIAL AMENDMENT.

Allahabad.—For the purposes of executing a decree based on a loan against the agricultural produce of a judgment-debtor the word "six" shall be deemed to have been substituted for the word "twelve" wherever it occurs in S. 48—U. P. Regulation of Agricultural Credit Act, 14 [XIV] of 1 40, S. 9 (21-12-1940).

Section 47 (concl'd.)

[14] Application under S. 47 (2) is not analogous to application for amendment of plaint seeking to introduce new cause of action. (Vol 27) 1940 Oudh 27 (32).

[15] Powers under S. 47, O. 21, Rr. 58, 59, 60 and 63 are not conferred on Collector. (Vol 23) 1936 Bom 227 (231) : 60 Bom 516.

SECTION 48—SYNOPSIS.

1. Appellate decree.
2. Applicability and scope.
- 2a. "At a certain date."
3. Computation of period of limitation.
4. Execution application.
5. Finality of decision.
6. Fraud or force.
7. Fresh application.
8. Insolvency Act and S. 48.
9. Limitation Act and S. 48.
10. Recurring periods.
11. Retrospective effect.
12. Revival of previous application.
13. Starting point.
14. Subsequent order.

1. Appellate decree. — [1] The appellate decree being the only decree capable of execution limitation runs from the date of the appellate decree even though a portion only of the original decree was appealed against and an execution application made after 12 years from the original decree but within 12 years from that of the appellate decree is not barred under S. 48. (1911) 21 Mad L Jour 1020 (1021) & (1907) 34 Cal 874 (876, 877) & (Vol 33) 1946 Mad 231 (232) & (Vol 32) 1945 Mad 485 (487) & (1903) 26 Mad 91 (95, 96) (F B) & (Vol 36) 1943 Pat 371 (373).

[2] Following are appellate decrees, for purposes of limitation under S. 48. (Vol 8) 1921 All 134 (134) : 43 All 405. (Order dismissing appeal on the ground that appellant has no right to it.) & (1910) 32 All 136 (137,

138). (Abatement of appeal owing to death of appellant.) & (Vol 25) 1938 Pat 401 (402). (Peremptory order by Appellate Court directing defendants to pay printing costs within certain time and on default appeal to stand dismissed).

[3] The following are not appellate decrees for purposes of limitation under S. 48. (Vol 13) 1926 All 440 (441); 48 All 377. (Dismissal of appeal filed from a non-appellable decree.) & (Vol 13) 1926 Cal 664 (664, 665). (*Ex parte* decree against defendant.) & (1912) 15 Cal L Jour 678 (682) (Appellate Court directing payment of decretal amount in instalment.) & (Vol 22) 1935 Lah 292 (294). (Mere direction by Appellate Court to amend decree.)

[4] Appeal against some defendants — Limitation for execution against others will run only from date of original decree. (Vol 10) 1923 Bom 400 (400)

[5] Where an appeal is dismissed for default the only decree which could be executed is the decree of the original Court and limitation runs from the date of the original decree and not from the date of the order of dismissal for default. (Vol 5) 1918 Oudh 446 (449) & (Vol 30) 1943 Pat 371 (373).

[6] Revision petition presented to High Court against decree of Small Cause Court — Period of twelve years should be computed from date of decree and not from decision of High Court. (Vol 28) 1941 Mad 477 (478) & (Vol 30) 1943 Pat 371 (373).

2. Applicability and scope.—[1] Per *Phillips J.* —The Legislature has laid down a period of twelve years as the maximum period within which a decree can be executed (save in the case of fraud) and presumably this period has been fixed to avoid a prolonged harassing of the judgment-debtor, and consequently, the section must be construed strictly. (Vol 5) 1913 Mad 1187 (1194) : 40 Mad 989 (F B).

[2] Section 48 governs applications for execution of all kinds of decrees except those for injunction. (1910) 32 All 499 (501, 502).

[3] Section 48 applies to decrees for sale. (Vol 4) 1917 Pat 485 (486) : 1 Pat L Jour 214.

Section 48 (contd.)

[4] Section 48 has no application to decrees made by the High Court in the exercise of its ordinary original civil jurisdiction. (1893) 20 Cal 551 (557).

[5] Decree passed by Presidency Small Cause Court transferred for execution to Court of Sub-Judge — Section 48 is not applicable. (Vol 19) 1932 Sind 116 (118) : 26 Sind L R 91 * (Vol 29) 1942 Pat 128 (128, 129, 130)

[6] Execution proceedings should not be permitted to drag on for more than 12 years, merely because it suits the convenience of the decree-holder. (1910) 8 Ind Cas 727 (728) (Oudh).

[7] For determining the period of 12 years under this section, reference must be made exclusively to the provisions of the Code. (Vol 30) 1943 Pat 371 (373).

[8] Before the execution of a decree can be held barred under this section it must be shown that the decree was in all parts ripe for execution on the date from which the period of twelve years is to be computed. (1922) 36 Bom 368 (371, 372) * (Vol 18) 1931 Bom 492 (494).

[9] Decree-holder securing possession — Omission to specify shares of judgment-debtors does not make decree unexecutable. (Vol 7) 1920 Nag 40 (42).

[10] Paragraph 11 (3), Sch. 3 controls S. 48. (Vol 21) 1934 Oudh 465 (470) * (Vol 6) 1919 All 64 (2) (65) : 42 All 118 * (1910) 13 Oudh Cas 303 (308).

[11] Section 48 of the present Code is more extensive than S. 230 of the old Code and covers compromise decrees. (Vol 2) 1915 Bom 40 (40, 41) : 39 Bom 256.

[12] Section 48, Civil P. C., which does not prescribe any period of limitation does not apply to the warrant under S. 386 (1) (b), Criminal P. C. (Vol 28) 1941 Bom 158 (159) : I L R (1941) Bom 147 : 42 Cri L Jour 534.

2a. "At a certain date." — [1] Where a decree does not fix a definite date the question whether a sum is payable by a certain date should be ascertained by construction of the decree and if so ascertainable time runs from that date (1891) 14 Mad 396 (398) * (1889) 1889 Pun Re No. 159, p. 559 (561).

[2] An order merely directing a compromise petition for payments by instalments to be filed is not an order directing payments to be made at a particular date. (Vol 19) 1932 All 273 (282) : 54 All 573 (F B) * (1889) 16 Cal 16 (18, 19).

3. Computation of period of limitation. — [1] This section does not contemplate a deduction of any particular period from the prescribed period of 12 years. The period during which execution proceedings have been stayed cannot be deducted from the period of 12 years. (Vol 7) 1920 Nag 68 (69).

[2] The period during which the estate is in charge of Government under the Act, is excluded for limitation to file an application for execution. (1911) 38 Cal 288 (292).

[3] The time spent in obtaining the conciliator's certificate under S. 48, Dekkhan Agriculturists' Relief Act can be deducted in computing the period of limitation under S. 48, Civil P. C. (Vol 5) 1918 Bom 187 (188) : 42 Bom 367.

[4] The provisions of S. 45, Madras Court of Wards Act allowing deduction of time during which the estate was under the Court's management will apply only when decrees have been transferred to the Collector for execution, and an amendment of it in execution cannot be permitted to revive a barred claim. (Vol 2) 1915 Mad 449 (451).

[5] The decree in question was obtained against the appellant on 17th July 1920. Various applications for execution were put in and the last was made on 28th April 1933. The judgment-debtor raised various objec-

tions. The entire property of his was under the control of the Collector from 27th April 1926 to 18th November 1929 in execution of the decree held by the bank. *Held* that this period should be excluded from the period of 12 years prescribed by S. 48, Civil P. C. (1937) 1937 Oudh W N 1116 (1117).

[6] A decree-holder cannot by binding himself not to execute a decree for a certain period, add to the time which the law allows him to execute it. (1912) 15 Cal L Jour 678 (682).

[7] Application for sale of non-hypothecated properties made more than 12 years from date of decree providing for payment of mortgage money is barred. (Vol 5) 1918 Mad 449 (449).

[8] Validity of the original presentation of an application for execution of a decree is not affected by a subsequent order of return for correction of defects unless the defects to be corrected are such as to prejudice the judgment-debtor substantially. (Vol 2) 1915 Mad 1042 (1043).

[9] An application to execute an order awarding mesne profits, made on the last day of the 12th year after the order but which came for hearing after 12 years, is not barred. Also an application presented in time but corrected at the Court's direction and represented after time, is not defective in any way and is not barred. (1910) 7 Mad L Tim 353 (353, 354).

[10] Solenama instalment decree passed in a mortgage suit in 1909 authorizing decree-holder to realize whole amount in case of default — Final decree passed in 1911 — Personal decree passed under O. 34, R. 6 in 1920 — Execution application in 1925 — Application was held to be time barred and personal decree not necessary in view of the solenama decree. (Vol 15) 1928 Cal 668 (669).

[11] The fact that a previous execution petition was held not barred by S. 48, does not for ever remove the operation of S. 48, out of the way of future petitions. (Vol 14) 1927 Mad 842 (844).

[12] No fraud or force preventing consideration of application — There is no suspension of execution. (Vol 4) 1917 Cal 460 (461).

[13] An order postponing execution of a decree or ordering payment by instalments under S. 210 (old Code) is virtually an order amending the decree and an application for execution made within 12 years of the order, is not barred. (Vol 4) 1917 Mad 188 (188).

4. Execution application. — [1] A decree was passed on 7th August 1875. It was kept alive until 26th July 1887. On that date application for certificate was made to the Court which passed the decree to allow execution to be taken out in another Civil Court. The decree was sent for execution but execution had been refused : *Held* that the application was merely to transfer the decree for execution and not an application for the execution of the decree itself. (1889) 16 Cal 744 (745, 746).

[2] On 19th December 1881 the respondents obtained a decree against the appellant. On 11th December 1893 the respondents applied for transmission of certified copy of the decree to the District Judge as no property was within the jurisdiction of the High Court. Notice was issued and the certified copy was transmitted to District Court. The appellant filed objection that the execution of the decree was barred. *Held* that the application of 11th December 1893 was not an application for execution and order of 19th December 1893 was not an order for execution. There was no necessity for issue of a notice. The first application for execution of the decree was not within time. The execution of the decree was barred. (1895) 22 Cal 921 (923, 924).

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[3] When application has not been properly made within the 12 years' period provided in S. 48 no amendment should be allowed in execution petition which would have the effect of depriving the judgment-debtor of putting forward the plea of limitation. But in special circumstances the Court has discretion to order such amendments in order to enable the decree-holder to proceed further with execution. (Vol 27) 1940 Mad 19 (20).

[4] Application for amendment of previous application for execution made after 12 years is not necessarily *ultra vires* but whether the amendment is to be allowed or not will depend upon the circumstances of each case. (Vol 15) 1928 Mad 1154 (1155).

[5] Execution application filed *bona fide* against wrong legal representative within time — Amendment allowed but after 12 years time — Amendment takes effect from date of original representation. (Vol 22) 1935 Mad 161 (163).

[6] Complete execution application filed within 12 years — Application for execution against other properties beyond 12 years cannot be allowed as one for amendment of the first. (Vol 14) 1927 Mad 347 (347, 348).

[7] Execution application filed within twelve years from date of decree — Notice to party representing one defendant served after expiry of twelve years — Application held within time. (Vol 24) 1937 Mad 113 (113).

5. Finality of decision. — [1] Court has jurisdiction to decide the question of limitation — Decision whether right or wrong stands unless set aside in appeal or revision — Till then it cannot be attacked in another proceeding. (Vol 21) 1934 Cal 282 (283) : 61 Cal 234.

[2] Application for attachment allowed to be decided *ex parte* even after notice — Plea of twelve years' bar cannot be allowed in appeal — No review also can be allowed. (Vol 16) 1929 Mad 826 (826).

6. Fraud or force. — [1] The proviso to S. 48 is intended to prevent the twelve years' rule of limitation being an inducement to judgment-debtors to evade execution by fraud or force with a view to obtaining the benefit of the twelve years' rule. (1899) 22 Mad 320 (323) (F B).

[2] The second proviso of S. 48 has the effect of extending the period of limitation to 12 years from the time when the decree-holder was, by fraud of the judgment-debtor, prevented from executing his decree. (1912) 34 All 20 (21)* (1910) 8 Ind Cas 805 (805) (Mad).

[3] In order to succeed under S. 48 (2) the decree-holder must prove that he was prevented from executing the decree by reason of fraud or force on the part of judgment-debtor. If he merely fails to execute when he can, he cannot be protected by S. 48 (2). (Vol 16) 1929 Pat 597 (599) * (1912) 15 Cal L Jour 678 (680).

[But see (Vol 22) 1935 Mad 8 (9) : 58 Mad 311. (By mere fact of fraud being committed by judgment-debtor, decree-holder can claim exemption under S. 48 (2) (a)—He need not show that he was prevented from executing decree by such fraud.)]

[4] The term 'fraud' is used in a wider sense than in English law. (Vol 12) 1925 Nag 82 (82, 88) : 22 Nag L R 67* (1912) 15 Cal L Jour 678 (682).

[5] Term "fraud" in S. 48 (2) should be liberally construed. (Vol 33) 1946 Mad 172 (173).

[6] Any action of the judgment-debtor which puts off the decree-holder from executing his decree at once should be taken as fraud, if the result thereof is to bar execution of the decree under the 12 years' rule. (Vol 18) 1931 All 31 (33)* (Vol 22) 1935 Pat 380 (382) : 14 Pat 816.

[7] Fraud must be of nature which decree-holder is not able to discover and which helps judgment-debtor

in gaining time. (Vol 18) 1931 All 134 (134) : 53 All 419* (Vol 23) 1936 Lah 843 (845). (Dishonest circumvention is fraud—But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud.)* (Vol 14) 1927 All 668 (669). (Fraud includes also circumvention.)

[8] In the following cases the conduct of the judgment-debtor has been held to amount to fraud within the meaning of the section. (Vol 9) 1922 All 145 (146) : 44 All 319. (Delaying of execution due to frivolous objections by debtor is fraud.)* (1912) 9 All L Jour 17 (18, 19). (Judgment-debtor successfully evading arrest.)* (1909) 6 All L Jour 401 (402). (Judgment-debtor either keeping out of the way or taking false objections to evade payments.)* (1885) 9 Bom 318 (319). (Appellant evading payment of money justly due to decree-holder by many stratagems and raising objections.)* (Vol 27) 1940 Lah 178 (179). (Fraudulent transfer.)* (Vol 11) 1924 Mad 836 (837). (Evasion by judgment-debtor of arrest when able to pay is fraud.)* (Vol 7) 1920 Mad 492 (492, 493). (Evasion of arrest in execution.)* (1913) 24 Mad L Jour 270 (270). (An improper means resorted to in order to prevent execution could amount to fraud.)* (1912) 35 Mad 670 (676, 677). (A deliberate evasion of the process of Court to defeat execution of decree amounts to fraud.)* (1899) 22 Mad 320 (322) (FB). (Locking up the house when judgment-debtor knew that warrant for attachment of his moveable property had been issued.)* (1883) 6 Mad 365 (367). (Delay caused by evading service of warrant.)* (Vol 12) 1925 Nag 82 (82, 88) : 22 Nag L R 67. (Locking house, evading arrest or payment or fictitious transfer).

[9] Keeping doors closed is *per se* no evidence of fraud, on the part of a lady. Deliberate attempt to do so against executing officer is necessary. (Vol 4) 1917 Oudh 159 (160).

[10] An unsuccessful appeal by judgment-debtor from execution proceedings does not of itself constitute fraud or frivolous or vexatious evasion or the execution of decree. (1910) 1910 Pun L R No. 20, p. 49 (50) : 1910 Pun Re No. 17.

[11] Mere raising of objections as to prolong execution proceedings beyond the period of limitation is not necessarily fraud. (Vol 23) 1936 Lah 843 (845) * (1912) 15 Cal L Jour 678 (680). (Conduct of the judgment-debtor cannot be deemed fraudulent simply because his objection to the validity of sale of his property in execution ultimately proves unsuccessful.)

[12] A decree-holder cannot take advantage of his judgment-debtor's fraud or force if he has ample time to apply afresh after the conclusion of the fraud or force. (1909) 1909 Pun L R No. 75, p. 273 (275, 276).

[But see (Vol 6) 1919 Mad 197 (198). (A decree-holder applying for execution after 12 years from the date of the decree is not restricted to proving that the fraud or force occurred within three years of the application. He is entitled to the benefit of the proviso even if the fraud or force was long anterior in date.)]

[13] Fraud of the judgment-debtor need not be continuous. Existence of fraud, and prevention by the debtor, of execution within the period of 12 years is sufficient. (1911) 14 Oudh Cas 238 (243).

[14] An application was made by the decree-holder for the execution of the decree more than 12 years after decree. Execution was prevented by the heirs of the original judgment-debtor. Held that the decree-holder was not barred in respect of the application. (1882) 4 Mad 292 (294).

[15] Fraud committed by judgment-debtor — Decree-holder can avail of it against legal representative. (Vol 22) 1935 Mad 8 (11) : 58 Mad 311.

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[16] When the execution of decree is prevented by the fraud of one of several judgment-debtors, extension of time will be allowed only against such judgment-debtor and not against others who are not guilty of fraud. (Vol 3) 1916 Mad 1 (2) : 38 Mad 419 (F B) * (Vol 18) 1981 Mad 381 (383) * (Vol 17) 1930 Sind 218 (219).

[17] Claim by third person preferred and allowed — Decree-holder filing a suit for declaration and getting a decree — Fresh application for execution — Decree-holder will be deemed to be prevented from proceeding with execution under S. 48 (2) (a). (Vol 21) 1934 Pat 532 (533).

[18] Plea of fraud can be raised by decree-holder for first time even in appeal arising out of execution proceedings. (Vol 33) 1946 Mad 172 (173).

[But see (1910) 1910 Pun L R No. 20, p. 49 (50): 1910 Pun Re No. 17.

[19] Continuing absence from jurisdiction being continuing fraud gives new starting point from the last day that the judgment-debtor was present. (Vol 12) 1925 Nag 82 (90) : 22 Nag L R 67.

7. Fresh application. — [1] Section 48 applies only to fresh application for execution and not to applications for revival of previous execution. (Vol 24) 1937 Pat 43 (43, 44).

[2] Per *Rachhpal Singh, J.* — When an application is made by a decree-holder after the expiry of the period of 12 years from date of the decree, the Court has to decide whether it is a fresh application or one in continuation of an application which has been lying dormant. The test is to see, whether the character of the fresh application is different from that of the former application; for instance, where the relief claimed in the second application is against properties, or persons, different from those mentioned in the former application, the second application will be "fresh application". (Vol 21) 1934 All 482 (489) (F B).

[3] The question whether an application is a fresh application or is merely one to revive the previous execution proceedings has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application. (Vol 27) 1940 All 270 (272) : I L R (1940) All 377 (F B) * (Vol 26) 1939 P C 80 (84) : 66 Ind App 84 : 14 Luck 192 : I L R (1939) Kar P C 136 (P C).

[4] Application within 12 years of specified date found defective — Amendment of the application after 12 years should not be allowed if it has the effect of substantially altering the character of execution proceedings. (Vol 29) 1942 All 442 (443).

[5] Where the defect of the application is a fundamental one, amendment of the application to make it operative from the date of the original application ought not to be allowed. (1890) 17 Cal 631 (636 to 638, 641).

[6] An application to amend a previous application though not in the prescribed form but which when read with previous application, supplies the necessary information, should be treated as a fresh application to allow execution to proceed. (Vol 6) 1919 Cal 261 (262).

[7] Following are "fresh applications" for purposes of S. 48 :—

(i) Where character of subsequent application is different from that of the previous one. (Vol 29) 1942 Cal 255 (257) : I L R (1942) 1 Cal 245.

(ii) Application to proceed against properties other than those mentioned in first application. (Vol 28) 1941 Pat 635 (635, 636) * (Vol 32) 1945 Nag 239 (239, 240) : I L R (1945) Nag 555 * (Vol 18) 1931 All 134 (134) : 53 All 419. (The fact that execution proceedings started

by the previous application are pending does not save limitation.)

(iii) Application for attachment of property under the jurisdiction of a different Court than that in which the decree is passed. (1911) 35 Bom 103 (109).

(iv) Application to proceed against person other than one against whom it was originally sought to execute decree. (Vol 28) 1941 Pat 635 (636).

(v) Application to correct misdescription is one for continuation but to substitute property for one mentioned in application is fresh application. (Vol 30) 1943 Pat 127 (130, 131):21 Pat 835* (Vol 32) 1945 Oudh 84 (87).

(vi) First application asked for arrest of judgment-debtor and sale of his holding — After it was barred another application for attachment of moveables filed — Application held was not continuation of previous application. (Vol 25) 1938 Cal 162 (163).

[8] *The following are not "fresh applications" :—*

(i) Application to continue proceedings against legal representatives of judgment-debtor. (Vol 18) 1931 Bom 425 (2) (427) * (Vol 33) 1946 Cal 51 (52, 53) * (Vol 18) 1931 Mad 303 (308).

(ii) Application for restoration of an execution petition, presented within 12 years of passing the decree, but struck off on account of insufficient process-fee. (1911) 33 All 517 (519, 522) (F B).

(iii) Application for re-sale of property not found to be incapable of being sold. (Vol 24) 1937 Pat 43 (43, 44).

(iv) Court ordering sale on execution application by decree-holder — On adjustment between judgment-debtor and decree-holder latter applying for postponement of auction sale — Fact that case was struck off does not show that execution application came to an end — Nor does tabular form of subsequent application suggest that it is fresh. (Vol 27) 1940 All 270 (272) : I L R (1940) All 377 (F B).

(v) Application for sale of properties, not sold in previous execution proceedings is not fresh. (Vol 24) 1937 Nag 92 (93) : I L R (1937) Nag 522.

(vi) Decree-holder undertaking to give further list of properties if that in the first application is not sufficient — No order by Court regarding that undertaking — Decree not completely satisfied by sale — Application including further list is not a fresh application. (Vol 21) 1934 All 481 (486) : 56 All 791 (F B).

(vii) A supplemental list of properties sought to be attached and sold should be taken as part of the original application. (Vol 5) 1918 Cal 73 (74).

[9] Fresh execution petition beyond the period of limitation — Special circumstances must be shown to circumvent salutary provisions of S. 48. (Vol 23) 1936 Mad 623 (624).

8. Insolvency Act and S. 48. — [1] Section 48 does not apply to insolvency proceedings. (Vol 11) 1924 Mad 163 (167) : 47 Mad 120.

[2] Execution of decree — Limitation is extended by S. 78 (2), Provincial Insolvency Act, which controls the limitation period provided by any statute — Benefit of S. 78, Provincial Insolvency Act, is not exhausted once it is made use of. (Vol 26) 1939 Mad 270 (271, 272, 273) : I L R (1939) Mad 611.

[3] Decree-holder prevented from applying for execution due to special provisions of law should be protected. S. 78 (2), Provincial Insolvency Act, controls S. 48, Civil P. C. (Vol 19) 1932 Oudh 69 (70) : 7 Luck 397.

[4] Stay of execution under S. 50, Provincial Insolvency Act extends period of limitation. (1912) 16 Ind Cas 541 (541, 542) (Cal).

9. Limitation Act and S. 48. — [1] It is the Limitation Act, and not S. 48, Civil P. C., that prescribes a period of limitation. S. 48 only fixes an outside period after which execution of a decree, though not barred by

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Limitation Act, cannot be granted. (Vol 19) 1932 Oudh 220 (291) * (Vol 5) 1918 All 216 (218) : 40 All 198.

[2] Section 48 is not controlled by S. 6, Limitation Act. (Vol 26) 1939 Nag 245 (247) : 1 L R (1939) Nag 559 * (Vol 2) 1915 All 349 (350) : 37 All 638 * (Vol 2) 1915 All 122 (123) * (1912) 36 Bom 498 (500) * (Vol 25) 1933 Cal 25 (30) : 1 L R (1937) 2 Cal 373 * (Vol 31) 1944 Lah 68 (68) : 1 L R (1945) Lah 448 * (Vol 1) 1914 Mad 526 (527, 528) : 37 Mad 186 * (Vol 28) 1941 Pat 45 (48) : 20 Pat 1.

[But see (Vol 17) 1930 Bom 508 (509) : 54 Bom 776 * (Vol 16) 1929 Mad 394 (396) * (Vol 2) 1915 Mad 449 (451).]

[3] Section 48 is controlled by Limitation Act, S. 15. (Vol 30) 1943 Bom 164 (165, 166) * (Vol 26) 1939 All 403 (405, 406) : 1 L R (1939) All 647 (FB) * (Vol 31) 1944 Nag 155 (158) : 1 L R (1944) Nag 250.

[But see (Vol 5) 1918 All 216 (218) : 40 All 198. ("Prescribed" refers to periods prescribed by that Act and does not apply to Civil P. C.) * (Vol 15) 1928 Mad 1154 (1156) * (Vol 9) 1922 Mad 268 (268) : 45 Mad 785 * (Vol 18) 1931 Oudh 351 (351) : 7 Luck 150 * (Vol 16) 1929 Pat 597 (600).]

[4] Section 29, Limitation Act, does not include Civil Procedure Code in its scope—Ss. 19 and 20, Limitation Act, do not apply to S. 48, Civil P. C. (Vol 21) 1934 Oudh 465 (471) * (Vol 4) 1917 Pat 485 (486) : 1 Pat L Jour 214.

[5] Section 230 of the Code of 1877 (now S. 48) cannot affect period allowed by Art. 180, Limitation Act of 1877 (now Art. 183). (1884) 7 Mad 540 (544).

[6] The phrase "period of limitation" can be used in two senses (1) a strict and (2) a loose sense. In the strict sense it means such a period that a proceeding to which it is sought to be applied will be in time if filed within the period, and beyond time, if filed after. In the loose sense it means a secondary period which applies a further check to an application or suit which is found not wanting when the strict period is applied. S. 48 falls into the latter category. (Vol 9) 1922 Mad 268 (270) : 45 Mad 785.

[7] The words "provided for" in Art. 182 mean that where execution is barred by S. 48, Civil P. C., execution cannot be allowed under Art. 182, Limitation Act. (Vol 19) 1932 All 351 (352) : 54 All 622 * (Vol 2) 1915 Bom 40 (40, 41) : 39 Bom 256 * (Vol 26) 1939 Pat 607 (609, 610) : 18 Pat 395.

[8] Article 181, Limitation Act, should be read as application for which no period of limitation for the purpose of dismissal is provided elsewhere in the schedule or by S. 48. (Vol 17) 1930 Mad 995 (998) : 54 Mad 306.

[9] Section 48 does not apply to revival of antecedent application held in suspense by reason of some bar—Such application is governed by Limitation Act (1908), Art. 181. (Vol 5) 1918 Pat 296 (2) (297) : 3 Pat L Jour 103.

10. Recurring periods. — [1] Execution proceedings — Compromise — Decretal amount to be paid by instalments — On default of any instalment, whole amount to become recoverable — Limitation begins to run from the default. (Vol 32) 1945 Cal 154 (155) * (Vol 27) 1940 All 423 (424) : 1 L R (1940) All 536 * (Vol 11) 1924 All 263 (264) : 46 All 73 * (Vol 6) 1919 Cal 322 (323). (Instalment decree — Whole decretal amount to fall due on default — No option given to decree-holder — Limitation in respect of whole amount runs from date of first default.) * (Vol 23) 1936 Lah 159 (160) (Do.) * (Vol 30) 1943 Pat 33 (34).

[2] Decree providing payment by instalments at specified times — In case of default of any instalment while decretal amount becoming due — No instalment

paid—Section 48 does not bar execution of decree with regard to instalments not barred by limitation as the decree-holder has a right to waive default. (Vol 19) 1932 Lah 564 (565).

[3] Instalment decree giving option to decree-holder to execute full decree on default — He may not exercise this option. (Vol 23) 1936 Lah 159 (160, 161).

[4] Decree repayable within twelve years — Interest to be paid every year—On default of two years' interest whole property liable to be sold or else only after twelve years — After first default decree-holder applying for sale — Application not pursued — Another application after nine years of default and after twelve years of the decree filed — Second application held time barred as decree-holder had exercised his option on the first default and could not therefore fall back upon the former clause giving him twelve years' time. (Vol 18) 1931 Bom 263 (263).

[5] Decree directing recovery of money from A on failure to recover from B — Execution against A is barred after twelve years from date of decree. (Vol 13) 1926 Mad 20 (22) : 48 Mad 846. [(Vol 5) 1918 Mad 1187 : 40 Mad 989 (FB) considered as overruled by (Vol 4) 1917 P C 85.]

[6] Instalment decree ceasing to be so on default — Court cannot restore decree to original status at the request of the judgment-debtor. (Vol 12) 1925 Bom 326 (326).

11. Retrospective effect. — [1] Section 48 has a retrospective effect, and governs an application for the execution of a decree passed before the Code came into force. Hence such an application, if presented twelve years after the date of the decree, is barred. (Vol 8) 1921 Bom 40 (43) : 45 Bom 365. (Mortgage-decree.) * (Vol 13) 1926 All 93 (94) : 48 All 121. (Decree under old Code.) * (Vol 12) 1925 Bom 326 (326). (Do.) * (1913) 40 Cal 704 (709, 710). (Mortgage-decree under old Code.) * (1913) 19 Ind Cas 899 (900) (Cal). (Do.) * (Vol 2) 1915 Nag 103 (104, 106) : 11 Nag L R 25. (Do.) * (Vol 4) 1917 Pat 493 (494) * (Vol 4) 1917 Pat 485 (486) : 1 Pat L Jour 214. (Mortgage-decree under old Code.)

[But see (Vol 6) 1919 Cal 1003 (1004). (Section 48 does not apply to execution proceedings in mortgage suit pending at time of coming into force of new Civil Procedure Code.)]

12. Revival of previous application. — [1] Section 48, Civil P. C., has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or has been stayed pending the determination of a subsequent litigation. (Vol 5) 1918 Pat 296 (297) : 3 Pat L Jour 103.

[2] Execution ordered—Interruption not attributable to decree-holder — After interruption removed decree-holder re-applying for execution — Latter application is to revive former execution proceedings. (Vol 18) 1931 Bom 492 (494) * (Vol 21) 1934 Pat 532 (533) * (Vol 4) 1917 Oudh 69 (71).

[3] Execution application is pending until validly disposed of—Subsequent application for the same prayer is continuation of the previous one, and not being a "fresh application" does not attract the provisions of S. 48. (Vol 2) 1915 Mad 407 (411) * (Vol 27) 1940 Pat 432 (433, 435).

[4] Two conditions must be satisfied, so that subsequent application may be regarded as in continuation of the previous one by the decree-holder, namely, (1) the previous one should have been dismissed for no fault of the decree-holder; and (2) the latter application should be similar in scope and character to the previous one. A fair test to gauge the similarity of scope and character between the two, would be to see if the decree-holder could have got the relief in the previous application,

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which he claims in the subsequent one, supposing the previous application had not been struck off. (Vol 11) 1924 Pat 367 (369, 370).

[5] The following applications were held to have the effect of continuing the previous application:

[a] Execution application filed within limitation but execution arrested without fault of decree-holder beyond period of limitation—Application to continue the execution made beyond limitation — Latter application is merely ancillary to first and is not barred. (Vol 13) 1926 All 331 (331, 332).

[b] Application twelve years after passing of decree but within three years of the last one. (1913) 21 Ind Cas 923 (924, 925) (Cal).

[c] Court dismissing execution application on ground of case being old and with intention to remove it from its list—Second application for same relief held in continuation of old one. (Vol 28) 1941 Lah 62 (64). [(Vol 27) 1940 Lah 35 reversed.]

[d] Execution suspended until decision of objection raised by judgment-debtor — Request by decree-holder for re-attachment after period of limitation held to be in continuation and ancillary to original application. (Vol 23) 1936 Lah 843 (844).

[e] An application for the arrest of judgment-debtor being struck off, because the judgment-debtor absconded, a fresh application after twelve years, which is not otherwise barred, may be taken as in continuation of the previous application. (1910) 1910 Pun L R No. 6, page 16 (17).

[f] Application for execution of a decree amended under Madras Agriculturists' Relief Act, which was deemed still pending execution. (Vol 30) 1943 Mad 765 (766).

[g] Property attached in execution of decrees of two Courts, higher and lower—Proceedings in lower Courts stopped — Application thereafter to higher Court for rateable distribution is a continuation of the lower Court proceeding and is not barred by S. 48. (Vol 9) 1922 Mad 3 (5).

[h] An application for sale is nothing but a continuance of the prior application for attachment. (1910) 8 Mad L Tim 367 (367).

[i] Execution suspended as judgment-debtor compromised by agreeing to pay yearly instalments. An application by decree-holder on failure of debtor to pay instalment. (Vol 27) 1940 Oudh 26 (26).

[j] Also see the following cases: (1909) 6 Mad L Tim 333 (334) * (Vol 17) 1930 Lah 647 (651) * (Vol 32) 1945 Oudh 110 (111, 112) * (Vol 29) 1942 Oudh 331 (332) : 17 Luck 618.

[6] Following applications were held, not having the effect of continuing the previous one:

[i] Decree for arrears of rent in 1896—Execution application in 1908 for attachment and sale—Sale, subsequently, set aside — Subsequent applications to convert decree into money decree — Applications in 1917 and 1918 to attach personal property of judgment-debtor and purchaser of property respectively—Last application in 1922 for attachment was, held, not to be in continuation of the application of 1908. (Vol 16) 1929 P C 209 (212) (PC).

[ii] An application for execution cannot be in continuation of a previous application for transfer of decree. (Vol 13) 1926 All 660 (660, 661) : 48 All 482 * (1912) 34 All 396 (397).

[iii] Previous application for arrest of judgment-debtor; subsequent one for execution of the decree on failure of debtor to pay instalment. (Vol 18) 1931 All 31 (33).

[iv] Subsequent application for execution for recovery of amount which decree-holder had to refund is not one for revival or continuation of original execution pro-

ceeding. (Vol 29) 1942 Cal 255 (257) : I L R (1942) 1 Cal 245.

(v) Decree partly satisfied — Fresh list of properties filed, on granting of application, beyond period of limitation was not one for execution nor one made pending execution. (Vol 22) 1935 Cal 143 (144).

(vi) Application within three years of previous proceedings but after 12 years from the decree and asking for a new relief by attachment and sale of moveables is barred under S. 48. (Vol 15) 1928 Cal 241 (242, 243).

(vii) Second application after dismissal of first execution application on account of non-appearance of applicant. (Vol 27) 1940 Lah 75 (77).

(viii) Dismissal for decree-holder's default — Subsequent application is not in continuation. (Vol 18) 1931 Lah 125 (126).

(ix) Subsequent application to supplement list of properties to be attached when previous execution application is pending due to no fault of decree-holder. (Vol 15) 1928 Lah 808 (811).

(x) Application for transmission of decree and one for restoring the transmission order are of different character and the second is not in continuation of the first. (Vol 16) 1929 Mad 745 (745).

(xi) An application for execution cannot be treated as a continuation of a prior application where the relief asked for is different and is directed against property not touched by the first application. (Vol 4) 1917 Pat 485 (487) : 1 Pat L Jour 214.

(xii) Previous application for temporary alienation; subsequent one for appointment of receiver. (Vol 23) 1936 Pesh 209 (210).

[7] Compromise, pending execution — "Darkhast" disposed of as decree fully satisfied — Compromise subsequently held to be invalid — Application is not revived. (Vol 29) 1942 Bom 282 (284).

13. Starting point.—[1] In the absence of anything postponing the period of execution, the period of twelve years is to be computed from the date of the decree. (1900) 2 Bom L R 199 (200).

[2] In the case of a preliminary and final decree in a suit, for the purpose of this section the two are to be taken as a single decree and the date from which time is computed is the date of the final decree. (Vol 3) 1916 Cal 482 (483) * (Vol 11) 1924 Cal 131 (132) : 50 Cal 743.

[3] Direction for enquiry into mesne profits assumed to operate as a final decree. (Vol 5) 1918 All 254 (255) : 40 All 211.

[4] Decree nisi under Dekkhan Agriculturists' Relief Act, 1879 — No need to apply to the Court for decree absolute—Application for decree absolute will not give the starting point for the period under S. 48. (Vol 9) 1922 Bom 95 (95) : 46 Bom 761.

[5] Limitation under S. 48 runs from date of original decree and not from date of amendment — Execution after 12 years from date of original decree is barred, amendment or no amendment. (Vol 27) 1940 Mad 127 (128) : I L R (1940) Mad 349 (FB) * (Vol 19) 1932 All 351 (352) : 54 All 622 * (Vol 22) 1935 Lah 292 (294) * (Vol 21) 1934 Oudh 465 (469) * (Vol 26) 1939 Pat 607 (609, 610) : 18 Pat 395 (60 Ind Cas 318 (Pat) dissent- ed.)

[6] Where there is a combined mortgage decree providing that if the net proceeds of the sale of the mortgaged property are not sufficient to satisfy the mortgagee's claim the balance be realised from the person and other properties of the mortgagor, the period begins to run from the date of the decree in respect of both the remedies. (Vol 4) 1917 P C 85 (85) (PC) ((Vol 2) 1915 Cal 8 affirmed.) * (Vol 8) 1921 Cal 456 (457) * (Vol 13) 1926 Mad 954 (955) : 50 Mad 5 * (Vol 13) 1926 Mad 20 (28) : 48 Mad 846 (Vol 5) 1918 Mad 1187 : 40 Mad 989 (FB) and (Vol 5) 1918 Mad 607 held as overruled.

TRANSFEREES AND LEGAL REPRESENTATIVES.

49. Every transferee of a decree shall hold the same subject to the equities (if any) which *Transferee.* the judgment-debtor might have enforced against the original decree-holder.

[1882, S. 233; 1877, S. 233. See O. 21, R. 16.]

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by (Vol 4) 1917 P C 85) & (Vol 12) 1925 Mad 331 (331) & (Vol 3) 1916 Mad 972 (974).

[7] Mortgage decree for sale—Personal decree passed after 12 years and executed twice without objection—On objection being raised at third execution, personal decree being unobjected held binding and execution within 12 years of personal decree held enforceable. (Vol 7) 1920 Cal 378 (378, 379).

[8] Compromise decree in mortgage suit providing for passing of preliminary and final decree—Preliminary and final decrees can be passed and also personal decree for balance afterwards—Time for execution would run from the date of personal decree. (Vol 27) 1940 Oudh 90 (91, 92) : 15 Luck 95.

[9] Starting point of limitation—Decree executable after happening of contingency—Time does not run until contingency occurs. (Vol 26) 1939 Bom 75 (76, 78) : I L R (1939) Bom 87 & (Vol 7) 1920 Nag 40 (41).

[10] Decree amended under S. 5, U. P. Agriculturists' Relief Act—Limitation under S. 48 runs from date of amended decree. (Vol 30) 1943 Oudh 412 (418) : 19 Luck 292.

14. Subsequent order.—[1] Subsequent order must be order passed by Court, which passed decree and not order made in course of execution. (Vol 23) 1936 Oudh 266 (266) : 12 Luck 244. & (Vol 5) 1918 All 216 (218) : 40 All 198 & (Vol 31) 1944 Lah 106 (109) : I L R (1944) Lah 592 & (Vol 10) 1923 Lah 678 (678, 679) & (Vol 10) 1923 Lah 381 (382) & (Vol 8) 1921 Pat 340 (340).

[But see (Vol 27) 1940 All 270 (272) : I L R (1940) All 377 (FB). ((Vol 19) 1932 All 273 : 54 All 543 (FB). held overruled by (Vol 26) 1939 P C 80 : 14 Luck 192 : I L R (1939) Kar P C 136 : 66 Ind App 84 (P C).) & (Vol 27) 1940 All 107 (108) & (Vol 12) 1925 Bom 503 (504) : 49 Bom 695 & (Vol 32) 1945 Cal 154 (155) & (Vol 13) 1926 Lah 465 (466).]

[2] In S. 48 (1) (b) the "subsequent order" must be an order in the suit, in which the decree is made and an order which directs payment of money by the debtor or the surety in respect of the judgment-debt. (Vol 20) 1933 P C 52 (54) : 12 Pat 195 : 60 Ind App 43 (P C).

[3] *The following are instances of "subsequent order" within the meaning of S. 48 (1) (b):—*

(a) Order of executing Court allowing time for judgment-debtor to pay up the balance of decretal amount. (Vol 12) 1925 Bom 503 (504) : 49 Bom 695.

(b) The order of the executing Court disposing of the execution case on the basis of the compromise. (Vol 32) 1945 Cal 154 (155).

(c) Decree modified by Patna High Court in 1920—Transfer of execution case to Court under jurisdiction of Calcutta High Court—Appeal by judgment-debtor to Calcutta High Court from order dismissing objections dismissed—Application for leave to appeal to Privy Council—Compromise pending application—Compromise decree drawn up by Calcutta High Court in 1928—Order of High Court in 1928 recording compromise held was subsequent order of competent Court. (Vol 25) 1938 Cal 25 (30) : I L R (1937) 2 Cal 373.

(d) Order certifying adjustment by executing Court. (Vol 18) 1931 Nag 50 (51) : 27 Nag L R 150 & (Vol 26) 1939 Sind 93 (94, 95, 96) : I L R (1939) Kar 502. (Parties entering into compromise changing mode of satisfying decree—Executing Court recording compromise and ordering parties to act upon it—Court's order held amounted to 'subsequent order'.)

[4] *In the following cases it was held that the orders were not "subsequent orders" within the meaning of S. 48 (1) (b):—*

(i) Order merely taking notice of and referring to compromise. (Vol 31) 1944 Lah 106 (109) : I L R (1944) Lah 592.

(ii) Order for mesne profits. (Vol 14) 1927 Mad 842 (843).

(iii) Subsequent compromise order in execution proceedings. (Vol 22) 1935 Pat 380 (381) : 14 Pat 816.

[5] A decree directing the execution of a conveyance comes under the expression "directs the delivery" in S. 48. (Vol 2) 1915 Mad 407 (410).

Section 49—Note 1.

[1] Decree assigned—Assignee stands in no better position than assignor as regards equities existing between original parties—That assignee had no notice of equities is immaterial. (1910) 12 Cal L Jour 312 (321).

[2] Section 49 does not cover a transferee of the property; it refers only to transferees of the decree. (Vol 30) 1943 Oudh 354 (358) : 19 Luck 1 (F B).

[3] Assignee, benamidar for some judgment-debtors—Equities against those judgment-debtors do not bind assignee. (Vol 12) 1925 Pat 449 (450) : 4 Pat 120.

[4] Mere claim for restitution of certain sum of money against decree-holder is not equity available to the judgment-debtor. (Vol 20) 1933 Cal 865 (868).

[5] Section 49 relates to the stage of execution. Under this section, it is the Court executing the decree that has to consider whether the decree is held subject to any equities which the judgment-debtor could enforce against the original decree-holder. (Vol 6) 1919 Mad 424 (426) : 42 Mad 338.

[6] Transferee takes subject to right of judgment-debtor to set off mesne profits—Notice is immaterial. (Vol 32) 1945 Mad 381 (383) : I L R (1946) Mad 30 & (Vol 20) 1933 Mad 215 (217).

[7] Decree in favour of A against B—B obtaining decree against A in another suit—During pendency of latter suit A assigning his decree to C—Held B was entitled to set-off—Want of notice on part of C is immaterial. (Vol 24) 1937 Rang 316 (317).

[8] Assignment of decree—Cross-decree by judgment-debtor against assignor—Amount deposited under the assigned decree can be attached by judgment-debtor for his own decree. (Vol 11) 1924 Nag 46 (47) : 19 Nag L R 164.

[9] A holding decree against B—Suit by B against A—Pending suit A assigning his decree to C—Application for execution by C—During execution proceeding B obtaining decree against A in his suit—B can claim equitable set-off for amount due to him under his decree against C's claim. (Vol 25) 1938 Bom 253 (256) : I L R (1938) Bom 263.

[10] G assigning to N rights under his decree for money against B and N—B assigning to S rights under his decree against N and others—Application for execution by S against N and others—N claiming set-off of decretal amount assigned to him by G—N held entitled to such set-off as equity possessed by N against B could not be affected by assignment by B to S. (Vol 24) 1937 All 351 (352) : I L R (1937) All 553.

[11] Transferee of decree applying for transfer of decree to another Court for execution—Court to which application for transfer is made cannot go into question of equities under S. 49 and dismiss it on that ground. (Vol 24) 1937 Cal 570 (571).

50. (1) Where a judgment-debtor dies⁵ before the decree has been fully satisfied,⁶ the holder *Legal representative.* of the decree may apply to the Court which passed it to execute the same against the legal representative³ of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent³ of the property of the deceased⁴ which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[1882, S. 234; 1877, S. 234; 1859, S. 210. See O. 21, R. 22.]

SECTION 50 — SYNOPSIS.

1. Scope.
2. Legal representative.
3. Extent of liability of legal representative.
4. Property of deceased.
5. "Dies" — Meaning of.
6. "Before decree has been fully satisfied."
- 6a. Holder of the decree.
7. Application to execute against legal representative.
8. Execution against wrong legal representative or without legal representative.
9. Decree for injunction.

1. Scope. — [1] Order of substitution under S. 50 by executing Court is matter of procedure and not of jurisdiction. (Vol 28) 1941 Pat 139 (140, 141); 19 Pat 838.

[2] A decree cannot be executed against the legal representatives of a person against whom decree purports to have been passed but who died before the hearing. (1913) 17 Cal L Jour 634 (636) ✕ (Vol 7) 1920 Nag 61 (62); 16 Nag L R 138.

[3] Death of defendant after hearing but before judgment—Decree is valid by virtue of O. 22, R. 6 and can be executed against son of deceased judgment-debtor. (Vol 19) 1932 Pat 261 (264); 11 Pat 445.

[4] As to liability of ancestral property for the purposes of this section, see S. 53.

2. Legal representative. — [1] When a judgment-debtor dies during the pendency of execution proceedings the decree-holder can apply under S. 50 for execution of the decree against his heirs. (Vol 7) 1920 All 171 (171, 172); 42 All 570.

[2] Execution can proceed against transferee from legal representative. (Vol 14) 1927 Bom 93 (95); 51 Bom 37.

[3] A mitakshara son succeeding by survivorship, can be brought on record as legal representative of his deceased father. (1910) 6 Ind Cas 582 (583) (Cal).

[4] Attachment of joint Hindu family property—Holder of property declared insolvent—Insolvent dying afterwards — Undivided sons of insolvent are his legal representatives. (Vol 23) 1936 Bom 456 (459).

[5] Manager of a joint Hindu family firm dying — Other members are his legal representatives. (Vol 28) 1941 Pat 596 (599); 20 Pat 755.

[6] A nephew of a Hindu propositus is not the legal representative when the propositus dies leaving also a widow behind him. (1910) 32 All 404 (408).

[7] Decree against daughters for arrears of rent accrued due after the death of last male holder — Daughters in enjoyment of profits — Daughters surrendering estate to reversioners—Liability under decree is personal liability—Reversioners are not legal representatives of daughter, judgment-debtor, in respect of property sought to be sold within S. 50. (Vol 22) 1935 Cal 713 (715).

[8] Personal decree for maintenance not creating

charge — Death of judgment-debtor — Decree cannot be executed against subsequent holders of property. (Vol 16) 1929 Cal 423 (424, 425).

[9] Suit against defendants 1 to 6 alleging to be in possession of deceased's property — Deceased by will giving life interest to defendant 2 and vested remainder to defendant 4 — Defendants 4 to 6 exonerated before trial—After decree defendant 2 dying—Execution taken against property coming to defendant 4 — Defendant 4 not being judgment-debtor or his legal representative, property in her hands cannot be proceeded against. (Vol 20) 1933 Mad 508 (509).

[See also Notes on S. 2 (11), S. 53 and O. 22, R. 3.]

3. Extent of liability of legal representative.— [1] To make legal representative or administrator liable decree-holder must prove not only the amount of the assets left by the deceased but also the extent of the assets which has actually passed into the hands of the legal representative or administrator. (Vol 11) 1924 Mad 466 (468).

[2] Where legal representative is proved to have come into possession of assets of deceased, it is for such representative to prove extent of assets received by him and to account for them. (Vol 20) 1933 Rang 309 (310).

[3] Under S. 50 (2) the liability is not confined to the property which has come to the hands of the legal representative. To fasten liability on the legal representative, the right which has devolved must be property which can be disposed of for satisfying the debt. (1913) 9 Nag L R 137 (138, 139).

[4] Where party on record is one of the legal representatives and is in possession of deceased's property he cannot object to execution to the extent of assets on the ground that the legal representatives of the deceased have not been brought on the record. (Vol 3) 1916 Mad 699 (700).

[5] No person is personally liable for debts of deceased person—Liability can be placed on estate. (Vol 18) 1931 Bom 229 (232).

[6] Legal representative of a Hindu liable to the extent of property in his hands not duly disposed of— No question of exemption of ancestral property as distinguished from self-acquired property arising — Order exempting ancestral property from liability is wrong. (Vol 16) 1929 Lah 424 (424).

[7] Heir possessing deceased judgment-debtor's estate is liable to his creditors to the extent of assets in his hands. (Vol 1) 1914 All 392 (393); 36 All 439.

[8] Suit against father—Subsequent partition between father and son—Decree against father alone in suit passed subsequent to partition—Death of father — Sons are liable to pay pre-partition debt—But decree obtained against father alone cannot be executed against separate share of sons. (Vol 22) 1935 Pat 275 (287); 14 Pat 732 (FB).

[9] Where payments are made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, the decree cannot be executed even though he may still have in his possession property which originally belonged to defendant. (1913) 9 Nag L R 137 (139).

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[10] Legal representative cannot be made answerable for what has not come into his hands.—Security deposit of deceased judgment-debtor.—No provision in S. 50 for attachment of such deposit in execution against legal representative. (Vol 24) 1937 Rang 274 (274).

4. Property of deceased. — [1] Decree against assets of deceased father.—Property in son's hands proceeded against.—Property does not cease to be "property of deceased father" by reason of son's death. (Vol 1) 1914 Mad 668 (669).

[2] Mesne profits whether accruing in the shape of rent, or interest are for the purpose of discharging debts of the deceased, assets in the hands of the legal representative just as much as the real estate is. (Vol 4) 1917 Mad 536 (537).

[3] Property received by the legal representative in his own right is not the property of the deceased within the meaning of the section. (Vol 11) 1924 Oudh 364 (365) : 27 Oudh Cas 262.

[4] Tenancy not transferable — Crops grown by tenant's heirs are not assets of deceased — They are not liable to be attached. (Vol 3) 1916 Lah 313 (314).

[5] Mortgage decree against father.—Occupancy field sold and mortgage satisfied.—Balance money is not assets of father in son's hands. (Vol 12) 1925 Nag 449 (450).

[6] The undivided interest of a coparcener does not, after his death, constitute his assets. (Vol 18) 1931 P C 294 (298) : 58 Ind App 402 : 55 Mad 1 (PC).

[7] Property obtained by son on partition with father is not assets of father in son's hands within Ss. 50 and 52. (Vol 1) 1914 Mad 328 (330) : 38 Mad 1120.

[8] Although a Jat governed by the ordinary agricultural custom of the Punjab has power to alienate during his life-time his ancestral property for necessity but when he dies without exercising this power and the property passes into the hands of his heirs, it ceases to be part of the assets of his estate and the heirs are not bound to account for its due disposal. (1911) 1911 Pun L R No. 182, page 674 (675) : 1913 Pun Re No. 4.

5. "Dies"—Meaning of. — [1] Word "dies" in S. 50 means natural and not civil death. (Vol 22) 1935 Cal 713 (714) : (Vol 18) 1931 All 306 (307) : 53 All 529.

6. "Before decree has been fully satisfied." — [1] Once a decree has been fully satisfied there is no need to bring legal representative of the deceased judgment-debtor on record under S. 50. Proceedings under O. 21, R. 95 being between auction-purchaser and the claimants the legal representatives of the judgment-debtor need not be added. (Vol 28) 1941 Nag 322 (324) : I L R (1942) Nag 633.

6a. Holder of the decree.—[1] For the definition of 'decree-holder,' see S. 2 (3). There is no provision in the Code that execution abates by the death of the decree-holder ; see O. 22, R. 12.

7. Application to execute against legal representative.—[1] Judgment-debtor dying during execution — There should either be fresh execution application against legal representative or application for legal representative to be brought on record.—If former course is followed decree-holder must proceed under S. 50 — Notice under O. 21, R. 22 is obligatory. (Vol 23) 1936 Mad 205 (206) : 59 Mad 461 (F B). ((Vol 11) 1924 Mad 130 : 47 Mad 63, overruled.)

[2] Execution application against legal representative of judgment-debtor without prayer to add such legal representative is valid. (Vol 20) 1933 Mad 568 (568, 569).

[3] Application for execution against deceased judgment-debtor pending.—Fresh application for execution against legal representatives is not necessary — Execu-

tion can be continued by substituting name of legal representative in place of deceased judgment-debtor. (Vol 23) 1936 Bom 456 (457). * (1910) 34 Bom 142 (151).

[4] The order permitting execution against the legal representatives can be made *ex parte*. (Vol 15) 1928 Rang 40 (42) : 5 Rang 775.

[5] The legal representative is not to be proceeded against in execution till he has been brought on record. (1912) 23 Mad L Jour 287 (287).

[6] An application under this section is necessary only when further execution is needed or asked for. A separate application merely for substituting a legal representative is not necessary. (Vol 23) 1936 Oudh 152 (153) : 11 Luck 500 * (Vol 8) 1921 Mad 693 (693) (Execution not necessary for twenty years — Decree-holder is not barred.)

[7] The application to execute the decree against the legal representatives should be made to the Court which passed the decree. (Vol 24) 1937 Pat 239 (241) * (1894) 18 Bom 224 (226) (Application for execution against legal representative lies to Court which passed the decree, though notice to party may be issued by transferee Court.) * (Vol 21) 1934 Bom 215 (216) * (1912) 23 Mad L Jour 287 (287) * (Vol 13) 1926 Mad 411 (412).

[8] The application for substitution of legal representative should be made to the Court which passed the decree. But if it is made to the transferee Court the defect might be waived and the acquiescing party cannot challenge the legality of the proceedings. (Vol 15) 1928 P C 162 (164) : 55 Ind App 227 : 3 Luck 314 (P C) [Affirming (Vol 12) 1925 Oudh 448.] * (Vol 18) 1931 All 320 (2) (322) [Following (Vol 15) 1928 P C 162 : 55 Ind App 227 : 3 Luck 314 (P.C.)] * (Vol 13) 1926 Lah 34 (35) (Application for substituting legal representative's name if not made to the Court passing the decree, it is mere irregularity which is cured by S. 99.)

[9] Question as to whether application to add legal representative of a deceased judgment-debtor should be made to the Court passing decree or to Court which is executing decree is one of procedure and not one of jurisdiction — In case of non-compliance with procedure defect might be waived. (Vol 25) 1938 Rang 385 (387) : 1938 Rang L R 355.

8. Execution against wrong legal representative or without legal representative. — [1] The fact that one of the parties in appeal to the Privy Council had died before the appeal was heard but his legal representatives had not been brought on record, does not make the Privy Council decree a nullity. (Vol 19) 1932 Pat 261 (262) : 11 Pat 445.

[2] Judgment-debtor dead prior to sale — Notice to legal representative is necessary — Failure makes sale nullity and not merely irregularity. (Vol 20) 1933 Pesh 41 (43) * (Vol 29) 1942 Cal 436 (437, 438) : I L R (1942) 2 Cal 262. (Death of judgment-debtor pending execution — No application under S. 50 and heirs not brought on record.—Sale held in such execution is void and not merely voidable — Fact that decree executed is rent decree makes no difference.) * (Vol 13) 1926 Mad 138 (139) * (Vol 9) 1922 Mad 307 (309) * (Vol 32) 1945 Pat 1 (17) : 23 Pat 528 (FB).

[But see (1928) 32 Cal W N 418 (420, 421). (Sale is mere irregularity.) * (Vol 7) 1920 Oudh 178 (179) : 23 Oudh Cas 349. (Do.)]

[3] Plaintiff should implead all ordinary legal representatives — Other legal representatives though not represented through a *bona fide* mistake are bound if plaintiff was ignorant of their existence. (Vol 20) 1933 Lah 380 (381) : 14 Lah 696 * (1938) 40 Pun L R 25 (26).

[4] Decree against deceased obtained during his lifetime — Execution of — Sons and not executors under

PROCEDURE IN EXECUTION.

Powers of Court to enforce execution.
decree—

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

^a[Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied,—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

- (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
- (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or
- (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
- (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

[See O. 21, Rr. 30 to 34, 35, 53, 56 and 64 ; O. 40, R. 1 ; also Ss. 54 and 68 to 72.]

[a.] Proviso inserted by the Code of Civil Procedure (Amendment) Act, 1936, (21 [XXI] of 1936), S. 2.

Objects and Reasons.

"Clause 51.—This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general

in terms. Any limitation that may be found necessary will be imposed by rules."—S. O. R.

"Clause 51. — We have added a power to execute a decree by appointing a receiver, on the suggestion of the Advocate-General of Madras."—S. C. R.

Section 50 (contd.)

deceased's will made parties — No allegation as to sons not being in possession or intermeddling with deceased's property — Auction sale held passed property to purchaser. (Vol 81) 1944 Cal 42 (43).

9. Decree for injunction.—[1] Decree for injunction does not run with land and cannot be enforced in absence of statutory provision against surviving member of joint family or against purchaser from judgment-debtor, but can be enforced against legal representatives joined under S. 50 and so also against transferees from original judgment-debtor under Transfer of Property Act, S. 52. (Vol 18) 1931 Bom 280 (282, 283).

[2] Decree for permanent injunction against father of a joint Hindu family can be executed against sons. There is no distinction between the son who inherits the father's estate and the son who was joint. (Vol 18) 1931 Bom 484 (485, 488) ; 55 Bom 709 s (Vol 18) 1931 Bom 482 (483). [Application for proceeding should be under O. 21, R. 32.]

SECTION 51.—SYNOPSIS.

1. Appeal.
2. Applicability and scope.
3. Arrest and detention.

4. Attachment and sale or sale without attachment.

5. Decree-holder's application.

6. Explanation.

7. Limitations prescribed.

8. Powers of the Court.

9. Proviso to section.

10. Receiver.

1. Appeal.—[1] Finding as to judgment-debtor's inability to pay is one of fact and is conclusive in second appeal. (Vol 29) 1942 Pat. 242 (243).

[2] Order of committal to jail passed without jurisdiction—Objection to its legality not taken—No appeal lies as no question has arisen between the parties for determination within S. 47. (Vol 16) 1929 Rang 161 (161) : 7 Rang 110.

2. Applicability and scope. — [1] Decree-holder can take any or all forms of execution. (Vol 25) 1938 Pat 130 (131) : 17 Pat 248.

[2] "Subject to such conditions and limitations as may be prescribed"—Effect of these words—Madras Civil Rules of Practice, R. 178, which prohibits the sale of a decree in execution of another decree, is not *ultra vires*

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as being inconsistent with the Code. (Vol 21) 1934 Mad 692 (694) : 58 Mad 285.

[3] Tenant's rights under C. P. Tenancy Act—Effect of Ss. 46 (2) and 70 (2) of the Act prohibiting sale in execution of such rights — Their attachment for any other purpose, *e. g.*, putting the fields in charge of receiver under S. 51, Civil P. C. is not prohibited. (Vol 4) 1917 Nag 197 (197) : 13 Nag L R 250.

[4] Nature of decree-holder's right and how it arises, explained — Civil Procedure Code does not create that right but simply gives procedure in execution and ways in which execution may be ordered. (Vol 29) 1942 Cal 587 (592).

[5] Decree transferred to Collector who proposed leasing—Non-agriculturist decree-holder refusing to take lease but asking that the land should be mortgaged to him which could not be done as the judgment-debtor was an agriculturist—Court thereupon filing the proceedings — *Held*, this was not correct and that all lawful methods of satisfying decree must be tried before Court files proceedings. (Vol 16) 1929 Lah 195 (195).

[6] There is distinction between execution of decree directing delivery of specific property and execution of decree for sale under simple mortgage and money decree — Distinction explained. (Vol 18) 1931 Pat 241 (244) : 10 Pat 670 (FB).

3. Arrest and detention. — [1] Execution by arrest of judgment-debtor—Decree-holder not debarred by S. 51 proviso—Court still has discretion to order arrest or refuse to do so. (Vol 31) 1944 Mad 191 (191, 192).

[2] Execution of money decree — Court cannot in absence of special circumstances insist that decree-holder should proceed only against property—But under certain circumstances, Court must not allow decree-holder to have process for arrest and detention of judgment-debtors. (Vol 22) 1935 Cal 127 (129).

[3] Court cannot choose mode of execution and cannot direct decree-holder to proceed against property when he wants to proceed against person. (Vol 23) 1936 Pesh 46 (47).

[4] Ordinarily if the failure of the decree-holder to recover the decretal amount is due to the obstruction and bad faith of judgment-debtor, there would be very strong ground for ordering arrest. But when there is no such bad faith on the part of the judgment-debtor and it cannot be reasonably inferred that he is deliberately keeping the decree-holder out of his money, Court should allow reasonable period to the former to pay the decretal amount and if he fails in this, due to negligence, the question of his arrest should be re-considered. (1911) 1911 Pun L R No. 246, p. 912 (913, 915).

[5] Burden to prove circumstances justifying execution by arrest and detention is on decree-holder. (Vol 27) 1940 All 494 (496).

[6] Arrest of judgment-debtor — Creditor should bring his case within S. 51. (Vol 29) 1942 Pat 242 (242).

[7] Decree-holder asking for arrest of judgment-debtor in execution of decree cannot be compelled to accept payment in instalments. (Vol 17) 1930 Lah 220 (221).

[8] Application for execution by arrest of judgment-debtor—Judgment-debtor cannot object on ground that decree-holder should first proceed against property and be permitted to proceed against person only on failure of his remedy against property. (Vol 26) 1939 Pat 380 (381) : 18 Pat 366.

[9] Judgment-debtor aged sixty—Execution delayed by judgment-debtor's appeal—No evidence of bad health

—Judgment-debtor is not entitled to any consideration. (Vol 29) 1942 Sind 19 (21) : I L R (1941) Kar 479.

4. Attachment and sale or sale without attachment. — [1] Sale without attachment is not void. (Vol 10) 1923 Pat 45 (47) : 2 Pat 207 & (Vol 26) 1939 Bom 277 (278) : I L R (1939) Bom 420.

[2] Mortgage-decree directing sale of property — No attachment is necessary. (Vol 16) 1929 Lah 90 (91) : 10 Lah 543.

[3] Property exempt from sale may yet not be exempt from attachment. (Vol 30) 1943 Lah 166 (167).

5. Decree-holder's application.—[1] It is only the holder of a decree that can apply for execution, and in the case of a compromise decree granting allowances to parties to a suit and also to a stranger the latter, being no party to a suit or decree cannot apply for execution, though he can sue separately for his claim. (Vol 4) 1917 Oudh 182 (184) (17 Mad 343 ; 11 Bom 153 dist.)

[2] An application under S. 51, Civil P. C., may be inferred from an act of the Court. (Vol 7) 1920 Lah 443 (446).

6. Explanation.—[1] Where property which is exempt from attachment yields an income which is not exempt from attachment such income may be taken into consideration in estimating the judgment-debtor's capacity to pay. (Vol 30) 1943 Lah 166 (167).

[2] Explanation applies only to proviso (b) — It is not concerned with proviso (a). (Vol 27) 1940 Pesh 33 (33, 34).

[3] Amount of pension after it is paid over to pensioner ceases to be exempt from attachment under S. 11, Pensions Act — Amount of pension payable month to month to pensioner cannot be left out of account for purposes of S. 51 (b) and Explanation. (Vol 31) 1944 Mad 263 (264).

[4] Judgment-debtor being agriculturist — Court while determining question of his capacity to pay decretal amount cannot take into account his agricultural lands and residential houses. (Vol 26) 1939 Lah 299 (299, 300).

7. Limitations prescribed. — [1] The word "prescribed" in S. 51 means prescribed by the rules of Sch. I, Civil P. C. (Vol 29) 1942 Pat 455 (456).

[2] All modes mentioned in this section are not open in every case. (Vol 23) 1936 All 495 (502) : 58 All 949 (F B).

8. Powers of the Court. — [1] Civil Court is not empowered to execute decree by granting lease of judgment-debtor's property either under S. 51 or under S. 72, more so when judgment-debtors are protected from sale of their property by Bundelkhand Land Alienation Act. (Vol 25) 1938 All 290 (291, 292) : I L R (1938) All 528 (Vol 19) 1932 All 571 overruled & (Vol 24) 1937 All 699 (700, 701).

[2] Where a Court decrees a suit for rent it should pass a decree for rent simply, without any limitation on the right of the landlord to execute a decree in any legal method open to him. (Vol 5) 1918 Cal 186 (186).

[3] Power of temporary alienation derived from power of sale—Power to sell taken away from Court — Power of temporary alienation also goes away. (Vol 28) 1936 Pesh 90 (91, 92).

[4] Judgment-debtor in possession of movable property sufficient to satisfy decree but resisting execution for about ten years — Executing Court can properly mortgage his land for decretal amount. (Vol 17) 1930 Lah 77 (78).

9. Proviso to section. — [1] Contumacious conduct on part of judgment-debtor is necessary for arrest. (Vol 25) 1938 Lah 692 (693).

[2] Judgment-debtor after decree selling his property, receiving sale consideration but neglecting to pay

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decretal amount — He becomes liable to be detained in civil prison. (Vol 25) 1938 Pesh 17 (18).

[3] Judgment-debtor held had sufficient means to pay and had refused to pay. (Vol 29) 1942 Sind 19 (20): I L R (1941) Kar 479.

[4] Decree for price of car — Defendant making hypothecation of plaintiff's car along with other cars left with him for sale or for custody, in favour of third party — Conduct of defendant held amounted to making fraudulent concealment or transfer of his properties. (Vol 25) 1938 Cal 448 (449).

[5] "Sufficient means to pay debt" — Onus is on decree-holder. (Vol 26) 1939 Pat 22 (22).

[6] Decree for payment of arrears of alimony under S. 37, Divorce Act, is decree for payment of money within the meaning of S. 51, Proviso — Fact that on arrest in execution of decree for alimony judgment-debtor cannot apply in insolvency under S. 55 (3), does not affect nature of decree. (Vol 28) 1941 Bom 17 (18).

10. Receiver. — [1] Receiver can be appointed whenever it is just and convenient. (Vol 19) 1932 Mad 193 (195).

[See (Vol 28) 1941 Cal 240 (241). (Circumstances held justified appointment of receiver in execution.)]

[2] When relief for appointment of receiver is asked in execution proceedings, justice and convenience of relief must be shown. (Vol 18) 1931 Oudh 307 (308): 7 Luck 203.

[3] Reasonable grounds must be made out for appointment of receiver — There must be danger of waste or destruction of property. (Vol 20) 1933 Sind 231 (232).

[4] Remedy by way of appointment of receiver cannot be claimed as of right or matter of course. (Vol 19) 1932 Cal 189 (192): 59 Cal 205.

[5] Appointment of receiver under S. 51 is subject to provisions of O. 40, R. 1 — Burden to show that it is just and convenient to appoint receiver lies on party who applies for his appointment. (Vol 24) 1937 Oudh 232 (233).

[6] Court cannot appoint receiver in respect of property not subject-matter of suit. (Vol 20) 1933 Sind 231 (232).

[7] Execution of mortgage-decree — Judgment-debtor is not entitled to apply for appointment of receiver. (Vol 9) 1922 Pat 369 (371).

[8] Receiver can be appointed even in cases in which attachment cannot be made. (Vol 29) 1942 Oudh 410 (412): 18 Luck 147.

[9] Provisions of O. 21, R. 30 are not exclusive and do not override provisions of S. 51 or O. 21, R. 11 in connexion with execution of decree for payment of money by means of appointment of receiver under O. 40, R. 1 which gives very wide powers to Court which can do so when just and convenient. (Vol 26) 1939 Oudh 116 (117): 14 Luck 538.

[10] Where inam fields of judgment-debtor were granted to him for maintenance and as remuneration for services rendered and as such were non-alienable and non-attachable, it was held receiver can be appointed to realise income from them to satisfy decree-holder's claim. But judgment-debtor can apply for allowance to maintain his family. (Vol 23) 1936 Nag 288 (288, 289): I L R (1937) Nag 534.

[11] Appointment of receiver in execution without prior attachment is not bad. (Vol 29) 1942 Mad 396 (396, 397).

[12] Land not liable to attachment or sale — Still receiver can be appointed. (Vol 29) 1942 Lah 126 (128): I L R (1943) Lah 179.

[13] Jahagir unattachable — Still receiver can be appointed on suitable allowance to judgment-debtor — Same is to be determined not at the time of the order

on estimated income but profits in receiver's hands. (Vol 20) 1933 Nag 266 (267).

[14] Where property of widow could not be attached as she had no power of disposition, it was held that decree-holder was entitled to have receiver of income of property. (Vol 24) 1937 Mad 864 (864).

[15] Clause directing trustees to make payment to treasurer — Failure by trustees to make collections and payment — Proper remedy is not by appointment of receiver in execution but by a suit under S. 92, Civil P. C. (Vol 23) 1936 Mad 581 (583): 59 Mad 751.

[16] Temple property — Receiver — When he should be appointed, stated. (Vol 19) 1932 Mad 193 (195).

[17] Receiver appointed in execution proceedings — Other decree-holders need not apply for appointment of receiver of same property. (Vol 17) 1930 Mad 4 (11).

[18] Judgment-creditor's position is not improved by appointment of receiver in execution instead of attachment and sale. (Vol 17) 1930 Mad 4 (10).

[19] Receiver appointed by Court is appointed for all persons interested — Moneys in hands of receiver cannot be spent without order from Court. (Vol 17) 1930 Mad 4 (9).

[20] Receiver is not agent of judgment-creditor in execution of whose decree he is appointed — Moneys realized by receiver do not become money belonging to judgment-creditor. (Vol 17) 1930 Mad 4 (8).

[21] Receiver can be appointed to realise property outside jurisdiction. (Vol 8) 1921 Mad 119 (119).

[22] Execution of decree against son on death of father — Court directing receiver to take possession of property in hands of son — Property situated in State — According to State law son not shown to be not so liable — Order directing appointment of receiver is not *ultra vires* — Court in such case should direct son to hand over property to receiver. (Vol 25) 1938 Lah 93 (94): I L R (1938) Lah 305.

[23] Section 51 should be read with O. 40, R. 1 — Occupancy holding subject to prohibition of attachment and sale in execution contained in S. 18, Colonization of Government Lands (Punjab) Act — Order appointing receiver of such property for seven years under S. 51 (d) is proper. (Vol 24) 1937 Lah 738 (739).

[24] Order appointing a receiver, though made in execution, may fall within O. 40, R. 1 and not exclusively under S. 51 (d). (Vol 14) 1927 Lah 190 (190).

[25] Decree against member of Legislative Assembly — It is objectionable to appoint receiver for his salary if decree-holder has other remedies open (Per *Derbyshire C. J.*) (Vol 26) 1939 Cal 428 (430): I L R (1939) 1 Cal 523.

[26] Before appointing receiver it should be seen whether in view of assets, amount due under decree is likely to be realized from profits of attached property. (Vol 19) 1932 Cal 189 (193): 59 Cal 205.

[27] Order under S. 51 appointing receiver is to be deemed as one under O. 40, R. 1. (Vol 19) 1932 Cal 189 (192): 59 Cal 205.

[28] Simple creditor without charge on specific fund cannot ask for appointment of receiver. (Vol 19) 1932 Cal 189 (192): 59 Cal 205.

[29] Appointment of receiver — Case should be made out that ordinary execution is not advantageous — Application for appointment of receiver to have immovable property realized by sale should be made to Court having territorial jurisdiction over property. (Vol 17) 1930 Cal 502 (504, 505): 59 Cal 964.

[30] Section 51 entitles the Court to appoint a receiver of rents of the estate of a deceased person for the purpose of liquidating debts against that estate, and there is nothing in the Code to limit such appointment to a case where the debt to be discharged was a debt against the heirs and not against the deceased holder of the estate. (Vol 6) 1919 Oudh 326 (328): 22 Oudh Cas 194.

Enforcement of decree against legal representative.

52. (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

[1882, S. 252; 1877, Ss. 252 and 234; 1859, Ss. 203 and 210. See O. 22, Rr. 4, 5 and 12.]

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[31] A receiver can be appointed to realise the rents and profits in execution of a decree against a Ghatwal, though the Ghatwali property cannot be attached and sold. (1912) 39 Cal 1010 (1015) (28 Cal 483 followed.)

[32] Decree for sale of mortgaged property—Application for stay of execution by judgment-debtor and application for appointment of receiver by decree-holder—Execution stayed and receiver appointed—Appointment of receiver is just and fair. (Vol 20) 1933 All 227 (228).

[33] Murshidabad Act (15 [XV] of 1891), S. 5—Receiver can be appointed of rents and profits of properties of Nawab—Question of public policy does not arise. (Vol 18) 1931 P C 160 (161); 58 Ind App 215:59 Cal 1 (P C).

[34] Money decree against agriculturists in Bundelkhand—Execution—Appointment of receiver is not prohibited by U. P. Bundelkhand Land Alienation Act. (Vol 21) 1934 All 605 (605, 606).

[35] Decree against widow—Widow in possession of village in lieu of maintenance—Execution by appointment of receiver held should be considered only if widow persisted in making default in payment. (Vol 30) 1943 All 1 (2) (F B).

[36] Decree capable of execution in ordinary manner—Receiver will not be appointed. (Vol 20) 1933 Sind 231 (232).

[37] Receiver cannot be appointed in respect of agricultural land of judgment-debtor in Santal Parganas. (Vol 16) 1929 Pat 700 (700); 9 Pat 368 (F B).

[38] Applicability—Appointment of receiver—Expropriatory and occupancy tenancies—Tenancies exempted from sale under S. 23, Agra Tenancy Act, in execution of decree—Section 51 does not confer general power of appointing receiver—It merely prescribes mode of execution by appointment of receiver—Section 51 and O. 40 go together and S. 51 is subject to rules in Sch. 1 of the Code—Appointment of receiver of such tenancies in effect amounts to dispossession of tenant and deprives him of his right to cultivate lands—Appointment in effect defeats provisions of Agra Tenancy Act—Receiver therefore of such tenancies cannot be appointed under O. 40, R. 1 (2). (Vol 24) 1937 All 389 (392, 393); 1 L R (1937) All 542.

[39] Interim receiver appointed at instance of decree-holder cannot sue for possession of property after sale certificate has been granted to auction-purchaser—In case of suit by receiver Court cannot apply provisions of Civil P. C. (1908), O. 1, R. 10. (Vol 19) 1932 Rang 11 (12); 9 Rang 565.

SECTION 52 — SYNOPSIS.

1. Applicability and scope.
2. Assets.
- 2a. Decree against dead person.
3. Decree against legal representative.
4. Decree against some legal representatives.

5. Decree against wrong legal representatives.

6. Extent of liability — Sub-section (2).

7. Insolvency.

8. Legal representative, meaning of.

9. Property in hands of third party.

1. Applicability and scope.—[1] Section 52 does not provide for the reservation of property¹ to satisfy debts. It merely states the extent and manner of recovering debts. (Vol 3) 1916 Mad 645 (645).

[2] Decree against assets of the deceased debtor is only a money decree and does not create a charge on such assets. (Vol 33) 1946 Oudh 1 (4): 20 Luck 517 & (Vol 3) 1916 All 284 (285) (Decree under S. 52 is not decree against any specific property.) & (Vol 3) 1916 Mad 645 (645).

[3] Section 52 is applicable to a case of company taking assets and liabilities of another company under liquidation on the ground of justice, equity and good conscience. (Vol 26) 1939 Pat 580 (584, 586).

[4] Registrar acting under S. 35, Presidency Small Cause Courts Act, can pass order under Section 52 (2). (Vol 22) 1935 Mad 298 (298).

[5] Decree against son as representative under O. 22, R. 4 will be executed as provided under Ss. 52 and 53. (Vol 13) 1926 Oudh 801 (803).

2. Assets.—[1] A decree is capable of execution against the 'assets' of judgment-debtor. 'Assets' include those acquired after the decree. (Vol 3) 1916 All 284 (286).

[2] Income accruing to deceased judgment-debtor's property in hands of his heir can be taken in execution—Heir is personally liable to the extent of income appropriated by him. (Vol 25) 1938 Oudh 45 (48): 13 Luck 639. ((Vol 1) 1914 Oudh 233: 17 Oudh Cas 207, overruled.) & (Vol 23) 1936 Lah 236 (236). & (Vol 11) 1924 Mad 530 (537): 47 Mad 411 (F B).

[3] Rents and profits arising out of debtor's immovable property are his assets. (Vol 15) 1928 Oudh 40 (40): 2 Luck 408 & (1871) 15 Suth W R 285 (285) (Mesne profits.) & (Vol 4) 1917 Mad 536 (537) (Mesne profits are included in assets.) & (1932) 9 Oudh W N 315 (318).

[4] Grant in lieu of maintenance—Grantee having heritable but non-transferable right in property—Property when inherited by heirs forms assets of grantee in hands of heirs. (Vol 23) 1936 Oudh 76 (77, 78, 79).

[5] Where sums due for a widow's maintenance have become a debt, such a debt should be regarded as assets of the widow after her death liable for a decree against her. (1887) 11 Bom 528 (533).

[6] Decree for maintenance obtained by the widow against a reversioner is not assets of her deceased husband. (Vol 18) 1931 All 368 (369).

[7] Decree against assets of K in hands of daughter—K's share in offerings of temple attached—Contention that share of offerings not so liable as offerings were future income—Share held was in daughter's hands by inheritance and produced income—Hence income could be attached as assets of K. (Vol 23) 1936 All 131 (134): 58 All 457.

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[8] Mortgage decree against father satisfied by sale of occupancy holding after father's death—The balance of sale proceeds in the hands of the son are not assets. (Vol 12) 1925 Nag 449 (450).

[9] Property acquired from maternal grandfather is available for payment of decree against him. (Vol 4) 1917 Pat 146 (147) : 3 Pat L Jour 168.

[10] Decree against son as legal representative of father—Joint family consisting of grandfather, father and son—Death of father before grandfather—Joint family property in hands of son held liable for debts of father. (Vol 21) 1934 Lah 101 (101)* (Vol 26) 1939 Pat 500 (502) (Award.)

[11] Where a decree was against the assets of the father in the hands of his son, held that the property did not cease to be "the property of the deceased father" merely because the son died and it passed into the hands of his heirs or legal representative. (Vol 1) 1914 Mad 668 (668, 669).

2a. Decree against dead person. — [1] A person who dies *pendente lite* before a decree is passed against him is not a judgment-debtor and the decree cannot be enforced against his legal representatives. (Vol 7) 1920 Nag 61 (61, 62) : 16 Nag L R 138.

[See also Notes on O. 22, R. 4.]

3. Decree against legal representative. — [1] The plaintiff is entitled to sue the legal representative of the deceased debtor without proving that assets have come into his hands—It is sufficient if there are assets of which he may become possessed. (1884) 8 Bom 309 (310) * (Vol 22) 1935 All 390 (391) * (Vol 7) 1920 All 205 (206) * (1911) 33 All 414 (419) * (Vol 13) 1926 Nag 170 (170) * (Vol 7) 1920 Nag 195 (195) (Plaintiff is entitled to decree on proof that assets exist—Extent of assets need not be proved.)

[But see (1936) 1936 All W R 32 (33).]

[2] Phrase 'out of the estate of the deceased' is merely restrictive—Decree must mention name of legal representative. (Vol 21) 1934 Mad 562 (563).

[3] Son's liability—Alienation by father of whole joint family property for debts due set aside and confirmed with respect to father's share—Suit for refund of balance of consideration—Son's pious duty to pay—Decree granted against assets of father and son's interest—Held suit was not barred—Held also decree against father's assets and son's interest was proper under S. 52. (Vol 4) 1917 Mad 418 (419).

[4] The fact that the plea of *plene administravi* can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree is no reason why it cannot be taken in the suit as a reason for no decree being passed. (Vol 14) 1927 All 459 (462) : 49 All 645.

[5] Suit against legal representative in possession of assets—Representative may show preference in payment of debt due to himself. (Vol 14) 1927 All 459 (460, 461) : 49 All 645.

[6] Certain persons being sued as representatives of deceased person, a decree cannot be passed against them as partners of a firm. (1910) 34 Bom 244 (249).

4. Decree against some legal representatives.

— [1] A decree obtained against some only of several heirs of a deceased person may be binding on the estate in the absence of fraud or collusion, on the principle of substantial representation. (1905) 32 Cal 296 (313) : 32 Ind App 23 (34) (P C) (Mahomedan co-heirs.) * (1882) 8 Cal 370 (374). (Do.).

[2] All legal representatives need not be impleaded—Plaintiff suing those legal representatives as found on inquiry is sufficient—Decree is effective to extent of assets in their hands. (Vol 21) 1934 Lah 657 (658).

[3] Hindu law—Suit against sons and grandsons on mortgage executed by a deceased father—Suit decreed against sons as legal representatives of father but dismissed as against grandsons—Interest of grandsons in the family property cannot be attached in execution. (Vol 25) 1938 P C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (P C).

[4] Devolution of interest on two legatees—Decree against one will not bind interest of the other who was not a party. (1912) 24 Mad L Jour 228 (229).

5. Decree against wrong legal representatives.

— [1] Decree against person in possession of the deceased debtor's property wrongly impleaded as a representative—Execution proceedings thereon will bind the real heir, though this is an exception to the general rule that a person is not bound by the execution proceedings to which he is no party. (Vol 6) 1919 Mad 16 (17) * (1885) 11 Cal 45 (49, 50) * (Vol 26) 1939 Lah 277 (278) (A decree against the widow as legal representative of her deceased husband binds the sons, though they were the proper representatives, but were not made parties.) * (Vol 15) 1928 Mad 243 (244, 245).

[But see (Vol 21) 1934 All 474 (476) (Decree does not bind the rightful owner except where the Court decides who the legal representative is.) * (1885) 9 Bom 86 (91, 92) (Decree against mother will not bind widow or adopted son who are not parties to decree.) * (1913) 15 Bom L R 41 (44) * (1888) 11 Mad 408 (411) (Decree against widow in ignorance of adopted son—Decree does not bind son as estate was not properly represented.)

[2] Decree against assets in the hands of a person who was not the real legal representative—True legal representative cannot be substituted in execution—Remedy lies by a regular suit. (Vol 33) 1946 Oudh I (5) : 20 Luck 517 * (Vol 14) 1927 Mad 197 (198, 199) * (1910) 33 Mad 75 (77).

[3] Execution of a decree against the holder of an impartible estate was sought after his death against his widow. The successor to the estate was not made a party to the execution proceedings, and a lease of the estate was granted to satisfy the decree. It was held that the lease did not bind the successor to the estate who was entitled to avoid it. (1912) 34 All 79 (83).

[4] Mortgagor and mortgagee—Execution against wrong representative and not the widow—Execution sale while property in hands of usufructuary mortgagee—Purchaser gets only right to redeem—Sale held not binding on reversioners. (Vol 3) 1916 Mad 726 (727).

6. Extent of liability—Sub-s. (2)—[1] The liability of legal representative is same whether he is impleaded before decree under S. 52 or after decree under S. 50. (1884) 7 Mad 255 (257).

[2] Decree passed against a legal representative is not a personal decree and consequently only the property of the deceased and not the property of the legal representative is to be proceeded against in execution of the decree. (Vol 12) 1925 Oudh 113 (113) : 27 Oudh Cas 234.

[3] Sub-section (2) applies only when no property of deceased is in possession of judgment-debtor and he fails to satisfy that he had duly applied property inherited. (Vol 17) 1930 Lah 354 (355) * (Vol 17) 1930 Lah 204 (204) (Where heirs do not show that income of property is applied to payment of debts of deceased they are personally liable.) * (Vol 17) 1930 Lah 332 (333) (Assets of deceased in hands of legal representative—Legal representative failing to account for them—Decree can be executed personally against him—Lapse of time in bringing him on record does not absolve him of his liability.) * (Vol 9) 1922 Oudh 200 (200) * (Vol 24) 1937 Pesh 80 (80).

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[4] Decree against legal representatives to extent of assets of deceased — Decree-holder must first prove that legal representatives did take some assets—Burden is then shifted to legal representatives to show extent of assets and how they were applied. (Vol 21) 1934 Lah 106 (107) * (Vol 20) 1933 Lah 447 (447) * (Vol 19) 1932 Lah 383 (383) * (1866-68) 3 Mad H C R 161 (164).

[5] Decree-holder must prove that property attached is part of assets — Property not dealt with at partition — Decree-holder must prove that it was joint family property. (Vol 21) 1934 All 249 (250) * (1900) 4 Cal W N 151 (152).

[6] When a legal representative has made payments to the deceased's creditor to the full extent of the property that came to his hands, the decree cannot be further executed though the decree-holder may prove that the representative still has in his possession property that originally belonged to the deceased. (1869) 12 Suth W R 177 (178).

[7] Where defendant is proved to have received sufficient assets to meet the plaintiff debt a personal decree could be passed against him without waiting for execution to determine the extent of liability. (1897) 20 Mad 446 (447).

[8] Creditor obtaining money decree against heir at law to the extent of the assets in his hands and filing suit for administration of estate of deceased—Administration order should be refused as plaintiff could obtain all relief under S. 52 (2) by application in execution. (Vol 29) 1942 Mad 588 (589, 590).

[9] Property of deceased in hands of his widow as executrix and not in her personal capacity can be attached in execution of decree against deceased—Decree-holder may not file administration suit. (Vol 27) 1940 Rang 78 (80).

[10] Heir obtaining property of deceased in administration suit — Such property disposed of before decree against deceased is passed — Though heir is legal representative of deceased, his personal property is not liable under S. 52 (2). (Vol 21) 1934 Rang 93 (94).

[11] Decree against legal representative of mortgagor — Personal decree obtained against legal representative, mortgaged property proving insufficient — Defendant held personally liable to extent he failed to prove that he had duly applied the property. (Vol 4) 1917 Mad 536 (538).

[12] Suit on promissory note executed by deceased grandfather decreed against estate of deceased — Decree is against defendants as legal representatives and limited to joint family estate in their hands. (Vol 19) 1932 Bom 522 (523).

[13] Property held by one heir as legal representative — Creditor can proceed against whole property and need not wait for partition among heirs—Purchaser in execution is not responsible for neglect on the part of heir in possession in allowing a larger portion to be sold than necessary. (Vol 12) 1925 Oudh 515 (516, 517).

[14] Questions arising in an enquiry under the section are questions arising between parties to suit relating to execution and must be decided by executing Court. (Vol 14) 1927 Rang 127 (127) : 5 Rang 44 * (Vol 18) 1931 Nag 173 (174, 175): 27 Nag L R 247 (Question of possession of assets.)

[See however (Vol 12) 1925 Nag 380 (381) (The question of possession of assets may be investigated in the suit or in the execution proceedings.)]

[15] When a decree is passed against sons for the debts of the father, it is to be executed to the extent of the assets which have come to the hands of the sons. A personal decree cannot be passed against them unless they have sufficient assets. (1910) 8 Mad L Tim 105 (105).

[16] A Muhammadan widow of a talukdar obtained under S. 52 a decree for dower against all heirs of the deceased—Decree realized only out of non-talukdari property—Suit for contribution against succeeding talukdar—Talukdar held liable to contribute according to the value of the property at the date of deceased's death. (Vol 25) 1938 P C 169 (174) : 65 Ind App 219 : 32 Sind L R 772 : 13 Luck 494 (P C).

[17] As to liability of ancestral property for the purposes of this section, see Section 53.

7. Insolvency. — [1] Insolvency of legal representative—Before his liability for debts of deceased can be proved in insolvency personal decree under S. 52 is necessary. (Vol 21) 1934 Rang 162 (163) : 12 Rang 602.

[2] The husband of the defendant died without filing any schedule after he was adjudicated insolvent and the vesting order was made. After his death, a creditor brought a suit against the widow as his legal representative, without impleading the Official Assignee. It was held that the suit was properly framed, but liberty was given to the creditor to prove his decretal debts in the insolvency. (1895) 22 Cal 259 (267).

8. Legal representative, meaning of.—[1] Executor *de son tort* is legal representative. (Vol 5) 1918 Nag 73 (74).

[2] Decree against legal representative—He, too, dying, his own representative brought on record—Such person should be regarded as the legal representative of the original deceased debtor—It is sufficient that he is in possession of the assets of the original deceased ; it is immaterial how and when he got them. (1938) 1938 Nag L Jour 176 (179, 180).

See also Section 2 (11).

9. Property in hands of third party.—[1] If the heir has disposed to a *bona fide* purchaser, of property which he has inherited from a deceased person, the creditor cannot follow such property, but can only sue the heirs who are responsible to him for the assets they receive. (1869) 12 Suth W R 177 (178).

[2] Creditor of ancestor has general lien on assets of ancestor and can follow them in hands of heirs—Disposal of assets by heirs to persons who have no notice of creditor's claim—Creditor's right to follow is lost—Right cannot be revived merely because heirs are adjudged insolvent and transfer made by him is set aside. (Vol 21) 1934 Rang 162 (163): 12 Rang 602.

[3] Property of deceased in hands of alienee from his legal representative can be approached by decree-holder when alienation is void. (Vol 26) 1939 Lah 373 (374) * (Vol 21) 1934 Lah 659 (660) (Gift of property made by Hindu widow in order to defeat decree-holder against assets in her hands — Gift is invalid and property can be attached.)

[4] Creditor's right to follow assets in legatee's hands can be exercised only by suit and not merely by levying execution. (Vol 28) 1941 Cal 27 (28) * (Vol 17) 1930 Cal 762 (763, 764) : 58 Cal 170.

[5] Malabar law—Tarwad — Property devolving on heir can be mortgaged by him as his own — Unless *mala fide* the mortgage will prevail against the ancestor's creditor's right to recover debt. (Vol 27) 1940 Mad 22 (22, 23).

[6] Usufructuary mortgage by legal representative, part consideration being to discharge the debts of the deceased — Mortgagee knowing that debts are not fully discharged and the consideration not utilised for the purpose — Subsequent decree by deceased's creditor — Property mortgaged attached — Held, execution Court could not attach property on purely equitable grounds, the attachment could only be subject to mortgagee's rights. (Vol 25) 1938 Mad 684 (686).

53. For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Objects and Reasons.

"*Clause 53.* — Has been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion. It is true that where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hands of the son or grandson in execution is a debatable point under the Code. The question is

merely one of procedure, and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor, the clause in question not imposing upon them a greater liability than that imposed by the Hindu law."—S. O. R.

SECTION 53 — SYNOPSIS.

1. Applicability and scope.
2. Decree.
3. Legal representative.
4. "Property of the deceased."
5. "Property in the hands of a son or other descendant."
6. "Which is liable under Hindu law."

1. Applicability and scope. — [1] Section 53 enacts a rule of procedure only and does not affect the son's liability for father's debts under Hindu law. (Vol 22) 1935 Oudh 510 (515) : 11 Luck 449* (Vol 21) 1934 All 590 (593) (F B).

[2] The section has no application where property has passed into the hands of a brother. (1904) 31 Cal 224 (227).

[3] Section 53 has no application where ancestor against whom decree is passed is still alive. (Vol 23) 1936 Oudh 139 (139, 140) : 11 Luck 523* (Vol 21) 1934 Mad 662 (663, 664) * (Vol 24) 1937 Nag 45 (49) : I L R (1938) Nag 10.

[4] Section 53 does not negative claim of son to be legal representative under S. 2 (11) — Section 53 treats the property which has passed to the son as surviving coparcener as being property of deceased come to the hands of the son. (Vol 28) 1941 Bom 23 (24) : I L R (1941) Bom 177 (F B).

[5] Section 53 does not take away descendant's right to contest existence of debt or illegality or immorality of its character. (Vol 26) 1939 Mad 867 (873) : I L R (1940) Mad 123.

[See however (Vol 21) 1934 Lah 438 (441) : 15 Lah 772. (Decree under O. 34 against father — Sons are bound and cannot object on ground of immorality or otherwise.)]

[6] Section 53 covers only case of son or other descendant who is to be deemed legal representative of his ancestor with respect to property which was liable for debt of such ancestor in respect of which decree is passed. (Vol 22) 1935 Lah 650 (651).

[7] Suit for specific performance — Decree for alternative remedy of compensation — It creates a debt of record without its being a decree on a debt and therefore S. 53 does not apply. (Vol 27) 1940 Nag 278 (281) : I L R (1941) Nag 632.

2. Decree. — [1] The word "decree" in S. 53 is not confined to money-decrees. A decree passed in respect of joint family properties can be executed against the sons after the father's death. (Vol 11) 1924 Mad 571 (574).

[2] Debt incurred by an ancestor — Section applies when such debt passes into a decree, against his legal representative. (Vol 14) 1927 All 683 (684).

[3] Where during pendency of the appeal before Privy Council, the judgment-debtor dies and no substitution of

his heirs is made and the Privy Council passes a decree, such decree is not a nullity and it can be executed against the property of the deceased in the hands of his sons as provided by S. 53. (Vol 24) 1937 Pat 321 (322) : 16 Pat 316.

[4] Suit on pronote executed by deceased grandfather of defendants decreed against estate of deceased — Decree is against defendants as legal representatives and limited to joint family estate in their hands. (Vol 19) 1932 Bom 522 (523).

3. Legal representative. — [1] Legal representative includes Hindu son becoming owner of his father's property by survivorship. (Vol 26) 1939 Pesh 45 (46, 47).

[2] Hindu son with ancestral property liable for the debt is legal representative. (Vol 12) 1925 All 471 (472)* (1930) 32 Bom L R 919 (922, 923)* (Vol 10) 1923 Pat 143 (147) : 6 Pat L Jour 451.

[3] Son of Hindu father is his legal representative whether his father left private property or not and son can be brought on record on death of his father. (Vol 31) 1944 Lah 473 (476, 477).

[4] Son is not necessarily legal representative in respect of all his father's property. (Vol 13) 1926 All 220 (222) : 48 All 245.

[5] Women's Right to Property Act, 1937 — Deceased leaving movable property — Widow also is legal representative. (Vol 31) 1944 Lah 473 (477).

[6] Plaintiff obtained an injunction against two brothers who together with the sons of one of them formed a joint Hindu family. The sons were not made parties to the suit. After the death of the two brothers, decree-holder sought to execute the decree against the sons. It was held that the decree could not be so executed as the sons were neither parties to the suit nor legal representatives in any sense. (Vol 5) 1918 Bom 165 (166) : 42 Bom 438.

[7] See also Notes on Ss. 2 (11), 50 and O. 22, R. 3.

4. "Property of the deceased." — [1] Provident fund of deceased judgment-debtor paid to dependent minor son under Provident Funds Act, S. 4 (i) — Such fund is property of the son, and is not an asset of the ancestor, hence not liable to attachment for father's debt. (Vol 21) 1934 Mad 173 (174) : 57 Mad 440.

[2] Decree against Hindu father — Although lands inherited by agriculturist son cannot be attached, the rents thereof are liable to attachment for satisfaction of the decree to extent of property inherited though such rents have not come into his hands at the time of his father's death. (Vol 16) 1929 Bom 233 (235) : 53 Bom 463.

[3] Decree against assets of deceased father — Property in the hands of the son proceeded against — Property does not cease to be "property of deceased father" by reason of son's death. (Vol 1) 1914 Mad 668 (668, 669).

[4] Where decree is passed ostensibly against the son but is really against the assets of the deceased father,

Section 53 (*contd.*)

the compensation in respect of forest dues from Government becoming due after death of the father and received by the son, are liable to attachment in execution of the decree. (Vol 17) 1930 Nag 134 (134).

5. "Property in the hands of a son or other descendant."—[1] "Descendants" do not include a nephew. It is only son or other lineal descendants who come within scope of S. 53. (Vol 10) 1923 All 539 (540):45 All 455.

[2] A decree obtained against a member of a joint family, even if it be for a debt binding on the family, cannot be executed against the shares of other members of the family unless they are the sons of the judgment-debtor. (Vol 24) 1937 Mad 472 (474).

[3] Hindu brothers—Promote by elder—Decree on—Younger brother not impleaded—Execution against share of younger brother not allowable—Section 53 does not apply. (Vol 22) 1935 Mad 145 (146).

[4] The expression "property in the hands of a son" in S. 53, does not necessarily signify tangible property exclusively possessed by son without any co-sharer or co-parceners; it means and includes the undivided share of the son in the joint family property held by him along with other co-parceners. (Vol 22) 1935 Oudh 510 (515):11 Luck 449.

[5] A person who has obtained a decree against the father can proceed at once against the property in the hands of his son who is liable under Hindu law for the payment of the debt of his deceased father. (Vol 19) 1932 Pat 261 (264):11 Pat 445.

[6] If sons and grandsons are also impleaded and the suit is dismissed against them, then, their interest is not liable for the debt. This position is not available for subsequently born sons or grandsons and their undivided interest must be held liable under S. 53. (Vol 31) 1944 Oudh 131 (134):19 Luck 481:(Vol 20) 1933 Oudh 309 (312):8 Luck 700.

[7] Property which is not self-acquired property of the sons but has come to them from their father by survivorship is liable to satisfy decree under O. 34, R. 6 against the assets of the father. (1910) 11 Cal L Jour 362 (364).

[8] An obligation incurred by father under a suretyship bond can be enforced as against the son by attachment and sale of his undivided share in joint family property. (Vol 22) 1935 Oudh 510 (515):11 Luck 449.

[9] Sons are liable for debts of father to extent of joint family property in their hands even though father dies during lifetime of grandfather. (Vol 20) 1933 Lah 857 (858):15 Lah 50.

[10] A decree obtained against the father as a trespasser, can be executed against the property in the hands of the son, even though he is not a party to the suit and had partitioned from his father prior to decree. Section does not say that the property should belong to the deceased or it should come into the hands of the son as the legal representative. (Vol 30) 1943 Mad 415 (415, 416).

[11] A decree against B—On B's death it was tried to be enforced against B's sons and 'C' a brother of B, on the ground that B and C constituted a joint Hindu family and C was a legal representative of B—Held in the presence of B's sons C is no legal representative and so the property of the deceased in the hands of B's sons only could be proceeded against. (Vol 24) 1937 Oudh 327 (328):13 Luck 241.

6. "Which is liable under Hindu law".—[1] Sections 47 and 53 can be extended even to property which comes into legal representative's hands by partition before judgment-debtor's death. (Vol 18) 1931 Sind 34 (37):25 Sind L R 374:(Vol 26) 1939 Sind 258 (260):14 S (1939) Kar 300.

[2] The whole of the ancestral and not merely that portion of it in the hands of a Mitakshara son, which upon partition would have represented the interest of the father, if a partition had taken place during his lifetime, is liable for satisfaction of the judgment-debt in execution of a decree passed against the deceased Mitakshara father, where the loan was not contracted by the father for immoral purposes. (1912) 16 Cal L Jour 85 (86) * (Vol 31) 1944 Nag 360 (361):1 L R (1945) Nag 409 * (Vol 11) 1924 Oudh 393 (393):27 Oudh Cas 111.

[3] A decree against a father, when it is not illegal or immoral, under Hindu law is a debt which the son is under an obligation to discharge. (1904) 27 Mad 243 (246, 250) * (Vol 10) 1923 All 124 (125) * (1896) 20 Bom 385 (389) * (Vol 17) 1930 Mad 257 (258).

[4] Sons who take the property of their father obtained by him in a partition among them are liable for the decree of costs against him and property in their hands is liable to attachment. (1913) 19 Ind Cas 252 (252) (All).

[5] A decree-holder who has a decree against a Hindu father can proceed in execution after his death against the joint ancestral property in the hands of his son and can treat the son as the legal representative or his judgment-debtor provided the property is liable under the Hindu law for the debt. (Vol 12) 1925 All 471 (472).

[6] Mortgage decree against Hindu father—Proceedings in execution may be continued against sons. S. 53 makes sons legal representatives of father in respect of property which descends to them and which has been made liable for the satisfaction of the decree passed by Court. (Vol 10) 1923 Pat 142 (147).

[7] Decree against father lambardar for amount collected by him as well as for amount remaining uncollected due to his negligence—Father dying before any property attached in execution—Joint family property in hands of son is liable for payment of decretal debt. (Vol 20) 1933 All 110 (110).

[8] Hindu son is legally bound to provide out of estate descending to him maintenance payable by father—Maintenance can be enforced against entire property and not only against one charged with it. (Vol 26) 1939 Pesh 45 (46, 47).

[9] Mortgage decree against father in Hindu joint family governed by Mitakshara—It can be executed against his son, though not a party to suit, but who claimed the property by survivorship. (1906) 33 Cal 676 (677, 678).

[10] Section 53 applies even if there is decree against father in respect of pre-partition debt binding on property allotted to son in partition—Word 'debt' includes pre-partition debt which includes liability for mesne profits though determined in a suit after partition (Per *Cornish J.*). (Vol 24) 1937 Mad 610 (615, 616):1 L R (1937) Mad 880 (F B).

[11] Suit against father—Decree against father alone passed after a partition had already been effected between father and sons—Death of father—Held, though sons are liable for the pre-partition debts, a decree against father alone cannot be executed against the separate share of the sons. Section 53 does not apply. (Vol 22) 1935 Pat 275 (287):14 Pat 732 (FB) (*Wort J. contra.*)

[12] The descendant is entitled to show that he received no joint family property from his ancestor, that the debt was one for which he was not liable under Hindu law, or such debt was non-existent. (1907) 34 Cal 642 (647, 648, 654).

[13] Watan property is not to be regarded as property inherited by son. (Vol 28) 1941 Bom 144 (146)* (Vol 21) 1934 Bom 116 (117):58 Bom 218.

54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to "the Crown", or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

[1882, S. 265 ; 1877, S. 265 ; 1859, S. 225. See Ss. 67 to 72.]

[a] *Substituted by A. O. for "the Government".*

Section 53 (contd.)

[14] A personal decree under S. 90, T. P. Act, against a legal representative to be realised out of the property belonging to the deceased personally cannot be executed against property which passed by survivorship to the son of the deceased. (1911) 9 Ind Cas 631 (632) (All).

[15] In the case of Hindu impartible estates the debts of a deceased zamindar are not enforceable against the estate in the hands of the successor. (1904) 31 Cal 224 (227).

[16] Impartible estate which was exclusively owned by a deceased holder is assets in the hands of legal representatives under S. 234 of the Code of 1882. (1909) 32 Mad 429 (432).

[17] Ancestral property of a deceased Jat judgment-debtor is not an asset in the hands of his heirs for purposes of S. 234, Civil P. C. of 1882, unless it is specifically charged in his lifetime by the original debtor for his debts. (1911) 1911 Pun W R No. 80, p. 207 (207).

[18] The objection by the heir of a judgment-debtor, against whom a decree had been passed, that the debt was not one incurred for necessity, can be decided in execution without recourse to a separate suit. (1912) 1912 Pun W R No. 243, p. 645 (647).

[19] Execution proceedings instituted after the death of father who alone was party to money suit — Decree cannot be executed against joint family property or any part of it in the hands of the son, when the proceeding is not in continuation of attachment of property affected during father's lifetime. (1894) 16 All 449 (464).

[20] Decree against father alone—Sons not parties to suit actually or even constructively — Subsequent adjudication of father as insolvent — Question of discharge of father's debts by sons under pious obligation doctrine is for insolvency Court and not for executing Court. (Vol 29) 1942 Mad 732 (733).

SECTION 54 — SYNOPSIS.

1. Applicability and scope.
2. Decree for partition.
3. "Estate," meaning of.
4. Partition by Collector.

1. Applicability and scope.—[1] In a decree for partition the mode of partitioning revenue paying mahals cannot be ordered. (Vol 11) 1924 Oudh 360 (364).

[2] A suit for partition by a tenure-holder having the right for partition of the whole estate comes within the meaning of S. 54. (Vol 18) 1931 Cal 104 (105).

[3] Decree for partition of portion of undivided estate is outside scope of section. (Vol 20) 1933 Mad 259 (259); 56 Mad 443.

[4] Section 54 applies only where decree is for partition of land by metes and bounds. (Vol 4) 1917 Low Bur 126 (127) ; 8 Low Bur Rul 338.

[5] Words "separate possession of a share of such an estate" contemplate the case of a man whose right is to the possession of an aliquot part or share of the whole undivided estate considered as one. (Vol 18) 1931 Cal 93 (95) ; 58 Cal 122.

[6] Object of the section is to protect the revenue due to Government. Also the Collector is more qualified to deal with the matter than the civil Court. (1889) 16 Cal 203 (205).

[7] Civil Court can decree partition of revenue paying estate. (Vol 4) 1917 Pat 637 (638) ; 2 Pat L Jour 221.

[8] Decree for partition of revenue paying estate passed by civil Court — Subsequent partition obtained from Collector does not supersede former decree. (Vol 21) 1934 Pat 365 (366) ; 13 Pat 637.

2. Decree for partition. — [1] It is not necessary under S. 54 to ask for division of revenue. (Vol 18) 1931 Cal 104 (105) ; (Vol 18) 1931 Cal 93 (95) ; 58 Cal 122 ; (Vol 20) 1933 Mad 259 (259) ; 56 Mad 443.

[See however (1897) 24 Cal 725 (734) (FB) ; (Vol 21) 1934 Pat 365 (366) ; 13 Pat 637 ; (Vol 20) 1933 Pesh 101 (103).]

[2] Decree for partition must not be so framed as to divest the Collector of the powers conferred upon him under S. 54 and O. 20, R. 18. (Vol 30) 1943 Sind 7 (8, 9) ; 1 L R (1942) Kar 162.

[3] Unless decree, not containing directions as required by O. 20, R. 18 (1), is corrected the plaintiff cannot ask for transfer of proceedings to Collector under S. 54. (Vol 22) 1935 Sind 192 (192).

[4] A decree of a civil Court on an application to partition the lands of an estate is not a decree under the section and cannot be sent to the Collector for execution under S. 12 (2), Estates Partition Act. (1917) 1 Pat L W 51 (54).

[5] Section 54 has no application to execution of decrees in administration suits and Collector cannot be directed to partition the estate. Partition can be correctly made by appointing a receiver. (Vol 4) 1917 Low Bur 126 (127) ; 8 Low Bur Rul 338.

[6] For the form of a decree in suit for partition of property or separate possession of a share therein, see O. 20, R. 18.

3. "Estate," meaning of.—[1] The word "estate" in this section must not be construed in a restricted sense but must be construed as being used in its ordinary signification. (1884) 10 Cal 435 (440).

[2] Raiyatwari estates are not estates within the meaning of S. 54. (1884) 7 Mad 382 (384) (F B).

[3] Section 54 only applies to case of estate assessed to revenue in lump and not to those assessed at acre rates. (Vol 13) 1926 Rang 80 (80) ; 5 Rang 206.

[4] Where the interest of the tenure-holder is only in a particular mouza which is partly in one estate and partly in another it consists only of isolated parts of the two estates and is not an estate within the meaning of the section. (Vol 18) 1931 Cal 104 (105).

4. Partition by Collector. — [1] Under this section the Court has no power to appoint a Commissioner to effect the partition, and the partition must be made by the Collector. (1896) 23 Cal 679 (682).

[2] A civil Court is not competent to make a division of revenue paying land, even with the consent of the parties. (Vol 2) 1915 Oudh 28 (29) ; (Vol 6) 1919 All 140 (142) ; 41 All 207 (All that the civil Court could do would be to declare the share of the plaintiffs and give a decree leaving him to take steps for actual partition in the Revenue Courts.)

[See (Vol 32) 1945 Oudh 1 (3) (Decree for partition of revenue-paying land — Parties desiring actual partition by arbitrator must apply to Collector.)]

[See however (Vol 5) 1918 Pat 63 (63, 64) ; 4 Pat

ARREST AND DETENTION.

55. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or where such civil prison does not afford suitable accommodation, in any other place which the [Provincial Government] may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

Section 54 (*contd.*)

L Jour 29 (Civil Court can partition property but only if cannot partition the revenue. The Collector alone can do it. When he does so he can re-consider the partition and alter the partition.)]

[3] Partition effected by Collector under S. 54 — Civil Court has no power to hear objection. (Vol 32) 1945 Mad 336 (340) : I L R (1946) Mad 10 (F B) (19 Mad 455, overruled.) * (1891) 15 Bom 527 (529) * (Vol 5) 1918 Pat 63 (63, 64) : 4 Pat L Jour 29 (Collector can review.)

[See (1904) 28 Bom 238 (240) (Where a Collector has in partitioning an estate contravened the decretal command or otherwise acted *ultra vires*, his action is subject to the control and correction by the Court which passed the decree and sent it to him for execution.) * (1889) 12 Bom 371 (376) (Bad faith, contravention of the decree or transgression of law by Collector—Court can interfere.)]

[4] The civil Court has a right of control over the Collector's proceedings in execution. (Vol 1) 1914 Sind 97 (98) : 8 Sind L R 335 * (1890) 14 Bom 450 (451) (Refusal by Collector to carry out decree.) * (Vol 1) 1914 Sind 97 (98) : 8 Sind L R 335 (Civil Court can ask the Collector to expedite, to revive and continue a proceeding pending before him.)

[See however (Vol 5) 1918 Bom 206 (207) : 42 Bom 689 (A civil Court referring a case to the Collector under S. 54 has no power to interfere with the Collector's proceedings therein—15 Bom 527 followed.)]

[5] Partition under this section means not merely the partition of the lands but includes the delivery of shares also to respective allottees. (1887) 11 Bom 662 (663) * (Vol 14) 1927 Nag 300 (301) (Collector can also place them in possession of the crops.)

[6] Separate possession obtained by some—Property left insufficient to meet remaining share—Share should be re-adjusted in execution by Collector. (Vol 2) 1915 Bom 279 (280) : 40 Bom 118.

[7] Decree for partition of revenue-paying lands — Application to send papers to Collector is not governed by Limitation Act, Art. 181 or Art. 182. (Vol 32) 1945 Bom 558 (549, 541, 342) (F B).

SECTION 55 — SYNOPSIS.

1. Appeal and revision.
2. At any hour and on any day.
3. Court's duty to inform judgment-debtor to apply to be declared insolvent.
4. Court may release.
5. In any other place which the Government may appoint.
6. Insolvency, when protection.
7. Judgment-debtor's arrest.
8. Realization of security.
9. Security bond by judgment-debtor.
10. Surety—Liability and discharge of.
11. Woman occupant.

1. Appeal and revision. — [1] Money-decree — Execution—Judgment-debtor arrested — Security bond furnished—Decree-holder applying for proceedings under S. 55 (4)—Notice to surety—Court ordering security to be realized — Such notice held also to be given under S. 145—Surety can appeal—Application for revision by decree-holder on surety's appeal can be treated as appeal. (Vol 19) 1932 Bom 77 (78).

[2] An order made under S. 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. (Vol 4) 1917 Upp Bur 16 (17) : 2 Upp Bur Rul 103.

2. At any hour and on any day. — [1] The arrest of judgment-debtor on Sunday was admittedly lawful and the execution of the warrant could only be complied with by bringing the complainant before Court when it next sat. (1907) 30 Mad 179 (180).

3. Court's duty to inform judgment-debtor to apply to be declared insolvent. — [1] It is the duty of the Court to inform the judgment-debtor whenever he is brought before the Court under arrest in execution of a money-decree, to apply for insolvency. This must be done before any inquiry is made. (1909) 1909 Pun Re No. 16, p. 37 (38).

[2] Failure to inform the judgment-debtor under S. 55 (3) that he could apply for insolvency does not

(2) The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the ^a[Provincial Government] in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he ^c[may be discharged] if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court ^d[may release] him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

[1882, S. 336; 1877, S. 336. See O. 21, Rr. 37-40.]

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by *ibid.* for "Local Official Gazette".

[c] *Substituted* by the Code of Civil Procedure (Amendment) Act, 1921 (3 [III] of 1921), Section 2, for "will be discharged". [d] *Substituted* by Section 2 *ibid.* for "shall release".

Objects and Reasons.

"Clause 55 (1), second proviso.—The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.

Clause 55 (2) — The sub-clause is intended to cover the case of certain persons or classes of persons whose summary arrest might, as in the case of railway servants,

be attended with danger or inconvenience to the public."—S. O. R.

"Clause 55.—We have carefully considered the provision as to breaking open dwelling-houses and have come to the conclusion that it should be limited to dwelling-houses in the occupancy of the judgment-debtor."—S. C. R.

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invalidate a warrant of arrest which was otherwise legally issued. (1940) 42 Pun L R 374 (378).

[3] When the application of a judgment-debtor to be declared an insolvent has been dismissed, and he is re-arrested in execution of a decree, he cannot claim the benefit of S. 55 (3) and (4) so long as the bar of the previous dismissal is not removed. (1911) 9 Ind Cas 121 (121) (Sind).

[4] Section 55 (3) does not entitle the debtor to be adjudged an insolvent on an application except in conformity with the provisions of the Insolvency law. (1913) 25 Mad L Jour 545 (547, 548).

[5] Absence of note in record that provisions of S. 55 (3) have been complied with does not necessarily indicate that they have not been complied with—Failure to comply with provisions does not invalidate arrest. (Vol 17) 1930 Lah 736 (736).

[6] Under the Act of 1877, Small Cause Court debtors could obtain the benefit of Chapter XX of that Act, enabling them to be declared insolvents. (1878-80) 2 Mad 9 (10).

4. Court may release. — [1] A judgment-debtor who, when brought before the Court under arrest, has not expressed his intention to apply to be declared an insolvent, is not thereby precluded from so applying during his imprisonment and getting himself released, under the Insolvency laws. (1885) 11 Cal 451 (459, 460).

[2] Section 59 is not controlled by S. 55 (3) and (4)—Judgment-debtor suffering from illness should be released. (Vol 21) 1934 Lah 807 (808).

5. In any other place which the Government may appoint. — [1] Where a judgment-debtor committed to particular jail was handed over by the officer arresting him of his own motion, to the officer-in-charge of another jail, it was held that such imprisonment was unlawful and the prisoner was entitled to be discharged. (1885) 11 Cal 527 (530).

6. Insolvency, when protection. — [1] Judgment-debtor arrested in execution of money-decree —

Having been adjudicated insolvent under Presidency Towns Insolvency Act (1909) he produced protection order from Calcutta High Court — He is immune from arrest and detention for the said debt. (Vol 17) 1930 Lah 1070 (1072).

[2] An order of adjudication will not protect a judgment-debtor from arrest in respect of debts not mentioned in the insolvency petition. (1899) 16 Cal 85 (88).

7. Judgment-debtor's arrest. — [1] The apprehension of a judgment-debtor by an officer arresting without having in his possession the warrant of arrest if the Court executing the decree, is illegal. (1883) 5 All 318 (321, 322).

[2] A Nazir, who has been directed to execute a warrant of arrest, is not prohibited from authorizing a deputy to do so for him. An endorsement to this effect subsequent to the arrest does not invalidate the arrest. (1884) 6 All 385 (388).

[3] If a warrant is addressed to the bailiff authorising him to arrest a judgment-debtor at a place A and the judgment-debtor happened to be found at place B within the jurisdiction of the Court, bailiff can legally make the arrest at the latter place. (1940) 42 Pun L R 374 (377).

[4] The mere fact that a warrant for attachment of property of the judgment-debtor has been issued may be a sufficient ground for refusing to issue warrant of arrest but when the judgment-debtor has evaded payment it would not be a sufficient ground to refuse warrant of arrest. (1883) 7 Bom 301 (302).

[5] Bailiff is not bound to show civil warrant in first instance. (Vol 8) 1921 Cal 79 (79, 80).

[6] Court has no power to arrest defendant in pending suit unless he is in contempt. (Vol 19) 1932 All 524 (526).

[7] Defendant entering plaintiff's baithak with bailiff and naib sheriff believing that judgment-debtor was there — No trespass is committed and plaintiff is not

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entitled to damages on that score. (Vol 20) 1933 Lah 728 (724).

[8] Provisions of S. 55 are mandatory. (Vol 15) 1928 Cal 62 (63) : 54 Cal 782.

[9] The provisions of this section apply, so far as may be, to all persons arrested under this Code. *See* section 134. For prohibition of arrest of women in execution of decree for money, *see* section 56. For exemption of certain persons from arrest under civil process, *see* sections 135 and 135A. For arrest before judgment, *see* O. 38, R. 1.

8. Realization of security. — [1] Surety for judgment-debtor in carrying penalty under his bond — Amount paid by surety should be credited against decretal amount—Decree-holder cannot claim amount over and above the amount of decree. (Vol 8) 1921 Cal 559 (560).

[2] A transferee decree-holder is entitled to have his decree executed against surety, on the failure of judgment-debtor to present insolvency petition. (1903) 26 Mad 258 (259).

[3] Security bond executed under S. 55 (4)—Judgment-debtor failing to apply within one month—Court discharging sureties—On remand of case on appeal Court holding that surety was liable — Subsequent order held was without jurisdiction as option to proceed against judgment-debtor had already been exercised by Court previously in favour of surety. (Vol 24) 1937 Pat 476 (477).

[4] Judgment-debtor failing to apply within one month — Option as to whether security should be realized or judgment-debtor committed to prison lies not with decree-holder but executing Court. (Vol 16) 1929 All 377 (377, 378).

[But *see* (Vol 29) 1942 Pat 506 (507, 508) : 21 Pat 644. (Option under S. 55 (4) to proceed against surety or judgment-debtor is with decree-holder and not with Court—But Court must be satisfied that remedy chosen by decree-holder can be availed of.)]

[5] Where cash security is deposited by a surety for benefit of a decree-holder to enable the judgment-debtor to apply in insolvency, the cash security must be paid to the decree-holder if the insolvency application fails and the Court cannot forfeit the amount to the Government. (1912) 39 Cal 1048 (1049, 1050).

[6] Decree-holder making no attempts to execute against surety for about three and half years—Security held should not be forfeited. (Vol 28) 1941 Cal 122 (123).

[7] Surety's liability—Surety executing security bond undertaking to pay decretal amount on default—Judgment-debtor meanwhile applying to Debt Conciliation Board—Execution case struck off as wholly infructuous on date of hearing due to such application and without protest from decree-holder—Surety bond is cancelled in effect—Decree-holder cannot proceed to realize security on his refusal to accept offer of judgment-debtor before the Board. (Vol 24) 1937 Nag 269 (269, 270) : I L R (1939) Nag 497.

[8] Surety bond for payment of decree amount—No date given—Contract becomes operative since its acceptance by Court. (Vol 15) 1928 Mad 469 (470).

9. Security bond by judgment-debtor. — [1] Security bond given under S. 55 must be interpreted and enforced according to conditions expressly mentioned therein. (Vol 17) 1930 Lah 575 (576).

[2] Bond under S. 55 (4) should conform to terms of S. 55 (4). (Vol 29) 1942 Sind 134 (136) : I L R (1942) Kar 79 * (Vol 4) 1917 Mad 237 (238) (Extent of liability is determined by S. 145.)

[3] Security bond executed under S. 55 (3) and (4) should be construed in light of order directing security to be given — Order on application under S. 55 and directing 'necessary bond' to be executed — Bond must be such as is required by S. 55 (4). (Vol 23) 1936 Rang 168 (170) : 14 Rang 190.

[4] Covenants as to what would happen if the judgment-debtor's application for insolvency was dismissed in the security bond are not contemplated by this section, and could not be enforced under this section. (1894) 16 All 37 (39).

[5] Presidency Towns Insolvency Act, Ss. 17 and 18 (3)—Proceeding for arrest of judgment-debtor commenced before adjudication is not inoperative, but must be carried to the end — On production of order of adjudication, security to appear should be taken. (Vol 12) 1925 Rang 305 (305, 306) : 3 Rang 187.

[6] Surety executed a bond for producing the judgment-debtor on a particular day which happened to be a holiday : Held that subsequent arrest of the judgment-debtor was in compliance with the terms of the surety bond. (1928) 1928 Mad W N 871 (873).

[7] Where the judgment-debtor is arrested and brought before the Court or comes before it upon notice the Court has a discretionary power not to put the warrant in force if the judgment-debtor furnishes security for his appearance when called upon. (1898) 22 Bom 731 (733).

[8] This section is applicable to judgment-debtors under arrest but not committed to jail—When he is already committed to jail, he can only be discharged under S. 341 of the old Code (now S. 58). (1885) 8 Mad 508 (504).

[9] A surety bond given in pursuance of an order under S. 55 (4) in which the surety incurs only personal obligation falls under Art. 6, Sch. II, Court-fees Act and not under Art. 57, Stamp Act. (Vol 20) 1933 Lah 89 (90) : 14 Lah 284 (S B) * (Vol 21) 1934 Lah 228 (229) : 14 Lah 708.

10. Surety — Liability and discharge of. —

[1] Surety becomes liable where judgment-debtor fails to apply for insolvency within time fixed. (Vol 15) 1928 Lah 974 (975) * (Vol 22) 1935 Lah 918 (918).

[2] Death of judgment-debtor discharges surety under S. 55. (Vol 1) 1914 Cal 162 (163) : 41 Cal 50 * (1907) 29 All 466 (468).

[3] Failure of judgment-debtor to apply within time makes surety liable though judgment-debtor may die after the time allowed — S. 55, cl. (4) does not mean that the Court may proceed both against the surety as well as the debtor. (Vol 11) 1924 Bom 428 (429) : 48 Bom 500.

[4] Security given under S. 55—Failure of judgment-debtor to apply for insolvency — Liability of surety arises and does not cease even though execution proceedings against judgment-debtor are consigned to record room. (Vol 22) 1935 Lah 918 (919) * (Vol 19) 1932 Lah 492 (493).

[5] Surety's bond operates even after dismissal of execution case. (Vol 8) 1921 Pat 72 (73) : 5 Pat L Jour 417.

[6] Court as well as decree-holder can enforce security bond even in execution and although original execution case in which the bond was filed, was dismissed. (Vol 11) 1924 Pat 487 (488).

[7] Surety's liability does not terminate by filing of insolvency application or dismissal of execution. (Vol 4) 1917 Mad 237 (239).

[8] Liability of surety on bond executed to produce judgment-debtor continues till judgment-debtor appears. (Vol 1) 1914 Mad 270 (271).

[9] Judgment-debtor committed to prison—Surety is automatically discharged — Court cannot concurrently proceed against both. (Vol 20) 1933 Nag 38 (38, 39) : 29 Nag L R 83 * (Vol 16) 1929 Lah 479 (480) * (Vol 29) 1942 Pat 506 (507) : 21 Pat 644.

[10] For enforcement of security bond failure of both conditions referred to in S. 55 (4) is not necessary.

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(Vol 29) 1942 Sind 134 (136) : I L R (1942) Kar 79* (Vol 14) 1927 Mad 1081 (1081).

[But see (Vol 27) 1940 All 304 (304) : I L R (1940) All 338. (Unless there is failure both in applying for adjudication and appearance decree-holder cannot proceed against surety.)]

[11] Service of special notice upon debtor is not necessarily calling upon him to appear—It is sufficient if his counsel is informed that his presence would be necessary on next date. (Vol 23) 1936 Rang 168 (170) : 14 Rang 190.

[12] Security for appearance of judgment-debtor—Surety producing judgment-debtor and praying for discharge—Court cannot refuse. (Vol 21) 1934 Lah 962 (962)* (Vol 16) 1929 Lah 262 (262).

[13] A judgment-debtor who was arrested in execution of the decree was released on condition that he furnished security under this section. The surety undertook to produce the judgment-debtor and that he would file insolvency application. The decree-holders did not object to the bond and after producing the judgment-debtor on the date fixed the surety applied for cancellation of the bond and it was done. Held that the order of the Court was not nullity. (Vol 20) 1933 All 382 (384) : 55 All 548.

[14] Surety undertaking to produce judgment-debtor on the date fixed must produce even though decree-holder remains absent. (Vol 15) 1928 Lah 974 (975).

[15] Bond undertaken that judgment-debtor would be present on specified date and that in default surety would produce him—Failure to produce after specified date when called on by Court—Surety is liable. (1937) 1937 Mad W N 1165 (1166).

[16] The fact that in the meantime the judgment-debtor had got a protection order does not absolve the surety of his duty to produce the judgment-debtor on his adjourned date. (Vol 13) 1926 Mad 953 (959).

[17] Surety bond executed under S. 55 (4) — But surety not binding himself to do anything in case of default—He may plead that he incurred no liability under the bond—But if decree is passed against him he cannot raise this defence in execution proceedings. (Vol 20) 1933 Mad 817 (818).

[18] Surety cannot claim to be released from obligation at his pleasure—Principle of S. 130, Contract Act, does not apply. (Vol 29) 1942 Mad 101 (102).

[19] Mere re-arrest of judgment-debtor does not discharge surety. (Vol 18) 1931 Bom 444 (446).

[20] Proceedings against surety—Court has discretion to refuse to make an order in favour of judgment-creditor. (Vol 9) 1922 Bom 340 (341) : 46 Bom 702.

[21] Section 55 does not provide that surety will be effective only if bond is formally executed—Liability of surety is determined by undertaking given by him by agreement or statement and accepted by Court. (Vol 24) 1937 Lah 772 (776).

[22] Surety appearing without service cannot plead want of notice. (Vol 1) 1914 Mad 270 (271).

[23] To discharge surety, petition by judgment-debtor must be in proper form and formalities and within prescribed time. (Vol 15) 1928 Sind 192 (192).

[24] Arrest of A in execution—B filing surety bond—On construction of his bond held that B could not be discharged from his liability in circumstances of the case. (Vol 20) 1933 Mad 360 (361, 362).

[25] The security bond, under this section, has reference only to the proceeding actually before the Court and the power of the Court to realise the security in execution of decree cannot be exercised when the execution proceeding, having been dismissed, is no longer in existence. Dismissal of decree-holder's application

operates as a discharge of surety. (1887) 14 Cal 757 (760, 761).

[26] Where a surety was to be liable for the absence of the judgment-debtor on a certain date, his liability ends if the judgment-debtor presents on that date but remains absent on a further date fixed by the Court. (1910) 1910 Pun L R No. 51, page 128 (130).

[27] Surety-bond under S. 55 (4) is in favour of Court—Decree-holder granting time to judgment-debtor—Surety is not discharged under Contract Act, S. 135. (Vol 14) 1927 Lah 336 (336).

[28] Execution proceedings—Surety for appearance and for satisfaction of decree in case of non-production—Execution dismissed for default—Surety is discharged in absence of any indication to contrary. (Vol 21) 1934 Lah 92 (92).

[29] Judgment-debtor too ill to attend—Non-production by sureties should be excused. (Vol 16) 1929 Lah 479 (480).

[30] Certain persons executing surety bond undertaking to produce judgment-debtor on particular day—Mere fact that judgment-debtor is ill does not absolve sureties from their liability, when his illness is not such as to render his appearance in Court physically impossible—Obligation under bond can be successfully avoided only by reasons akin to *vis major*. (Vol 25) 1933 Mad 530 (530, 531).

[31] Surety bringing judgment-debtor in Court during stay ordered in his favour—Conditions of suretyship are not fulfilled. (Vol 12) 1925 All 344 (345).

[32] Principal debtor and surety—On construction of security bond, held on failure of judgment-debtor to file insolvency petition surety should be given opportunity to produce judgment-debtor. (Vol 22) 1935 Mad 543 (544).

[33] A surety is liable for the default of his principal to apply for insolvency when he has agreed to produce him. (1910) 12 Cal L Jour 419 (422, 423).

[34] Judgment-debtor not applying within one month to be declared insolvent—No charge of failing to appear when required to do so, against judgment-debtor—Surety is liable—Time cannot be extended. (Vol 13) 1926 Mad 286 (286).

[35] Surety executing a bond under S. 55 (4) undertaking to cause judgment-debtor to file insolvency petition within one month and to get him prosecute it till end—Surety's liability is at an end if debtor presents insolvency application and is duly adjudicated insolvent—Surety is not liable if subsequently insolvency is annulled, on failure by judgment-debtor to apply for discharge within prescribed period. (Vol 23) 1936 Mad 963 (963, 964)* (Vol 20) 1933 Nag 40 (41) : 29 Nag L R 28. (Case of construction of surety bond—Held bond was intended to be as near the bond contemplated in S. 55 (4) as possible.)

[36] Application for being declared insolvent need not contain all particulars required by S. 13, Provincial Insolvency Act—Surety for judgment-debtor engaging that judgment-debtor would apply for being declared insolvent within 15 days—Judgment-debtor applying within that time—Application rejected as not containing all particulars required by S. 13, Provincial Insolvency Act—Still liability of surety comes to end. (Vol 18) 1931 Bom 444 (446).

[37] Surety for conduct of insolvency proceedings—Failure to apply for discharge—Surety cannot be made liable. (Vol 30) 1943 Mad 363 (364, 365) : I L R (1943) Mad 691.

[38] Court cannot extend period of one month prescribed by S. 55 (4) even under S. 148. (Vol 13) 1926 Mad 689 (690).

11. Woman occupant. — [1] In order to arrest a purdahnashin lady a special order of the Court

Prohibition of arrest or detention of women in execution of decree for money.

[1882, S. 245-A.]

57. The ^a[Provincial Government] may fix scales, graduated according to rank, race and *Subsistence-allowance.* nationality, of monthly allowances payable for the subsistence of judgment-debtors.

[1882, S. 338; 1877, S. 338; see O. 21, R. 39.]

[a] *Substituted by A. O. for "Local Government".*

Detention and release.

58. (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(b) in any other case for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

[1882, Ss. 341, 342; 1877, Ss. 341, 342; 1859, S. 278.]

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empowering the officer to arrest by entering zenana of the house in which she resides is not necessary; the arrest can be effected by breaking open into any room in the house, including zenana if he, the officer, is able to enter the house. (1881) 7 Cal 19 (20).

Section 56 — Note 1.

[1] A woman cannot be arrested in execution of a money decree under this section. (Vol 9) 1922 Nag 98 (101) : 18 Nag L R 145. (The proposition, that no money-decree is possible which does not carry with it a right to arrest the judgment-debtor, is not correct.)

Section 57 — Note 1.

[1] The provisions of this section apply, so far as may be, to all persons arrested under this Code, see section 134.

[2] As to the method how subsistence allowance is to be paid, see O. 21, R. 39.

SECTION 58—SYNOPSIS.

1. Sub-section (1).

2. Sub-section (2).

1. Sub-section. (1).—[1] Section 58 does not apply to the case of a person imprisoned for contempt of Court. (1879) 4 Cal 655 (657, 658).

[2] The Court cannot fix any term for the imprisonment of a judgment-debtor. (1890) 13 Mad 141 (142).

[3] Imprisonment on arrest before judgment becomes, after decree, imprisonment in execution of a decree and the imprisonment suffered must be taken into consideration in calculating the total period of imprisonment. (1882) 7 Bom 431 (437).

[4] In execution of a decree payable by instalments the debtor cannot be detained separately for default in

the payment of each instalment. (1883) 7 Bom 106 (108).

[5] Detention in court-house cannot be regarded as detention in civil prison and S. 58 does not apply. (Vol 24) 1937 Lah 253 (254).

[6] Agreement by judgment-creditor merely to release judgment-debtor or cancel security bond does not amount to adjustment of decree. (Vol 20) 1933 Sind 305 (306).

[7] The cost of clothing, etc., required under S. 33, Prisons Act, is not "subsistence allowance" under S. 58 which includes only the monthly allowance fixed by scale under S. 57. (1911-12) 6 Low Bur Rul 61 (61).

[8] A payment cannot be considered to have been made to the officer until he actually receives the money. (Vol 1) 1914 Mad 24 (24).

2. Sub-section (2). — [1] Once the judgment-debtor is released from imprisonment in execution of a decree, he cannot be re-arrested under the same decree. (1898) 20 Cal 874 (878).

[2] The discharge of a defendant from confinement in jail in consequence of the plaintiff's failure to pay subsistence money at the rate fixed by the Court, bars a second arrest and imprisonment in execution of a decree. (1863-69) 4 Mad H C R 76 (76, 77).

[3] A judgment-debtor once arrested and imprisoned in execution of a decree, cannot be re-arrested under a new order for the execution of the same. (1886) 12 Cal 652 (656, 657, 658).

[4] Where a judgment-debtor has been arrested but not imprisoned, his immunity from a second arrest depends not only upon his having been arrested, but upon his having been imprisoned under the arrest.

59. (1) At any time after a warrant for the arrest of a judgment-debtor has been issued *Release on ground of illness.* the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the ^a[Provincial Government], on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

[1892, S. 653.]

[a] *Substituted by A. O. for "Local Government".*

ATTACHMENT.

60. (1) The following property is liable to attachment and sale in execution of a decree, *Property liable to attachment* namely, lands, houses or other buildings, goods, money, bank-notes, *and sale in execution of decree.* cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as herein-after mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

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(1896) 23 Cal 128 (129, 130)* (Vol 16) 1929 Lah 361 (362)* (1895) 8 Mad 21 (22).

[5] A judgment-debtor released through mistake of jail authorities can be re-arrested but the period of imprisonment already undergone should be deducted. (1911-12) 6 Low Bur Rul 61 (62).

[6] A judgment-debtor arrested and imprisoned in execution of a decree, after having obtained an interim protection order under S. 13 of the Indian Insolvency Act, is liable to be re-arrested in execution of the same decree. (1902) 26 Bom 652 (657).

[7] A judgment-debtor released under S. 59 may be re-arrested, but the period of his detention in the civil prison should not in the aggregate exceed that prescribed in this section ; see section 59 (4).

Section 59—Note 1.

[1] Section 59 is not controlled by S. 55 (3) and (4)—Judgment-debtor suffering from serious illness should be released. (Vol 21) 1934 Lah 807 (808).

[2] Discretion exercised by lower Court under S. 59 will not be interfered with in appeal unless it is wrongly exercised—Asthma and indigestion do not constitute serious illness. (Vol 20) 1933 Lah 307 (308).

[3] The provisions of this section apply, so far as may be, to all persons arrested under this Code, see section 134.

SECTION 60—SYNOPSIS.

1. Applicability and scope.
2. Belonging to judgment-debtor.
3. Debt.
4. Objections to attachment.
5. Saleable property.
6. Proviso to sub-section (1)—General.
 7. Necessary wearing apparel, etc.—Clause (a).
 8. Tools of artisans, implements of husbandry, etc.—Clause (b).
 9. Houses of agriculturists, etc. — Clause (c).
 10. Right to sue for damages—Clause (e).

11. Right of personal service—Clause (f).
12. Stipends and gratuities allowed to pensioners—Clause (g).
13. Wages of labourers—Clause (h).
14. Salary—Clause (i).
15. Salary of army officers.
16. Salary, meaning of.
17. Pay of persons to whom Indian Army Act of 1911 applies—Clause (j).
18. Compulsory deposits—Clause (k).
19. Allowances of public officers—Clause (l).
20. Mere expectancy or other contingent or possible interest—Clause (m).
21. Right to future maintenance—Clause (n).
22. Moveable property — Exemption — Cl. (p).
23. Sub-section (2).
24. Waiver.

1. Applicability and scope.—[1] Object of S. 60 is to exempt certain property from attachment. (Vol 23) 1936 Pesh 109 (110).

[2] Words "attachment and sale" at the beginning of S. 60 must be treated separately—They do not mean that there can be an attachment only where a sale can follow. (Vol 30) 1943 Nag 1 (2) : ILR (1943) Nag 1.

[See however (1907) 30 Mad 378 (381). (Property incapable of being transferred under S. 10, T. P. Act, cannot be attached.)]

[3] Right to apply for attachment is processual right. (Vol 15) 1928 Mad 1173 (1174) * (Vol 28) 1941 Nag 239 (240, 241). (An attachment does not give priority over other creditors for the purposes of rateable distribution.) * (Vol 2) 1915 Oudh 1 (3).

[4] Section 60 does not apply to executions under a mortgage decree. (Vol 16) 1929 Rang 275 (275).

[5] Section should be very strictly interpreted. (Vol 4) 1917 Lah 21 (22).

[6] Attachment to be valid must be made in strict conformity with O. 21. (Vol 22) 1935 Rang 186 (186).

[7] All properties of judgment-debtor can be attached

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;
- (b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;
- (d) books of account ;
- (e) a mere right to sue for damages ;
- (f) any right of personal service ;
- (g) stipends and gratuities allowed to ^a[pensioners of the Crown], or payable out of any service family pension fund ^{aa}notified in the ^b[Official Gazette] by ^c[the Central Government or the Provincial Government] in this behalf, and political pensions ;
- ^d(h) the wages of labourers and ^edomestic servants, whether payable in money or in kind ; ^e[* * * * *] ;
- ^f[(i) salary to the extent of the first hundred rupees and one-half of the remainder :

Provided that where such salary is the salary of a servant of the Crown or a servant of a railway company or local authority, and the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree.]

- (j) the pay and allowances of persons to whom the ^e[Indian Army Act, 1911, or the Burma Army Act applies] [or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, applies] ;

Section 60 (contd.)

as no limit is placed upon the extent that can be attached. (1912) 16 Ind Cas 708 (710) (Cal).

[8] Section cannot affect properties which are declared to be not attachable by any special or local laws though they are attachable under this section. (1897) 21 Bom 588 (591) (FB)* (1942) 1942 All W R (Rev) 253 (253) (Sale under Encumbered Estates Act, section made expressly applicable.)

[9] Distress — Distress is not permitted under Civil P.C., and provisions of S. 60 cannot be applied by analogy to distraint. (Vol 26) 1939 Sind 276 (277): ILR (1939) Kar 566.

[10] Orders under S. 60 are appealable — Appeals are not confined to grounds in Rr. 5 and 6 of O. S. (Vol 20) 1933 Cal 757 (757) : 60 Cal 1851.

[11] The repeal of Act 9 [IX] of 1937 by Act 5 [V] of 1943 did not affect the existing rights and liabilities created by that Act. (Vol 33) 1946 Bom 102 (104).

[12] Under Section 3 of the Amending Act, 1937, amendments made by S. 2 have no effect on proceedings arising out of suits instituted before 1st June 1937 and the words "suits instituted" in S. 3 are not confined to proceedings on suits initiated on presentation of plaints alone but also include proceedings resulting on an award. (Vol 25) 1938 Sind 176 (177).

[13] Proviso in S. 60 (2) (b) is dead law being repealed by Repealing and Amending Act (10 [X] of 1914) (Vol 5) 1918 Bom 32 (38) : 43 Bom 716.

2. Belonging to judgment-debtor. — [1] All attachable properties belonging to judgment-debtor can be

attached and sold unless prohibited by any law or proviso to the section. (Vol 1) 1914 Cal 496 (497). (Held there was nothing in Court of Wards Act prohibiting the attachment and sale of balance of money in the hands of the Court of Wards.)

[2] Words "belonging to judgment-debtor" do not mean "belonging to judgment-debtor alone" but also belonging to him along with another. (Vol 24) 1937 Cal 199 (200) : 1 L R (1937) 2 Cal 48.

[3] Jurisdiction to attach moveables in the hands of another depends upon the existence of the right of judgment-debtor to sue for them. (Vol 5) 1918 Pat 126 (128) : 4 Pat L Jour 141* (Vol 19) 1932 Pat 311 (312) : 11 Pat 584. (Money claimed as debt due to insolvent — Right to sue or that it was held in trust for him must be shown.)

[4] Reference to disposing power is limited to context indicated by words that follow, namely, "whether the sum be held in the name of the judgment-debtor or by another person in trust for him or on his behalf." (Vol 28) 1941 Pat 157 (159).

[5] Illustrative cases of property not belonging to judgment-debtor or under his disposal. (1834) 6 All 634 (636) (Bonus money not actually paid.)* (Vol 18) 1931 Bom 300 (300, 302) (Property vesting in trustees and payable to children of constituents on death)* (1862-63) 1 Bom H C R 233 (235) (Trust created for payment of creditors — Debtor has no interest)* (1888) 15 Cal 329 (340) : 15 Ind App 1 (P C). (Property held in trust for religious purpose. Specific portions too cannot be

- (k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, ¹[1925], for the time being applies in so far as they are declared by the said Act not to be liable to attachment;
- i[(l) any allowance forming part of the emoluments of any ^k[servant of the Crown] or of any servant of a railway company or local authority which the ¹[appropriate Government] may by notification in the ^m[Official Gazette] declare to be exempt from attachment, and any subsistence grant or allowance made to ⁿ[any such servant] while under suspension;]
- (m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;
- (n) a right to future maintenance;
- (o) any allowance declared by ^o[any Indian law] to be exempt from liability to attachment or sale in execution of a decree; and,
- (p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

^p[*Explanation I.*] — The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable, ^p[and in the case of salary other than salary of a ^k[servant of the Crown] or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable.]

^q[*Explanation II.* — In clauses (h) and (i), "salary" means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave.]

^r[*Explanation III.* — In clause (l) "appropriate Government" means —

- (i) as respects any ^s[person] in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government;
- (ii) as respects any ^s[person] employed in connexion with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative; and
- (iii) as respects any other ^k[servant of the Crown] or a servant of any other railway or local authority, the Provincial Government.]

Section 60 (*contd.*)

attached or sold on the ground that a margin of profit was available to the trustee after performance of trust duties.) * (Vol 11) 1924 Lah 335 (335). (Crops raised by heir after tenant's death.) * (Vol 24) 1937 Mad 424 (426, 427): I L R (1937) Mad 1004. (Hindu father and shares of sons after partition.) * (Vol 22) 1935 Mad 181 (182, 183): 58 Mad 693 (FB). (Promissory note in the name of third person holding in trust for judgment-debtor.) * (Vol 31) 1944 Nag 144 (144): I L R 1944 Nag 711 (Moneys in provident fund.) * (Vol 25) 1938 Nag 24 (27): I L R (1938) Nag 136. (Hindu father and shares of sons after partition.) * (Vol 16) 1929 Pat 97 (98): 8 Pat 478. (Money deposited as security for costs in appeal is a property over which the depositor has no disposing power.) * (Vol 12) 1925 Pat 372 (374). (Debt due to debtor in his capacity as trustee.) * (Vol 29) 1942 Rang 59 (60): 1941 Rang L R 759. (Amount of cheque before it is paid.) * (Vol 27) 1940 Rang 1 (3): 1939 Rang L R 649 (FB). (Hire-purchase — Purchaser not owner till the entire cost is paid.) * (Vol 3) 1916 Low Bur 21 (21). (After divorce, a wife under the Buddhist Law ceases to have any interest in the joint property of her husband and herself.) * (1910) 8 Ind Cas 992 (994) (Low Bur). (The 3rd share of the wife in let-tet-paw property, though not alienable can be attached in execution of a decree against the wife, with the husband's consent.) * (Vol 26) 1939 Sind 15 (17). (Mutual benefit fund—Assignment—Trust in favour of assignee created after death could not be attached after death.)

[6] Illustrative cases of property belonging to judgment-debtor or under his disposal. (1913) 37 Bom 471 (477, 478). (Assurance for benefit of wife — Failure to appoint trustee — Becomes part of estate of deceased.) * (1893) 17 Bom 503 (506). (Donor and donee — Property to revert to donor on death of donee — Donor has interest.) * (Vol 15) 1928 Cal 518 (521, 522): 55 Cal 1315. (Sons of assured where nominee under policy has been appointed.) * (Vol 16) 1929 Lah 600 (600, 601). (Property in the hands of administrator after paying all expenses and debts.) * (Vol 13) 1926 Lah 7 (7). (Property in the hands of the mother of the deceased proprietor can be attached for debts of the previous holder as she holds it only as representative of her husband by virtue of her marriage in the family.) * (1912) (1912) Pun L R No. 220: 1912 Pun Re No. 89. (Amount of fine paid after reversal of sentence.) * (Vol 32) 1945 Mad 278 (279). (Hindu father and joint family estate.) * (Vol 18) 1931 Mad 511 (512). (Property sold in auction — Judgment-debtor has interest till confirmation of sale.) * (1890) 13 Mad 242 (246, 247). (Letters with their contents held in trust for or on behalf of judgment-debtors.) * (Vol 33) 1946 Oudh 20 (26). (Life tenant and estate with power of alienation.) * (Vol 25) 1938 Pat 464 (464). (Unless a thika tenure comes to an end with the period for which arrears of rent had been decreed, the judgment-debtors have an interest which would *prima facie* appear to be saleable.) * (Vol 18) 1931 Pat 76 (76, 77). (Residuary legatee's vested interest.) * (Vol 7) 1920 Pat 468 (468). (Arrears

(2) Nothing in this section shall be deemed —

* [] to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land. * []

[1892, S. 266; 1859, S. 205.]

[a] Substituted by A. O. for "pensioners of the Government". [aa] For such a notification, see Gazette of India, 1909, Pt. I, p. 5. [b] Substituted by A. O. for "Gazette of India". [c] Substituted by A. O. for "the Governor-General in Council". [d] Clauses (h) and (i) were substituted for the original clauses (h) and (i) by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), S. 2. (4-3-1937). These amendments have no effect in respect of any proceedings arising out of any suit instituted before 1-6-1937, see *ibid.*, S. 3. [e] The words "and salary to the extent of the first hundred rupees and one half the remainder of such, salary" were omitted by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943). [f] Clause (i) and the proviso thereto were substituted for the original clause (i) and the proviso, *ibid.* [g] Substituted by A. O. for "Indian Articles of War apply". [h] Inserted by the Amending Act, 1934 (XXXV of 1934), Section 2 and Schedule. [i] Substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for "1897". [j] Clause (l) was substituted, *ibid.*, for the original clause. See also foot-note d above. [k] Substituted for "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943), S. 2. [l] The words "appropriate Government" were substituted by A.O. for "Governor-General in Council". [m] The words "Official Gazette" were substituted *ibid.*, for "Gazette of India". [n] Substituted for the words "any such officer or servant" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943), S. 2. [o] Substituted by A. O. for "any law passed under the Indian Councils Acts 1861 and 1892". [p] The original Explanation was re-numbered Explanation 1 by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), S. 2 and the words within square brackets were inserted, *ibid.* [q] Explanation 2 was inserted by S. 2 of the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937). [r] Explanation 3 was inserted by A. O. [s] Substituted for the words "public officer" by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943), S. 2. [t] Letter and brackets "(a)", word "or" and clause (b) were repealed by the Repealing and Amending Act, 1914 (X of 1914), S. 3 and Sch. II.

Section 60 (contd.)

of rent accrued due during lifetime of ghatwal belongs to him.) * (Vol 23) 1936 Pesh 88 (89). (Denami purchaser is the owner till disproved.)

3. Debt. — [1] The word "debt" means a sum of money which is presently payable or will become payable in future by reason of present obligation—It is an actually existing debt perfected and absolute and not a mere sum of money payable at a future date on the happening of an uncertain contingency. (Vol 29) 1942 Lah 275 (278) : I L R (1943) Lah 17 (FB). (Unpaid purchase money is a debt.) * (1894) 16 All 286 (294). (Principal's or vendor's claim against agent or vendee even with respect to uncertain amount due is a debt.) * (Vol 30) 1943 Bom 258 (258). (Moneys in the hands of Collector payable to an inamdar for services rendered is debt.) * (Vol 24) 1937 Bom 382 (383). (Amount due under policy is debt.) * (Vol 12) 1925 Cal 561 (563). (Accrued debt is attachable though its payment is deferred.) * (1900) 27 Cal 38 (41, 42). (Monthly maintenance allowance before it has fallen due is not debt.) * (1905) 9 Cal V N 703 (704, 705). (Accrued debt but payment deferred is attachable.) * (Vol 29) 1942 Lah 284 (286) : I L R (1943) Lah 746. (Unpaid mortgage money is not debt.) * (Vol 24) 1937 Lah 608 (609). (Unpaid purchase money.) * (Vol 23) 1936 Lah 727 (728, 729) : 17 Lah 270. (Unpaid mortgage money is not debt.—(Vol 22) 1935 Lah 141 reversed.) * (Vol 26) 1939 Pat 77 (79) : 17 Pat 706. (Remuneration which has become due though it has not become payable till after certain time can be attached.) * (Vol 7) 1920 Low Bur 46 (46, 47). (Debt not payable immediately.)

[2] There is no debt until an obligation has been fully incurred. (Vol 29) 1942 Sind 47 (49) : I L R (1941) Kar 401 * (Vol 15) 1928 All 193 (193) : 50 All 507. (Rent not due is not debt.) * (1909) 31 All 304 (307). (Future unearned salary is not a debt.) * (Vol 18) 1931 Bom 288 (290). (Where vendee withheld part of the purchase-money on condition that it would be paid on actual delivery of the house that was bought and there was no such delivery.—*Held*, it was doubtful under the circumstances whether a debt was due from the vendee.) * (Vol 25) 1938 Lah 533 (534) : I L R (1938) Lah 546.

(Compensation money in hands of Collector awarded under Land Acquisition Act is not a debt till a tender is made.) * (Vol 19) 1932 Pat 311 (313) : 11 Pat 584. (Gratuity before payment is not a debt.) * (Vol 12) 1925 Rang 318 (319) : 3 Rang 235. (Prospective rent not a debt.)

[3] Sum which a person may or may not pay in his uncontrolled discretion is not a debt. (Vol 20) 1933 Rang 23 (24) : 11 Rang 116 (FB).

[4] Word 'debts' does not merely mean entire debts but also includes share of debts. (Vol 24) 1937 Cal 199 (200) : I L R (1937) 2 Cal 48.

4. Objections to attachment. — [1] Damages resulting from wrong attachment of stranger's property can be recovered from the decree-holder though he acts in good faith. (Vol 12) 1925 Nag 390 (391).

[2] Exemption can be claimed only by judgment-debtor. (Vol 20) 1933 Lah 251 (252).

[3] Where property has been attached and sold without objection a party to the order of sale or one who was aware of it cannot raise objections later on. (Vol 28) 1941 Oudh 395 (399). * (Vol 18) 1931 All 112 (113) : 52 All 1027. (Father failing to object, sons cannot.) * (Vol 5) 1918 All 305 (306) : 40 All 680 * (Vol 1) 1914 Bom 137 (138) : 38 Bom 667. (Salary of Indian Army Officer attached without objection.) * (Vol 33) 1946 Pat 309 (310). (Objection not taken at time of sale — Title of auction-purchaser not affected.)

[4] Objections to attachment and sale under S. 60 must be taken at the earliest opportunity before actual sale. (Vol 29) 1942 Oudh 308 (309) * (Vol 21) 1934 Bom 348 (350) : 58 Bom 564. * (Vol 19) 1932 Lah 643 (643) : 14 Lah 117. (Second objection is entertainable under S. 47.) * (Vol 17) 1930 Lah 106 (106) * (Vol 31) 1944 Mad 548 (548, 549) : I L R (1945) Mad 211 * (Vol 30) 1943 Nag 330 (331) : I L R (1944) Nag 159 * (Vol 22) 1936 Nag 30 (31) : 31 Nag L R 217 * (Vol 21) 1934 Nag 82 (82) : 30 Nag L R 135 (Objection can be raised under S. 47.)

[5] Plea under proviso to S. 60 must be raised in the written statement itself. (Vol 28) 1941 Oudh 395 (398) * (Vol 11) 1924 All 328 (322). (Objection should be raised in suit itself.) * (1894) 8 Bom 185 (187). (Express declaration in decree that property is to be sold—Objection cannot be raised in execution.)

PROVINCIAL AMENDMENTS.

Punjab.

(a) In sub-section (1), in the proviso —

(i) In Clause (c), for the words "occupied by him" the following words shall be deemed to be substituted, viz :—

"not proved by the decree-holder to have been let out on rent or lent to persons other than his father, mother, wife, son, daughter, daughter-in-law, brother, sister or other dependents or left vacant for a period of a year or more ;"

(ii) After Clause (c), the following clauses shall be deemed to be inserted, viz :—

"(cc) Milch animals, whether in milk or in calf, kids, animals used for the purposes of transport or draught cart and open spaces or enclosures belonging to an agriculturist and required for use in case of need for tying cattle, parking carts, or stacking fodder or manure ;

"(ccc) one main residential house and other buildings attached to it (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment-debtor other than an agriculturist and occupied by him : Provided that the protection afforded by this clause shall not extend to any property specifically charged with the debt sought to be recovered."

(b) After sub-section (2), the following sub-sections shall be deemed to be inserted, viz :—

"(3) Notwithstanding any other law for the time being in force an agreement by which a debtor agrees to waive any benefit of any exemption under this section shall be void.

(4) For the purposes of this section the word 'agriculturist' shall include every person whether as owner, tenant, partner or agricultural labourer who depends for his livelihood mainly on income from agricultural land as defined in the Punjab Alienation of Land Act, 1900.

(5) Every member of a tribe notified as agricultural under the Punjab Alienation of Land Act, 1900, and every member of a scheduled caste shall be presumed to be an agriculturist until the contrary is proved.

(6) No order for attachment shall be made unless the Court is satisfied that the property sought to be attached is not exempt from attachment or sale."

—Punjab Relief of Indebtedness Act, VII of 1934, S. 35 (as amended by Punjab Acts XII of 1940 and VI of 1942.)

Section 60 (contd.)

[See however (1936) 38 Pun L R 668 (669) * (Vol 22) 1935 Lah 942 (943). (Objection can be raised at any stage though not at a preliminary stage.)]

[6] A person is not precluded from objecting to the attachment of a priestly office with emoluments, because he mortgaged the same. (1897) 1 Cal W N 493 (495).

[7] Judgment-debtor-agriculturist, mortgaging house to decree-holder—He is estopped from raising question that house cannot be attached. (Vol 22) 1935 Lah 164 (164).

[8] Even if objection is not taken if Court otherwise becomes cognizant that the property attached was house of agriculturist it would be its duty to withdraw attachment. (Vol 17) 1930 All 727 (729).

[9] Where objection to attachment is raised the exemption will operate unless it is proved that the judgment-debtor is not an agriculturist or that the property does not belong to him. (Vol 23) 1936 Lah 980 (981).

[10] A Civil Court has jurisdiction to determine claims and objections in respect of attachments of standing crops. (Vol 1) 1914 Low Bur 268 (269) : 7 Low Bur Rul 294.

5. Saleable property. — [1] "Property" includes all interests in properties available to judgment-debtor. (Vol 29) 1942 Cal 92 (99) : I L R (1942) 1 Cal 169 * (Vol 24) 1937 All 652 (653) : I L R (1937) All 823. (Preliminary decree in mortgage suit) * (Vol 17) 1930 All 225 (242) : 52 All 619 (F B). (Proprietary interest of a surety in the surplus after discharge of liability of the security.) * (Vol 2) 1915 All 3 (4) : 37 All 72. (Flag used by Pragwals at Allahabad.) * (Vol 26) 1939 Cal 283 (284) : I L R (1938) 2 Cal 618. (Patent rights.) * (Vol 22) 1935 Cal 751 (752). (Preliminary decree for accounts.) * (Vol 16) 1929 Mad 641 (646) : 52 Mad 563 (F B). (Partner's interest in partnership.) * (Vol 8) 1921 Mad 498 (502). (Right to reconveyance.) * (Vol 27) 1940 Pat 107 (108, 109) : 18 Pat 688. (When a right to sue merges in a decree it is no longer a mere right to sue—

Preliminary decree is property.) * (Vol 23) 1936 Pesh 90 (90). (Mere right to grant lease is not property.)

[2] Word "saleable" in S. 60 refers to execution sale and not private sale. (Vol 3) 1916 Cal 175 (175).

[3] Property not liable to be sold cannot be attached. (Vol 25) 1938 Nag 504 (506) : I L R (1940) Nag 261 * (Vol 9) 1922 Mad 197 (198) : 45 Mad 620.

[4] In determining whether under S. 60 particular property is or is not liable to attachment and sale in execution of a decree, S. 4 is to be borne in mind. (Vol 27) 1940 All 24 (26) : I L R (1939) All 901.

[5] Property of judgment-debtor cannot be sold unless he has disposing power over it—The measure of liability to involuntary transfer is the power of voluntary transfer. (Vol 18) 1931 Pat 364 (367) : 10 Pat 582.

[6] Statutory restriction against alienation makes alienation *ab initio* void. Contractual or decretal restriction operates when person entitled to the benefit does not object. (Vol 23) 1936 Oudh 76 (77). (Rights of holder of maintenance grant declared by decree to be heritable but not transferable—In absence of objection by grantor, property held liable to attachment and sale in execution of decree against grantee.)

[7] Property held saleable—Illustrative cases :—

(a) Crown grant containing prohibition against alienation—Creditor can proceed only against profits and not against tenure itself. (Vol 26) 1939 Pat 598 (601) : 18 Pat 370 * (b) Palas for worship of deities—Custom to transfer by private treaty—It can be sold by execution by limiting class of persons entitled to bid and purchase same. (Vol 22) 1935 Pat 181 (182) * (c) Holdings though non-transferable can be sold in execution of money-decree against tenant. (Vol 9) 1922 Pat 19 (20, 21) * (d) Grant by East India Company of village to make permanent provision for grantee and his heirs as compensation for loss sustained owing to resumption of emoluments attached to police services—Grantee entitled to rents and profits but prohibited from alienating village—Village held could not be attached and sold in execution—Only interest attachable and saleable held

Section 60 (contd.)

was right to enjoy rents and profits — (Per *Abdur Rahman and Venkataramana Rao JJ.*; *Burn J. contra.*) (Vol 25) 1938 Mad 623 (625, 628, 631) : I L R (1938) Mad 767. (e) Inam land in a proprietary estate attached to the office of blacksmith is not exempted from attachment and sale in execution of a decree. (1910) 7 Mad L Tim 264 (265). (f) An unenfranchised inam can be attached and sold in execution. (1910) 20 Mad L Jour 88 (89). (g) Partner's interest in partnership is saleable property. (1890) 13 Mad 447 (449). (h) Right of occupier of State land to occupy such land is saleable interest. (Vol 24) 1937 Rang 74 (75, 76) : 14 Rang 619. ((Vol 21) 1934 Rang 263, dissented from.) (i) Equity of redemption can be attached and sold in execution. (Vol 10) 1923 Rang 119 (119, 120) : 4 Upp Bur Rul 132. (j) Grantee's descendants given absolute estate in granted property — Right being heritable and transferable could be attached. (Vol 1) 1914 All 475 (476) : 36 All 318. (k) Vested rights in ancestral property are saleable. (1883) 5 All 430 (434). (l) Shebait's turn of worship which is alienable is capable of attachment. (Vol 20) 1933 Cal 757 (759) : 60 Cal 1351. (m) Permanent lease without condition of immunity from court sale is saleable. (Vol 3) 1916 Cal 175 (175). (n) Standing crops on jagir lands can be attached. (Vol 1) 1914 Cal 765 (765). (o) Share in partnership business can be attached. (1893) 20 Cal 693 (694, 695). (p) Unascertained property capable of being ascertained by measurement and division can be attached. (1887) 14 Cal 241 (244, 245). (q) Kadims' share in offerings of shrine allowed to be sold by custom, is attachable and saleable in execution. (Vol 21) 1934 Lah 57 (58) : 15 Lah 136. (r) Absolute hereditary grant is liable to be attached. (Vol 24) 1937 Nag 248 (249, 250) : I L R (1938) Nag 27. (s) Country liquor or beer brewed within the local limits to which the Excise Act, 1896, applies is not exempt from attachment and sale in execution of a Civil Court decree. (Vol 2) 1915 Nag 21 (24) : I L R L R 67.

[8] Property held not saleable—Illustrative cases :—

(a) Expropriatory and occupancy tenancies—Tenancies exempted from sale in execution of decree of Civil or Revenue Court by S. 23, Agra Tenancy Act — Interest in tenancies is not property which can be attached under S. 60 (1). (Vol 24) 1937 All 389 (390) : I L R (1937) All 542. (Vol 14) 1927 All 779 (779).

(b) Future or unearned salary. (1909) 31 All 804 (307).

(c) Right to manage and receive offerings in a temple. (1882) 4 All 81 (83).

(d) Grant with restriction on alienation to widow. (Vol 24) 1937 Mad 864 (864).

(e) Widow's right to live in portion of family house. (Vol 22) 1935 Mad 848 (848).

(f) Personal inam for public services. (Vol 9) 1922 Mad 197 (198) : 45 Mad 620.

(g) Income of property belonging to a married woman subject to a restraint on anticipation, accruing due after date of decree against such married woman's separate property under S. 8, Married Women's Property Act, is not attachable in execution. (1907) 30 Mad 378 (381).

(h) Hereditary village offices governed by Madras Hereditary Village Offices Act [3 III] of 1895. (1905) 28 Mad 84 (86).

(i) Money deposited as security by servant of a railway company subject to the lien of the company cannot be sold until the same is at the disposal of the judgment-debtor free from the lien. But an attachment can be placed thereon at the instance of the judgment-creditor subject to the lien of the company. (1886) 9 Mad 203 (206).

(j) Melwaram not accrued due cannot be attached. (1894) 4 Mad L Jour 13 (14).

(k) There is only a right to sue with respect to shares in village profit before their accrual and cannot be attached. (Vol 23) 1936 Nag 218 (219, 220).

(l) Service tenures are not attachable. (Vol 16) 1929 Nag 232 (232).

(m) Interest of a Buddhist couple in marriage property is not saleable within S. 60. (Vol 14) 1927 Rang 274 (275) : 5 Rang 478.

(n) Uncertain, future and fluctuating profits. (Vol 16) 1929 Cal 352 (353, 354).

(o) Non-transferable occupancy holding. (Vol 3) 1916 Cal 812 (813).

(p) Doors and window shutters of a pucca building cannot be separately attached apart from the building. (1885) 11 Cal 164 (166).

(q) Homestead in town Comilla is not saleable. (1909) 10 Cal L Jour 110 (112).

(r) Priestly office with emoluments attached to it. (1897) 1 Cal W N 493 (496).

(s) Hindu widow restricted by deed of compromise from having any disposing power — Property cannot be attached. (Vol 10) 1923 Bom 276 (277) : 47 Bom 597.

(t) Non-transferable occupancy is exempt from sale and does not vest in Official Receiver. (Vol 17) 1930 Sind 75 (76).

(u) Groves in possession of judgment-debtor sought to be attached—Groves inalienable according to village custom as recorded in *wajib-ul-arz* — Judgment-debtor having not saleable interest, groves cannot be attached. (Vol 23) 1936 Oudh 235 (235, 236) : 12 Luck 59.

(v) House not saleable according to *wajib-ul-arz* cannot be attached in execution. (Vol 20) 1933 Oudh 79 (80).

(w) Hereditary but non-transferable lease granted by Settlement Court in Oudh is not attachable under money-decree. (Vol 12) 1925 Oudh 702 (704).

6. Proviso to sub-section (1) — General. — [1] Proviso to S. 60 (1) is mandatory and the Courts have no jurisdiction to attach and sell any of the properties mentioned therein. (Vol 22) 1935 Lah 942 (943).

[2] Prohibition is only against forcible attachment—Agriculturist himself mortgaging his house—S. 60 does not apply. (Vol 22) 1935 Lah 164 (164).

[3] Exemptions are cumulative. (Vol 26) 1939 Rang 432 (432) : 1939 Rang L R 504.

[4] Proviso — "Or" is used to include decrees in which no attachment is necessary. (Vol 28) 1941 Pesh 53 (55).

[5] The word "or" in "attachment or sale" in proviso is used in the conjunctive sense as in the sub-clause and therefore properties mentioned therein are neither attachable nor saleable. (Vol 31) 1944 Lah 29 (32) : I L R (1943) Lah 666.

[6] Burden of proof lies on person seeking benefit. (Vol 18) 1931 All 20 (21).

7. Necessary wearing apparel, etc.—Clause (a). — [1] *Thali* and *gagra* are cooking vessels. (Vol 19) 1932 All 344 (345) : 54 All 399.

[2] "Mangala sutra" of a Hindu married woman was held necessary wearing apparel. (1885) 9 Bom 106 (107). (Addition of words "such personal ornaments" etc., was made subsequent to this decision.)

8. Tools of artisans, implements of husbandry, etc.—Clause (b). — [1] An artisan is a person engaged in a mechanical employment. "Artisan" is roughly synonymous with handicraftsman or mechanic. (Vol 30) 1943 Mad 523 (523).

[2] An artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity. (Vol 22) 1935 All 848 (848).

[3] A person will not be an artisan within the meaning of this section unless he employs himself in a handicraft personally and depends for his living essentially on

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the proceeds derived from that handicraft. (Vol 30) 1943 Mad 523 (524).

[4] The question whether the judgment-debtor is an artisan is to be determined with reference to his status and position of affairs at the time of execution. (Vol 28) 1941 All 157 (158) : I L R (1941) All 278.

[5] The expression "tools of artisan" indicates that all the tools used by the artisan are exempt. It cannot be confined to tools necessary for maintenance. (Vol 28) 1941 All 157 (157) : I L R (1941) All 278.

[6] Following have been held to be artisans:—(a) Soap-maker. (Vol 19) 1932 All 344 (345) : 54 All 399 * (b) Village carpenter. (Vol 21) 1934 Nag 260 (260).

[7] Following have been held not to be artisans:—(a) Musicians and washermen. (Vol 29) 1942 Mad 4 (5). (Artisan does not include musician.) * (b) Surgeon or a doctor. (Vol 20) 1933 Lah 936 (936) : 15 Lah 26 * (c) An artist. (Vol 29) 1942 Mad 4 (5).

[8] Following are instances of what have been held to be tools of artisans:—(a) Sewing machine is a tool of an artisan. (Vol 10) 1923 Nag 289 (289) : 19 Nag L R 22 * (Vol 28) 1941 All 157 (157, 158) : I L R (1941) All 278 * (Vol 29) 1942 Mad 4 (4). * (b) Paraphernalia of soap-maker's factory are tools of an artisan. (Vol 19) 1932 All 344 (345) : 54 All 399. * (c) Utensils used by a sweetmeat vendor. (Vol 22) 1935 All 848 (848).

[But see (Vol 30) 1943 Mad 523 (524).]

[9] Following are instances of what have been held to be not tools of artisans:—

(a) Musical instruments are not tools of artisan. (Vol 29) 1942 Mad 4 (5) * (Vol 4) 1917 Upp Bur 4 (4, 5) : 2 Upp Bur Rul 133.

(b) Instruments of a doctor or a surgeon are not tools. (Vol 20) 1933 Lah 936 (936) : 15 Lah 26.

Implements of husbandry.—[10] Implements of husbandry mean such instruments as the agriculturist handles in the course of his agricultural work. Motor tractor is not implement of husbandry. (Vol 26) 1939 Nag 3 (4) : I L R (1939) Nag 355.

[11] Term "implements of husbandry" should be interpreted in a fair and reasonable spirit and not in a narrow sense. Engine or water-pump is implement of husbandry. (Vol 26) 1939 Sind 96 (97) : I L R (1939) Kar 499.

[12] *Charaks, Kadhais* and planks of timber used by an agriculturist for pressing sugarcane grown on his field are implements of husbandry. (Vol 11) 1924 Bom 294 (294, 295).

[13] Press and karah are implements of husbandry. (Vol 15) 1928 Lah 943 (944).

Cattle and seed-grain.—[14] Such cattle and seed-grain, as may, in the Court's opinion, be necessary to enable an agriculturist to make a living are not attachable. Even if the cattle are pledged as a security for a debt, they will not be attached. (1921) 61 Ind Cas 777 (778) (All).

[15] There must be an order of the Court that such cattle and seed-grain are necessary to enable the judgment-debtor to earn his livelihood. The "Court" means the executing Court. (1884) 10 Cal 39 (40) * (Vol 7) 1920 Sind 14 (15) : 13 Sind L R 210. (Question of exemption from attachment of cattle on ground of necessity must be looked into and decided by executing Court.)

[16] Cattle and seed-grain can be attached when the judgment-debtor is able to replace them easily. (Vol 2) 1915 Mad 320 (321).

[17] In a case governed by this section and the Punjab Land Revenue Act, the fodder required for the cattle is exempt from attachment. (1907) 1907 Pun Re No. 82, page 406 (406).

9. Houses of agriculturists, etc.—Clause (c).—

[1] Agriculturist means a person who earns his livelihood wholly or principally by cultivating land either personally or through servants. (Vol 29) 1942 Mad 375 (375) * (Vol 22) 1935 All 448 (448) * (Vol 3) 1916 All 332 (332). (Person owning greater area as a tenant than zamindari land and whose chief occupation and means of livelihood is agriculture.) * (Vol 3) 1916 Cal 891 (891). (Means common agriculturist such as lives in this country.) * (Vol 25) 1938 Lah 72 (72) : I L R (1938) Lah 374 (The term does not mean a mere owner of land.) * (1897) 1897 Pun Re No. 47, page 212 (213). (Does not include mere owner of land.) * (Vol 24) 1937 Mad 551 (553) : I L R (1937) Mad 777 (F B) * (Vol 25) 1938 Nag 366 (369, 370) : I L R (1938) Nag 461 (Agriculture need not be the sole means of livelihood—(Vol 7) 1920 Nag 45 : 16 Nag L R 89 and (Vol 14) 1927 Nag 374 overruled) * (Vol 28) 1941 Oudh 395 (398) * (Vol 20) 1933 Oudh 79 (79) (Patwari is government servant and not agriculturist.) * (Vol 19) 1932 Oudh 76 (76) * (Vol 31) 1944 Pat 272 (273) : 23 Pat 348.

[2] Professed cultivators earning wages from an employer though not owners or tenants of land are agriculturists. (Vol 4) 1917 Bom 253 (253, 254) : 41 Bom 475.

[3] Chief source of livelihood is the test in each case to determine whether a person is an agriculturist. (Vol 18) 1931 Nag 8 (8, 9) : 26 Nag L R 295 (Substantial portion of livelihood by cultivation though some portion also by skilled labour.) * (Vol 18) 1931 All 20 (20, 21). (Main source of livelihood to be agriculture.)

[4] Where chief source of livelihood of a person is not by cultivation he is not an agriculturist though he may also cultivate lands. (Vol 27) 1940 Cal 5 (6) * (Vol 15) 1928 All 211 (213) (A person, both cultivator and zamindar—Whether he can be called agriculturist only if agriculture is his main income is doubtful.) * (Vol 14) 1927 All 601 (603) (Zamindars are not necessarily agriculturists.) * (Vol 4) 1917 All 427 (428) (Chief source of income from zamindari—Person is not an agriculturist.) * (Vol 33) 1946 Lah 267 (268) (Cultivation of insignificant area.) * (Vol 26) 1939 Lah 537 (537) (Person neither tilling soil with his own hands nor maintaining himself mainly on agriculture is not agriculturist.) * (1940) 42 Pun L R 261 (263) (Casual cultivation for one year does not invest the status of agriculturist.) * (Vol 13) 1926 Mad 350 (350, 351) : 49 Mad 227 (Large landed proprietor.) * (Vol 12) 1925 Oudh 365 (365) * (Vol 23) 1936 Pesh 151 (152) (Person living upon trade—Pleasure garden appurtenant to house—Neither house nor garden exempted.)

[5] The question whether a person is an agriculturist turns upon the question of occupation and not so much on the question of the source of income. (Vol 22) 1935 All 292 (292) (Person with different occupation cultivating land with hired labour is not an agriculturist.)

[6] Whether a person is an agriculturist is a question of fact in each case. (Vol 29) 1942 Pesh 65 (66) * (Vol 23) 1936 Lah 532 (533) (Main source of income not proved to be agriculture—Land not situated near house in dispute—Area of land owned not proved—Held not an agriculturist.)

[7] Person claiming benefit under S. 60 (1) (c) must prove he is an agriculturist. (Vol 23) 1941 Oudh 395 (398) * (Vol 14) 1927 All 601 (603, 604) * (1913) 35 All 307 (308) * (Vol 3) 1916 Cal 891 (891) * (1941) I L R (1941) Lah 441 (444) * (Vol 15) 1928 Lah 132 (133).

[8] Owner of land letting it reserving money or produce is not an agriculturist. (Vol 25) 1938 Nag 366

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(369, 370) : I L R (1938) Nag 461 [(Vol 7) 1920 Nag 45 and (Vol 14) 1927 Nag 374 overruled.]

[See however (Vol 29) 1942 Cal 425 (425) (Occupancy raiyat letting out lands and living on such income and having no other income held agriculturist.)]

[9] Where a person has tilled his land for years, his temporary letting out of the land does not destroy his status as an agriculturist. (Vol 17) 1930 Lah 191 (191).

[10] Obtaining permission for building houses on occupancy land does not make a person non-agriculturist. (Vol 19) 1932 All 499 (499).

[11] Turning Akali does mean to cease to be an agriculturist. (Vol 12) 1925 Lah 331 (331).

[12] The house of an agriculturist occupied by him is exempt from both attachment and sale. (Vol 25) 1938 All 85 (86) (Where person deriving income mainly from non-agricultural source loses it before attachment he gets the benefit of the section.) * (Vol 4) 1917 All 10 (11) : 39 All 120 * (Vol 20) 1933 Nag 80 (81) : 29 Nag L R 106 (Though a portion of the house is enough for agricultural purposes.) * (Vol 15) 1928 Nag 23 (24) (One of judgment-debtors agriculturist—House belonging in common to all is protected.)

[13] "Occupation" in cl. (c) does not necessarily mean "residence" only. (Vol 14) 1927 All 214 (214) * (Vol 3) 1916 All 332 (332) (House used for keeping agricultural implements.) * (Vol 32) 1945 Mad 276 (276) (Residential house of agriculturist does not lose the exemption merely because he has a shed on the land where he stores his implements. Actual use for agricultural purpose is not necessary in such a case.)

[14] Occupation must be in good faith and for purposes of agriculture. (Vol 20) 1933 Rang 227 (228) : 11 Rang 372 (F B) ((Vol 17) 1930 Rang 129 : 7 Rang 766 overruled.)

[15] House of agriculturist insolvent does not vest in Official Receiver—He cannot therefore sell it. (Vol 20) 1933 Lah 1010 (1010).

[16] Co-operative Societies Act, S. 44 — C. P. Land Revenue Act, S. 128—Agriculturist's house is not exempt from sale for debts due to the society. (Vol 14) 1927 Nag 217 (218) : 23 Nag L R 66.

[17] Exemption from attachment depends upon the legal representative also occupying the house as an agriculturist. (Vol 19) 1932 All 508 (508) : 54 All 786 * (Vol 15) 1928 All 211 (212) (They need not prove that it was so occupied by their deceased father.)

[See however (Vol 30) 1943 Lah 19 (21, 22) : I L R (1943) Lah 242 (F B) * (Vol 27) 1940 Lah 320 (320) : I L R (1941) Lah 588 [(Vol 26) 1939 Lah 556 affirmed.] * (Vol 25) 1938 Lah 608 (609).

[18] Agriculturist mortgaging house by usufructuary mortgage and staying in half house as tenant of mortgagee — He cannot be said to be in "occupation" of house within meaning of cl. (c). (Vol 23) 1936 Oudh 155 (156) * (Vol 27) 1940 Lah 126 (128).

[See however (Vol 25) 1938 Lah 736 (737).]

[19] For exemption under S. 60 (1) (c) house must be occupied by agriculturist for purposes of agriculture — Onns — Parcha Khatauni is not sufficient to prove that objector occupies house as agriculturist. (Vol 29) 1942 Oudh 308 (309) * (Vol 24) 1937 Lah 200 (201) * (Vol 22) 1935 Lah 894 (895) (Mere fact that he has residential house and open sites does not deprive him of the exemption.) * (Vol 22) 1935 Nag 59 (60) * (Vol 6) 1919 Nag 54 (54, 55) : 15 Nag L R 83 (Requirements as agriculturist must be judged with reference to the possibility of his cultivating whole area himself.) * (Vol 28) 1941 Pesh 68 (69) (While occupying residential house agriculturist need not put it to some agricultural use.) * S. 60 (1) (c). * (Vol 23) 1936 Rang 215

(215, 216) (Housing cattle, implements, seeds and labourers is occupation for agricultural purposes.)

[20] The house need not be a dwelling house also. It is enough if it is occupied or used for agricultural purposes. (Vol 6) 1919 Nag 54 (54, 55) : 15 Nag L R 89 * (1909) 1909 Pun Re No. 65, page 214 (215) (Unused *khurli* house is attachable.)

[21] Town house of an agriculturist not put to use for agricultural purposes is not exempt from attachment. (Vol 22) 1935 Pat 496 (497) * (Vol 5) 1918 All 250 (251) (House in town belonging to agricultural family.) * (1905) 7 Bom L R 685 (686) (Residential house in town.) * (Vol 13) 1926 Lah 230 (230) (Town house when used for agricultural purpose is exempt.) * (Vol 17) 1930 Rang 129 (129) : 7 Rang 766 (Agriculturist's house occupied by him in village and his hut in field are both exempted.)

[22] House used as a liquor shop is not exempt from attachment. (Vol 21) 1934 Lah 614 (615).

[23] House in ruins is not exempt. (Vol 14) 1927 All 214 (214).

[24] The phrase "houses and other buildings" does not include a vacant site used for storing manure and fodder. (Vol 4) 1917 Lah 21 (22).

[25] Lack of intention on the part of the owner to rebuild must be proved before attachment can be had. (Vol 15) 1928 Nag 23 (23, 24).

[26] Property which is not necessary for agricultural purposes is not exempt. (Vol 21) 1934 Lah 168 (168) (Two houses one of which is sufficient for tying cattle and storing fodder—Other not necessary for agriculture.)

[27] Section 60 (1) does not apply to mortgage decree — House belonging to agriculturist is not exempt under S. 60 (1) proviso (c) in execution of decree based on mortgage of that house. (Vol 32) 1945 Lah 123 (124) : I L R (1945) Lah 373 (F B) * (Vol 5) 1918 All 250 (251) (House not appurtenant to holding is liable to be sold in execution of decree.) * (1912) 34 All 25 (27) (F B) * (1880) 4 Bom 25 (26).

[See however (Vol 28) 1941 Pesh 53 (56).]

[28] House of agriculturist, appurtenant to his agricultural holding, is not liable to sale in execution of decree as it is not transferable by law. (Vol 6) 1919 All 222 (223) * (1911) 33 All 186 (188).

[29] Where an ancestral house is sold in execution of a decree against a Hindu father the objection having been dismissed for default the sale is binding on the sons also. (Vol 26) 1939 All 399 (400) : I L R (1939) All 602 (F B) [(Vol 17) 1930 All 727 (729) overruled.]

[30] "Panchotra" money in not covered by the section. (Vol 11) 1924 Lah 226 (227).

Punjab Amendment. — This section has been amended by S. 35, Punjab Relief of Indebtedness Act, 7 [VII] of 1934 (as amended by Punjab Acts 12 [XII] of 1940 and 6 [VI] of 1942). Following are decisions bearing on the amended portion :—

[31] Words "belonging to agriculturist" qualify "open spaces or enclosures" — Section 60 (1) (cc) exempts milch animals whether belonging to agriculturist or not. (Vol 29) 1942 Lah 88 (89).

[32] Section 60 (1) (ccc) is not retrospective — It does not apply to attachment or sale effected before it came into force — Fact that sale was not confirmed is immaterial. (Vol 29) 1942 Lah 102 (103) : I L R (1942) Lah 849 (F B).

[33] Judgment-debtor's house lent to and occupied by his sons who are independent proprietors living apart held not exempt from attachment. (Vol 26) 1939 Lah 50 (51).

[34] The effect of the amendment of S. 60 by the Punjab Act 7 [VII] of 1934, is that if the house is reserved for the personal occupation of the judgment-debtor then it is saleable only if it has remained un-

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occupied for more than one year. (Vol 24) 1937 Lah 100 (101).

[35] Section 60 (1) (ccc) as amended by Punjab Act 6 [VI] of 1942 is not retrospective. Objection to saleability of property attached before amendment is not sustainable. (Vol 31) 1944 Lah 29 (31) : I L R (1943) Lah 666.

[36] Property validly and legally vested in Official Receiver in 1933 — Amendment coming into force in 1935 does not divest him of such property — Succession opening out long after vesting of property — Legal representatives can claim no exemption. (Vol 25) 1938 Lah 459 (460).

10. Right to sue for damages — Clause (e).—[1] Right to claim compensation cannot be attached in execution. (Vol 22) 1935 Nag 185 (137); 31 Nag L R 235* (Vol 6) 1919 Mad 864 (864). (Right of mulgani tenant in south Kanara to compensation for improvements.)

11. Right of personal service—Clause (f).—[1] Right of personal service cannot be attached and sold in execution. (Vol 23) 1936 Pat 10 (10, 11).

[2] Following are illustrations of rights of personal service:—

(a) Vritti. (1899) 23 Bom 131 (135)* (1888) 12 Bom 366 (367, 368) (Joshi vritti.)

(b) Office of Maha-brahman or Birtacharji. (Vol 6) 1919 All 208 (208); 41 All 656 * (1871) 16 Suth W R 171 (171) (Birt Maha-brahmani.)

(c) Birt jijmani. (Vol 5) 1918 All 380 (380).

(d) Offerings at temples is personal property of the Begali (priest). (Vol 4) 1917 Lah 363 (363).

[See (Vol 23) 1936 All 131 (134) : 58 All 457 (Where right to receive offerings at a temple is independent of the obligation to render service of a personal nature the right to offerings can be attached.)]

(e) Right of gangaputra to receive offerings. (Vol 16) 1929 Oudh 444 (445, 447) : 5 Luck 206.

(f) Money due to firm of managing agents from company. (Vol 28) 1941 Cal 240 (241).

(g) Jatribahi of Gayawal. (Vol 9) 1922 Pat 556 (556): 1 Pat 619.

[3] A priest's share of net balance in the offering to an idol can be attached and sold. (Vol 14) 1927 Bom 145 (144).

12. Stipends and gratuities allowed to pensioners—Clause (g).—[1] "Pension" in S. 60 has the same meaning as in S. 11 of Pensions Act (23 [XXIII] of 1871). (Vol 1) 1914 Cal 765 (766).

[But see (Vol 24) 1937 Lah 178 (179) : I L R (1937) Lah 415.]

[2] Pension implies periodical payment by Government. (Vol 18) 1931 P C 160 (161) : 59 Cal 1 : 58 Ind App 215 (P C).

[3] The word pension denotes money payable otherwise than in respect of a right, privilege, perquisite or office. (1880) 4 Bom 432 (436) (SB).

[4] 'Pension' must be distinguished from money grants and land revenue grants. (1880) 4 Bom 432 (436) (SB).

[5] The word "political pension" is a general term and it is not necessary that it should be paid out of the revenues of the British Government so long as the payment is made by the government through its treasury. (Vol 14) 1927 Mad 604 (606) : 50 Mad 711.

[6] Following are illustrations of what are pensions:—

(a) Toda Giras allowance. (1909) 33 Bom 268 (262). [But see (1880) 4 Bom 432 (436) (SB) (Toda Giras Haq is not a pension.)]

(b) Malikhana allowance. (1911) 8 All L Jour 1326 (1326).

(c) Jagirs of land revenue or cash allowance or other dues recoverable by government may be political pensions. (Vol 24) 1937 Lah 211 (214).

(d) Assignment of land revenue in lieu of relinquishment of sovereign rights and for securing alliance and

good will is pension. (Vol 24) 1937 Lah 178 (179) : I L R (1937) Lah 415.

(e) Allowance in the nature of remission of land revenue or assignment of land revenue for political reasons. (Vol 24) 1937 Lah 178 (179); I L R (1937) Lah 415.

(f) Jagirs in Ambala as compensation to dethroned princes. (Vol 21) 1934 Lah 881 (881); 36 Cri L Jour 440.

(g) Yeomiah allowance. (1870) 5 Mad H C R 371 (372).

(h) Carnatic stipend. (1869) 4 Mad H C R 277 (279).

(i) Stipends to Mysore family. (1867) 7 Suth W R 169 (169).

(j) Wasika allowance. (1909) 12 Oudh Cas 323 (329, 330) * (Vol 6) 1919 Oudh 252 (252) : 21 Oudh Cas 329 (Arrears of wasika allowance.)

(k) Remuneration to inamdar for services rendered — Inamdar alienee of revenue and not soil. (Vol 30) 1943 Bom 258 (259).

[7] Following are illustrations of what are not pensions:

[a] Rent free grant to Deshmuk confirmed by British Government on condition of rendering loyal service — Lands described as Vritti and occupants as Malik makbuza muafidar Sarkar—*Held* not a pension. (Vol 25) 1938 Nag 269 (270, 271, 272) : I L R (1939) Nag 679 * (Vol 24) 1937 Nag 202 (203). (Deshpandia allowance.)

[b] Shares given to members of family of grantee out of increased revenue "as an act of grace" under Government's direction is not a pension. (1902) 1902 All W N 161 (162).

[c] Grant of land revenue. (Vol 7) 1920 Mad 148 (149).

[d] Heritable revenue free Jaghir is not a political pension. (Vol 4) 1917 P C 94 (95) (P C).

[e] Jaghir not burdened with service attachable. (Vol 19) 1932 Mad 417 (417).

[f] Zemindari movrasi holding substituted for a political pension and held by heirs of grantee as zemindari holding. (1909) 31 All 382 (385, 386).

[8] Pension is ordinarily not attachable — Onus of proving exception is on decree-holder. (Vol 9) 1922 All 429 (429) : 44 All 697.

[9] Pension after actual receipt by the pensioner is liable to attachment. (1909) 12 Oudh Cas 323 (327).

[10] Commutation of pension is not stipend — At least it ceases to be so after amount is paid to pensioner. (Vol 29) 1942 Sind 19 (20) : I L R (1941) Kar 479.

[11] Gratuities allowed to ex-Government servants as pensioners are exempt from attachment. (1884) 6 All 173 (174).

[12] Gratuity being a gift given by Railway company is not attachable whether in the hands of the judgment-debtor or his heirs. (Vol 10) 1923 Oudh 21 (22) : 26 Oudh Cas 53.

[13] Gratuity payable by University can be attached. (Vol 11) 1924 Lah 688 (688, 689).

[14] Where the trial Court has decided upon the saleability of pension the executing Court cannot question it. (Vol 12) 1925 All 652 (652, 653) : 47 All 900.

13. Wages of labourers — Clause (h).—[1] Cotton spinners getting remuneration on the quantity spun are labourers. (1881) 5 Bom 132 (134) * (Vol 33) 1946 Bom 102 (104) (Clerk in mill doing no manual labour is not labourer or domestic servant.) * (Vol 29) 1942 Bom 191 (192) : I L R (1942) Bom 287 (Jobber required to do personal manual labour is labourer.)

[2] Bonus payable on the nature of work and number of days worked is wages. (Vol 32) 1945 Bom 119 (122) : I L R (1945) Bom 46.

[3] The wages of labourers and domestic servants were held to be wholly exempt from attachment even under the section as it stood before its amendment in 1943. (Vol 29) 1942 Pat 194 (194) : 20 Pat 866 * (Vol 29) 1942 Bom 191 (193) : I L R (1942) Bom 287.

14. Salary—Clause (i).—[1] Salary up to Rs. 100 and

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half the remainder and also independently of it, amount of provident fund is exempted. (Vol 27) 1940 Mad 766 (768).

[2] Recurring contributions of the judgment-debtor to the provident fund must fall on that moiety of excess of salary over the first hundred rupees which is not already reserved for the judgment-debtor by cl. (i). (Vol 28) 1941 Pat 157 (159).

[But see (Vol 31) 1944 Cal 135 (137, 138) : I L R (1944) 2 Cal 187.]

[3] Recoveries of advances from provident fund cannot be deducted from attachable income. (Vol 27) 1940 Mad 766 (767).

[4] Section 60 prohibits only forcible attachment of salary and judgment-debtor can waive privilege. (Vol 27) 1940 Lah 65 (65).

[But see (Vol 31) 1944 Lah 168 (168). (Salary of postal employee does not by his consent become attachable.)]

[5] Salary — Order of alimony under S. 37, Divorce Act — Person proceeded against is entitled to protection under S. 60 (1) (i). (Vol 30) 1943 Nag 1 (2, 3) : I L R (1943) Nag 1.

[6] Protection given to the private employees under the Amending Act of 1937 is not applicable to proceedings started prior to the passing of the amending Act. This position is not affected by the repeal of the amending Act of 1937 by Act 5 [V] of 1943. (Vol 33) 1946 Bom 102 (104).

[7] A conditional order directing an insolvent to pay fixed amount monthly out of his salary as a condition precedent to his being adjudged insolvent is illegal by virtue of the provisions of this section. Proper course would be to take steps against insolvent under S. 69. (Vol 17) 1930 Pat 326 (326) : 9 Pat 304.

15. Salary of army officers. — [1] Indian Army Act applies only to Indian officers and other persons specified in S. 2 of that Act. (Vol 9) 1922 All 122 (124) : 23 Cri L Jour 241.

[2] There was a conflict of opinion amongst the different High Courts as to whether the pay of an officer of His Majesty's regular forces serving in India could be attached in view of S. 60 (2) (b), and S. 136 of the English Army Act, 1881. By Act 10 [X] of 1914, sub-s. (2) (b) was repealed and now the section becomes clearly applicable to such cases and the salary of a British officer in the Indian Regiment can be attached. (Vol 4) 1917 All 315 (316) : 39 All 308 * (Vol 5) 1918 Bom 32 (38) : 43 Bom 716.

[3] Pay of soldier in regular forces governed by Army Act is not liable to attachment. (Vol 25) 1938 Sind 237 (239) : I L R (1939) Kar 160 * (Vol 24) 1937 All 129 (138) : I L R (1937) All 350 (FB) (Pay of Assistant Surgeon in Indian medical service.) * (Vol 21) 1934 Bom 31 (32) (Pay of staff sergeant.) * (Vol 20) 1933 Bom 185 (185) (Pay of First Class Warrant Officer.) * (Vol 5) 1918 Upp Bur 39 (40) : 3 Upp Bur Rul 20 (Pay of non-commissioned officer.)

[See (Vol 20) 1933 All 597 (600) : 55 All 643 ("Soldier" if he comes within the meaning of the word "public officer" within the meaning S. 2 (17) his salary is not attachable. Otherwise it is attachable.)]

[4] Where deduction for meeting the claim has been ordered by the Commander-in-Chief under S. 145, English Army Act, Civil P. C. has no application and Civil Court cannot interfere. (Vol 6) 1919 Bom 133 (134) : 43 Bom 368.

[5] There is fundamental distinction between deduction and attachment. The former is made by army authorities in their discretion while attachment is legal process and army authorities have no discretion but are bound to obey orders of Court. (Vol 24) 1937 All 129 (132) : I L R (1937) All 350 (F B).

16. Salary — Meaning of. — [1] Emoluments

as pay are "salary." (Vol 26) 1939 Rang 432 (432) : 1939 Rang L R 504.

[2] Salary mentioned in Cl. (i) does not necessarily mean the net salary. (Vol 28) 1941 Pat 157 (159).

[3] The scope of Cl. (i) cannot be restricted by saying that salary mentioned in Cl. (i) refers to the salary of one who is entitled to get allowances mentioned in Cl. (h). (Vol 26) 1939 Pat 77 (80) : 17 Pat 706.

[4] Allowances of Railway Guard can be taken into account in determining salary attachable. (Vol 27) 1940 Mad 766 (767).

[5] Percentage received by 'khot' for collecting assessment on Dhara lands is not salary. (1889) 13 Bom 673 (674).

[6] Profits accruing to ghatwal is not salary. (Vol 26) 1939 Pat 242 (244).

[7] In a case to which the provisions of the Amending Act 9 [IX] of 1937 did not apply it was held that the daily fee of an advocate engaged by the Government was salary. In view of the amendment it will not be "salary" now. (Vol 26) 1939 Pat 77 (80) : 17 Pat 706.

17. Pay of persons to whom Indian Army Act of 1911 applies — Clause (j). — [1] Pay of persons subject to the Indian Army Act of 1911 is not attachable in view of S. 120 of that Act—For case law see Note 15.

18. Compulsory deposits—Clause (k). — [1] Provident fund is not attachable. (Vol 21) 1934 Lah 153 (154) : 36 Cri L Jour 217 * (Vol 30) 1943 Bom 453 (454, 455) (The fact that it is credited to deceased employee will not make it liable.) * (Vol 10) 1923 Cal 585 (586) : 50 Cal 347 (Railway Provident Fund.) * (Vol 23) 1936 Lah 694 (695) (Provident fund of the Imperial Bank.) * (Vol 24) 1937 Pat 22 (23) : 15 Pat 779 (Compulsory deposit in Government or Railway provident fund.) * (Vol 28) 1941 Rang 256 (258, 259) [(Vol 28) 1941 Rang 239 (240) not approved.] * (Vol 20) 1933 Rang 23 (24) : 11 Rang 116 (F B) (Sum standing to the credit of a deceased judgment-debtor in benefit scheme of a private company is not attachable.)

[2] Deposit by optional subscriber also is a compulsory deposit. (Vol 11) 1924 Pat 524 (525) : 3 Pat 74 * (Vol 31) 1944 Cal 135 (137) : I L R (1944) 2 Cal 187 (*Obiter.*)

[3] Deposit in provident fund does not lose its compulsory nature on the retirement of the subscriber. (1905) 29 Bom 259 (263) * (Vol 16) 1929 All 417 (418, 419) : 51 All 845.

[But see (1903) 5 Bom L R 454 (458) (Fund can be attached after retirement.) * (Vol 9) 1922 Cal 196 (197).]

[4] Once the fund is paid to the person entitled, it ceases to be exempt from attachment. (Vol 11) 1924 All 68 (68) : 45 All 554 * (Vol 22) 1935 Bom 396 (397) : 59 Bom 517 * (Vol 14) 1927 Oudh 22 (23) : 1 Luck 313 * (Vol 24) 1937 Pat 22 (25) : 15 Pat 779.

[5] Post office is agent of judgment-debtor and provident fund money transmitted through post office can be attached. (Vol 3) 1916 All 336 (336, 337).

[6] Deposit in a provident fund can be attached but not sold till it is at the disposal of the judgment-debtor. (Vol 29) 1942 Sind 47 (49) : I L R (1941) Kar 401.

19. Allowances of public officers — Clause (l). — [1] Notification No. 1489 D/43 dated 29-4-1943—Dearness allowance of private employee is not exempt. (Vol 33) 1946 Bom 102 (103, 104).

20. Mere expectancy or other contingent or possible interest—Clause (m). — [1] An expectancy of succession by survivorship or other merely contingent or possible right or interest cannot be attached in execution. (Vol 26) 1939 P C 6 (7) : I L R (1939) Bom 36 : 32 Sind L R 963 (P C).

[2] Following are illustrations of what are contingent and possible interests or expectancy and what are not.

Section 60 (*contd.*)(A) *Interests which are contingent —*

[a] Children's interest under a will which operates upon the death of parents. (Vol 26) 1939 P C 6 (7) : I L R (1939) Bom 36 : 32 Sind L R 963 (P C) ((Vol 23) 1936 Sind 65 (66) : 30 Sind L R 50 affirmed.)

[b] Right of son in the self-acquired property of the testator which has been devised to the widow without express powers of alienation. (1898) 22 Bom 984 (985).

[c] Future rent and profits receivable by ghatwal. (1901) 28 Cal 483 (485).

[d] Future offerings or bhog to deity. (Vol 7) 1920 Pat 651 (651).

[e] A sum of money in which there is only a future interest. (1881) 3 All 12 (14).

[f] Son's right to succeed by survivorship to father's specific share of property. (1867) 8 Suth W R 253 (254).

[g] Possible right of judgment-debtor is not liable to attachment. (Vol 18) 1931 Oudh 398 (399).

(B) *Interests which are not contingent —*

[i] Interest of coparcener in joint family property. (Vol 29) 1942 Mad 97 (99).

[ii] Present gift with payment postponed. (Vol 18) 1926 Mad 371 (373).

[iii] Reversionary interest of widow after alienation of life estate. (Vol 3) 1916 Mad 347 (350) : 39 Mad 565.

[iv] Right of the husband of predeceased daughter in the estate granted for life to the widow with directions to vest absolutely in daughter after the death of the widow. (Vol 23) 1936 Cal 802 (803) : I L R (1937) 1 Cal 583.

[v] Interest of settlor of life interest for widow in lieu of maintenance. (1888) 10 All 462 (465, 466).

[vi] Interest of judgment-debtor in surplus amount lying in Court after confirmation of sale. (Vol 24) 1937 Nag 391 (392, 393) : I L R (1938) Nag 402.

[vii] Gift to grand-daughters under will. (Vol 30) 1943 P C 121 (123, 124) : I L R (1943) Kar P C 117 (P C).

[viii] Residuary legatee's interest. (Vol 18) 1931 Pat 76 (76).

21. Right to future maintenance—Clause (n).—

[1] Clause (n) contemplates personal and not heritable right to future maintenance. (Vol 29) 1942 Oudh 410 (411) : 18 Luck 147.

[2] "Right to maintenance" contemplates bare right to maintenance. (Vol 8) 1921 All 120 (121) : 43 All 617.

[3] Right to future maintenance in S. 60 (1) (n) means right of person to receive from another boarding, lodging, clothing and other necessities of life. (Vol 22) 1935 Mad 815 (815).

[4] Rule in S. 60 (1) (n) merely states that only present rights can be dealt with as property and not future rights which have not accrued. (Vol 24) 1937 Nag 202 (203) * (1865) 3 Suth W R 16 (16) * (Vol 4) 1917 Mad 79 (82) : 40 Mad 302 * (1910) 20 Mad L Jour 97 (98).

[5] Following are illustrations of attachable rights :

[a] Commuted right of maintenance where it did not exist independently of the contract. (Vol 22) 1935 Mad 815 (815).

[b] Property in lieu of maintenance with prohibition against alienation. (Vol 3) 1916 Mad 833 (833, 834).

[c] Hereditary right to an allowance. (1907) 30 Mad 279 (280).

[d] Property granted to a member of Malabar tarwad. (Vol 3) 1916 Mad 833 (833, 834).

[e] Produce on land granted in lieu of maintenance. (1912) 22 Mad L Jour 204 (206).

[f] Right of real owners who were entitled to receive

an allowance from the person in possession of their property under award. (Vol 12) 1925 All 297 (298).

[g] Vested rights to rents in inam lands given in lieu of maintenance. (Vol 24) 1937 Nag 202 (203).

[h] Heritable annuity granted by will. (Vol 8) 1921 Oudh 164 (165) : 24 Oudh Cas 250.

[i] Monthly allowance to father the payment of which was made a specific charge on the estate. (1912) 16 Cal L Jour 354 (357, 359, 360).

[j] Annuity under a will. (1906) 10 Cal W N 1102 (1104).

[k] Heritable right to allowance. (1884) 10 Cal 521 (522).

[l] Order of Criminal Court allowing arrears of maintenance — Creating only personal right. (Vol 22) 1935 Cal 578 (579, 580) : 62 Cal 404.

[m] Annuity in lieu of share in estate. (Vol 23) 1936 Lah 55 (58) : 17 Lah 378.

[n] Annuity under will. (Vol 22) 1935 Lah 811 (812).

[o] Maintenance decree for arrears. (Vol 21) 1934 Nag 83 (83).

[6] Following are illustrations of non-attachable rights:

[i] Specific shares of profits from impartible estate allotted to junior members. (Vol 22) 1935 Nag 133 (135) : 31 Nag L R 239.

[ii] Rights and interests made over to a Hindu widow. (1893) 15 All 371 (372).

[iii] Proceeds of the sale in execution of property under charge for future maintenance. (Vol 22) 1935 Sind 21 (22).

[iv] Sum reserved in will as "pocket money." (Vol 23) 1936 Lah 944 (945, 946).

[v] Property assigned for common enjoyment by the females of a zamindari family. (Vol 4) 1917 Mad 624 (624).

[vi] Land in lieu of maintenance with prohibition against alienation. (1905) 15 Mad L Jour 7 (9) * (1886) 10 Bom 342 (345).

[vii] Maintenance allowance by father to daughter. (1910) 12 Cal L Jour 146 (150, 159).

[7] Although the right of maintenance is not attachable and saleable, yet in a fitting case a Receiver may be appointed for realising the rents and profits of the property. (Vol 12) 1925 P C 176 (176) : 47 All 335 : 52 I A 282 (P C) * (Vol 29) 1942 Oudh 410 (412) : 18 Luck 147.

[8] Order appointing receiver to collect future maintenance is order for attachment. (Vol 20) 1933 Bom 350 (351) : 57 Bom 507.

22. Moveable property—Exemption—Clause (p).

[1] Section 60 (p) applies only to moveable property. (Vol 22) 1935 Pesh 113 (114).

23. Sub-section (2).—[1] Section 60 (1) Proviso as amended by Punjab Act 12 [XII] of 1940 does not apply to mortgages of houses annulled by Court before amendment was passed. (Vol 30) 1943 Lah 19 (22) : I L R (1943) Lah 242 (F B).

24. Waiver. — [1] Protection of S. 60 Proviso (i) cannot be waived. (Vol 30) 1943 Lah 268 (274) : I L R (1944) Lah 379 (F B) [(Vol 20) 1933 Lah 251; (Vol 26) 1939 Lah 316 ; (Vol 26) 1939 Lah 539 and (Vol 27) 1940 Lah 65 overruled.] * (Vol 28) 1941 Bom 389 (392) : I L R (1941) Bom 415 * (Vol 29) 1942 Mad 391 (392) : I L R (1942) Mad 640.

[But see (Vol 7) 1920 Cal 424 (425) * (Vol 25) 1933 Nag 544 (544) * (Vol 14) 1927 Pat 233 (233) : 6 Pat 254.]

[2] In Punjab under the amendment of the section by S. 35 of the Punjab Relief of Indebtedness Act (7 [VII] of 1934) an express sub-section sub-s. (3) has been added to the effect that an agreement by which the debtor waives any exemption under this section shall be void.

61. The ^a[Provincial Government] ^b[* * *] may, by general or special order published in the *Partial exemption of agricultural produce.* ^c[Official Gazette], declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the ^a[Provincial Government] to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council", were *repealed* by the Devolution Act, 1920, (38 [XXXVIII] of 1920), S. 2 and Sch., Part I. [c] *Substituted* by A. O. for "Local Official Gazette".

Objects and Reasons.

"*Clause 61.*—The words 'be exempted from liability to attachment or sale in execution of a decree' have been substituted for the words 'be released from attachment

and shall be free from liability to sale in execution of a decree' in order to make it clear that the exemption extends to produce which has been hypothecated." — S. C. R.

62. (1) No person executing any process under this Code directing or authorizing seizure of *Seizure of property in dwelling-house.* moveable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

[1882, S. 271, 1877, S. 271. See O. 21, R. 43.]

Objects and Reasons.

"*Clause 62.* — The Committee have inserted a new provision to authorise the breaking open of the outer door of a judgment-debtor's house. They do not think

that it would be safe to extend the operation of this provision to the house of a stranger." — S. O. R.

"*Clause 62* has been brought into line with clause 55 as now amended." — S. C. R.

63. (1) Where property not in the custody of any Court is under attachment in execution of *Property attached in execution of decrees of several Courts.* decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

[1882, S. 285; 1877, S. 285. See Order 21.]

Section 61 — Note 1.

As to the method of attachment of agricultural produce and the custody thereof after attachment, see O. 21, Rr. 44 and 45.

Section 62 — Note 1.

[1] Judge ordering process-server to break open the lock if he found it lawful to do so is very strange order. (Vol 18) 1981 Oudh 311 (311).

[2] A bailiff has authority to break open the door of a shop in order to execute a writ of attachment. (1878-79) 3 Bom 89 (90).

[3] Outer door closed — House opened by persons by getting over roof — Subsequent attachment of moveables by aamin after entry not invalid. (Vol 2) 1915 Mad 320 (321).

[4] Zenana quarters need not be in possession of judgment-debtor — It is enough if decree-holder considers that there may be property of judgment-debtor. (Vol 22) 1938 All 490 (492) : 36 Cri L Jour 545.

[5] Accused going with bailiff to execute distress warrant — Judgment-debtor not present at his house but his wife, pardanashin lady, in house — Latter trying to shut door — Accused pushing door violently — Woman falling down unconscious in great pain — Accused is guilty. (Vol 21) 1934 Sind 52 (53) : 34 Cri L Jour 963.

[6] Attaching creditor will be liable in damages to the third person injured by unlawful attachment, though he may have acted *bona fide* and without malice. (1878-79) 3 Bom 74 (83).

SECTION 63 — SYNOPSIS.

1. Appeal.
2. Applicability and scope.
3. Claim or objection.
4. Court of highest grade.
5. Effect of non-compliance with sub-s, (1) — Sub-s, (2).

64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation. — For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

[1882, S. 276 ; 1877, S. 276 ; 1859, S. 240. See O. 21, R. 58.]

Objects and Reasons.

"*Clause 64.* — An explanation has been added to make it clear that claims within the protection of this

clause include claims for rateable distribution of assets." — S. O. R.

Section 63 (contd.)

6. Procedure where inferior Court sells property.

7. Rateable distribution—See S. 73.

1. Appeal.—[1] Attachment of property both by subordinate Court and District Court — Application for sale made to subordinate Court dismissed having regard to S. 63—Appeal lies. (Vol 4) 1917 Cal 182 (182).

2. Applicability and scope.—[1] Object of section is to prevent different claims arising out of attachment and sale of same property by different Courts. (Vol 33) 1946 Nag 170 (172) : I L R (1946) Nag 400.

[1a] Object of section is to prevent confusion in execution of decree. (Vol 8) 1921 Pat 140 (141) * (1898) 25 Cal 46 (48).

[2] When the rival decree-holders have not attached any of the properties belonging to the judgment-debtor, they cannot invoke the provisions of S. 63. ILR (1939) 1 Cal 488 (492).

[3] Section does not apply when attachment by Court of superior jurisdiction is void. (Vol 33) 1946 Nag 170 (172) : I L R (1946) Nag 400.

[4] A person who has obtained an attachment before judgment can avail himself of S. 63, Civil P. C., till some order has been passed by the Court upon his application for execution. (Vol 23) 1936 Mad 91 (93) : 59 Mad 303.

[5] Section 63 does not apply where property is attached by a civil and also a revenue Court. (Vol 8) 1921 All 142 (143) : 43 All 612.

[6] Section 63 cannot be controlled by S. 38. (Vol 26) 1939 Mad 169 (170) : I L R (1939) Mad 248 (Decree of Court of lower grade called up under S. 63 by Court of highest grade — Latter Court has jurisdiction to sell attached property.)

[7] Decrees passed by same Court—S. 63 still applies. (Vol 23) 1936 Mad 797 (799) : 59 Mad 1023.

3. Claim or objection. — [1] Section 63 contemplates only such claims as can be summarily enquired into. (1910) 11 Cal L Jour 69 (77).

[2] Words 'any claim' in S. 63 include claim for rateable distribution under S. 73. (Vol 24) 1937 Nag 80 (82) : I L R (1937) Nag 219.

4. Court of highest grade.—[1] "Grade" of the Court depends upon the pecuniary or other limitations of the jurisdiction of the particular Court. (Vol 18) 1931 Nag 127 (127).

[2] District Court is of higher grade than Subordinate Court. (1909) 1 Ind Cas 78 (78) (All).

[3] Small Cause Court having higher pecuniary jurisdiction than Additional Small Cause Court is a Court of higher grade within the meaning of S. 63, Civil P. C. (Vol 23) 1936 Nag 270 (270): I L R (1937) Nag 122.

[4] The Court of a Munsif must be regarded as a Court of higher grade than a Court of Small Causes. (1894) 16 All 11 (19) (F B).

5. Effect of non-compliance with sub-s. (1)—Sub-s. (2)—[1] "Proceeding" includes sale or order allowing set-off against purchase-money. (Vol 18) 1931 Bom 350 (353) : 55 Bom 473.

[2] Sale held by lower Court when it ought to have been held by higher Court — Sale not invalid and it is incumbent on higher Court to accept it. (Vol 23) 1936 Mad 797 (798) : 59 Mad 1023* (1895) 19 Bom 127 (129) * (Vol 11) 1924 Mad 889 (890) * (Vol 5) 1918 Mad 663 (664)* (Vol 4) 1917 Mad 602 (605).

[See (1894) 18 Bom 458 (463).]

[3] Sale of same property by two Courts — Sale by Court which attached later but sold first is valid unless it was done with knowledge of prior attachment. (Vol 21) 1934 Pat 511 (512) : 13 Pat 765 * (Vol 8) 1921 Pat 140 (141, 142) : 6 Pat L Jour 332.

[4] Where the Court of the lower grade sold the property and distributed the proceeds without giving any share to the judgment-creditor whose execution was pending in the higher Court; *Held*, that the Court of the lower grade acted in contravention of S. 63 of the Code and that the judgment-creditor in the higher Court can bring a suit under S. 73 (2) of the Code for refund of his share of the assets. (1910) 8 Ind Cas 1176 (1178, 1179) (Low Bur).

6. Procedure where inferior Court sells property.—[1] Inferior Court selling property — Superior Court should accept sale and call for proceeds for purpose of distributing them rateably among all decree-holders. (Vol 23) 1936 Mad 797 (798) : 59 Mad 1023* (Vol 8) 1921 Pat 140 (141, 142) : 6 Pat L Jour 332* (Vol 7) 1920 Pat 75 (77).

[See (Vol 25) 1938 Oudh 12 (14) (Court of inferior grade should send sale proceeds to superior Court.)]

[See also (1881) 3 All 356 (361) (Superior Court has no jurisdiction under this section to set aside an execution sale held by an inferior Court.)]

[2] Property of same judgment-debtor attached by Subordinate Judge and District Munsif—District Munsif in ignorance of attachment by Subordinate Judge selling the property—Subordinate Judge should call for the sale-proceeds to his Court. (Vol 14) 1927 Mad 67 (68)* (Vol 12) 1925 Bom 420 (422) : 49 Bom 655.

[3] Proper procedure is to apply to a District Court to transfer sale proceeds realised by inferior Court to superior Court. (Vol 8) 1921 Pat 140 (142) : 6 Pat L Jour 332* (Vol 6) 1919 Cal 545 (546) : 46 Cal 64.

7. Rateable distribution — See S. 73.

SECTION 64 — SYNOPSIS.

1. Applicability, scope and object.
2. Attachment before judgment.
3. Claim for rateable distribution — Explanation.
4. Contrary to such attachment.
5. Discontinuance or abandonment of attachment.
6. Effect of attachment.
7. Effect of dismissal or striking off of execution proceedings. — See under O. 21, R. 57.
8. Effect of removal of attachment.
9. Effect of vesting order after attachment.
10. Objections as to attachment.

Section 64 (*contd.*)

11. Private transfer or delivery of property attached or any interest therein.
12. Prior contract or sale of property.
13. Removal of attachment.
14. Transfer is void only against claims enforceable under attachment.
15. Waiver of benefit under section.
16. "Where an attachment has been made".

1. **Applicability, scope and object.** — [1] Object of the section is to prevent fraud on decree-holder and to secure intact rights of judgment-creditors. (Vol 4) 1917 Cal 561 (561).

[2] The section has no application to transfers made before the attachment is levied. (1898) 8 Mad L Jour 266 (266, 269) * (Vol 8) 1921 Cal 801 (803) (Mortgage.) * (Vol 19) 1932 Sind 164 (165) : 26 Sind L R 158.

[3] Section 64 does not refer to alienation through process of Court but merely affects private alienations. (Vol 32) 1945 Cal 264 (266) * (Vol 7) 1920 Mad 626 (626) * (Vol 31) 1944 Nag 324 (325) : I L R (1944) Nag 739 (Section not applicable to execution sales.)

[4] It is immaterial for the applicability of the section whether the transferee acted in good faith or not. (Vol 6) 1919 Oudh 4 (7) : 23 Oudh Cas 18 * (Vol 6) 1919 Mad 594 (595) : 42 Mad 565 (No question of *bona fides* of alienee arises under S. 64.)

[5] The combined effect of the section with its explanation is to extend the protection to claimants for rateable distribution against private alienations of property after attachment just as much as to the decree-holder at whose instance the attachment is made. But the attachment will not enure for the benefit of those who apply for rateable distribution of assets in future. (1936) 1936 Oudh W N 861 (864).

[6] There is no inconsistency between S. 64, Explanation and O. 21, R. 48 (2). (1912) 14 Bom L R 633 (634).

[7] Attachment of money-decree is governed by O. 21, R. 53 and not by S. 64. (Vol 16) 1929 Pat 1 (3) : 7 Pat 726.

[8] Application under O. 21, R. 89 does not offend S. 64. (Vol 4) 1917 Cal 281 (282).

[9] Although in view of S. 7 (1) (a) of U. P. Encumbered Estates Act (25 [XXV] of 1934) an attachment made by creditor, before the Act, on the property X became null and void on the date the Collector passed an order under S. 6, the right acquired by creditor to realise his decree from property X remained intact and any sale by the debtor subsequent to attachment is subject to creditor's such right. (Vol 31) 1944 All 176 (177, 178) : I L R (1944) All 280.

[10] Adjustment within the meaning of O. 21, R. 2 — Section 64 does not apply. (Vol 27) 1940 Pesh 18 (19).

2. **Attachment before judgment.** — [1] Section applies to attachment before judgment. (Vol 9) 1922 Nag 238 (238) * (Vol 16) 1929 Cal 494 (495) : 57 Cal 274.

[2] The effect of an attachment whether it be before or after decree, is the same provided that in the former case, a decree is made for the plaintiff at whose instance the attachment takes place. (1899) 26 Cal 531 (533).

[3] Attachment before judgment is not effective against subsisting rights. (Vol 30) 1943 Bom 27 (30).

[4] Section 64 does not require fresh attachment of property attached before judgment. (Vol 2) 1915 Mad 386 (386).

[5] Attachment before judgment must be made according to O. 21, R. 54 — Mere order of attachment is not enough. (Vol 26) 1939 Bom 508 (511).

[6] Attachment before judgment made, without complying with procedure laid down in O. 38, R. 5 — Order

is mere irregularity and not nullity. (Vol 25) 1938 Lah 49 (51, 52) : I L R (1937) Lah 756.

[But see (Vol 9) 1922 Nag 238 (239) (Attachment before judgment not complying with procedure under O. 38, R. 5, is *ultra vires*.)]

[7] Two independent attachments before judgment of same property — Property passes to purchaser in first sale — It cannot be sold over again in other decree. (Vol 7) 1920 Mad 626 (627).

[8] Attachment before judgment — No decree passed — No execution applied for — Rateable distribution cannot be claimed. (Vol 15) 1928 Bom 545 (547).

[9] Attachment before judgment does not create a charge in favour of the attaching creditor. (Vol 20) 1933 All 953 (953, 954).

[10] Attachment before judgment — Mention of mortgage in execution application does not prevent decree-holder from challenging the mortgage, nor does it prevent the provisions of this section from applying. (Vol 15) 1928 Bom 444 (447).

3. **Claim for rateable distribution—Explanation.** — [1] The explanation is not necessarily a fresh addition to previous enactment but merely removes doubt which existed in the previous enactment. (Vol 21) 1934 All 1057 (1063).

[2] No special priority to claims under S. 73 as such is given. (Vol 8) 1921 Oudh 176 (183).

[3] Explanation does not control provisions of O. 21, R. 89. (Vol 14) 1927 Mad 445 (446).

[4] "Claim enforceable under attachment" — "Attachment" refers to attachment under which execution sale is made. (Vol 21) 1934 All 1057 (1060) * (Vol 15) 1928 Bom 545 (547).

[5] Claim not falling under S. 73 is not enforceable under S. 64. (Vol 15) 1928 Bom 545 (547).

[6] Applicant for rateable distribution is on same footing as attaching decree-holder. (Vol 21) 1934 All 896 (897).

[7] Private transfer during pendency of attachment in one suit — Attachment in execution of decree in another suit made after transfer but while decree in former suit remained unsatisfied and attachment therein subsisting — Auction-purchaser in sale effected in pursuance of second attachment will not obtain good title — Alienation would not be void as against him. (Vol 27) 1940 Mad 335 (339) : I L R (1940) Mad 526 (FB) (Per Leach C. J., Pandrang Row and Patanjali Sastri JJ.; Abdur Rahman and Krishnaswami Ayyangar JJ., Dissenting.)

[8] Property attached, sold and price deposited in Court — Prior to execution sale, attached field sold privately and 5 per cent. deposited in Court and receipt of satisfaction of decree deposited — Another decree-holder who had applied for execution prior to auction and obtained order for rateable distribution subsequently attached the same field, brought it to sale and purchased it himself — Private sale cannot prevail against the subsequent auction-purchaser. (Vol 20) 1933 Nag 349 (351).

[9] In order that the explanation may apply there must be assets in possession of Court for distribution. (Vol 30) 1943 Bom 261 (262, 264) : I L R (1943) Bom 514 * (Vol 21) 1934 All 1069 (1070, 1071) * (Vol 24) 1937 Nag 1 (4) : I L R (1937) Nag 291 * (Vol 24) 1937 Pat 609 (610) (Property attached purchased by decree-holder privately — No assets are held.) * (Vol 2) 1915 Low Bur 92 (92) (Payment by judgment-debtor in Court by private sale of property — Assets are held.)

[But see (Vol 27) 1940 Mad 335 (407) : I L R (1940) Mad 526 (FB) (It is not necessary that property should have been sold or that assets must have come into executing Court (Per Abdur Rahman J.).)]

Section 64 (contd.)

[10] A obtained a decree against B and attached his property. C also obtained a decree against B and also applied for execution. B then transferred the property to D and discharged A's decree. C having no right to rateable distribution cannot question D's title to the property. (Vol 5) 1918 Mad 127 (132) : 41 Mad 265 (FB) * (Vol 8) 1921 All 45 (46) : 43 All 399 * (Vol 8) 1921 Oudh 176 (184).

[See however (1911) 13 Bom LR 1189 (1192, 1193).]

[11] In order that a claim for rateable distribution may be effective under this section it is not necessary that the claim should have been in existence on the date of the private sale, i. e., the claimant should have obtained a decree and applied for execution before that date. (Vol 9) 1922 Bom 241 (242) : 46 Bom 895 * (Vol 13) 1926 Mad 807 (308) : 49 Mad 88 * (1892) 16 Bom 91 (101, 110). (Case under the old Code.) * (Vol 4) 1917 Cal 561 (561).

[But see (Vol 8) 1921 Cal 801 (805).]

[12] N bringing D's property to sale in execution of his decree on 29th August 1934 — Other decree-holders including S applying for rateable distribution — Sale set aside on 31st October 1934 on application by D under O. 21, R. 89, Civil P. C. — On 20th September 1934 D selling property to P — On 29th September 1934 S attaching aforesaid property pursuant to his application of 29th August 1934 — Claim by P on basis of his sale deed from D dismissed — Suit by D in 1935 against S and D for declaration of his title — S held could not make any claim based upon S. 64 explanation or his action on 29th August 1934. (Vol 29) 1942 Mad 522 (522, 523).

[13] Explanation to S. 64 indicates that applications for rateable distribution go hand in hand with execution application — Court ordering execution application to be filed but mentioning in order that attachment should subsist — No such order made on application for rateable distribution which was also filed — Decree-holder for rateable distribution can take advantage of order on execution application. (Vol 28) 1941 Pesh 18 (20).

4. Contrary to such attachment. — [1] Section 64 avoids transfers contrary to, not during the continuance of, attachment. (Vol 18) 1931 Mad 570 (571) * (1902) 29 Cal 154 (166) : 29 Ind App 9 (P C). (Case under the Code of 1877).

[2] Where the judgment-debtor alienates the property and pays of the attaching decree-holder, the alienation is not 'contrary to such attachment'. (Vol 24) 1937 All 641 (642) * (Vol 21) 1934 All 1057 (1060) * (Vol 15) 1928 Bom 545 (547) * (Vol 5) 1918 Mad 127 (131, 132) : 41 Mad 265.

[3] Money decree attached — Transfer by holder of decree is not prohibited. (Vol 16) 1929 Pat 1 (2, 3) : 7 Pat 726.

[4] Decree attached — Assignment thereof is subject to attaching creditors' right. (Vol 14) 1927 Mad 1025 (1026).

[5] Attaching decree-holder is not bound by compromise between parties to attached decree during proceedings for further leave to appeal, if judgment-debtor had notice of attachment — S. 64 does not apply. (Vol 20) 1933 All 82 (84).

[6] Transfer of property to stranger before attachment is not affected. (Vol 15) 1928 Bom 545 (546).

[7] Discharge of encumbrance by private purchaser after attachment in execution sale is void under S. 64. (Vol 13) 1926 Mad 1082 (1083).

[8] Letting out land during attachment on nominal rent is act "contrary to attachment." (Vol 21) 1934 All 902 (908).

[9] This section is not intended to avoid dispositions of attached property by the judgment-debtor which are

merely in the nature of a renewal of an encumbrance already existing on the property prior to attachment and which do not enhance the burden to which it was previously liable. (1882) 4 Mad 417 (418).

[10] Mortgage during attachment is not binding on auction-purchaser. (Vol 9) 1922 All 443 (444, 445) : 44 All 714.

[11] Mortgage during attachment to pay prior mortgage is binding on purchaser. (Vol 15) 1928 Mad 708 (704).

[12] Mortgage of attached property — Part of consideration utilised for discharging prior encumbrances having charge on such property — Mortgage is valid only to this extent. (Vol 22) 1935 All 391 (397).

[13] Subsequent compromise whereby mortgagors agree to transfer portion of mortgaged land in consideration of mortgagee reducing mortgage charge is not illegal. (Vol 25) 1938 Lah 737 (738, 739).

5. Discontinuance or abandonment of attachment. — [1] An attachment may cease by the decree being discharged by payment out of Court. (1900) 23 Mad 478 (482).

[2] On the happening of a judicial sale all previous attachments effected upon the property sold fall to the ground. (1886) 12 Cal 317 (321) * (Vol 7) 1920 Mad 626 (627) * (Vol 23) 1936 Nag 209 (214) : I L R (1936) Nag 127 * (Vol 7) 1920 Pat 75 (77).

[3] Attachment struck off — No steps taken except keeping alive decree for statutory period when execution and attachment were again applied for — Attachment may be presumed to be abandoned. (Vol 8) 1921 Mad 30 (32, 33) : 44 Mad 232.

[See (1894) 17 Mad 180 (182). (On facts held there was no abandonment of attachment.)]

[4] A re-attachment in execution *ex majori cautela* of certain immovable properties which had been attached before judgment, does not amount to an abandonment of the original attachment. (Vol 2) 1915 Mad 386 (386).

[5] Attachment set aside but on same day property re-attached — Private sale before re-attachment — On appeal by decree-holder against order setting aside attachment, first attachment ordered to stand — Held, decree-holder's rights were not affected by temporary discontinuance of attachment. (Vol 6) 1919 Lah 54 (56).

6. Effect of attachment. — [1] An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law, such as is effected by a vesting order in the Official Assignee of the insolvent. (Vol 1) 1914 P C 129 (130) : 41 Ind App 251 : 42 Cal 72 (P C). (Reversing 15 Ind Cas 288 (Cal).)

[2] Attachment only prevents private alienations and does not confer any title, charge or lien on the property. (1898) 25 Cal 179 (185) : 24 Ind App 170 (P C) * (Vol 19) 1932 All 353 (355) * (1910) 32 All 479 (483) * (Vol 2) 1915 Cal 444 (446) * (Vol 10) 1923 Lah 261 (262) : 3 Lah 414 * (Vol 2) 1915 Lah 281 (281) : 1915 Pun Re No. 39 * (Vol 20) 1933 Mad 342 (344) * (Vol 18) 1931 Mad 474 (477) : 54 Mad 727. (Attachment creates no equities.) * (Vol 14) 1927 Mad 190 (191) * (Vol 23) 1936 Nag 209 (213) : I L R (1936) Nag 127. (23 All 467 held impliedly overruled by 25 Cal 179 : 24 Ind App 170 (P C).) * (Vol 24) 1937 Pat 50 (51).

[3] Attachment cannot avoid previous transfer. (Vol 18) 1931 Mad 570 (571) * (Vol 20) 1933 Cal 212 (214) : 59 Cal 1176. (Attachment subsequent to execution of mortgage, but before its registration does not affect mortgage.)

[4] Attaching creditor is not secured creditor. (Vol 17) 1930 Bom 16 (18) * (Vol 16) 1929 Cal 524 (525) : 57 Cal 122.

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[5] More than one creditor attaching same mortgage amount—Court cannot give to one of them charge at the expense of other creditors. (Vol 17) 1930 Mad 4 (8).

[6] Transfer of property under attachment is inoperative as against subsequent judgment-creditor although decree is passed subsequent to transfer. (Vol 4) 1917 Cal 561 (561).

[7] Attachment before judgment—Suit dismissed—Subsequent alienation by debtor is not affected by subsequent reversal of judgment in appeal — No charge is created and there is no enforcement of claim under that attachment. (Vol 21) 1934 All 165 (167, 168).

[8] Mortgaged property attached — Attaching creditor's purchase subsequent to decree absolute for foreclosure obtained by mortgagee — Attaching creditor is not entitled to redeem mortgage. (Vol 23) 1936 Nag 209 (211, 213, 214) : I L R (1936) Nag 127. ((Vol 15) 1928 Nag 97 : 23 Nag L R 164, overruled.)

[9] An attachment will not in any way stand in the way of the partition suit. (Vol 16) 1929 All 726 (732) : 51 All 932.

[10] An attachment made by one creditor does not enure for the benefit of the whole body of creditors, so as to make a private transfer void against the whole world. (1937) 1937 Mad W N 366 (367).

[11] There is no authority to show that an attachment is ineffective in relation to that part of the property which does not vest in judgment-debtor at the time of attachment and that a transfer of attached property cannot be impugned on any ground even if immediately after attachment and before sale the judgment-debtor becomes owner of that part of property and sells it in the teeth of attachment. (1940) 42 Pun L R 356 (357, 358).

[12] Decree attached — Decree-holder cannot deal with it in any way pending attachment. (Vol 5) 1918 Pat 454 (456) & (Vol 6) 1919 Mad 840 (843).

7. Effect of dismissal or striking off of execution proceedings. — See under O. 21, R. 57.

8. Effect of removal of attachment. — [1] If attachment is validly withdrawn though under misapprehension subsequent attachment does not relate back to the date of first attachment and cannot have such effect against person taking transfer during interval. (Vol 16) 1929 Rang 229 (237) : 7 Rang 201 & (1895) 22 Cal 909 (920) : 22 Ind App 129 (P C).

[2] A private sale of property pending an attachment by a decree-holder which has subsequently been raised is valid as against a non-attaching decree-holder who had applied for rateable distribution during the continuance of the attachment. (Vol 6) 1919 Lah 129 (130) : 1919 Pun Re No. 5.

[3] Attachment coming to end—Claims thereunder cease to be enforceable. (Vol 15) 1928 Bom 545 (548).

[4] Mortgage of property attached — All money due under execution in which property is attached paid — Mortgage transaction is rehabilitated in law. (Vol 19) 1932 Rang 103 (104) : 10 Rang 199.

[5] Release of attachment between execution and registration of sale deed does not invalidate sale. (Vol 14) 1927 Nag 289 (289).

9. Effect of vesting order after attachment. —

[1] Adjudication of debtor automatically puts an end to attachment and vests the property in Official Assignee free of attachment. (Vol 30) 1943 Mad 179 (180) : I L R (1943) Mad 659.

[2] Adjudication of judgment-debtor does not affect the rights of a creditor who has attached before adjudication. (Vol 27) 1940 Mad 47 (48).

[3] Where the alienation is effected by operation of law, as in the case of a vesting order, the attachment cannot prevent the operation of the statute and a Court

executing a decree is bound to take notice of it. (1885) 8 Mad 554 (556).

[4] Attachment by itself does not create any charge or lien on property or give any priority to attaching creditor as against Official Assignee or Receiver. (Vol 20) 1933 Nag 229 (230) : 29 Nag L R 303.

[5] Defendant depositing amount with plaintiff's pleader under Court's order — Deposit subject to result of pending action — Subsequent insolvency of defendant — Plaintiff is entitled to deposit in preference to general creditors. (Vol 20) 1933 Cal 625 (626, 627).

[6] Creditor attaching debtor's property — Debtor alienating property in contravention of attachment — Debtor subsequently declared insolvent and discharged — Creditor can still follow property which he had attached, for, the effect of transfer contrary to S. 64, Civil P. C., was not to make it absolutely void, so that the property could still be treated as the assets of debtor notwithstanding the transfer. (Vol 23) 1936 Mad 100 (101).

[7] Order vesting insolvent's property in Official Assignee is not analogous to attachment. (Vol 15) 1928 Mad 735 (745) : 51 Mad 417 (F B).

[8] Adjudication order of a foreign Court has no effect of vesting in receiver property in British India, and therefore, a decree-holder is entitled to the benefit of his prior attachment. (Vol 20) 1933 P C 134 (135, 136) : 60 Ind App 167 : 56 Mad 405 (P C). (Overruling (Vol 18) 1931 Mad 474 : 54 Mad 727.)

10. Objection as to attachment. — [1] Only persons having claims enforceable under attachment can object. (Vol 16) 1929 Pat 1 (3) : 7 Pat 726.

[2] Attachment for a larger amount than due is valid to the extent of the amount due. (1910) 20 Mad L Jour 821 (822).

[3] A judgment-debtor who consents to an attachment of an occupancy holding is not estopped from objecting to the sale on the ground of its non-transferability. (Vol 5) 1918 Pat 604 (605).

[4] Judgment-debtor or person claiming through him cannot challenge validity of sale as against purchaser. (Vol 4) 1917 Mad 211 (211).

[5] Transferee from judgment-debtor after attachment is competent to apply under R. 89, O. 21. (Vol 4) 1917 Cal 281 (283).

[6] Transferee from judgment-debtor after attachment can apply under R. 90. (Vol 20) 1933 Mad 96 (97).

[7] Property mortgaged pending attachment — Auction-purchaser must sue for possession within twelve years from date of taking symbolical possession. (Vol 13) 1926 Mad 966 (967).

[8] Purchaser of property after attachment in execution proceedings is bound by decision of executing Court though not party to it. (Vol 19) 1932 Mad 86 (89) : 55 Mad 495.

[9] Conditional order of attachment before judgment passed — Some defendants minor — Plaintiff applying for appointment of guardian *ad litem*—Proposed guardian later on informing Court his unwillingness — Attachment subsists — Purchaser of property of minor pending such conditional attachment can oppose the making of conditional order absolute. (Vol 15) 1928 Mad 1 (2).

11. Private transfer or delivery of property or any interest therein — [1] Section affects only private sales after attachment and does not cover enforced execution of conveyance in obedience to decree of Court. (Vol 32) 1945 Bom 481 (482) & (Vol 29) 1942 Nag 36 (37) : I L R (1942) Nag 691. (Involuntary sale under decree of Court.) & (Vol 23) 1936 Nag 163 (165) : I L R (1936) Nag 172.

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[2] Order of Court by consent of parties is tantamount to a transfer. (Vol 32) 1945 Mad 412 (414) * (Vol 22) 1935 Lah 481 (481).

[3] Adjudication by a foreign Court operates as a private transfer within the meaning of S. 64 and therefore cannot prevail over a prior order of attachment by British Indian Court. (Vol 27) 1940 Mad 47 (48) * (Vol 20) 1933 P C 134 (135, 136) : 60 Ind App 167 : 56 Mad 405 (P C). [(Vol 18) 1931 Mad 474 : 54 Mad 727, reversed.]

[4] Section applies to private alienations pending claim proceedings and subsequent suit. (Vol 5) 1918 Mad 1095 (1096) : 40 Mad 955.

[5] A charge created under a compromise decree is no better than any other private transfer and is therefore void against a person attaching those properties prior to compromise decree. (1937) 1937 Mad W N 45 (46) * (Vol 21) 1934 Rang 313 (315). (Transfer by agreement though incorporated in decree is private transfer.)

[6] Attachment of interest of judgment-debtor in a fund in Court which was awarded in land acquisition proceedings — Subsequent compromise by which judgment-debtor abandoned his claim to compensation money operates as a private transfer—Delivery of fund to other persons is contrary to such attachment. (1910) 12 Cal L Jour 545 (548).

[7] Assignment of debt involves transfer of interest in it. (Vol 16) 1929 Rang 229 (234) : 7 Rang 201.

[8] Debtor's property attached by one creditor — Another creditor cannot do an act as to put debtor's property beyond the reach of attaching creditor. (Vol 14) 1927 Mad 1147 (1148). (Resolution of a Bank setting of shares for debts due to a Bank.)

[9] *Bona fide* arbitration award and decree thereon transferring property to third person — Award is not a private transfer. (Vol 9) 1922 Mad 221 (222) : 45 Mad 103*(1882) 4 All 220 (226)* (Vol 6) 1919 Mad 798 (798).

[See (Vol 26) 1939 Bom 212 (214). (Where there is an arbitration but the settlement creating a charge is drawn up in the form of award, it is a private transfer.)]

[10] Award without Court's intervention — Transfer in pursuance of partition decree based on it is not private transfer. (Vol 19) 1932 P C 235 (237) : 59 Ind App 405 : 13 Lah 702 (P C) * (Vol 30) 1943 Bom 283 (285) (Charge created by award decree.)

[11] Surrender of holding attached during attachment—Surrender invalid, if holding transferable. (1910) 8 Ind Cas 76 (77) (Cal).

[12] Attachment—Subsequent private sale of portion by judgment-debtor—Decree-holder can proceed against portion sold. (Vol 4) 1917 All 423 (423).

[13] Alienations under O. 21, R. 83 are acts of judgment-debtor alone and are "private transfers" within S. 64. (Vol 21) 1934 Mad 727 (729) : 58 Mad 392 * (Vol 28) 1941 Mad 208 (212, 213).

[See however (1906) 30 Bom 337 (340). (The prohibition contained in this section is qualified by S. 305 now O. 21, R. 83.)]

[14] Assignment pending attachment—Consideration of assignment paid to prior attaching creditors as agreed but not before third attachment — S. 64 does affect the payment to prior attaching creditors. (Vol 2) 1915 Mad 599 (600).

[15] Lease during attachment is ineffective against auction-purchaser. (Vol 2) 1915 Mad 1121 (1122).

12. Prior contract for sale of property.—[1] Section 64 is meant for the protection of a creditor against transactions subsequent to attachment, but obligations touching the property attached incurred by the debtor prior to the attachment are not affected by the section. (Vol 3) 1916 Cal 927 (927).

[2] Conveyance of property executed after its attachment before judgment by creditor in pursuance of contract entered into before attachment prevails over attachment. (Vol 26) 1939 Bom 492 (493)* (Vol 30) 1943 Bom 145 (145, 146) (Agreement to sell — Subsequent attachment—Decree for specific performance and consequent sale prevails against attachment)* (Vol 3) 1916 Cal 927 (928)* (Vol 29) 1942 Mad 67 (69) (Contract to sell)* (Vol 11) 1924 Mad 610 (610)* (Vol 23) 1936 Nag 163 (165) : I L R (1936) Nag 172.

[See however (Vol 16) 1929 Cal 494 (495) : 57 Cal 274. (Agreement to sell prior to attachment cannot prevail.)]

[3] An agreement to sell creates an obligation to convey property and a later attachment will not override the conveyance made in pursuance of the obligation. Attachment holds good in respect of such a right as the vendor had in property at the time of attachment as when there is an unpaid balance of purchase money the attachment fastens to the judgment-debtor's right to recover the money. (Vol 22) 1935 Mad 872 (873) : 59 Mad 1* (Vol 28) 1941 Bom 198 (199, 200) : I L R (1941) Bom 290* (Vol 22) 1935 Mad 193 (195).

[4] Son's interest in joint Hindu family estate attached in execution of decree against father — Father adjudicated insolvent — Sale by Official Receiver in pursuance of contract of sale of joint property entered into by father prior to attachment is not contrary to S. 64—Sale conveys even son's interest. (Vol 26) 1939 Mad 702 (706, 707) : I L R (1939) Mad 853.

[5] Prior decree for specific performance of agreement to mortgage—Subsequent attachment—Mortgage executed by Court as per decree — Attachment held subject to mortgage. (Vol 19) 1932 Bom 301 (303, 305).

[6] Possession delivered and money paid before attachment — Registered deed prepared during attachment — Sale is not invalid. (Vol 12) 1925 Rang 382 (383).

[7] Sale-deed executed before but registered after attachment of property covered by sale-deed—Sale-deed though subsequently registered, operates from date of its execution and its operation is not affected by attachment. (Vol 24) 1937 Nag 143 (145) : I L R (1939) Nag 266.

13. Revival of attachment.—[1] Alienation after valid release of attachment and before second attachment is valid. (Vol 11) 1924 Cal 744 (747) : 51 Cal 548.

[See however (Vol 7) 1920 All 356 (357) : 42 All 39. (Attachment before judgment cancelled and again restored — Private sale in interim held void.)]

[2] Where a claim is allowed, releasing the property from attachment and in the suit the claim order is set aside, it was held that the attachment revives so as to affect the alienations made in the interval. (1896) 23 Cal 829 (833, 834) * (Vol 9) 1922 Mad 176 (178) : 45 Mad 84* (Vol 5) 1918 Mad 1095 (1096) : 40 Mad 955* (Vol 26) 1939 Pat 138 (139) : 17 Pat 588.

[3] Claim suit decreed and attachment raised — Decree reversed in appeal — Attachment is revived and renders transfer during interval invalid. (Vol 9) 1922 Nag 138 (141).

[4] The decree-holder's rights are not affected by the temporary discontinuance of the attachment. (Vol 6) 1919 Lah 54 (56).

14. Transfer is void only against claims enforceable under attachment.—[1] The words 'All claims enforceable under the attachment' do not mean all claims of attaching creditor enforceable under that or any subsequent attachment. (Vol 10) 1923 Pat 564 (567).

[2] Section does not render an alienation pending attachment void against all persons and for all purposes but only against a claim enforceable under the attachment, i. e., the decree-holder's right to bring the pro-

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perty for sale unaffected by the alienation. (Vol 28) 1941 Mad 161 (173) : I L R (1941) Mad 438 (F B)* (1870-72) 14 Moo Ind App 543 (549, 550) (PC). (Case under S. 240 of the Code of 1859.) * (1898) 20 All 421 (424, 425) * (Vol 4) 1917 Cal 281 (282)* (1921) 63 Ind Cas 108 (108) (Lah) * (Vol 29) 1942 Mad 330 (332) * (Vol 25) 1938 Mad 465 (466, 467) * (Vol 12) 1925 Mad 338 (339). (Alienations after attachment are void and not merely voidable).

[See however (1905) 2 All L Jour 265 (267). (A sale of property under attachment is not void but only voidable against the attaching creditor alone).]

[3] Attaching creditor cannot accept transfer for certain purposes and ignore it for other purposes. (Vol 27) 1940 All 500 (504) : I L R (1940) All 681.

[4] Purchaser after attachment has even no lien for purchase money. (Vol 3) 1916 Pat 353 (356).

[5] A purchaser at a private sale under O. 21, R. 83 has no claim enforceable under attachment and cannot contest a prior mortgage executed by the judgment-debtor pending attachment. (Vol 28) 1941 Mad 208 (212, 213).

[6] A claim can only arise under attachment when some sort of transaction has taken place—Person proposing to purchase attached property in execution sale cannot have such claim till he makes such purchase. (Vol 24) 1937 Pat 609 (610).

[7] The attachment referred to in the section is that particular attachment in respect of which the property was sold and it is that attachment alone which can be employed for the purpose of impugning the private alienation. (Vol 3) 1916 P O 238 (240, 241) : 44 Ind App 172; 44 Cal 662 (P. C.)* (1884) 6 All 33 (36) * (Vol 24) 1937 Mad 843 (844) : I L R (1937) Mad 970 * (Vol 20) 1933 Nag 230 (232).

[8] Where property attached in execution is alienated but the attachment ceased subsequently by reason of dismissal of the execution under O. 21, R. 57, and the property was sold in pursuance of second attachment, the transfer is not void as against the auction-purchaser under the second attachment. (1926) 97 Ind Cas 547 (548) (All).

[9] Attaching decree-holder paid in full—Attachment set aside — Claim of creditor who had applied for rateable distribution cannot be said to be enforceable under attachment — Alienation by judgment-debtor after attachment has ceased is not void under S. 64 as against creditor who applied for rateables but was not paid. (Vol 30) 1943 Mad 165 (166, 167) : I L R (1943) Mad 175.

[10] Where part of consideration for sale of attached property was paid to the attaching decree-holder, in consequence of which he withdrew from execution, it was held that the attachment would not invalidate the sale. (1867) 7 Suth W R 430 (430).

[11] A mortgage executed while the property is under an attachment in execution of a decree, is inoperative against the auction-purchaser though the decree-holder was not in any way prejudicially affected. (1913) 20 Ind Cas 241 (242, 243) (Cal).

[12] Prior mortgagee attaching property in execution of his money decree subject to his mortgage—Subsequent mortgage expressly providing for payment of certain amount to prior mortgagee — Payment of such amount is not "contrary to attachment" or against claim enforceable under attachment." (Vol 29) 1942 Bom 227 (229, 230).

[13] Attachment—Sale of encumbered property subject to no encumbrance — Liability cannot be avoided by auction-purchaser. (Vol 2) 1915 Oudh 157 (158).

[14] Where a mortgagee whose rights had been attached, assigned his rights to a third person and direc-

ted him to pay the consideration for the assignment to the attaching creditors and the assignee paid them off but not before the money in his hands were attached by the plaintiff. *Held*, that the assignee was entitled to protect himself by paying prior creditors and such payment did not offend the provisions of S. 64 and the plaintiff was not entitled to impeach the same. (Vol 2) 1915 Mad 599 (600).

[15] Sale set aside — Attachment ceases — Decree-holder can attach and sell but cannot use same attachment for purpose of other decrees. (Vol 5) 1918 Mad 280 (281).

15. Waiver of benefit under section. — [1] Decree-holder can agree to forgo benefit of section — Transferee of decree with knowledge of such agreement is also bound by it. (Vol 10) 1923 Mad 230 (231)* (Vol 21) 1934 Pat 685 (686) : 13 Pat 446.

[See, however (Vol 14) 1927 Mad 648 (649). (Sale with decree-holder's consent is not excepted).]

[2] Attachment before judgment — Suit decreed — Mortgage of property to third person — Property sold in execution of decree and purchased by decree-holder — Mention of mortgage in execution application does not prevent decree-holder from challenging the mortgage, nor does it prevent the provisions of S. 64 from applying. (Vol 15) 1928 Bom 444 (447).

[3] Decree-holder recognizing attachment and notifying it in sale proclamation is estopped from subsequently contesting it. (Vol 3) 1916 Oudh 169 (174).

16. "Where an attachment has been made". — [1] No property can be declared to be attached unless, firstly, an order of attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been made. (Vol 15) 1928 P O 189 (141) : 51 Mad 849 : 55 Ind App 256 (P C). (Reversing (Vol 9) 1922 Mad 447; 45 Mad 90)* (Vol 32) 1945 Cal 308 (310, 311). (Principle equally applies whether attachment is in execution or before judgment)* (Vol 18) 1931 Pat 58 (59) : 9 Pat 860.

[2] Attachment under S. 64 means one made under O. 21, R. 54. (Vol 4) 1917 Cal 832 (832).

[3] Attachment is not complete before prohibition and proclamation under O. 21, R. 54 — Sale by judgment-debtor after order of attachment but before completion under O. 21, R. 54 is not within S. 64. (Vol 16) 1929 Bom 395 (396) : 53 Bom 851 * (Vol 21) 1934 All 165 (166). (Actual attachment has no retrospective effect from date of order)* (Vol 3) 1916 Cal 135 (135)* (Vol 7) 1920 Mad 804 (807) : 42 Mad 844 (F B). (Prohibition to alienation of attached goods operates only from date of proclamation under O. 21, R. 54)* (Vol 3) 1916 Oudh 169 (173, 174).

[4] Where the formalities regarding proclamation and affixing of notices prescribed by law are not complied with the attachment is not complete and the transfer is not rendered void by S. 64. (Vol 24) 1937 Lah 671 (672)* (1880) 2 All 58 (60)* (Vol 20) 1933 Cal 212 (212) : 59 Cal 1176. (Attachment — Affixing of the prohibitory order on the court house is absolutely necessary)* (Vol 22) 1935 Lah 57 (59). (For valid attachment, copy of order must be affixed on conspicuous part of property)* (Vol 1) 1914 Oudh 308 (309). (Attachment is not complete till proof is given that all requirements of O. 21, R. 54 are complied with)* (Vol 21) 1934 Pat 619 (622). (Copy of order must be duly served on debtor — Else no attachment of debt.)* (Vol 20) 1933 Rang 198 (199). (Requirements of O. 21, R. 54 (2) and (3) not complied with.)* (Vol 20) 1933 Rang 267 (268) (Warrant of attachment not affixed).

[5] Where there is a material misdescription of the property to be attached the section will not apply. (1881) 3 All 698 (701) (F B).

SALE.

65. Where immoveable property is sold in execution of a decree and such sale has become *Purchaser's title*, absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

[1882—S. 316; 1859—S. 259; See O. 21, Rr. 82 and 92.]

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[6] A claim for rateable distribution under S. 295 of Code of 1882 (S. 73) does not amount to attachment. (1888) 15 Cal 771 (774).

[7] Attachment is effected when judgment-debtor prohibited from making alienation has opportunity of knowing that he is so prohibited. (Vol 6) 1919 Mad 594 (595); 42 Mad 565.

[8] The method of attaching a promissory note under O. 21, R. 51 is by actual seizure and by bringing it into Court. If it is not complied with the section will not apply. (Vol 10) 1923 Mad 317 (318); 46 Mad 415.

[9] Section 64 relates to private alienation after attachment but not to alienation after *ad interim* injunction restraining alienation of property. (Vol 17) 1930 Lah 858 (859).

SECTION 65 — SYNOPSIS.

1. "Shall be deemed to have vested".
2. Right to possession when accrues.
3. Right to mesne profits.
4. Right to and liability for rent.
5. Sale in execution of mortgage decree.

1. "Shall be deemed to have vested". —

[1] Until sale is confirmed, title does not vest in the purchaser. (Vol 20) 1933 Sind 198 (200); 27 Sind L R 256 & (Vol 6) 1919 All 253 (254); 41 All 526. (If decree awards interest till realization and property is sold in execution thereof interest is recoverable till date of confirmation of sale.) & (Vol 12) 1925 Bom 483 (484). (Property sold in execution of two decrees—Purchaser at the unconfirmed sale gets no title to property.) & (1937) 1937 Oudh W N 1153 (1156) & (Vol 27) 1940 Pat 565 (566).

[2] Title of purchaser at an execution sale becomes complete on the date of confirmation but relates back to the date of sale. (1909) 2 Ind Cas 81 (82) (All) & (Vol 17) 1930 Bom 81 (83, 84) & (1913) 40 Cal 89 (102, 103); 39 Ind App 228 (P C) & (Vol 25) 1938 Mad 317 (318) & (Vol 20) 1933 Mad 482 (484) & (Vol 13) 1926 Nag 17 (18, 19); 24 Nag L R 48 & (Vol 20) 1933 Oudh 38 (38) & (Vol 27) 1940 Pat 565 (566). (The words of the section make it clear that the property does not actually vest in the purchaser at the time of the sale; but once the sale is confirmed, it is deemed to have vested in him as and from that date. Without confirmation purchaser acquires no title.) & (Vol 19) 1932 Pat 80 (83); 10 Pat 670 & (Vol 25) 1938 Pesh 49 (50).

[3] Fact that sale certificate is issued on later date than that of confirmation does not affect vesting of title on confirmation of sale. (Vol 18) 1931 Pat 241 (243); 10 Pat 670 (FB) & (1926) 95 Ind Cas 965 (966) (All) & (Vol 1) 1914 Oudh 306 (306) & (Vol 19) 1932 Pat 80 (83); 10 Pat 670.

[4] Under the present section, it is no longer necessary for the decree to be subsisting on the date of the confirmation of the sale for the property to vest in purchaser; and hence a sale in favour of a bona fide purchaser not a party to the suit will not be set aside merely because the decree has been reversed before confirmation. (Vol 20) 1933 Mad 598 (603, 604, 605); 56 Mad 808.

[5] Order prohibiting sale would prohibit confirmations of sales which had already taken place but had

not been confirmed and the purchaser does not get any title. (Vol 27) 1940 Pat 565 (566).

[6] Legislation before confirmation of sale exempting property from attachment or sale will not affect rights of auction-purchaser unless there is clear provision to contrary. (Vol 29) 1942 Lah 102 (104); I L R (1942) Lah 349 (FB).

[7] Auction-purchaser is entitled to claim accretions to property from date of sale — Conversely he is responsible for any deterioration or loss which property suffers in between sale and confirmation of sale. (Vol 13) 1926 Nag 17 (19); 24 Nag L R 48 & (1913) 40 Cal 89 (102, 103); 39 Ind App 228 (P C). (Property sold before confirmation for arrears of revenue — Purchaser loses property.)

[8] An auction-purchaser's title cannot be defeated by any transfer made by the judgment-debtor between the date of the sale and the date of its confirmation. (1911) 15 Cal W N 312 (316).

[9] Gift by auction-purchaser before confirmation of sale — Donee authorized to take possession — Gift is valid. (Vol 14) 1927 Oudh 261 (262); 2 Luck 496.

2. Right to possession when accrues. — Right of auction-purchaser to possession accrues from date of sale not from the date of the sale certificate. (Vol 27) 1940 Lah 230 (233); I L R 1941 Lah 91.

[But see (Vol 30) 1943 Pat 320 (322, 324); 22 Pat 280. (Per *Manohar Lal J.*)]

3. Right to mesne profits. — [1] The auction-purchaser is entitled to mesne profits from the date of the sale. (Vol 27) 1940 Lah 230 (233); I L R (1941) Lah 91 & (Vol 5) 1918 Oudh 9 (10) & (Vol 15) 1928 Rang 67 (68); 5 Rang 803.

[2] Auction-purchaser can sue for profits from date of sale though his name is not recorded in revenue papers till later date. (Vol 24) 1937 All 661 (663).

4. Right to and liability for rent. — [1] Auction-purchaser is entitled to rent from the date of sale when his sale is confirmed. (1937) 1937 Mad W N 1009 (1009).

[2] Auction-purchaser and not judgment-debtor is liable for rent for period from date of sale to its confirmation. (Vol 1) 1914 Cal 785 (785).

[3] Mukarrari tenure sold in execution of decree — Rent accruing due between dates of sale and its confirmation — Held in the absence of any contract the auction-purchaser was not liable personally for it but only the tenure that was liable. (Vol 30) 1943 Pat 320 (324); 22 Pat 280 & (Vol 27) 1940 Pat 673 (675); 19 Pat 824. (Section 65 determines priority as between purchasers at successive sales. It is not meant to confer upon a defaulting tenant the privilege of rent-free occupation for so long as he or the decree-holder can delay confirmation of sale.)

[4] Plaintiff mortgagee purchasing mortgaged property—Revenue paid by him—Subsequent setting aside of the sale—Property again put for sale and purchased by a third party — Plaintiff suing mortgagor under S. 69, Contract Act, for recovery of money paid by him — Plaintiff cannot recover the money as defendant was not bound by law to pay after the purchase of the property by the plaintiff. (Vol 15) 1928 Pat 552 (554).

5. Sale in execution of mortgage decree. — [1] In deciding between the competing titles of two different purchasers in execution of two different mortgage decrees the Court should be guided not by the dates of the

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser on the ground that it is liable to satisfy a claim of such third person against the real owner.

[1882—S. 317; 1877—Ss. 316 and 317; 1859—S. 260.]

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several mortgages but of the several purchases. (1909) 32 Mad 485 (489).

SECTION 66 — SYNOPSIS.

1. Applicability, object and scope.
2. Retrospective operation.
3. Bar of suit against certified purchaser or his representatives.
4. "Certified purchaser."
5. Joint purchasers.
6. Plea of benami in defence.
7. Purchase by Hindu coparcener.
8. Sub-section (2) — Fraudulent purchase.
9. Suit for declaration.
10. Suit for specific performance.
11. Suits not covered by the section.

1. Applicability, object and scope. — [1] S. 66 bars a suit against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claimed. This section is clearly aimed at *benami* purchases in execution sales. (Vol 3) 1916 Cal 762 (763, 764): 43 Cal 20 (Vol 7) 1920 P C 30 (32): 47 Ind App 108: 43 Mad 643 (PC). (Object is to check *benami* purchases at court auction.) (Vol 2) 1915 P C 81 (82): 42 Ind App 177: 37 All 545 (PC) (1912) 10 All L Jour 97 (99) (1909) 31 All 282 (284) (Vol 32) 1945 Cal 355 (360). (Section 66 (2) was enacted for the protection of creditors of beneficial owner to prevent fraudulent secretion of property.) (1893) 16 Mad 290 (292, 293) (Vol 26) 1939 Nag 274 (276).

[2] As the substantive part of the enactment contained in S. 66 (1) bars the equitable jurisdiction of Courts it must be strictly construed and should not be extended beyond its express words. On the self-same principle, the exception to the substantive rule in S. 66 (1) which is contained in S. 66 (2) should not be narrowly construed but as much scope should be given as its language can bear. (Vol 32) 1945 Cal 355 (360) (1874-75) 2 Ind App 154 (156) (PC) (Vol 7) 1920 Lah 491 (493).

[3] To attract the operation of S. 66 (1), the suit (which may be of any character) must be against the *benamidar* certified purchaser or his privies, and it must be by the beneficial owner or a person who claims the property through him. (Vol 32) 1945 Cal 355 (359) (Vol 7) 1920 Lah 491 (493).

[4] The section does not make *benami* purchase illegal. (1907) 31 Bom 61 (68) (Vol 17) 1930 Bom 81 (83).

[5] Section 66 contemplates a real sale and not fictitious sale in execution of bogus decree to avoid some creditor. (Vol 2) 1915 Cal 492 (494).

[6] Section 66 (1) does not deal with cases in which a purchaser at court auction in his own name though on behalf of somebody else. (Vol 26) 1939 Nag 274 (276).

[7] Section 66 applies whether ostensible purchaser is real purchaser to extent of entire or only fraction of property sold. (Vol 7) 1920 Nag 147 (148).

[8] Section applies only when claim is based on auction-purchase. (Vol 3) 1916 Pat 315 (316) (Vol 13) 1926 All 124 (126): 48 All 209. (Section not applicable to sales by receiver).

[9] Persons claiming under *benami* court auction purchase—Suit between them is not covered by S. 66. (Vol 4) 1917 Mad 365 (366).

[10] The section does not apply to revenue sales. (Vol 28) 1941 Nag 84 (86): 1 L R (1941) Nag 90.

[11] Decree for arrears of rent — Sale in execution by revenue Court under Madras Estates Land Act—S. 66 does not apply. (Vol 29) 1942 Mad 154 (155, 156).

[12] The provisions of S. 66 barring a suit against a certified *benami* purchaser at an execution sale, apply to the case of a purchaser at a sale in enforcement and execution of certificate under S. 19 (2) of the Public Demands Recovery Act. (1912) 16 Cal L Jour 412 (414).

[13] The section has no application to sales under the Chota Nagpur Tenancy Act—Properties put to sale by Deputy Commissioner in execution of rent decree—Suit by plaintiff, for partition on the ground that the properties were purchased at court sale by himself and defendant jointly—Suit is not barred by S. 66. (Vol 24) 1937 Pat 324 (325).

[14] Section 317 (now S. 66) and S. 182, Bombay Land Revenue Code are to be construed strictly and do not bar a suit where the plaintiff, although a *benamidar*, came honestly into possession. (1903) 5 Bom L R 329 (331).

[15] Section 66 does not draw distinction between purchase by a person in name of stranger and one by father in name of son. (Vol 26) 1939 Nag 274 (275).

[16] Section applies to all forms of action and all kinds of reliefs — Test is, if plaintiff cannot get any relief without proving that certified purchase was on behalf of plaintiff, S. 66 applies—Fact that he was already in possession and seeks confirmation of possession or that he was out of possession and seeks recovery of possession is immaterial. (Vol 25) 1938 Cal 602 (604) (1910) 7 All L Jour 623 (626). (Suit for return of purchase money supplied to *benamidar* is not maintainable) (Vol 13) 1926 Cal 512 (513): 53 Cal 297. (Section 66 applies equally to a suit for confirmation of possession as well as to a suit to recover possession from the *benamidar*).

[17] Sale certificate is presumptive proof that purchaser is real owner. (Vol 32) 1945 Cal 458 (461).

[18] Does not exclude evidence as to auction-purchaser being *benami* for another where such evidence is relevant. (Vol 12) 1925 Oudh 20 (24).

[19] Plea of bar under S. 66 not depending on disputed facts may be taken at any stage. (Vol 19) 1932 Cal 170 (170) (Vol 7) 1920 Lah 491 (493). (Allowed to be argued for first time in appeal.) (Vol 4) 1917 Oudh 143 (145). (Do.)

[20] Beneficial owner can maintain a suit in name of *benamidar* but the latter is a mere trustee for him

Section 66 (contd.)

and is subject to all the rights and obligations of the real owner and all the equitable considerations which would bind him. (Vol 16) 1929 Pat 664 (674) : 8 Pat 585.

[21] The failure of the alleged benamidar to assert his rights against the real purchaser during the latter's possession after the auction-purchase cannot be regarded as a waiver or transfer of the right. (Vol 7) 1920 Cal 852 (852).

2. **Retrospective operation.** — [1] Section 66 is not retrospective and does not apply to a case where sale was complete before new Code. (Vol 7) 1920 Cal 435 (437) : 47 Cal 1108 * (Vol 31) 1944 Cal 145 (151, 152) * (1936) 40 Cal W N 470 (471, 472). (Code of 1859 and not of 1908 applies.) * (Vol 24) 1937 Lah 471 (474).

[But see (Vol 8) 1921 All 165 (167) : 43 All 416 * (Vol 1) 1914 All 552 (554) * (Vol 4) 1917 Mad 324 (326).]

3. **Bar of suit against certified purchaser or his representatives.** — [1] Section 66 of the new Code is more comprehensive than S. 317 of the old Code. (Vol 4) 1917 Cal 464 (465).

[2] Section 66 bars enforcement of title against certified purchaser and also persons claiming through him. Under old Code, it could be enforced against whole world except certified purchaser. (Vol 7) 1920 Cal 435 (437) : 47 Cal 1108 * (Vol 22) 1935 All 143 (146) * (Vol 25) 1938 Cal 602 (604). (Section 66 applies also to assignee of benamidar.) * (Vol 3) 1916 Cal 394 (394) * (Vol 7) 1920 Nag 51 (51) : 16 Nag L R 87.

[3] Section 66 is no bar when the certified purchaser does not contest plaintiff's claim. (Vol 12) 1925 All 47 (48) * (Vol 23) 1936 All 750 (753). (Sons of auction-purchaser not contesting claim—Section 66 held no bar.)

[4] A real owner can seek for a declaration of his real title against one who had no claim under a certificated purchaser. (Vol 15) 1928 Cal 448 (449) : 55 Cal 1070.

[5] **Mortgage decree—Purchase for judgment-debtor's benefit** — Suit by judgment-debtor to recover property from purchaser is not maintainable. (Vol 6) 1919 Pat 523 (526).

[6] Section 66 applies only where person claims through certified and not real purchaser. (Vol 7) 1920 Cal 932 (935).

[7] **Sale in execution of mortgage-decree** — Property purchased by decree-holder S in name of his wife—Suit against wife by brother of decree-holder claiming share of inheritance in property alleging that property really belonged to S — Suit is barred—No distinction in principle even if the wife is the ostensible mortgagee by reason of the mortgage money proceeding from her husband S. (Vol 33) 1946 All 85 (87) : ILR (1946) All 89.

[8] A mortgagee claiming under a Court sale purchaser enjoys the same immunity from suit as his mortgagor. Therefore a suit against the mortgagee from such purchaser is barred by S. 66. (1911) 35 Bom 342 (347).

[9] Suit for relief which can only be given on declaration of title against persons claiming title under purchase certified by Court — Such persons being parties and contesting claims, suit is barred under Section 66. (Vol 25) 1938 Cal 874 (877).

[10] **Auction-purchaser no party to suit and indifferent as to which party is entitled to property purchased by him** — Section 66 does not apply—But if one of the parties is transferee from auction-purchaser, section 66 applies. (Vol 22) 1935 All 143 (146).

[11] **Judgment-debtor mortgaging property to avoid sale by payment to purchaser—Payment not made, sale held** — Auction-purchaser subsequently mortgaging to

another — Suit by first mortgagee against judgment-debtor, purchaser and his mortgagee — Suit held not barred by S. 66 as purchaser and his mortgagee did not hold on behalf of judgment-debtor. (Vol 7) 1920 Mad 422 (422).

4. **"Certified purchaser."** — [1] A person whose bid has been accepted is a certified purchaser from the date of such acceptance though certificate may have been granted later. (1876) 25 Suth W R 493 (494).

[2] Certified purchaser includes person claiming under him. (Vol 4) 1917 Mad 324 (325) * (1907) 31 Bom 61 (68) * (Vol 6) 1919 Oudh 420 (425) : 22 Oudh Cas 222.

5. **Joint purchasers.** — [1] Section 66 does not affect title of persons otherwise beneficially interested in purchase at auction — One of decree-holders or persons interested in decree executing decree and purchasing whole of property — Other decree-holder or person interested in decree is entitled to recover his share of property purchased — Section 66 is no bar. (Vol 29) 1942 Pat 230 (232, 233) : 20 Pat 855 * (Vol 2) 1915 P C 81 (82) : 37 All 545 : 42 Ind App 177 (PC). (Mortgage-decree) * (Vol 1) 1914 All 259 (2) (261). (Joint mortgagees) * (1910) 7 All L Jour 1091 (1092).

[2] One of two co-mortgagees purchasing property under his mortgage-decree in his own name—Other co-mortgagee joined as *pro forma* defendant in the suit — Suit by latter for a share in the property purchased in barred. (Vol 10) 1923 All 405 (406).

[3] Purchase made by one of joint decree-holders enures for benefit of all persons interested in joint fund utilized for purchase of property — Others acquire only right to claim share in property conditional on payment of proportionate costs of litigation — Such right can be relinquished without written instrument. (Vol 20) 1933 All 854 (2) (856).

[4] **Person purchasing solely for himself property at auction sale** — Another person claiming that purchase was in fact made jointly on behalf of auction-purchaser and claimant's predecessor — Claim is barred under S. 66 although it relates to share in property sold. (Vol 24) 1937 All 176 (177, 181) : I L R (1937) All 113 * (Vol 21) 1934 Cal 322 (324) : 61 Cal 371 * (Vol 26) 1939 Pat 207 (208) : 18 Pat 181.

[But see (Vol 13) 1926 Bom 525 (525) : 50 Bom 600.]

6. **Plea of benami in defence.** — [1] Section 66 should be construed literally and strictly, and is applicable only to a suit brought against certified purchaser to assert benami title against him. But the real owner in possession, obtained honestly, may in a suit brought by the certified purchaser, plead in defence, that the holder of the certificate is a mere trustee or benamidar. (1874-75) 2 Ind App 154 (155, 156) (P C) * (Vol 2) 1915 Nag 51 (52) : 11 Nag L R 130. (Suit by heir of certified purchaser to eject real owner.)

[2] **Holding sold in execution of rent decree** — Purchaser suing judgment-debtor in possession—Judgment-debtor can claim purchaser as his benamidar—Purchase by judgment-debtor not void but only voidable — Section 66 is no bar to defence. (Vol 32) 1945 Pat 390 (391) : 24 Pat 279.

[3] **Suit on mortgage against mortgagor and subsequent auction-purchaser** — Mortgagor can plead that purchaser is benamidar for plaintiff and therefore he cannot sue on the basis of the mortgage. (Vol 20) 1933 Lah 636 (637) : 14 Lah 712.

[4] **Suit by benamidar auction-purchaser to eject person claiming through judgment-debtor**—Section 66 does not apply — Plea of defendant that plaintiff being benamidar cannot sue — Suit held should be dismissed. (Vol 5) 1918 Mad 1258 (1259).

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[5] Property conveyed at revenue sale as benami for effecting fraud — Fraud committed — Property sold by benamidar to third party — Real owner cannot set up benami as defence to suit by third party. (Vol 20) 1933 Mad 457 (459) : 56 Mad 646.

[6] Defendant purchasing benami in plaintiff's name and remaining in possession and defrauding stranger in collusion with plaintiff—Plaintiff suing for possession—Defendant cannot plead benami and fraud. (Vol 12) 1925 Mad 1016 (1017).

[7] A plaintiff, a purchaser at a court sale is not entitled to recover the property from the defendant of whom he was found to be the benamidar and the benami-transaction was found to be free from fraud. (1912) 36 Bom 116 (117).

[8] Judgment-debtor purchasing his property in name of benamidar who transferred it to stranger—Purchaser can oppose judgment-debtor's claim for declaration of title on ground that he cannot be allowed to reap benefit of his own fraud. (Vol 1) 1914 Cal 175 (2) (176).

[9] Mahomedan father buying in auction in name of son—Tenant paying rent to father and after him to his heirs for some time—Heirs suing tenant — He cannot plead bar of S. 66. (Vol 7) 1920 Cal 48 (49).

7. Purchase by Hindu coparcener. — [1] The provisions of the section apply to ordinary benami purchases at execution sales, but not to purchases by one member of Hindu joint family in his own name but with joint funds. (1874) 12 Beng L R 317 (329, 330) (PC) * (Vol 2) 1915 Oudh 194 (195) : 18 Oudh Cas 160. [See also (1912) 1912 Mad W N 1071 (1074).]

[2] Section does not apply to suit between joint family members — But it applies to case of separated members though some property is left undivided between them. (Vol 4) 1917 Oudh 143 (144, 145).

[3] Karta of joint family purchasing with family funds property at auction sale in name of his son—His nephew bringing suit for recovery of his share in this property—Suit is not barred by S. 66. (Vol 21) 1934 Cal 567 (568) : 61 Cal 440.

[4] Benami purchase by decree-holder who was joint family manager — Suit for partition by other coparceners — S. 66 is not a bar. (Vol 9) 1922 Mad 481 (482, 483, 484) : 45 Mad 856.

[5] Where properties sold in execution of a decree were purchased with the funds of the manager of a joint Hindu family in the name of his son-in-law, S. 317 of the Civil P. C. 1882 barred the claim of the members of the joint Hindu family to the properties as being really joint family acquisitions. (Vol 4) 1917 P C 12 (17) : 44 Ind App 201 : 40 All 159 : 20 Oudh Cas 211 (PC).

[6] Hindu joint family purchasing property in name of female member entitled to maintenance—Purchase is benami. (Vol 8) 1921 All 185 (187) : 43 All 711.

[7] Head of the family making purchase on its behalf but allowing a third person to be entered in the sale-certificate — Plaintiff, a member of the family suing to recover possession of property—Plaintiff's suit is barred. (Vol 15) 1928 All 619 (621) : 50 All 512.

8. Sub-section (2) — Fraudulent purchase. — [1] Claim that purchase was on behalf of plaintiff cannot succeed unless auction sale is impugned on ground of fraud or irregularity — Particulars of fraud not pleaded before Court which took evidence cannot subsequently be allowed to be pleaded. (Vol 26) 1939 Rang 122 (123).

[2] A, B and C entering into contract providing that they would jointly put money necessary to purchase certain village in auction—Property purchased by agent of C acting on behalf of all but certificate taken in name of C alone—S. 66 is no bar to A and B's suit for their share and for possession. (Vol 27) 1940 Nag 1 (1, 4).

[3] A manager guilty of fraud by purchasing property in his own name with his ward's funds cannot take advantage of the section as against the ward. (Vol 2) 1915 Cal 563 (563).

[4] Certain decree-holders were refused permission to purchase at an auction-sale — Their agent purchased the property and got a sale certificate — The decree-holders supplied purchase-money, ratified the purchase, and agreed to take a conveyance after confirmation—On default of the agent to execute conveyance, plaintiffs sued for declaration that they were real purchasers and for possession. *Held*, under the circumstances second para. of the section did not exclude the application of first para. Section 88 of Trusts Act will not help the plaintiff. (1900) 22 All 434 (438, 441).

[5] Auction-purchaser is real purchaser in suits against him, except in cases under S. 66 (2). (Vol 3) 1916 Mad 657 (3) (658).

9. Suit for declaration.—[1] Suit by real owner for declaration of title against certified purchaser on ground that plaintiff was real purchaser is barred by S. 66 — Possession of plaintiff can only be defence to suit by certified purchaser. (Vol 20) 1933 Pat 264 (267) : 12 Pat 616 * (Vol 3) 1916 Cal 762 (764) : 43 Cal 20 * (Vol 4) 1917 Mad 324 (326) * (Vol 3) 1916 Oudh 255 (256) ("No suit" includes suit for declaration also.)

[But see (Vol 1) 1914 Low Bur 275 (276) : 7 Low Bur Rul 260 (Real purchaser in possession is not estopped by S. 66 to sue for declaration of title).]

[2] Mortgagee from the real purchaser is precluded from bringing a suit for declaration that the purchase was *benami* on behalf of his mortgagor. (1911) 33 All 382 (384).

[3] Real purchasers allowed to remain in adverse possession for more than twelve years — Suit by them for declaration of title so acquired is not barred — It is unnecessary for them to prove that auction purchase was made on their behalf. (Vol 25) 1938 All 391 (393) : 1 L R (1938) All 556 * (1892) 19 Cal 199 (201) * (Vol 7) 1920 Nag 51 (51) : 16 Nag L R 87.

[4] B purchasing property at auction sale with C's money in 1876 — After purchase B giving all profits from the property to C for fifteen years — B must be deemed to be trustee for C and C is entitled to declaration of right to and possession of property—Also C can be deemed to have acquired right to property by adverse possession. (Vol 21) 1934 All 990 (993).

[5] If an auction-purchaser allowed a stranger to be in possession for a long time and even attested a sale-deed executed by him to re-assure the purchaser. *Held*, that he was estopped from claiming the benefit of S. 317 of Civil P. C., 1882, and if after such sale, the auction-purchaser gets a sale certificate from the Court it is fraud. (1913) 36 Mad 564 (569).

10. Suit for specific performance. — [1] A suit by a judgment-debtor against an auction-purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred by S. 66. (Vol 6) 1919 Pat 523 (526) * (Vol 32) 1945 Cal 355 (359). (A contracting to sell to B property to be purchased by A at court sale—Suit for specific performance by B against C alleging him to be benamidar of A—Suit is barred by S. 66 (1) as B must be regarded as claiming through A, the beneficial owner.) * (Vol 19) 1932 Cal 170 (171) * (Vol 3) 1916 Mad 1156 (1156, 1157) * (1910) 8 Ind Cas 258 (258) (Mad). (Minor plaintiff—Plaint may be amended by insertion of prayer for damages.) * (Vol 8) 1921 Pat 39 (2) (40).

[2] Section 66 is no bar to a suit to enforce the specific performance of an agreement by the auction-purchaser subsequently to the auction-purchase to convey the property purchased to the plaintiff even though the plaintiff alleged that the certified purchaser was a *benami*.

^a[67. (1)] The ^b[Provincial Government] ^c[* * *] may, by notification in the ^d[Official Gazette], make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the ^b[Provincial Government], to make it impossible to fix their value.

^e[(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the ^b[Provincial Government] may, by notification in the ^d[Official Gazette], declare such rules to be in force, or may, ^c[* * *] by a like notification, modify the same.

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dar for the plaintiff. (Vol 6) 1919 Mad 94 (95) : 42 Mad 615 (F B) * (Vol 7) 1920 P C 30 (32) : 43 Mad 643 : 47 I A 108 (P C) * (Vol 17) 1930 Bom 81 (88) * (Vol 32) 1945 Cal 355 (358) * (Vol 10) 1923 Nag 11 (13).

[3] Agreement to purchase and convey to another entered into prior to and affirmed after sale can be enforced. (Vol 7) 1920 P C 30 (32) : 43 Mad 643 : 47 Ind App 108 (P C).

[4] Auction sale in name of defendant — Plaintiff supplying balance of purchase money on stipulation that he will be joint purchaser — Sale certificate held could not be issued in joint names but in name of defendant—Agreement being subsequent to sale, S. 66 did not bar suit for specific performance. (Vol 7) 1920 Cal 101 (103).

[5] Where defendants purchased property at an auction under an enforceable undertaking to reconvey the property to the plaintiff for whom they were acting as managers, after the period of management was over, S. 66 did not operate as a bar to recovery of the property by suit, where the re-conveyance was to be effected on the footing of the adjustment of the rights and liabilities of the parties, and not on a mere tender of the purchase price. (1935) 62 Cal L Jour 88 (93).

[6] The auction property was originally mortgaged to A and subsequently put into possession of B as a usufructuary mortgagee—In execution of A's mortgage decree X purchased the property as B's paid agent with B's money, and he agreed to execute a re-conveyance to B. X did not carry out the agreement and ejected B's tenant. *Held*, B was entitled to maintain a suit for recovery of possession from X. (1895) 18 Mad 436 (437).

[7] A, a certified purchaser obtaining symbolical possession agreed to reconvey property to the former owner at the time of auction sale — B sued for specific performance alleging that he never parted with possession—Suit not being one to oust the certified purchaser from possession was not barred by S. 66. (1887) 14 Cal 585 (585, 586).

[8] Agreement by auction-purchaser to sell property to real owner—Subsequently sale deed executed in favour of real owner — S. 66 is no bar to real owner. (Vol 32) 1945 Mad 32 (32).

11. Suits not covered by the section. — [1] Section 66 should be strictly construed — It applies to suit where cause of action is given by benami purchase and not to suit based on contract separate from the transfer. (Vol 18) 1931 Bom 578 (581) * (Vol 27) 1940 P C 202 (203) : I L R (1940) Kar (PC) 406 (P C). (Claim held barred as no case independent of auction-purchase and basing title on subsequent possession was put forth.) * (Vol 10) 1923 Cal 302 (303). (Section 66 applies only where the plaintiff seeks to enforce his secret title against the certificated purchaser.) * (Vol 11) 1924 Oudh 218 (221). (Section does not affect title of persons beneficially interested apart from *benami* nature.) * (Vol 3) 1916 Pat 315 (316).

[2] If the plaintiff does not seek relief on the ground that the certificated purchaser is a name-lender but relies on a certain state of facts as establishing certain other

legal relations between himself and the certified purchaser and entitling him to the property purchased, he can rely on such facts and circumstances notwithstanding S. 66 of the Civil P. C. (Vol 6) 1919 Mad 942 (943). (Suit by principal against agent.) * (1894) 17 Mad 282 (286). (Suit by principal against agent for recovery of property purchased by agent in his own name for principal.)

[3] Real owner in possession for 12 years—Benami-dar purchaser at auction dispossessing real owner—Suit for possession is not barred merely because part of cause of action set up is that purchase was benami. (Vol 16) 1929 P C 228 (231) : 56 Ind App 830 : 51 All 675 (PC). ((Vol 8) 1921 All 165 : 43 All 416, reversed.)

[4] Benami purchase of house at court-sale—Subsequent contract by benamidar to sell house to person for whom he had purchased benami — Suit to rectify sale deed—Section 66 (1) is no bar. (Vol 24) 1937 Mad 362 (363, 364).

[5] Suit for recovery of money advanced by A to B as contribution by A for purchase of a certain land at court-sale—Section 66 was held no bar to the suit as B's title was not challenged. (Vol 23) 1936 Pat 429 (430).

[6] Third person purchasing property disregarding decree-holder's instructions to obtain leave and bid for him—Decree-holder cannot sue for possession. (Vol 12) 1925 Nag 41 (44).

[7] Property subject to usufructuary mortgage purchased in G's name—H redeeming mortgage and getting possession — Mutation Court deciding in favour of G—H suing for a declaration that he was the real purchaser—Lower Court dismissing suit as barred by S. 66.—But granting money decree to the extent of money paid for redemption — *Held*, no money decree could be granted but H was entitled to benefit which the mortgagee possessed in the property. (Vol 19) 1932 All 32 (33).

[8] Where B's widow purchased in Court auction, from out of B's estate, a house in the name of C and enjoyed it till her death, and C during her lifetime never laid any claim thereto, held that a suit by B's heir against C's heir after the death of B's widow for possession of the house was not covered by S. 66 of Civil P. C. (1913) 35 All 138 (141, 142, 143).

Section 67 — Note 1

[1] *Held*, before the insertion of sub-s. (2) in 1914, that the sanction of Commissioner of a Division for sale of agricultural land in execution under Punjab Notification No. 1297-S, issued under cl. (2) of S. 327 of the Code of 1882, no longer necessary from date on which Code of 1908 came into force. (1913) 19 Ind Cas 479 (480) : 1913 Pun Re No. 89.

[2] Rules framed under S. 327 of the Code of 1882—Commissioner's sanction to validate sale of agricultural land held was not necessary even after the insertion of sub-s. (2) in 1914. (Vol 8) 1921 Lah 223 (224).

[3] Rule under S. 67 (2) promulgated by Local Government of Coorg — Rule restraining execution of decree by sale of land does not apply when decree is transferred for execution in British India. (Vol 28) 1941 Mad 45 (46).

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.]

[1882—S. 327; 1877—S. 327; *See* Ss. 54 and 68 to 72.]

[a] Original section 67 was *renumbered* as sub-section (1) of that section by the Code of Civil Procedure (Amendment) Act, 1914 (1 [I] of 1914), S. 3. [b] *Substituted* by A. O. for "Local Government". [c] The words "with the previous sanction of the Governor-General in Council" were *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, Pt. I. [d] *Substituted* by A. O. for "Local Official Gazette". [e] Sub-section (2) was *inserted* by Act 1 [I] of 1914, S. 3.

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

68. The ^a[Provincial Government] may ^b* * * declare, by notification in the ^c[Official Gazette], that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules for transferring to Collector execution of certain decrees.

[1882—S. 320, para. 1; 1871—S. 320; *see* Ss. 54, 67 and 69 to 72]

[a] *Substituted* by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council" were *repealed* by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, pt. I. [c] *Substituted* by A. O. for "Local Official Gazette".

Provisions of Third Schedule to apply.

69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

[*See* S. 68 and Ss. 70 to 72.]

Objects and Reasons.

"*Clause 69.*—The provision as to Collectors have been placed in a separate schedule. They deal with a

special matter and are not of general application."—S. O. R.

Section 68 — Note 1

[1] The object of the section is to enable the Collector of the district to liquidate the debts of encumbered land-holders without the immediate sale of their estates and so to preserve the old landed gentry of the country. (Vol 22) 1935 Oudh 156 (161) : 10 Luck 459.

[2] Sections 68 to 72 do not apply to decrees passed by revenue Court. (Vol 29) 1942 All 257 (258) : I L R (1942) All 237.

[3] Whether the judgment-debtor is agriculturist for purposes of Bombay Notification under S. 68 contained in Circular No. 95, Chapter II, Civil Manual, has to be determined with reference to the date on which the sale of his property is ordered. (Vol 26) 1939 Bom 526 (527).

[4] Property sold but sale not confirmed—Provincial Government cannot transfer execution to Collector. (Vol 21) 1934 Oudh 143 (144, 145) : 9 Luck 554.

[5] Simple money-decree—No immovable property ordered to be sold in execution—Decree cannot be transferred under S. 68. (Vol 13) 1926 Oudh 318 (319).

[6] The Bombay Notification under S. 68 which is contained in Circular No. 95, Chap. II, Civil Manual, and which provides that decrees for sale of immovable properties of agriculturists which have been mortgaged should be sent to Collector for execution does not apply to cases in which, at the time of the order for sale, the agriculturist judgment-debtor's interest in the property had devolved on a non-agriculturist. (Vol 30) 1943 Bom 127 (128, 129).

[7] Notification under S. 68 by Punjab Government, No. 365-R (Revenue Department) dated 17th January 1939—It is not necessary to transfer execution of decree as a whole to Collector merely because some land falling within purview of notification had been ordered to be sold. (Vol 27) 1940 Lah 345 (346, 347).

[8] The declarations made by the C. P. Government under S. 68 are rescinded by Revenue Department Notification No. 2937-2890-XII dated 17-9-43. Hence, jurisdiction of all revenue Courts in all Collector cases

except those which have been excluded is withdrawn. (1944) 1944 Nag L Jour 61 (61).

[9] Decree-holder asking for sale of agricultural property—Decree has to be transferred to Collector by virtue of a Notification No. 576/1 A-93 of 26th March 1932. (Vol 21) 1934 All 253 (255).

[10] U. P. Government Notification under S. 68, No. 576/1 A-93 dated 26th March 1932 was applicable to pending executions. (Vol 20) 1933 Oudh 274 (275) : 8 Luck 504 * (Vol 22) 1935 All 468 (469).

[11] U. P. Government Notification under S. 68, No. 576/1 A-93 does not apply to sale that has taken place before it had come into force. (Vol 21) 1934 Oudh 143 (143) : 9 Luck 554.

[12] Notification under S. 68 by Punjab Government, No. 365-R (Revenue Department) dated 17th January 1939 applies even to pending execution proceedings in which order for sale has been passed. (Vol 27) 1940 Lah 345 (346).

[13] The C. P. Government (Revenue Department) Notification No. 2937-2890-XII, dated 17th September 1943, rescinding previous declarations under S. 68 is *intra vires* and applies to pending executions. (Vol 31) 1944 Nag 188 (189) : I L R (1944) Nag 331.

[14] Decree transferred to Collector—Execution assigned to records in 1913—No sale by Collector—Collector as Court of Wards making payment till 1933—Subsequent application to recover balance—Application not barred under S. 48 and Sch. 3 para. 11 (3) nor under Limitation Act, Art. 182. (Vol 32) 1945 Oudh 110 (111).

[15] As to jurisdiction of Civil Court and Collector, *see* Note on S. 70. In executing a decree transferred to the Collector under this section, the Collector is deemed to be acting judicially; *see* S. 71. As to when Court may authorise Collector to stay public sale of land, *see* S. 72 (1).

Section 69 — Note 1

[1] The Collector must decide the best method of satisfying the decree whether by management by the

Rules of procedure.

70. (1) The ^a[Provincial Government] may make rules consistent with the aforesaid provisions—

- (a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court ;
- (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;
- (c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

[1892—S. 320, paras. 2 to 4.]

[a] Substituted by A. O. for "Local Government".

Section 69 (contd.)

Collector himself or by sale or by letting. But he has not got the discretion to decide whether the decree has been satisfied. (1913) 37 Bom 32 (34, 35).

[2] Decree transferred to Collector — Injunction to Court passing decree is futile. (Vol 16) 1929 Oudh 285 (236) : 4 Luck 685.

[3] Incases not covered by Sch. 3 or rules framed under S. 70, jurisdiction of Civil Courts is not ousted. Where execution by sale by Collector is questioned in appeal the Chief Court can order stay of sale. Its jurisdiction is not excluded by S. 70 (2). (Vol 30) 1943 Oudh 265 (265, 266).

SECTION 70 — SYNOPSIS.

1. Extent of power of Provincial Government to make rules.
2. Jurisdiction of Collector and Civil Court.
3. Ancestral property.
4. Suit to set aside orders of Collector.
5. Suit to set aside sale held by Collector.
6. Power of Collector to set aside sale.
7. Appeal or revision from order of Collector.
8. Power of Collector to pass order under S. 476, Criminal P. C.

1. Extent of power of Provincial Government to make rules.—[1] Government has power to make rules, making Revenue Court's orders unassailable by separate suit. (Vol 7) 1920 All 9 (10) : 42 All 275.

2. Jurisdiction of Collector and Civil Court.—[1] The Provincial Government has no power under this section to make any rule empowering the Collector to deal with questions of title. (1889) 11 All 94 (95, 96) * (1887) 9 All 43 (45). (*Held* that the application to set aside execution sale on ground of judgment-debtor having no saleable interest by the purchaser at a sale in execution of decree transferred to Collector, was entertainable by the Civil Court and the Collector had no jurisdiction under Notification No. 671 of 1880 to entertain it.)

[2] Where a decree is sent to the Collector for execution a Civil Court cannot interfere in matters declared to be in the Collector's jurisdiction. (Vol 24) 1937 All 550 (552) : I L R (1937) All 766 * (Vol 20) 1933 Bom 369 (369) * (Vol 5) 1918 Bom 216 (217) : 42

Bom 621. (Bombay Civil Circulars, Chap. II, Cl. 91, sub-cl. (16) — Power to grant leave to bid given to Collector — Civil Court cannot grant leave to bid.) * (Vol 24) 1937 Nag 41 (42) : I L R (1937) Nag 261 * (Vol 14) 1927 Nag-324 (324) * (Vol 12) 1925 Oudh 448 (451) : 28 Oudh Cas 330.

[3] Notification transferring sale to Collector — Sale by Civil Court is void as notification ousts Civil Court's jurisdiction (Vol 21) 1934 All 314 (315).

[4] Collector to whom decree has been transferred for execution under S. 68 and S. 9, C. P. Ten. Act, has powers of execution only and not of deciding other matters. (Vol 15) 1928 Nag 297 (298).

[See also (Vol 24) 1937 Oudh 298 (300). (Question of satisfaction of decree.) * (Vol 20) 1933 Sind 112 (114, 115) : 26 Sind L R 506. (Construction of decree and question of satisfaction of decree.)]

[5] Collector has no jurisdiction to decide as to disputed adjustment of decree under O. 21, R. 2. (Vol 23) 1936 Bom 277 (279) : 60 Bom 729 * (Vol 24) 1937 Nag 217 (219).

[6] In matters arising in execution, but not covered by the Third Schedule or the rules framed under this section, the Civil Court will continue to have jurisdiction. (Vol 18) 1931 All 320 (323) (Substitution of heirs.) * (1885) 7 All 407 (409) * (Vol 23) 1936 Bom 189 (191) : 60 Bom 688 * (Vol 23) 1936 Bom 227 (233) : 60 Bom 516 * (Vol 27) 1940 Nag 372 (374) * (Vol 30) 1943 Oudh 265 (265, 266). (Execution transferred to Collector — Execution by sale questioned in appeal — Chief Court can order stay of sale.)

[7] Application to set aside order of satisfaction — Held Collector had power to refer such questions to Civil Court under R. 13 (Revenue Book Circular, Vol 2, S. 3, Serial No. 8). (Vol 25) 1938 Nag 49 (49, 50).

[8] Collector can make any correction in the sale certificate to make it conform with the proclamation of sale, if he is approached for the purpose, as a consequential or incidental exercise of the authority vested in him to grant a certificate of sale after the sale is confirmed. (Vol 13) 1926 All 575 (576).

3. Ancestral property.—[1] Execution application for sale of property found to be ancestral — According to Allahabad Notifications, Collector alone can sell such property. (Vol 20). 1933 All 192 (195) * (Vol 1) 1914 All 339 (340) : 36 All 33. (Ancestral grove with a house in it.)

Collector deemed to be acting judicially.

[1882—S. 320.]

71. In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

72. (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

[1882—S. 326; 1877—S. 326; 1859—244; see SS. 54, 68 to 71.]

Section 70 (*contd.*)

4. Suit to set aside orders of Collector. — [1] Where the order of the Collector or other revenue authority is declared to be final by the rules framed by the Provincial Government, a suit to set aside the order does not lie. (Vol 10) 1923 All 186 (187) : 45 All 203 (FB). (Case under U. P. Rules 30, 31, 32 (3).) * (Vol 19) 1932 Oudh 273 (274). (Held that the Civil Court had no jurisdiction to question the correctness or validity of the Commissioner's order when the matter decided was exclusively within his jurisdiction, as mentioned in para. 1011, Cl. 8 of the Manual of U. P. Government Orders, Rev. Dept. Vol 1, page 315.)

[2] Where the order of the Collector is such that if it had been passed by the Court, a suit would have been maintainable to set it aside, a suit to set aside the order of the Collector is maintainable. (Vol 13) 1926 All 575 (576) : 48 All 568. (Suit will lie challenging the validity of order setting aside sale by Collector after confirmation.)

[3] After the transmission of the decree to the Collector for execution, no civil Court has authority in the matter and no suit is maintainable for a declaration that the plaintiff's shares in the property are not liable to attachment. (Vol 13) 1926 Oudh 612 (612) : 1 Luck 558.

[4] A suit to set aside order of Collector is maintainable where the order of the Collector is *ultra vires*. (Vol 25) 1938 Oudh 62 (64). (U. P. Manual of Revenue Department, Vol 1, Rr. 998 and 1011 — Commissioner setting aside sale on grounds not provided for in R. 998 — Civil Court has jurisdiction to entertain suit against such order.)

5. Suit to set aside sale held by Collector. — [1] Sale held by Collector vitiated by fraud — Fraud not coming within O. 21, R. 90 — Suit to set aside sale is maintainable. (Vol 12) 1925 All 146 (150, 151) : 47 All 217.

6. Power of Collector to set aside sale. — [1] Bombay High Court Manual of Circulars, R. 17 — Application to Collector to set aside sale — Collector held should at once refer applicant to Court executing the decree. (Vol 8) 1921 Bom 209 (209) : 45 Bom 1132.

[2] Sale confirmed and case retransmitted to Civil Court by Collector — Collector may set aside sale on ground of fraud in his inherent jurisdiction. (Vol 22) 1935 All 868 (871, 872) : 58 All 249.

7. Appeal or revision from order of Collector. — [1] Order passed by the Collector in an execution proceeding is not appealable to High Court. Appeal lies to such authorities as the Local Government may by rules prescribe. (1906) 7 Bom L R 652 (653) * (1888) 5 All 314 (316) (F B) * (Vol 13) 1926 Oudh 288 (288).

[2] Collector is not Court and his order cannot be re-

vised by the High Court. (Vol 20) 1933 Bom 369 (370) * (Vol 13) 1926 Oudh 288 (288).

8. Power of Collector to pass order under S. 476, Criminal P. C. — [1] A *mamladar* has no powers of either Civil, Revenue or Criminal Court while receiving an application under the rules framed under S. 70 for setting aside sale. Hence, he has no power to order prosecution. (Vol 22) 1935 Bom 158 (160) : 36 Cri L Jour 1005 : 59 Bom 345.

[2] Collector acting under S. 70 is Revenue Court and can order prosecution under S. 193, Penal Code., for statements made before him under Criminal P. C., S. 476. (Vol 4) 1917 All 59 (60) : 18 Cri L Jour 307 : 39 All 91.

Section 71 — Note 1

[1] Per *Broomfield, J.* — Collector is not Court. (Vol 30) 1943 Bom 12 (18) : I L R (1943) Bom 104.

[2] Under S. 72 (2) read with S. 71 the Collector is deemed to be acting judicially and all objections relating to the proceedings before him must be disposed of by him. (Vol 15) 1928 Lah 475 (476).

[3] Section 71 does not alter essential nature of powers exercised by Collector. It gives to Collector and his subordinates protection under Judicial Officers' Protection Act. (Vol 23) 1936 Bom 227 (230) : 60 Bom 516.

[4] Authority to see that Collector does not exceed his powers continues in Court. (Vol 23) 1936 Bom 227 (230) : 60 Bom 516.

SECTION 72 — SYNOPSIS.

1. Applicability and scope.

2. "Collector represents to the Court."

3. Discretion of Court.

1. Applicability and scope. — [1] Intervention of Collector is necessary for application of S. 72. Where land is not saleable S. 72 has no application. (Vol 23) 1936 Pesh 90 (91).

[2] Section 72 is not applicable to a decree which directs the sale of immovable property in pursuance of a contract specifically affecting the same. (1890) 2 All 856 (857).

[3] Section 72 must be read as alternative to S. 68 and so read it only indicates the source of the authority of the Collector to exercise powers under Sch. 3. Civil Court cannot under S. 72 exercise the powers of Collector under Sch. 3. (Vol 24) 1937 Nag 41 (42) : I L R (1937) Nag 261.

[4] Section does not empower Court to direct payment of decretal amount by instalments. (1870) 2 N W P H C R 347 (347) * (1874) 6 N W P H C R 39 (41).

[5] A farm of land in favour of the decree-holder under S. 72 does not follow the ordinary course of execution. It is more in the nature of an

DISTRIBUTION OF ASSETS.

73. (1) Where assets are held by a Court⁹ and more persons than one have, before the receipt of such assets, made application to the Court⁷ for the execution of decrees for the payment of money¹⁰ passed against the same judgment-debtor¹² and have not obtained satisfaction thereof,⁵ the assets, after deducting the costs of realization, shall be rateably distributed among all such persons: *Proceeds of execution sale to be rateably distributed among decree-holders.*

Provided as follows :—

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;
- (c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) ; and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.²¹

(3) Nothing in this section affects any right of ^a[the Crown].¹⁸

[1882—S. 295; 1877—S. 295; 1859—S. 270. See S. 64, O. 21, Rr. 52, 72, 89 and 90.]

[a] Substituted by A. O. for "the Government".

Section 72 (contd.)

adjustment of a decree and stands on a different footing from a lease. (Vol 22) 1935 Lah 964 (965).

[6] Civil Court is not empowered to execute decree by granting lease of judgment-debtor's property under S. 72 more so when they are protected from sale of their property by Bundelkhand Land Alienation Act. (Vol 25) 1938 All 290 (291, 292) : I L R (1938) All 528 (FB). (Overruling (Vol 19) 1932 All 571.)

[7] Civil Court can grant a remedy in execution of money decrees under S. 72 by referring the case to Collector where S. 68 is not in force or where the case comes under S. 68 and there is a Notification of the Local Government to that effect. (Vol 24) 1937 All 699 (700).

[8] Though S. 16, Punjab Alienation of Land Act, prohibits sale in execution of decree of land belonging to agriculturist it does not affect power of Court executing decree to make temporary alienation thereof under S. 72, Civil P. C. (Vol 7) 1920 Lah 456 (459) : 1 Lah 192 (F B) & (Vol 23) 1936 Lah 696 (698).

2. "Collector represents to the Court." — [1] The Collector when acting under S. 72 does not perform any judicial function. If he makes any representation under the section he does so as an officer of the Court. (Vol 7) 1920 Lah 456 (457) : 1 Lah 199 (FB).

[2] Collector has no authority to represent that temporary alienation is objectionable—It is for the Court to decide whether such objection should be maintained even if taken by Collector. (Vol 22) 1935 Pesh 113 (114).

[3] Collector is not authorized to suggest satisfaction by transfer of judgment-debtor's debt or mortgagee rights — Collector also cannot compel decree-holder to

take lease of judgment-debtor's land at valuation fixed by Collector. (Vol 23) 1936 Pesh 14 (15).

[4] Decree sent for execution to Collector — Collector reporting his inability to act — Executing Court should not file execution application but should proceed with the execution. (Vol 13) 1926 Lah 682 (682) : 27 Cri L Jour 1023.

3. Discretion of Court.—[1] It is within the discretion of the Court to accept or decline to accept a representation made by the Collector under the section. (Vol 7) 1920 Lah 456 (457) : 1 Lah 199 (F B) & (1883) 9 Cal 290 (293, 294, 295). (Court is bound to hear objections of decree-holder to scheme proposed by Collector and any evidence that may be offered in support of those objections.) & (Vol 5) 1918 Lah 361 (362).

[2] Where a District Judge, executing a decree for sale of land, orders its sale, he is not bound to accept the recommendation of a Sub-divisional Officer to the Collector to arrange to have the decree satisfied by a temporary alienation. (Vol 2) 1915 Lah 197 (198).

[3] More than one execution application pending — Collector representing that public sale of property under attachment was objectionable — Procedure indicated. (Vol 22) 1935 Lah 964 (965).

SECTION 73 — SYNOPSIS.

1. Appeal.
2. Applicability, scope and object.
3. Appropriation of amount on rateable distribution.
4. Essentials under section.
5. "And have not obtained satisfaction thereof."

Section 73 (*contd.*)

6. Applicant attaching before judgment.
7. Application before receipt of assets.
8. Application to Court holding assets.
9. Assets held by Court.
10. Decree for payment of money.
11. Dismissal of execution application.
12. Same judgment-debtor.
13. Insolvency or liquidation.
14. Mode of distribution.
15. Power of Court to hold enquiry.
16. Priority of debts.
17. Proviso (a).
18. Proviso (b).
19. Proviso (c).
20. Set off.
21. Suit for refund of assets.
22. Revision.

1. Appeal. — [1] An order passed under S. 73 is not an appealable order. (1892) 14 All 210 (211) * (Vol 23) 1936 All 626 (628) * (1910) 12 Bom L R 365 (366) * (Vol 25) 1938 Lah 307 (308) * (Vol 16) 1929 Lah 645 (647). (Court proceeding to determine matter under S. 73 — Order not in accordance with S. 73 — Still order is not appealable.) * (Vol 1) 1914 Mad 437 (437) * (Vol 8) 1921 Pat 401 (402) * (Vol 23) 1936 Pesh 52 (53).

[2] Rateable distribution order if it decides question covered by S. 47 is appealable. (Vol 11) 1924 Cal 801 (805) : 51 Cal 761 * (Vol 3) 1916 Mad 20 (21, 22) : 39 Mad 570 * (Vol 21) 1934 Pat 350 (351).

[3] Order ostensibly one under S. 73 but as a fact deciding matter under S. 47 (1) — Appeal lies. (Vol 14) 1927 Lah 100 (101) * (Vol 22) 1935 Lah 302 (303).

[4] Decree-holder attaching certain fund as payable to judgment-debtor — Court deciding that fund was not attachable by these decree-holders — Order is one under S. 47 and appeal lies. (Vol 5) 1918 Mad 1322 (1324).

[5] When decision under S. 73 is in respect of invalidity of execution or non-liability of fund for distribution such decision is virtually under S. 47 between particular decree-holder and judgment-debtor and as such appeal lies. (Vol 5) 1918 Mad 1322 (1323).

[6] Order under S. 73 determining question of rateable distribution between rival decree-holders in which judgment-debtor has no interest does not fall under S. 47 and is not appealable. (Vol 18) 1931 Bom 252 (253, 254) * (Vol 18) 1931 Bom 350 (351) : 55 Bom 473 * (Vol 2) 1915 Cal 658 (659) : 42 Cal 1 * (Vol 25) 1938 Lah 801 (803) * (Vol 19) 1932 Lah 96 (96) * (Vol 9) 1922 Mad 99 (99, 100) * (Vol 30) 1943 Nag 320 (320) : I L R (1943) Nag 562 * (Vol 25) 1938 Pesh 63 (64) * (Vol 28) 1941 Rang 113 (114) : 1940 Rang L R 718 * (Vol 24) 1937 Rang 134 (135).

[7] Order refusing to execute order granting rateable distribution is appealable. (Vol 18) 1931 Pat 359 (360) : 10 Pat 830.

2. Applicability, scope and object. — [1] The object of the section is to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of those assets. (Vol 28) 1941 All 110 (111) : I L R (1941) All 77 (FB) * (1901) 23 All 106 (110) * (Vol 32) 1945 Bom 76 (77) * (Vol 11) 1924 Cal 801 (805) * (1883) 9 Cal 920 (922) (F B) * (1910) 13 Oudh Cas 291 (292).

[2] Section 73 is not designed to enlarge in any way the rights of decree-holders or place at their disposal the proceeds of property which they could not have

themselves attached. (1901) 23 All 106 (110) * (Vol 23) 1941 All 110 (115) : I L R (1941) All 77 (F B) * (Vol 32) 1945 Bom 76 (77) * (1880) 4 Bom 429 (432).

[3] Rateable distribution is not matter of equity but should be dealt with under S. 73. (Vol 21) 1934 Mad 426 (427) : 58 Mad 59 * (Vol 13) 1926 Cal 957 (958).

[4] Section 73 does not apply to an attorney's lien. (Vol 14) 1927 Bom 542 (551) : 51 Bom 855.

[5] An order under S. 73 for rateable distribution of assets affects only interests existing at the time. (1900) 27 Cal 351 (353).

[6] Section 73 applies even when execution is transferred to Collector. (Vol 20) 1933 All 666 (668).

[7] Order under S. 186, Companies Act—Application for its execution ranks as application for execution of decree and S. 73 applies. (Vol 32) 1945 P C 60 (61) : 72 Ind App 85 : 20 Luck 162 : I L R (1945) Kar P C 148 (P C). ((Vol 27) 1940 Oudh 237 : 15 Luck 332 reversed.)

[8] Section 44, Evidence Act, has no application to proceedings under S. 73. (Vol 22) 1935 Cal 290 (295) : 62 Cal 715 (FB).

[9] Section 60 as amended in 1937 does not affect S. 73 — Section 60 proviso protects certain judgment-debtors and does not give one decree-holder priority over other — A obtaining decree against B in 1936 and attaching Rs. 60 out of his salary of Rs. 180 — C obtaining decree against B in 1938 and applying under S. 73 — C held entitled to rateable distribution out of Rs. 60. (Vol 28) 1941 Nag 239 (240, 241) * (Vol 25) 1938 Sind 144 (145).

[10] The right of the decree-holder against the judgment-debtor under S. 73 are controlled by S. 60 (i) — Attachment of salary of public officer by one decree-holder — Subsequent decree-holder who could not attach the salary in view of amended S. 60 (i) held not entitled to rateable distribution. (Vol 32) 1945 Bom 76 (77, 78).

[11] Section 63 is exception to S. 73 — Property under attachment of more Courts than one — Right of rateable distribution arises on satisfaction of conditions under S. 73. (Vol 23) 1936 Mad 797 (798) : 59 Mad 1028 * (Vol 21) 1934 Cal 559 (560).

[12] Property in possession of receiver—Application under S. 73—No leave of Court is necessary as the same will not amount to a disturbance of possession of Court through its officer. (Vol 19) 1932 Bom 622 (624).

3. Appropriation of amount on rateable distribution. — [1] Decree-holder receiving money as result of rateable distribution cannot appropriate it in any way he likes—What he receives goes towards payment of every rupee of his debt if one, or equally towards debts, if more than one. (Vol 26) 1939 Mad 268 (269) : I L R (1939) Mad 301.

4. Essentials under section. — [1] The essential conditions for the applicability of the section are :—(i) there must be assets held by Court; (ii) Decrees must be against the same judgment-debtor for the payment of money; (iii) The decree-holder must not have obtained satisfaction and he must have made application for execution of his decree to the Court before the receipt of assets. (Vol 19) 1932 All 411 (413) : 54 All 516 * (1905) 27 All 132 (135) * (Vol 3) 1916 Cal 264 (265) * (Vol 5) 1918 Mad 512 (512).

[2] Notice of an application for rateable distribution should go to the rival decree-holders whose interests may be affected thereby. (1910) 13 Oudh Cas 282 (284).

5. "And have not obtained satisfaction thereof." — [1] Application for rateable distribution — Sale of properties of other judgment-debtor confirmed and proceeds available to decree-holder before order allowing rateable distribution—Decree must be treated as satisfied to extent of proceeds realized. (Vol 21) 1934 Mad 426 (427, 428) : 58 Mad 59.

Section 73 (contd.)

6. Applicant attaching before judgment. — [1] A plaintiff attaching before judgment has not by reason merely of such attachment or process incidental thereto any right to be treated preferentially to others. (1906) 33 Cal 639 (643) * (Vol 2) 1915 All 275 (276, 277) : 37 All 575. (Confers no right of priority.) * (Vol 21) 1934 Cal 559 (560). (Attachment before preliminary decree in administration suit—Attaching creditor is not entitled to priority.)

[2] Assets held by Court — Right to rateable distribution does not arise notwithstanding attachment before judgment where decree is not obtained prior to realization of assets. (Vol 11) 1924 Lah 70 (70) * (Vol 15) 1928 Bom 545 (547) * (Vol 18) 1931 Mad 570 (571). (Potential decree-holders have no right to rateable distribution.)

[3] Section 73 can be availed of only by decree-holder making application for execution of decree — Attachment before judgment does not become attachment in execution and does not confer right to rateable distribution without application for execution—Sections 63 and 64 do not indicate that Court should *suo motu* ascertain claimants to particular sum and divide it among persons entitled to share. (Vol 28) 1941 Mad 125 (126) * (1888) 12 Bom 400 (406, 407) * (Vol 4) 1917 Mad 692 (692) * (Vol 26) 1939 Rang 20 (21) : 1938 Rang L R 565.

[4] An attachment before judgment cannot by itself give a simple creditor priority over a mortgagee nor can the former get any benefit under S. 73 when not only is there no application by him for the execution of the decree but the money is realised before attachment. (Vol 4) 1917 Mad 692 (692).

[5] As between two attaching decree-holders one executing his own decree and the other executing the attached decree, the one who has applied for execution of the attached decree is entitled to rateable distribution since in effect he is executing his own decree. (1918) 1918 Mad W N 1021 (1021, 1022).

[6] Section 73 does not include an application for rateable distribution by an attaching creditor of the judgment-creditor in a suit. (1909) 5 Mad L Tim 126 (126).

7. Application before receipt of assets. —

[1] To claim rateable distribution under S. 73 the decree-holder must have applied for execution before receipt of assets by the Court. Any application made after that would be barred by S. 73. (Vol 26) 1939 Mad 196 (196) * (Vol 23) 1936 All 626 (628). (Application by A for rateable distribution a few minutes after receipt of assets by Court — A cannot claim rateable distribution.) * (Vol 18) 1931 Bom 252 (254) * (Vol 4) 1917 Cal 740 (743, 744) : 44 Cal 789. (Claims must be put before receipt of assets whether by treasury or agent.) * (1921) 62 Ind Cas 857 (859) (Cal) * (Vol 16) 1929 Lah 645 (647) * (Vol 5) 1918 Lah 75 (76) : 1918 Pun Re No. 33 * (Vol 23) 1936 Mad 91 (92) : 59 Mad 303. (A defective application for rateable distribution made before the receipt of assets—Application returned and re-presented after the receipt of assets—Rateable distribution allowed as the first application was before the receipt of assets.)

[2] Attachment of property after judgment is not sufficient to share in the rateable distribution, but a formal application for execution is necessary before the assets come into Court's possession. (Vol 13) 1926 Cal 249 (250).

[3] Section 73 does not apply where no execution applications were made before the receipt of assets but only attachments before judgments had been effected. (1909) 13 Cal W N 1177 (1179) * (Vol 3) 1916 Cal 371 (371, 372).

[4] Application for rateable distribution made on very day on which sale proceeds deposited in Court—No presumption as to priority of application arises—Court must find as a fact whether application is made

prior or later. (Vol 24) 1937 Mad 504 (509) * (Vol 6) 1919 Mad 758 (758).

[5] There must be subsisting execution application at the time of receipt of assets. (Vol 24) 1937 Nag 18 (17) : I L R (1937) Nag 420.

[6] Where the parties are not entitled to claim rateable distribution under S. 73 by reason of the fact that none has applied for execution before the date of receipt of assets, to the Court having the custody of the assets, but all the same have made attachments, the attachment does not create any lien in favour of any of them but the Court holding the assets can divide the same amongst all of them *pro rata* on general principles. (Vol 23) 1936 Cal 390 (391).

[7] An application to the superior Court to transfer an execution case to itself from an inferior Court is not an application for execution to the superior Court within S. 73. (Vol 8) 1921 Cal 87 (89).

[8] Subordinate Judge holding assets—Decree-holder applying for execution to Munsiff—Subordinate Judge calling for execution records on application—There is no transfer of execution case. (Vol 14) 1927 Pat 252 (253).

[9] Where property is sold in execution of a decree, the assets must be deemed to be received not on the date when 25 per cent. of purchase-money is deposited but on the date when the balance of the purchase-money is paid. (1891) 18 Cal 242 (245) * (1911) 14 Cal L Jour 50 (52). (Till the whole purchase-money is deposited in Court a decree-holder can apply for execution and rateable distribution under S. 73.) * (1903) 26 Mad 179 (180, 181). (Realisation of part of the assets is not realisation of whole of the assets and therefore application filed after realisation of part of the assets but before realisation of whole of the assets can be entertained under S. 73.) * (1912) 35 Mad 588 (589) * (Vol 13) 1926 Nag 380 (383). (Receipt must be of the whole assets.)

[10] Assets realized by sale of immovable property—Application must be made before date of sale. (Vol 4) 1917 Cal 13 (17) : 44 Cal 1072 * (Vol 24) 1937 Cal 55 (56.) * (Vol 22) 1935 Mad 893 (895) : 59 Mad 342 * (Vol 8) 1921 Pat 401 (402) : 5 Pat L Jour 415. (Application for rateable distribution made when sale is going on is maintainable.)

[11] Decree-holder purchasing property in execution of his decree and setting off sale proceeds against his decree, obtaining exemption from payment of 25 per cent.—Assets are received by Court on date when sale is confirmed—Applications for rateable distribution presented before that date are within time. (Vol 23) 1936 Pesh 164 (166).

[12] Unauthorised sale by receiver subsequently ratified by Court—Assets held were received when price was paid into Court after ratification and not the date on which it was received by the Court. (Vol 27) 1940 Mad 826 (827, 828).

[13] Property sold in several parcels—Proceeds cannot be deemed to be received until entire purchase-money is paid. (Vol 8) 1921 Cal 801 (802).

[But see (Vol 12) 1925 Cal 966 (967). (Realisation of assets is separate in case of each lot.)]

[14] Decree sent to Collector for execution—Execution sale by Collector—Assets will be deemed to be received by Court when the whole of the purchase-money is paid to the Collector. (Vol 7) 1920 Bom 35 (37) * (Vol 25) 1938 Nag 14 (16) : I L R (1939) Nag 285.

[15] Order by superior Court to transfer sale proceeds realized by inferior Court to itself—Assets are deemed to be received within S. 73 when they are actually received by the superior Court. (Vol 14) 1927 Bom 247 (250).

[16] Decree-holder applying for set off — Money is "received" on the date the application reaches the Court. (Vol 13) 1926 Nag 380 (381, 382).

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[17] Fund belonging to defendant attached before judgment and deposited in Court to credit of suit—Fund does not become assets until plaintiff, after getting decree, applies for execution and the same is ordered by Court—Date of receipt is date of order—Other creditors taking out execution before such receipt are entitled to rateable distribution. (Vol 10) 1923 Mad 505 (507) : 46 Mad 506 (F B).

[18] Where a fund belonging to the defendant is attached before judgment and is lying in Court to the credit of a suit other than the one in which it is attached it does not become assets until it is transferred to the credit of the suit in which it is attached. The date of receipt of assets is the date of the transfer. (Vol 10) 1923 Mad 505 (507) : 46 Mad 506 (F B) * (Vol 14) 1927 Bom 405 (407, 408, 409) * (Vol 17) 1930 Mad 4 (11) * (Vol 8) 1921 Mad 218 (222, 223) : 44 Mad 100 (F B). (Dissenting from (Vol 6) 1919 Mad 66 : 42 Mad 692.) * (Vol 8) 1921 Mad 481 (483). (Mere attachment of fund does not effect a transfer of the money to the credit of the suit in which it is attached.) * (Vol 15) 1928 Sind 165 (166) : 22 Sind L R 345. (Money realized in another suit attached under O. 21, R. 52 but not transferred to the creditor's account—The money is not assets realized in execution.)

[19] Distribution of money amongst attaching creditors—Money standing to credit of one suit—Application for transfer of sum to be made in suit to whose credit money stands for transfer. (Vol 2) 1915 Cal 788 (789).

[20] Where the executing Court and the custody Court are the same, realisation of assets takes place when the Court as the custody Court passes an order transferring the amount standing to the credit of one suit to the credit of the decree under execution. Even if there is no formal order of transfer money is impliedly transferred by the custody Court to the credit of the decree in which payment out is ordered when the Court as executing Court makes an order calling for the money. (Vol 32) 1945 Mad 412 (415, 416, 419, 420).

[21] Custody Court holding money under O. 21, R. 52 ceasing to be custody Court and becoming execution Court by reason of execution applications—It can award rateable distribution under S. 73. (Vol 27) 1940 Oudh 237 (240) : 15 Luck 332.

[22] Custody Court under O. 21, R. 52 has no power to make rateable distribution, unless it happens to be the attaching Court as well. (Vol 20) 1933 Cal 814 (814, 815).

[23] Judgment-debtor having money in Court to his credit, such money not being proceeds of execution—Attachment of such amount—Subsequent attachment by another decree-holder and application for rateable distribution—When order for attachment is made, there is receipt of assets and is effective even though there is no book entry transferring such money. (Vol 22) 1935 Pat 201 (204).

[24] Decree-holder allowed to purchase property under O. 21, R. 72 (2) must share proceeds rateably with other decree-holders. Set off of purchase-money against decretal amount cannot be allowed to him. (Vol 18) 1931 Bom 252 (254).

[25] Money-decree against one judgment-debtor obtained by A, B and C—Judgment-debtor's funds attached by A by means of prohibitory order—Afterwards same funds attached by B in execution—Funds paid in Court—Same day C attached them as amount due in Court's custody. Held that A and B were entitled to rateable distribution but not C. (1896) 19 Mad 72 (74).

[26] Order 21, R. 72 is awkwardly expressed, but it must be read with S. 73 ; and to give effect to both, it must be held that the receipt can only be accepted for so much of the judgment-debt as the assets applicable

to its discharge may suffice to satisfy. (1892) 5 Mad 123 (124).

8. Application to Court holding assets.—[1] Application for execution is essential before a claim for rateable distribution can be made. (Vol 12) 1925 Nag 382 (383) * (1905) 27 All 132 (135). (It is not necessary that decree-holder at whose instance assets have been realised must have knowledge of application by other decree-holders for rateable distribution.) * (Vol 19) 1932 Bom 622 (624). (Bombay High Court Rules (Original Side), Rr. 318 and 325—Entry in negative register—Applicant is entitled to rateable distribution.) * (Vol 2) 1915 Cal 788 (789). (Application for rateable distribution on original side of High Court—Practice—Certificates of Accountant-General and Registrar necessary.) * (1899) 26 Cal 772 (777, 778). (Appointment by Court of a Receiver is a process of execution enforced by Court at the instance of judgment-creditor.) * (Vol 16) 1929 Mad 703 (704) : 52 Mad 760. (Substantial compliance with O. 21, R. 11 is sufficient for purposes of S. 73.) * (Vol 13) 1926 Mad 179 (180). (Execution application need not be such as to end successfully.) * (Vol 12) 1925 Mad 587 (587). (Rateable distribution applied for after realization of assets but execution of decree applied for before—Application cannot be rejected.) * (Vol 16) 1929 Nag 148 (150) : 25 Nag L R 94. (Rateable distribution is not a form of execution.) * (Vol 20) 1933 Oudh 75 (76). (Application under S. 73 is not application for execution—It must be amended under O. 21, R. 17 to proceed in execution.) * (Vol 27) 1940 Rang 201 (202) : 1940 Rang L R 421. (Court has no inherent power to order rateable distribution in absence of application for execution.) * (Vol 17) 1930 Rang 342 (344) : 8 Rang 294. (Letter by Collector to Judge for money due under decree is not sufficient.) * (Vol 18) 1926 Sind 177 (177) : 20 Sind L R 111. (Transfer of decrees to the Court having custody of attached property and application under O. 21, R. 11 before realization of assets are necessary before distribution can be claimed.)

[2] An application which does not comply with requirements of O. 21, R. 11 in form and substance is not an application for execution within S. 73. (1911) 34 Mad 25 (27).

[3] A creditor claiming rateable distribution must himself ask for execution of his decree by one of the modes specified in O. 21, R. 11. Application which does not specify the way in which assistance of the Court is sought is not one for execution according to law. (Vol 16) 1929 Nag 148 (150) : 25 Nag L R 94.

[4] Formal application for rateable distribution is not necessary—Only execution application must have been made. (Vol 21) 1934 All 1057 (1063) * (Vol 20) 1933 All 337 (338) * (1937) 1937 Mad W N 480 (486).

[5] A decree-holder applying for execution need not apply for the attachment of the assets also. Decree-holders who attach the surplus sale proceeds subsequent to the realisation of the assets are not entitled to any share in the assets. (1909) 9 Cal L Jour 210 (214) * (Vol 18) 1931 All 92 (94) : 53 All 125. (Especially where property is attached and brought to sale under another decree.) * (1881) 7 Cal 34 (38).

[6] Property once attached need not be attached again—All attaching decree-holders are entitled to rateable distribution. (Vol 17) 1930 Mad 4 (11) * (Vol 21) 1934 Oudh 110 (111). (Money due to judgment-debtor attached by order of one Court—Decree-holder applying for transfer of execution to another Court and for rateable distribution need not attach it again where money is received by latter Court.)

[7] Attachment of undivided share of member of joint family during his lifetime by one creditor—Share sold—Other creditors who have not obtained attachment before member's death are not entitled to rateable

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distribution. (Vol 27) 1940 Bom 190 (192): I L R (1940) Bom 146 * (1901) 23 All 106 (110).

[8] One attaching decree-holder can apply for execution of decree without obtaining consent of other attaching creditors because money recovered by the execution creditor will be held by the Court and be subject to the provisions of S. 73. (Vol 27) 1940 P C 173 (176): I L R (1941) Mad 1: I L R (1940) Kar P C 312: 67 Ind App 350 (P C).

[9] Application for execution must be made to Court holding assets. (Vol 13) 1926 Lah 538 (539) * (Vol 3) 1916 Mad 792 (793): 38 Mad 221*(Vol 15) 1928 Rang 96 (97): 5 Rang 757.

[10] Execution transferred—Application under S. 73 can be entertained by original Court. (Vol 21) 1934 Lah 113 (113) * (1913) 36 Bom 519 (522, 523). (Execution sale by Collector—Application under S. 73 can be made to Court passing decree.)

[11] Application for execution to transferee Court after order of transfer but before actual receipt of decree is not one to proper Court. (Vol 15) 1928 Mad 496 (497).

[12] Application with transfer certificate of the decree subsequently received complies with the requirements of law. (Vol 15) 1928 Nag 332 (333).

[13] Once inferior Court orders satisfaction or pays out amount in ignorance of decree of superior Court against same judgment-debtor, superior Court cannot order restitution or rectify error and make assets available for rateable distribution among decree-holders of superior Court. (Vol 17) 1930 Mad 699 (700).

[14] Where A obtains a decree in a superior Court against C and applies for execution there and B also obtains a decree against C in an inferior Court and applies for execution there and gets his execution case transferred to the superior Court, he can claim rateable distribution when property is sold in execution of A's decree by the superior Court without any further application for execution in that Court. (Vol 23) 1936 Lah 519 (521)*(1896) 20 Bom 377 (.79, 380).

[15] Where each of the three decree-holders of the same judgment-debtor took out execution of his decree in the execution cases of the Sub-Divisional Court and also in execution cases of the Township Court and where one of them in execution case of the Sub-Divisional Court attached and brought to sale certain properties belonging to the common judgment-debtor and where the other decree-holders claimed rateable distribution in the Sub-Divisional Court the decree-holders are entitled to rateable distribution in respect of the decrees for which they had taken out execution in the Township Court as well as those for which they had taken out execution in the Sub-Divisional Court. (Vol 16) 1929 Rang 198 (199).

[16] Where same property of judgment-debtor has been attached by superior and inferior Courts and the property or its proceeds are received or realized by superior Court, a person who had obtained decree against the same judgment-debtor in the inferior Court and applied for execution to that Court can claim rateable share of such property or proceeds although he has not applied for execution to superior Court nor got his execution transferred to that Court. (Vol 26) 1939 All 159 (161) I L R (1939) All 162 * (Vol 20) 1933 All 563 (564) 55 All 622 * (Vol 22) 1935 Bom 176 (178): 59 Bom 310*(Vol 23) 1936 Cal 723 (726) I L R (1937) 1 Cal 391*(Vol 12) 1925 Cal 966 (970) * (1894) 21 Cal 200 (205, 20) *(Vol 25) 1938 Lah 754 (756) * (Vol 23) 1936 Mad 797 798 59 Mad 1028*(Vol 22) 1935 Mad 988 (994)*(Vol 1) 1914 Mad 454 (455) * (Vol 18) 1931 Nag 127 (127)*(Vol 19) 13 Oudh Cas 291 (292, 293, 294) * (Vol 2) 1915 Low Bur 59 (59, 60): 8 Low Bur Rul

204*(Vol 18) 1931 Rang 111 (112)*(Vol 15) 1928 Rang 157 (158): 6 Rang 131*(Vol 25) 1938 Sind 175 (176).

[See (Vol 28) 1941 Oudh 277 (278). (Decree in favour of L against W by Additional Judge, Small Causes—L applying for execution by attachment of W's salary—Decree by E against same judgment-debtor in Court of Small Causes—Application by E for attachment of W's salary under O. 21, R. 48—Subsequent application by E under Ss. 63 and 73—E held entitled to rateable distribution from date of application for execution and not from date of application under Ss. 63 and 73.)]

[But see (Vol 8) 1921 Cal 87 (89)*(1910) 11 Cal L Jour 69 (77)*(1912) 25 Mad L Jour 601 (601).]

[17] Where execution proceedings are transferred from Small Cause Court to Sub-Judge Court, the Sub-Judge Court is not converted into a Small Cause Court with regard to those proceedings. Decree-holder can claim rateable distribution in the transferred decree provided other conditions are satisfied. (1894) 18 Bom 61 (64).

[18] A obtaining decree against B in District Munsif's Court—C obtaining decree against B on small cause side of Sub-Court in same district—A's decree transferred to Sub-Court for execution—B's property sold in execution of C's decree—A held entitled to rateable distribution. (1892) 15 Mad 345 (347).

[19] Two decree-holders—One purchasing judgment-debtor's property in satisfaction of his decree unable to pay money in cash—He cannot be ordered to pay certain amount to other—Proper order is to set aside sale. (Vol 20) 1933 All 337 (338).

[20] A decree-holder who has applied for payment cannot be put off on the chance of some others, having claims on the property, coming in at some time to have the property distributed rateably. (Vol 6) 1919 Mad 66 (69): 42 Mad 692.

[21] In cases under S. 63 receipt of assets by one Court amounts to constructive receipt by each Court—Hence attaching decree-holders in each Court are entitled to rateable distribution in assets held by one of them. (Vol 22) 1935 Mad 988 (995) * (Vol 33) 1946 All 291 (294).

[22] In the absence of attachment of same property of the judgment-debtor by more than one Court, the executing Court of higher grade cannot order rateable distribution of assets held by another Court. (Vol 33) 1946 Nag 170 (173): I L R (1946) Nag 400 (I L R (1939) 1 Cal 488 followed.)

[23] Court holding amount payable to decree-holder—Another Court passing decree against same judgment-debtor but in favour of another decree-holder cannot order first Court to transfer darkhast and amount held by it and then order rateable distribution. (Vol 26) 1939 Bom 468 (469, 470).

9. Assets held by Court. — [1] Essential condition for enforcing claim for rateable distribution is that Court should hold assets. (Vol 21) 1934 All 1057 (1060).

[2] Right to rateable distribution is conditional upon there being assets held by Court—Property attached, purchased by decree-holder privately—No right to rateable distribution arises. (Vol 24) 1937 Pat 609 (610)*(Vol 21) 1934 Pat 685 (693): 13 Pat 446.

[See also (Vol 12) 1925 Cal 102 (104). (Assets expected to be realised—Rateable distribution cannot be ordered.)* (Vol 7) 1920 Lah 94 (94). (Money not paid in Court.)]

[3] The rule laid down by O 21, R. 18 must be first applied before any question can arise for rateable distribution under S. 73. Thus, in case of cross-decrees which are allowed to be set off no rateable distribution can be allowed in respect of the decree of smaller amount. (Vol 27) 1940 P C 173 (176): I L R (1940) Kar P C 312: 67 Ind App 350:I L R (1941) Mad 1 (PC) * (Vol 24) 1937 All 422 (422).

[See (Vol 25) 1938 All 130 (131). (R holding decree against T—T becoming assignee of persons holding

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decrees against R—Execution of R's decree against T—Rateable distribution under S. 73 cannot be allowed to another decree-holder of R.)

[4] Assets mean all property of a man, whatever, which can be used for satisfying debts or demands against the person. The salary of Government servant attached under the Code is assets. (1912) 14 Bom L R 633 (634).

[5] Section 73 covers cases where money is in the hands of Court, however realized. (Vol 6) 1919 Mad 647 (647) : 41 Mad 616.

[6] Word 'assets' is not confined to those realised by sale or otherwise in execution of decree. Payments made into Court by judgment-debtor in part satisfaction of decree are assets. (Vol 19) 1932 All 411 (413) : 54 All 516 * (Vol 24) 1937 Nag 80 (83) : I L R (1937) Nag 219.

[7] Under S. 295 of the Code of 1882 a right of rateable distribution could only arise when the assets were realised by sale or otherwise in execution of a decree; see the following cases : (1912) 15 Cal L Jour 49 (51). (Private payment by judgment-debtor is not asset.) * (1913) 37 Bom 138 (141) * (1892) 16 Bom 91 (96) * (1894) 21 Cal 809 (817) * (1886) 13 Cal 225 (229) * (1905) 28 Mad 380 (382, 383).

[8] Words "where assets are held by the Court" include money paid into Court by judgment-debtor for avoiding attachment of his property in execution of decree. (Vol 17) 1930 Sind 300 (300) : 25 Sind L R 178 * (Vol 7) 1920 Cal 785 (786) : 47 Cal 515 * (Vol 26) 1939 Pat 392 (393, 394) : 18 Pat 404.

[9] Section 73 covers also money voluntarily paid into Court by judgment-debtor to satisfy decree under execution. (Vol 26) 1939 Pat 392 (393) : 18 Pat 404 * (Vol 8) 1921 Cal 749 (750) * (Vol 1) 1914 Mad 641 (641). (Payment into Court by a judgment-debtor of the decree money without any process.)

[10] Section 73 applies to money realized by process of execution. (Vol 6) 1919 Bom 152 (153) * (1938) 177 Ind Cas 269 (270) (Pat). (Sum of money attached and brought into Court in execution.) * (Vol 5) 1918 Lah 75 (76) : 1918 Pun Re No. 33. (Sale proceeds of moveables realized by Nazir are assets received by Court.) * (1912) 1912 Mad W N 407 (409). (Money realised in execution of personal decree.)

[11] Money paid under O. 21, R. 43 is assets and liable to be rateably distributed. (Vol 13) 1926 Bom 242 (245).

[12] Money paid into Court under a prohibitory order does not become the property of the creditor at whose instance it is issued without a further order directing payment to him. Till then it is assets available for rateable distribution. (Vol 4) 1917 Lah 410 (411) * (1896) 19 Mad 72 (73).

[13] Money paid to the Sheriff in garnishee proceedings—Money becomes "assets in the hands of Court." (Vol 17) 1930 Cal 623 (624) : 57 Cal 736 * (Vol 7) 1920 Cal 785 (786) : 47 Cal 515.

[14] Rateable distribution applies to attachments of salaries under O. 21, R. 43. (Vol 26) 1939 Cal 485 (485, 486) : I L R (1939) 1 Cal 40.

[15] Court to which execution is applied for holding money to the credit of judgment-debtor—Such money is not "assets" in the hands of execution Court unless such money is attached by the order of the Court under O. 21, R. 52 in the capacity of executing Court. (Vol 8) 1921 Mad 218 (221) : 44 Mad 100 (FB). (Overruling (Vol 3) 1916 Mad 792 : 38 Mad 221.)

[16] Money paid by a judgment-debtor to the officer arresting him to get himself released is not assets held by a Court. (Vol 4) 1917 Bom 275 (276) * (1882) 6 Bom 388 (389).

[17] Where money is paid into Court by any one of the modes mentioned in O. 21, R. 55, it is an "asset held by the Court" within the meaning of S. 73. (Vol 6) 1919 Mad 647 (648) : 41 Mad 616. (36 Bom 156 not approved.) * (Vol 7) 1920 Cal 785 (786) : 47 Cal 515 * (Vol 28) 1941 Nag 239 (240). (36 Bom 156 not approved.) * (Vol 26) 1939 Pat 392 (394, 395) : 18 Pat 404.

[But see (1912) 36 Bom 156 (163, 164) * (Vol 6) 1919 Bom 152 (153).]

[18] Judgment-debtor's property attached and placed in charge of Superatdar—Failure to produce property—Warrant issued—Payment made to avoid attachment—Amount paid is liable for rateable distribution. (Vol 21) 1934 Nag 62 (63).

[19] Deposit in Court of entire amount day before sale is held—Assets are realized. (Vol 2) 1915 Low Bur 92 (92).

[20] Receipt of purchase money by agent appointed under O. 21, R. 65 is receipt of assets by Court. (Vol 4) 1917 Cal 740 (743) : 44 Cal 789.

[21] Auction-purchaser making default in paying full amount—25 per cent. deposit is 'assets' within S. 73. (Vol 13) 1926 Mad 872 (875) : 49 Mad 570.

[See however (Vol 12) 1925 Cal 966 (967) * (1891) 18 Cal 242 (245).]

[22] Sale proceeds remaining in hands of purchasing decree-holder after setting off decretal amount under O. 21, R. 72 are held by Court—Refund under S. 73 can be enforced by process in execution. (Vol 5) 1918 Cal 400 (401, 402) * (Vol 20) 1933 All 666 (668).

[23] Money paid into Court by virtue of permission granted to judgment-debtor under O. 21, R. 83 is assets. (Vol 6) 1919 Mad 647 (648) : 41 Mad 616.

[24] "Assets" include money held by Court to satisfy decree—Source of money is immaterial—Money deposited under O. 21, R. 89, can be distributed. (Vol 25) 1938 Cal 521 (522) : 39 Cri L Jour 791 * (Vol 20) 1933 Nag 347 (348) * (Vol 19) 1932 Nag 156 (157) : 28 Nag L R 179 * (Vol 20) 1933 Pat 303 (304) : 12 Pat 772.

[But see (Vol 2) 1915 Cal 838 (838) : 40 Cal 619 * (1913) 40 Cal 619 (621) * (1903) 30 Cal 262 (263) * (Vol 5) 1918 Mad 704 (704) * (Vol 5) 1918 Mad 280 (281).]

[25] The section does not apply to deposits by judgment-debtor for a particular decree-holder. (Vol 12) 1925 Nag 157 (158) * (Vol 26) 1939 Bom 468 (470). (Amount produced by judgment-debtor to be payable for one decree-holder for specific purpose of securing postponement of sale—Amount is not assets.) * (Vol 26) 1939 Bom 112 (113, 114) : I L R (1939) Bom 133. (Application for stay of execution of *ex parte* decree—Bond executed by surety undertaking to pay amount if plaintiff suffered loss by stay—*Ex parte* decree set aside but decree *inter partes* passed—Execution applied—Surety paying amount into Court—Other decree-holders held not entitled to rateable distribution.) * (1913) 1913 Pun L R No. 55 (56) * (Vol 2) 1915 Upp Bur 15 (16). (Money deposited to avoid arrest before judgment.) * (Vol 7) 1920 Sind 118 (119) : 14 Sind L R 164. (Do.)

[26] Attachment before judgment raised on security being furnished—Sureties depositing money after decree and on execution being taken out—Money so deposited is "assets" held by Court. (Vol 9) 1922 Cal 19 (20, 21).

[27] Money sought to be attached before judgment paid by debtor into Court—Attachment irregular—Such payment should be considered as a deposit under O. 24, R. 1 and is not asset. (Vol 14) 1927 Rang 278 (278, 279) : 5 Rang 753.

[28] Money belonging to stranger or money paid into Court by third party under misapprehension is not assets. (Vol 21) 1934 Pat 685 (692) : 13 Pat 446.

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[29] Rent realised by receiver can be the subject of rateable distribution. (Vol 6) 1919 Oudh 326 (328, 329): 22 Oudh Cas 194 * (1899) 26 Cal 772 (775).

[30] Property attached sold for land revenue — Price recovered is "assets." (Vol 31) 1944 Nag 313 (314): I L R (1945) Nag 427.

[31] Compensation money awarded under Land Acquisition Act comes within the meaning of 'assets' either from the date of receipt or at least from the date of the final award. (Vol 13) 1926 Mad 307 (308): 49 Mad 38.

[32] Where money as of a judgment-debtor is paid into Court as security for the performance of an appellate decree under O. 41, R. 5, it is not liable to be rateably distributed among other attaching creditors of the same debtor. (Vol 2) 1915 Lah 147 (149, 150) * (Vol 5) 1918 Mad 442 (442): 41 Mad 327. (Property given as security under O. 41, R. 5 (3) by the judgment-debtor is applicable solely in discharge of the judgment debt, and is not liable to rateable distribution though the mode of realisation of the security is by sale in execution.)

[33] Decree on its face unexecutable against immovable property owing to judgment-debtor being agriculturist — Decree-holder is not entitled to rateable distribution in sale proceeds of such property. (Vol 25) 1938 Bom 90 (90): I L R (1938) Bom 98.

[34] When a third person produces to the Court the market value of goods attached before judgment but left into the custody of that third person who unsuccessfully claimed to be a pledgee of the property, the money so paid becomes "assets realised by sale, or otherwise in execution" within S. 295 (S. 73). (1904) 6 Bom L R 376 (388).

[35] X and Y obtaining simple money-decrees against A — X attaching preliminary mortgage decree obtained by A against B in execution — X thereafter continuing mortgage suit and selling mortgaged property — Y applying for rateable distribution — Y held entitled to rateable distribution as proceeds of sale were assets. (Vol 24) 1937 Pat 651 (652).

[36] Award executed under S. 59 (1) (b) of Bombay Co-operative Societies Act (7 [VII] of 1925), according to procedure provided for recovery of arrears of land revenue — Sale proceeds in hands of Collector are not liable to attachment at the instance of other creditor — S. 73 cannot apply. (Vol 25) 1938 Sind 157 (159, 160): I L R (1939) Kar 104.

[37] Where the fund in Court was the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree: *Held*, S. 73 was inapplicable and the fund was not available for rateable distribution and the attaching decree-holders were to be paid fully in the order of their attachment. (Vol 2) 1915 Mad 236 (236).

[38] Payment must be made by or for judgment-debtor and not by stranger — Payment by stranger can be treated as money realized and rateably distributed. (Vol 4) 1917 Mad 739 (740, 741).

10. Decree for payment of money. — [1] Rateable distribution can be asked for in execution of money decree only. (Vol 13) 1926 Oudh 616 (617): 1 Luck 569.

[2] Order for payment of money capable of execution is not decree — Person in whose favour such order is passed is not entitled to rateable distribution. (Vol 21) 1934 Nag 243 (244).

[3] Section 73 is wide enough to include transferees of decrees — Adjudication of validity of transfer and recognition of same by Court before receipt of assets is not condition precedent for entitling transferee to apply for rateable distribution. (Vol 28) 1941 Mad 795 (795, 796).

[4] Execution of decree of P — Property sold to M — Sale set aside — Order directing P to refund sale price to M — Same property sold in execution of decree held by other persons — M can claim rateable distribution. (Vol 27) 1940 Nag 267 (268): I L R (1942) Nag 136.

[5] Specific fund belonging to judgment-debtor attached — Application by decree-holder for payment out of the money — Court cannot suspend payment for effecting rateable distribution in respect of claims not matured into decrees. (Vol 6) 1919 Mad 66 (68): 42 Mad 692.

[6] Decree for money against A personally and against properties of B and C does not lose its character as money decree against A for claiming rateable distribution of assets of A held by Court. (1888) 10 All 35 (38).

[7] Holder of decree for unascertained mesne profits who has applied for ascertainment thereof and attachment of immovable property under O. 21, R. 42 comes within S. 73. (1882) 5 Mad 123 (124) * (Vol 21) 1934 Mad 604 (605): 58 Mad 233.

[8] Decree directing realization of decretal amount from hypothecated property and making defendant personally liable for balance is mortgage decree and not money decree. (Vol 20) 1933 Lah 48 (50): 14 Lah 248 * (Vol 26) 1939 Lah 303 (303, 304). (Holder of mortgage decree cannot claim rateable distribution even for costs.) [But see (Vol 21) 1934 Cal 764 (766).]

[9] A decree for sale of the mortgaged property, expressly exempting the defendant from personal liability is not a money decree. (1912) 23 Mad L Jour 699 (703, 704, 705).

[10] Mortgagee having personal decree independently of his mortgage can get relief under S. 73. (Vol 11) 1924 Pat 434 (436).

[11] Personal decrees under O. 34, R. 6 are money decrees for purpose of S. 73 — Mortgagee can apply for rateable distribution. (Vol 3) 1916 Mad 20 (22): 39 Mad 570.

[12] Where a mortgagee under a mortgage executed during attachment claimed rateable distribution under S. 73, Civil P. C., in respect of a simple money decree for interest due on his mortgage: *Held* that the disability imposed by O. 34, R. 14 did not apply and he was entitled to a rateable distribution. (Vol 6) 1919 Oudh 351 (352): 22 Oudh Cas 150.

[13] Order for rateable distribution can be made even when one or more creditors are secured creditors. (Vol 23) 1936 Pesh 52 (53).

[14] The holder of a decree which provides for the hypothecation of certain properties cannot claim rateable distribution with simple money decree-holders against the owner of the properties. The Court in which money is deposited by a person for a specified purpose, is bound to apply it for that purpose. (1913) 1913 Pun L R No. 55.

[15] Payment order under S. 186, Companies Act, is equivalent to a decree by reason of S. 199 of the same Act — Decree-holder can claim rateable distribution under S. 73, Civil P. C., against holder of order. (Vol 28) 1941 Lah 273 (273, 274): I L R (1942) Lah 460.

[But see (Vol 27) 1940 Oudh 237 (239): 15 Luck 332.]

11. Dismissal of execution application. — [1] For applying S. 73, execution application must be pending — Decree-holder getting his application struck off — He cannot then say that his application remained pending. (Vol 31) 1944 All 245 (246, 247).

[2] 'Application' must be one made in accordance with law, not barred by time, not yet satisfied and not already disposed of. (Vol 22) 1935 Rang 135 (136, 137): 13 Rang 514.

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[3] Execution application "struck off as wholly in-fructuous" — Merely because attachment is ordered to continue, application cannot be said to be pending for purpose of claiming rateable distribution. (Vol 23) 1936 Nag 277 (278) : I L R (1938) Nag 346.

[4] Court granting time to judgment-debtor and passing orders dismissing decree-holder's execution petition — Order of dismissal is not judicial order but is administrative — Execution petition is not disposed of — Granting of time cannot affect decree-holder's right for rateable distribution. (Vol 23) 1936 Mad 437 (439).

[5] A creditor whose application for execution is finally struck off, cannot claim rateable distribution in assets of the judgment-debtor's property realised under the decrees of other creditors. (1910) 7 Mad L Tim 110 (111) * (Vol 3) 1916 Cal 264 (266). (A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time barred or the decree is satisfied.)

[6] Dismissal of the application for default after date of receipt of assets will not affect decree-holder's right to rateable distribution which had accrued to him at time of receipt of assets. (Vol 27) 1940 Nag 302 (303) : ILR (1942) Nag 139. (Dismissal for default before actual distribution of assets.) * (Vol 2) 1915 Cal 16 (16). (Subsequent dismissal for default.) * (Vol 24) 1937 Pat 92 (93). * (Vol 20) 1933 Pesh 52 (53).

[7] When there are two decree-holders of one judgment-debtor and the objection of the judgment-debtor that the property was non-transferable against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former. (Vol 3) 1916 Cal 264 (265).

12. Same judgment-debtor. — [1] It is essential for an application under S. 73, that the decrees should have been passed against the same judgment-debtor. (Vol 2) 1915 Cal 658 (660) : 42 Cal 1 * (Vol 17) 1930 Cal 454 (455) * (Vol 6) 1919 Mad 758 (758).

[2] Words "same judgment-debtor" mean the same person in law and in fact and do not include the legal representative of the judgment-debtor. (Vol 31) 1944 Sind 81 (83) : I L R (1943) Kar 426 * (1901) 25 Bom 494 (497).

[3] Judgment-debtor must fill in same character in both decrees. (Vol 1) 1914 Low Bur 191 (191).

[4] Decree against person individually and decree as representative of deceased — Decrees are not against "same judgment-debtor". (Vol 28) 1941 Bom 327 (327, 328) : I L R (1941) Bom 544 * (1937) 1937 Mad W N 465 (468) * (1910) 33 Mad 465 (466) * (Vol 6) 1919 Oudh 326 (328, 329) : 22 Oudh Cas 194. (Decree against three heirs of deceased as representing his estate — Another decree against one of the heirs in his personal capacity.)

[But see (Vol 23) 1936 Cal 210 (211, 212) : 63 Cal 928.]

[5] Decree against deceased judgment-debtor obtained during his lifetime — Another decree obtained against his legal representative to the extent of assets of deceased in his hands — Latter decree is not against same judgment-debtor. (Vol 27) 1940 Rang 243 (244, 246) : 1940 Rang L R 492 * (Vol 24) 1937 Bom 461 (462, 463) : I L R (1937) Bom 795 * (Vol 22) 1935 Cal 738 (739).

[But see (Vol 30) 1943 Lah 148 (149) : I L R (1943) Lah 497 (F B).]

[6] Two decrees against a person — One against person individually and other against him as partner of firm — Decrees are not against same judgment-debtor within meaning of S. 73. (Vol 24) 1937 Lah 937 (938) : I L R (1937) Lah 637.

[7] Decree obtained against firm is decree against

partners individually — Decree-holder can take out execution against partners individually — Mere inclusion of names of other persons as partners does not render execution invalid — Decree-holder is also entitled to apply under S. 73 for rateable distribution in execution started by another decree-holder against partners individually. (Vol 25) 1938 Cal 316 (317, 318) * (Vol 30) 1943 Bom 156 (157, 158) : I L R (1943) Bom 306. (Decree against firm — Partner served individually under O. 30, R. 6 — Another decree passed individually against him — He is same judgment-debtor within S. 73.)

[8] Word "judgment-debtor" in S. 73 should not be literally interpreted — One decree against manager of joint family — Another decree against members of family and against family property — Both decrees are against same judgment-debtor within S. 73, Civil P. C. (Vol 23) 1936 Mad 123 (124, 125) * (Vol 24) 1937 Mad 504 (508, 509). (Question of binding nature of debt on sons is immaterial in considering question whether judgment-debtors are same so long as decree stands.) * (Vol 23) 1936 Mad 943 (948).

[But see (Vol 28) 1941 Bom 324 (325) : I L R (1941) Bom 540.]

[9] Joint Hindu family — Decree against grandfather must be deemed to be passed against son and grandson to the extent of their interest in family property — Decree against grandfather, son and grandson — Another decree against grandfather and son only — Grandfather and son adjudicated insolvents — Both decree-holders are entitled to rateable distribution in grandson's interest under S. 73. (Vol 27) 1940 Mad 525 (526). ((Vol 24) 1937 Mad 253 overruled.)

[10] Words "passed against same judgment-debtor" refer more to property which judgment-debtor represents than to person against whom execution is sought — Decree by A against B — After B's death M obtaining decree against B's assets in hands of his sons on the basis of pronote executed by B and one of his sons — S. 73 applies. (Vol 28) 1941 All 110 (118) : I L R (1941) All 77 (F B). ((Vol 26) 1939 All 545 overruled.) * (Vol 23) 1936 Mad 40 (40) : 59 Mad 107 (F B). (Decree passed against different persons but executable against the same property.)

[11] Creditor who had attachment before judgment obtaining decree and succeeding debtor as heir — Decree obtained by another creditor against such heir as representative of debtor and property in his hands sold in execution — Heir is entitled to claim rateable distribution in sale proceeds, if other properties are not sufficient to satisfy his decree. (Vol 29) 1942 Mad 260 (264) : I L R (1942) Mad 360.

[12] For applicability of S. 73 identity of all the judgment-debtors in each of the several decrees is not necessary. (Vol 22) 1935 Mad 399 (401) * (1888) 10 All 35 (38) * (1883) 9 Cal 920 (922).

[13] Decrees against same judgment-debtor — It is immaterial if it is also against others. (Vol 17) 1930 Sind 300 (301) : 25 Sind L R 178.

[14] Decree by one decree-holder against three persons — Decree by another decree-holder against two of them — Sale in execution of latter's decree — Former decree-holder is entitled to rateable distribution. (Vol 25) 1938 Lah 801 (802) * (1905) 29 Bom 528 (529) (F B) * (1899) 22 Mad 241 (244) * (Vol 10) 1923 Pat 521 (522, 523, 524).

[15] Two decrees were obtained against the estate of the deceased testator, each obtained against two out of three executors. One of those two executors was common to two suits. Each decree was *prima facie* capable of execution against the estate: *Held*, that the decree-holders were entitled to rateable distribution of the assets. (Vol 5) 1918 Cal 281 (282).

[16] Decree against several judgment-debtors — Money realised from one judgment-debtor who is com-

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mon to both decrees is only available for rateable distribution — Money paid by one judgment-debtor to decree-holder who has no claim against him—No rateable distribution can be allowed. (Vol 20) 1933 Pat 277 (278).

[17] Some defendants different—Rateable distribution can be allowed only to extent of their interest in both decrees. (Vol 1) 1914 Low Bur 191 (191).

[18] Decree passed in A's favour against B and C—A attaching property of both — D having a decree against C alone can get rateable distribution as to C's share only. (Vol 13) 1926 Bom 150 (151).

[19] Defendant obtained judgment against the judgment-debtors X, Y and Z. Plaintiff obtained a judgment against X and Y only. Held that the plaintiff is entitled to a proportionate distribution of the moneys realized by the sale of the property of X, Y and Z, so far as those moneys represent the share of his own judgment-debtors X and Y in that property. (1903) 30 Cal 583 (587) (F B).

[20] Assets obtained in execution of one decree from the surety of the judgment-debtor cannot be rateably distributed to the holder of another decree against the same judgment-debtor as the surety is not the judgment-debtor of such decree-holder. (Vol 27) 1940 Nag 79 (79).

[21] Surety for withdrawing attachment before judgment depositing decretal amount after passing of decree — Other creditors are not entitled to rateable distribution. (Vol 29) 1942 Oudh 491 (491).

13. Insolvency or liquidation. — [1] When the judgment-debtor becomes insolvent all sums representing his salary accrued or accruing due to him subsequent to the date of his insolvency vest in the Official Assignee, but as regards amount which had accrued due prior to the insolvency, the order under S. 73 creates rights which are not affected by the insolvency. (1900) 27 Cal 351 (353, 354).

[2] Order for rateable distribution — Amounts not drawn — Subsequent insolvency of judgment-debtor—Official Receiver cannot claim the amount in Court. (Vol 9) 1922 Mad 31 (31, 32).

[3] Powers under Insolvency Acts are not applicable to distribution under Code. (Vol 7) 1920 Mad 605 (614); 43 Mad 381.

[4] The proceeds of a sale held in pursuance of an attachment of properties of a company before its liquidation, must be distributed in accordance with the provisions of Civil Procedure Code. (Vol 3) 1916 Cal 918 (919); 43 Cal 586.

[5] Rateable distribution under Civil Procedure Code and distribution of assets under Provincial Insolvency Act are made on same principle. (Vol 22) 1935 Nag 214 (215); 31 Nag L R 423.

14. Mode of distribution. — [1] As to mode of distribution, see the following cases: (Vol 5) 1918 All 327 (327) (Vol 15) 1928 Mad 362 (363).

15. Power of Court to hold enquiry. — [1] Application for rateable distribution — Court has no power to inquire as to whether decree is proper or *bona fide* one — Remedy of aggrieved judgment-creditor is under S. 73 (2) — In distributing assets, Court acts in administrative and not judicial capacity. (Vol 22) 1935 Cal 290 (294); 62 Cal 715 (FB). ((Vol 1) 1914 Cal 575; 16 Cal L Jour 522; 11 Cal 42, Overruled.) (Vol 9) 1922 Bom 31 (32); 46 Bom 635. ((1889) 13 Bom 154, Overruled.) (Vol 5) 1918 Mad 825 (826, 827); 40 Mad 341 (Vol 3) 1916 Mad 792 (793); 38 Mad 221. (Question of fraud cannot be gone into.) (Vol 11) 1924 Nag 39 (40); 19 Nag L R 172 (Vol 13) 1926 Pat 497 (498); 5 Pat 445. (Question of collusiveness of decree cannot be gone into.)

[2] Court acting under S. 73 cannot inquire into validity of decree. (Vol 21) 1934 Pat 545 (546) (Vol 14) 1927 Mad 944 (944) (Vol 7) 1920 Mad 605 (613, 614); 43 Mad 381.

[3] Section 73 does not provide for enquiry being made by the Court when passing an order for rateable distribution—Judge is not bound to inquire as to whom the property belongs before making the rateable distribution. (Vol 15) 1928 Rang 163 (164); 6 Rang 582.

[See however (Vol 10) 1923 Pat 521 (522). (Though procedure under S. 73 is summary any inquiry that may be needed in order to give relief to the decree-holders should not be grudged by any Court.)]

[4] When the sum is realized and ordered to be rateably distributed among several decree-holders under S. 73, Civil P. C., a suit is maintainable by any one of such decree-holders for a declaration that a rival decree-holder had no right for a share as his decree was collusive. (1906) 3 Cal L Jour 385 (386).

[5] An executing Court cannot go behind the decree and by invoking S. 146, Civil P. C., it cannot change a decree passed against R into a decree against his legal representatives. For purposes of rateable distribution the executing Court must take the decrees as they are. (Vol 22) 1935 Cal 738 (739).

16. Priority of debts. — [1] Where right of the Crown and of subject meet at one and the same time, right of the Crown should be preferred. (Vol 20) 1933 Sind 368 (369); 27 Sind L R 444.

[2] Crown-debts are entitled to priority in rateable distribution of assets. (1869) 5 Bom H C R 23 (54).

[3] Sub-section (3) of S. 73 refers only to cases in which the Government is in the same position as any other decree-holder and declares that the Secretary of State will not really be governed by the provisions of sub-ss. (1) and (2), but will be entitled to the benefit of the doctrine of priority. (Vol 23) 1936 Mad 602 (603); 59 Mad 872.

[4] Executing Court cannot entertain claim on behalf of Government in absence of decrees in support of it—S. 73 (3) has reference merely to right of priority. (Vol 22) 1935 Lah 319 (320).

[5] Crown has priority over unsecured creditors in payment of debts — Claim to attached property by Collector acting under S. 46 (2), Income-tax Act, and under S. 45, Lower Burma Land and Revenue Act—Court holding assets must recognize priority of this claim — Such claim does not fall under S. 73. (Vol 24) 1937 Rang 880 (882); 1937 Rang L R 344.

[6] Attaching creditor is not secured creditor—Court must recognize priority of Crown debt. (Vol 23) 1936 Mad 132 (133); 59 Mad 428.

[7] Court-fees form a Crown-debt and under ordinary circumstances the principle would apply that Crown would be entitled to precedence in payment of this debt over all other creditors. (1906) 33 Cal 1040 (1044).

[8] Decree in appeal against judgment-debtor in Crown's favour for amount of court-fees — Execution petition by decree-holder — Before property sold in execution, nazir applying for execution of appellate decree but application withdrawn—When decree-holder applying for payment to him of sale proceeds deposited in Court, nazir claiming priority and making formal execution petition asking attachment of sale proceeds — In execution proceedings started by decree-holder Court declaring Crown to have priority and directing sale proceeds to be paid to nazir — Order held proper. (Vol 26) 1939 Lah 488 (490, 491); 1 I L R (1940) Lah 124.

[9] Under S. 270, Art VIII of 1859, a creditor obtaining an attachment was entitled to be first paid out of the proceeds of the sale, notwithstanding a subsequent attachment of the same property by any party in execution of his decree, but Section 295, Civil P. C.

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1882, points to a rateable distribution of the proceeds of sale under a decree in certain events and under certain circumstances. (1902) 29 Cal 428 (431, 432) (FB).

[10] Fund in Court attached by several creditors—Priority of attachment does not give preferential rights—Fund insufficient to meet claims in full—It should be rateably distributed amongst them. (Vol 4) 1917 Cal 13 (17) : 44 Cal 1072 * (Vol 8) 1921 Cal 801 (804) * (Vol 9) 1922 Mad 236 (236). (Attachment before judgment.) * (Vol 3) 1916 Mad 792 (794) : 38 Mad 221.

[11] Explanation to S. 64 does not give special priority to claims under S. 73 as such. (Vol 8) 1921 Oudh 176 (183).

[12] Decree against judgment-debtor as representative of his father—Priority cannot be claimed over decree against judgment-debtor personally. (Vol 5) 1918 Mad 512 (513).

[13] Goods of judgment-debtor attached by creditors remaining in possession of nazir in premises occupied by judgment-debtor as lessee—Landlord is entitled to rent during period of occupation as part of cost of realization out of sale proceeds. (Vol 27) 1940 Sind 17 (18).

[14] A debt due to a co-operative society under S. 19, Co-operative Societies Act, 1912, is entitled to no priority as such over other judgment-debts and the society cannot make any claim under S. 73 unless it gets a decree or a charge under S. 20 of that Act. (Vol 2) 1915 Cal 197 (197) : 42 Cal 377.

17. Proviso (a).—[1] Where property is sold subject to a mortgage in execution of a money decree, the mortgagee of the judgment-debtor who has obtained no decree against the latter, and has not made any application under S. 73, cannot claim the assets realised by the sale of the judgment-debtor's property. (Vol 6) 1919 Low Bur 124 (125).

18. Proviso (b).—[1] Execution of decree—Property subject to mortgage can be attached and equity of redemption sold. (Vol 6) 1919 Upp Bur 18 (19) : 3 Upp Bur Rul 139.

[2] Mortgagee not obtaining decree is not entitled to rateable distribution out of sale proceeds of property mortgaged—If he is paid out, suit for refund lies. (Vol 2) 1915 Low Bur 100 (100).

[3] Money decree-holder and mortgage decree-holder agreeing to sale in execution of money decree and to rateable distribution of proceeds—Mortgage decree-holder is entitled to same interest in sale proceeds as in property sold (Vol 24) 1937 Oudh 270 (272).

[4] Simple money decree-holder and mortgagee same person—Decree debt and mortgage debt not distinct and different—S. 73, Provisos (a) and (b), are not applicable. (Vol 17) 1980 Mad 138 (140, 141) : 53 Mad 670.

[5] Property sold free of mortgage—Mortgagee has lien on sale proceeds only—It is to be enforced by suit and cannot be claimed in execution proceeding. (Vol 7) 1920 Low Bur 107 (108) : 10 Low Bur Rul 398.

[6] If property is sold free of mortgage, the mortgagee is entitled to recover interest on the sale proceeds and there is no duty on him to draw the amount out of Court and apply it in part satisfaction of the claim. (1911) 10 Ind Cas 552 (552) (Mad).

[7] Prior incumbrancer is not affected by private alienation under O. 21, R. 83. (Vol 11) 1924 Lah 132 (135).

[8] Hypothecation of movables without possession is included in S. 73 (1) (a) and (b). (Vol 11) 1924 Cal 990 (991).

19. Proviso (c).—[1] The provisions of cl. (c) of the proviso operate only when the litigant concerned has himself obtained a decree and applied for rateable

distribution in execution thereof. (Vol 2) 1915 Cal 380 (381).

[2] Charge created in respect of judgment-debtor's property by decree obtained by unpaid vendor is not excluded from operation of proviso (c). (Vol 22) 1935 Mad 713 (713).

[3] When immovable property is sold in execution of decrees for discharge of incumbrances thereon the sale proceeds are to be applied in satisfaction of incumbrances according to their priority. (1885) 7 All 378 (381).

[4] Surplus assets after auction sale—Subsequent incumbrancer is not entitled to them without mortgagor's consent either under S. 73 or under O. 34, R. 13. (Vol 14) 1927 All 467 (468) : 49 All 636.

[5] Sale in execution of mortgage decree—Application under S. 73—Material date before which application should be made is when highest bid is accepted by Court officer. (Vol 19) 1932 Bom 622 (624).

[6] The third category in cl. (c) refers only to encumbrancers entitled to precedence over money decree-holders mentioned in fourth category. (Vol 8) 1921 Cal 801 (802).

[7] The word 'incumbrance' means only the incumbrance sued on and not other incumbrances. (1890) 12 All 546 (547).

[8] A executed a first mortgage in favour of X, a second mortgage in favour of Y and again a third mortgage in favour of X. X sued on the first mortgage, obtained a decree and sold the property. Y applied for payment to him out of the surplus sale proceeds. *Held*, he was entitled to be so paid in priority to the third mortgage of X. (1890) 12 All 546 (547).

[9] Possessory mortgagee electing to convert interest into rent payable by the mortgagor—Arrears of rent not a charge on the property which can be given priority over a subsequent incumbrance. (1886) 9 Mad 57 (60).

[10] Where Court did not stop sale as soon as amount of mortgage was realised and where before the sale other decree-holders had applied for execution of their decrees, had even attached property in question and one of them had applied for rateable distribution, it was held that sale by Court was in execution of all decrees in view of S. 73 (c). (1907) 17 Mad L Jour 80 (81).

[11] Contest as to disposal of surplus assets not disposed of in suit or execution proceedings—Court should refer claimant to suit. (Vol 14) 1927 All 467 (468) : 49 All 636.

20. Set-off.—[1] Right of decree-holder auction-purchaser to claim set-off of purchase money is subject to right of rateable distribution under S. 73. Although decree-holder be allowed to set off purchase money towards satisfaction of decree, assets still lie within control of Court and he can be ordered to deposit purchase money in cash for rateable distribution. (Vol 20) 1933 All 666 (668) * (Vol 17) 1930 Cal 761 (762) * (Vol 23) 1936 Mad 437 (438) * (Vol 23) 1936 Mad 797 (798, 799) : 59 Mad 1028 * (Vol 24) 1937 Nag 383 (384) : I L R (1937) Nag 466 * (Vol 18) 1931 Pat 359 (360) : 10 Pat 830 * (Vol 18) 1931 Pat 405 (407, 408) : 11 Pat 250.

[2] Sale proceeds and balance of sale amount left after setting off decretal amount in deposit in inferior Court—Whole property under attachment of superior Court which Court also calling for sale proceeds for rateable distribution—Amount already set off cannot be asset available for distribution. (Vol 18) 1931 Bom 350 (354) : 55 Bom 478.

[3] Court allowing subsequent decree-holder to set off whole purchase money against his debt knowing that there was another decree-holder entitled to rateable distribution—Sale should be set aside owing to material irregularity. (Vol 24) 1937 Pat 50 (53).

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[4] Where set-off is claimed under O. 21, R. 72, application under S. 73 must be made before decree-holder's application for set-off. (Vol 12) 1925 Oudh 287 (288) * (Vol 20) 1933 Mad 804 (805) : 57 Mad 38. (Decree-holder allowed to bid and set off amount of bid — Set off should be deemed to be made as soon as sale is made and other decree-holders cannot claim rateable distribution in the amount of bid.) * (Vol 31) 1944 Nag 295 (297, 298) : I L R (1944) Nag 806.

[5] Execution sale—Decree-holder purchaser—Purchase price less than decretal amount and set off by decree-holder — Applications for execution by other decree-holders against same debtor 15 days after sale — Claiming purchase money to be deposited in Court for rateable distribution—Purchaser held bound to deposit only amount due to decree-holders applying prior to and not after the sale. (Vol 22) 1935 Mad 593 (595) : 59 Mad 342.

21. Suit for refund of assets. — [1] Claim for rateable distribution disallowed — Aggrieved decree-holder's remedy is by suit and not by way of appeal or revision. (Vol 11) 1924 Mad 97 (98) * (Vol 2) 1915 Mad 547 (548).

[2] Section 73 (2) applies only when assets liable to be distributed are paid to persons not entitled to receive. (Vol 20) 1933 Pat 277 (278) * (Vol 4) 1917 All 276 (280) : 39 All 322.

[3] Terms of sub-s. (2) are wide enough to cover a case of plaintiff claiming all assets in custody of Court as against defendant who claims and obtains rateable distribution. (Vol 26) 1939 All 545 (548).

[4] Section 73 (2) does not apply where one decree-holder does not deny right of another to receive rateable assets. (Vol 25) 1938 Oudh 12 (13).

[5] Refund of excess—Person entitled to priority can maintain suit for refund of amount from person not entitled to receive it. (Vol 21) 1934 Lah 478 (480).

[6] Section 73 (2) does not contain any indication that a sale by virtue of which assets have been made available for rateable distribution can be attacked. (Vol 8) 1921 Nag 60 (62).

[7] Suit for refund of excess amount received — Decree-holder claiming to retain amount of rateable distribution from proceeds of sale cannot simultaneously plead that sale was void. (Vol 80) 1943 Nag 7 (9) : I L R (1942) Nag 685.

[8] A suit by a decree-holder for refund of sums improperly awarded to other decree-holders of the same judgment-debtor, before they have been actually paid, is premature and does not lie. (Vol 5) 1918 All 327 (327).

[9] Claim for rateable distribution not brought to Collector's notice — Right to claim it by suit is not barred — It is immaterial that decree noted as satisfied will have to be opened. (Vol 20) 1933 All 666 (669).

[10] Assets realized not found insufficient to discharge in full claims of decree-holders under S. 73—No decree-holder can file suit to declare that decree obtained by another was void being fraudulent. (Vol 20) 1933 Nag 214 (216).

[11] Besides the remedy provided by S. 73(2) a party entitled to rateable distribution is entitled to sue for declaration and injunction restraining payment. (Vol 7) 1920 Mad 605 (615) : 43 Mad 381. (*Obiter.*)

[12] Creditor in execution of decree putting judgment-debtor's land to sale and purchasing it himself and setting off sale money against his debt—Sale confirmed in his favour without disposal of applications of other creditors for rateable distribution — Their remedy held was by separate suit under S. 73. (Vol 27) 1940 Pesh 36 (37).

[13] A suit to recover money paid to a defendant under S. 73, Civil P. C. is a suit for money paid to him

for plaintiff's use and must be brought within three years from the date of payment and not within six years under Art. 120. (Vol 2) 1915 Mad 405 (407) : 39 Mad 62. (Vol 1) 1914 Mad 572 : 37 Mad 385 followed) * (Vol 4) 1917 All 276(278) : 39 All 322. (Suit for refund was neither governed by Art. 29 nor Art. 36—*Per Walsh J.*) * (Vol 31) 1944 Nag 313 (314) : I L R (1945) Nag 427.

[14] A suit under this clause is not one for setting aside the order for distribution. Art. 13, Limitation Act, is not applicable to such a suit as the order for distribution is a proceeding in a suit. (1901) 23 All 331 (332, 333) (PC) * (1891) 15 Bom 438 (440).

[15] Application to Collector to recall amount paid is futile and S. 14, Limitation Act, cannot save limitation. (Vol 31) 1944 Nag 313 (314) : I L R (1945) Nag 427.

[16] Property sold in execution of decree subject to mortgage — Mortgage satisfied out of sale proceeds first and surplus paid to attaching decree-holder, who was left short by Rs. 208 — He can sue for recovery of Rs. 208 on basis of "money had and received"—Suit is cognizable by a Court of Small Causes. (Vol 18) 1931 Rang 56 (58) : 8 Rang 485.

[17] Execution against heirs of *H* — Receiver appointed—Debt due from defendant 1 to *H* was attached — Decree against *A*, a son of *H*, personally—In execution whole of above debt attached by decree-holders defendants 2 and 3 — Garnishee proceedings taken — Debt paid in Court — Debt declared to be belonging to estate of *H* — Objection to attachment by heirs of *H* disallowed — On suit by receiver garnishee order held improper — Defendants 2 and 3 held not entitled to rateable distribution under S. 73—Receiver had preferential right — Order under O. 21, R. 61 or R. 264 of the High Court Rules, held did not bar suit. (Vol 7) 1920 Mad 403 (404).

22. Revision. — [1] Order under S. 73 is judicial order and not merely ministerial — Revision lies. (Vol 27) 1940 Oudh 237 (238) : 15 Luck 332 * (Vol 9) 1922 Cal 19 (20, 21) * (1909) 9 Cal L Jour 210 (214) * (1892) 4 Mad 383 (386) * (Vol 15) 1928 Rang 163 (164) : 6 Rang 582 * (Vol 20) 1933 Sind 329 (330) : 27 Sind L R 190.

[2] Revision lies against an order rejecting an application for rateable distribution, though a remedy by suit is open to the applicant under the provisions of S. 73 itself. (Vol 13) 1926 Nag 389 (390) : 24 Nag L R 68 * (Vol 15) 1928 Mad 362 (362) * (Vol 13) 1926 Mad 179 (181).

[But see (1912) 1912 Pun L R No. 176, p. 565.]

[3] Where suit for questions arising under S. 73 lies revision is not preferable specially when subsequent recipients not parties — High Court can but will not interfere. (Vol 2) 1915 Mad 547 (548).

[4] The High Court will not interfere on revision with order allowing or disallowing claims to rateable distribution, save in exceptional circumstances. (1921) 60 Ind Cas 371 (372) (Lah) * (Vol 22) 1935 Lah 971 (971) * (1894) 4 Mad L Jour 87 (88) * (Vol 23) 1936 Pesh 52 (53).

[5] Where the Court declines to exercise jurisdiction taking a wrong view of the section a revision would lie. (Vol 23) 1936 Mad 91 (93) : 59 Mad 303.

[But see (Vol 22) 1935 Pat 201 (202).]

[6] Revision lies in case of obvious mistake. (Vol 14) 1927 Mad 944 (944) * (Vol 14) 1927 Mad 1030 (1030).

[7] Disallowing rateable distribution in defiance of predecessor's order is illegal exercise of jurisdiction. (Vol 21) 1934 Oudh 110 (111).

[8] Execution of decree — Suspension of payment is irregularity in exercise of jurisdiction. (Vol 6) 1919 Mad 66 (69) : 42 Mad 692.

RESISTANCE TO EXECUTION.

74. Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

[1882—S. 330; 1877—S. 330; 1859—S. 228; See O. 21, Rr. 97 to 103.]

PART III.

INCIDENTAL PROCEEDINGS.

["The general powers of Courts in regard to commissions have been summarised in Cl. 75 and the detailed provision will be found in the First Schedule."—S. O. R.]

COMMISSIONS.

Power of Court to issue commissions. **75.** Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition.

[See Order 26.]

76. (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

Section 73 (contd.)

[9] Refusal of application for rateable distribution on ground that there was other property of judgment-debtor available — High Court will interfere. (1909) 32 Mad 334 (335, 336).

Section 74 — Note 1

[1] Where the resistance or obstruction contemplated by the section is the resistance or obstruction of the officer, it does not come under this section. (1892) 14 All 417 (418, 419).

[2] Section 74 refers to cases in which the Court is satisfied that such obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation. (1901) 25 Bom 478 (486).

[3] The word 'possession' is not limited to actual physical possession, the section is wide enough to cover cases of constructive possession such as by tenant. (1901) 25 Bom 478 (493).

[4] A decree for partition is a decree for possession within the meaning of this section. (1893) 16 Mad 127 (130).

Section 75 — Note 1

[1] Powers of Court to issue commission are strictly defined in S. 75. (1913) 15 Cal L Jour 17 (22, 23).

[2] A Court is not authorised to issue a commission to a person directing him to hear a woman sing and then to report not only as to her skill as a singer but also as to her occupation in life so far as it can be deduced from her musical talents. (Vol 19) 1932 All 264 (267).

[3] The question whether one of the parties is personally engaged in agricultural labour cannot be referred to the Commissioner. (Vol 15) 1928 Bom 145 (147).

[4] Section 75 does not authorize Court to issue commission to ascertain value of moveables in possession

of trustee. (Vol 27) 1940 Cal 337 (343) : I L R (1940) 1 Cal 372.

[5] Profits arising out of mortgaged property — Commissioner can investigate but he cannot enquire as to possession. (Vol 12) 1925 Pat 576 (576).

[6] Court cannot make over whole case or material issue to Commissioner for trial on merits. (Vol 13) 1926 Lah 145 (146.) * (Vol 17) 1930 Cal 764 (765) * (1893) 16 Mad 350 (351).

[7] The law does not authorise a Commissioner to try the issue referred to him with the aid of assessors. (Vol 19) 1932 All 264 (267).

[8] Issue of commission to two persons is irregular. (Vol 16) 1929 Mad 661 (663).

[9] Appointment of successive Commissioners without rejecting report of first is not permissible. (Vol 20) 1933 All 65 (65)* (Vol 16) 1929 Mad 661 (663).

[10] Court's finding that plaintiff has produced all account papers delivered to them and remaining papers are with defendant cannot be reagitated before Commissioner appointed to take accounts between parties. (Vol 27) 1940 Cal 337 (343) : I L R (1940) 1 Cal 372.

[11] The opinion of the Commissioner is no evidence and cannot be considered by the Court. (Vol 25) 1938 All 266 (267) : I L R (1938) All 370.

[12] Appellate Court has power to issue commission for local investigation and need not record reasons under O. 41, R. 27. (Vol 19) 1932 All 270 (271).

[13] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see S. 8.

Section 76 — Note 1

[1] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see S. 8.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

[1882—S. 386 ; 1877—Ss. 383, 384, 385, 386 (2) ; 1859—S. 175 ; See O. 26, R. 4.]

77. In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

[See O. 26, Rr. 5 and 6.]

78. ^a[Subject to such conditions and limitations as may be prescribed], the provisions as to *Commissions issued by foreign Courts.* execution and return of commissions for the examination of witnesses shall apply to commissions issued by ^a[or at the instance of]—

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of ^b[the Central Government or of the Crown representative], or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country. ^c[* * *].

[1882—S. 391 ; 1877—S. 391.]

[a] *Inserted* by the Code of Civil Procedure (Amendment) Act, 1932 (10 [X] of 1932), Section 2. [b] *Substituted* by A. O. for "the Governor-General in Council". [c] The words "for the time being in alliance with His Majesty" were *repealed* by the Code of Civil Procedure (Amendment) Act, 1932 (10 [X] of 1932), S. 2.

PART IV.

SUITS IN PARTICULAR CASES.

["The bulk of the corresponding part of the present Code will be found in the Rules. The provisions as to suits by aliens, etc., have been retained in the Bill and a few only of the provisions relating to suits by or against the Government. There is a general clause defining the nature of the interpleader suits."—S. O. R.]

SUITS BY OR AGAINST ^a[THE CROWN] OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

^b**79.** Subject to the provisions of sections 179 and 185 of the Government of India Act, 1935, *Suits by or against the Crown.* in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, the Governor-General in Council before the establishment of the Federation of India, and thereafter, the Federation;

Section 76 (*contd.*)

As to the issue of a commission for the examination of any person resident beyond the local limits of the jurisdiction of the Court issuing a commission, *see* O. 26, Rule 4 (1) (a).

Section 77 — Note 1

[1] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, *see* S. 8.

As to when a Court may issue a letter of request, *see* O. 26, R. 5.

Section 79 — Note 1

[1] Procedure under S. 79 applies to appeals also. (Vol 16) 1929 Lah 10 (11): 9 Lah 667.

[2] Before Government of India Act of 1935, suit against State Railway was required to be brought against Secretary of State for India in Council. (Vol 11) 1924 Bom 306 (306) : 48 Bom 297* (Vol 20) 1933 Pat 630 (632)* (Vol 18) 1931 Pat 893 (394)* (Vol 18) 1931 Pat 326 (328) : 10 Pat 466.

[3] Lease by Military Estates Officer on behalf of Secretary of State for India before amendment by Government of India (Adaptation of Indian Laws) Order, 1937—Suit to eject lessee after amendment filed in

name of Governor-General in Council through Military Estates Officer—Procedure is valid. (Vol 32) 1945 Nag 255 (256, 257) : 1 L R (1945) Nag 629.

[4] Appeal filed on 27th April 1937 describing respondent as 'Secretary of State for India in Council'—Addition of words "for India in Council" held did not justify dismissal of appeal. (Vol 26) 1939 Lah 293 (298).

[5] Land acquired by Government for District Board — District Board is not competent to appeal against the compensation allowed. (Vol 16) 1929 Lah 10 (11) : 9 Lah 667.

[6] Head of department is not liable for wrongful acts of his subordinate unless it can be shown that the act complained of was substantially the act of the head of the department himself. (Vol 14) 1927 Bom 521 (524) : 51 Bom 749.

[7] Suit by Government — Government should not stand in same position as private litigant—It should insist on its officers to see that facts on which action is founded are reasonably true. Private person's offer to indemnify Government for costs should not weigh with Government. (Vol 24) 1937 Mad 523 (528).

[8] As to the procedure to be followed regarding suits by or against the Crown, *see* Order 27. Also the Government of India Act, 1935, S. 176.

- (b) in the case of a suit by or against a Provincial Government, the Province; and
 (c) in the case of a suit by or against the Crown Representative, the Secretary of State.]

[1882—S. 416, Para. 1; 1877—S. 416; See O. 27.]

[a] *Substituted* by A. O. for "the Government". [b] Section was *substituted, ibid*, for the original Section 79.

80. No suit shall be instituted against ^a[the Crown] or against a public officer in respect of *Notice*. any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been ^b[delivered to, or left at the office of—

- (a) in the case of a suit against the Central Government, a Secretary to that Government;
 (b) in the case of a suit against the Crown Representative, the Political Secretary;
 (c) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District, and
 (d) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted],

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

[1882—S. 424; 1877—S. 424; See O. 27.]

[a] *Substituted* by A. O. for the words "the Secretary of State for India in Council". [b] *Substituted, ibid* for "in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District".

SECTION 80—SYNOPSIS.

1. "Act purporting...capacity."
2. Applicability, object and scope.
3. Computation of period of notice.
4. Fact of service of notice must be stated in plaint.
5. Limitation—Exclusion of period of notice.
6. Notice, if necessary for amendment.
7. Notice—Requisites and sufficiency of.
8. "Public officer"—See S. 2 (17).
9. Service of notice.
10. "Stating cause of action."
11. Suit during currency of notice.
12. Suits against Municipalities.
13. Suits against Railways.
14. Suits on contracts and injunction.
15. Variance between notice and plaint.
16. Waiver of notice.

1. "Act purporting ... capacity." — [1] Words "act purporting to be done," etc. refer to public officers only. (1898) 25 Cal 289 (242)* (Vol 11) 1924 Bom 1 (11, 12, 21, 22) : 48 Bom 87* (1911) 35 Bom 362 (365, 367).

[2] If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity. (Vol 17) 1930 All 704 (705).

[3] It is only where plaintiff complains of some act purporting to have been done by public officer in his official capacity that notice is enjoined. (Vol 21) 1934 P C 96 (97) : 61 Cal 470 (P O)* (Vol 17) 1930 All 742 (744) : 53 All 44. (Police Inspector acting in official capacity)* (Vol 2) 1915 All 358 (359). (Suit against police officer for acts done under Criminal Procedure Code—Notice is essential)* (1907) 29 All 567 (568).
 Suit by plaintiff against Sub-Inspector of Police for

recovery of account-books, which Sub-Inspector had seized during search apparently in pursuance of provisions of S. 165, Criminal P. C. of the plaintiff's house.)* (Vol 1) 1914 Bom 125 (126). (Talukdari Settlement Officer serving notice of eviction on person in wrongful possession of land—Latter cannot sue for permanent injunction to restrain former from evicting him without notice under S. 80.)* (Vol 18) 1931 Cal 61 (63) : 57 Cal 1127. (Neglect to recover rent by Official Receiver is an act purporting to be done under official capacity.)* (Vol 7) 1920 Mad 723 (727)* (Vol 28) 1941 Pat 461 (462)* (Vol 28) 1941 Pat 438 (439)* (Vol 5) 1918 Upp Bur 28 (30) : 3 Upp Bur Rul 1. (Suit against Bench Clerk of Judge for recovery of money which plaintiff lost through his negligence in losing execution application.)

[4] Suit against public officer not in his official capacity but in his individual capacity—Notice is not necessary. (1909) 36 Cal 28 (39) * (Vol 23) 1936 All 801 (802). (Dispute between two brothers who were *mutawallis*—A appointed by District Judge to manage property—A collecting rents—Suit against A for recovery of profits—Notice not necessary.) * (1910) 7 All L Jour 301 (304). (Public officer insulting, using defamatory language and assaulting his subordinate—Suit for damages—No notice is necessary.) * (Vol 15) 1928 Bom 352 (362) : 30 Cri L Jour 278 : 52 Bom 832 (F B). (Suit for damages for assault and battery by police officer while investigating cognizable offence—Police officer is not entitled to notice under S. 80.) * (Vol 28) 1941 Cal 643 (651). (Loan taken by common manager appointed under S. 95, Bengal Tenancy Act, by executing bond—Suit on such bond does not come under S. 80.) * (Vol 25) 1938 Cal 191 (191). (Suit against Official Receiver of estate for arrears of rent.) * (Vol 25) 1938 Mad 221 (223, 224). (Official Assignee executing release deed of insolvent's share of property in V's favour for certain sum—Prior to deed insolvent's share sold in execution of mortgage decree—Suit by V against Official Assignee for recovery of sum—Notice is not necessary.) * (Vol 25) 1938 Nag 449 (451) : 1 L R (1939) Nag 200. (Setting up of claim to property on behalf of estate which receiver represents is not act done by

Section 80 (*contd.*)

public officer in official capacity.) * (Vol 28) 1941 Oudh 529 (559). (Person appointed *mutwalli* by District Judge — Suit in respect of acts done by such person — Merely because such person happens to be public officer, acts done by him cannot be said to be done in official capacity.) * (Vol 33) 1946 Pat 31 (33) : 24 Pat 514. (Receiver appointed by Court — Suit for realization of price for seeds supplied against defendants including receiver—Notice is not necessary.) * (Vol 28) 1941 Pat 438 (439, 440). (Liquidator appointed by Registrar of co-operative societies executing award against member of society—Suit by member to restrain liquidator from selling his house and to release same from attachment — Notice to liquidator is not necessary.) * (Vol 27) 1940 Pat 516 (531) : 19 Pat 433. (Suit for royalty of lands in possession of receiver — Non-payment of royalty by receiver or his surrender of lands based on individual contract between him and plaintiff are not official acts.)

[5] Suit against estate in hands of receiver and not against receiver personally — Notice is not necessary. (Vol 27) 1940 Cal 1 (4).

[6] Mortgage by manager under S. 95, Bengal Tenancy Act—No personal liability on manager — Suit by mortgagee on successor manager—No claim against manager personally — Notice under S. 80 is not required. (Vol 21) 1934 P O 96 (97) : 61 Cal 470 (PC). ((Vol 19) 1932 Cal 275: 59 Cal 961 reversed.)

[7] Suit against public officer for act done in official capacity—He is entitled to notice even though such act is done *mala fide* — Question of good faith of public officer is immaterial. (Vol 28) 1941 Pat 461 (462, 463) * (Vol 17) 1930 All 704 (705) * (Vol 11) 1924 All 851 (852) : 46 All 884 * (Vol 11) 1924 Cal 145 (146, 148) : 50 Cal 992 * (Vol 5) 1918 Mad 62 (70, 71) : 41 Mad 792 (F B) * (Vol 28) 1941 Pat 385 (387, 388) : 42 Cri L Jour 375 : 20 Pat 417 * (Vol 21) 1934 Pat 14 (16) * (Vol 24) 1937 Sind 281 (284) : 32 Sind L R 106.

[But see (1904) 26 All 220 (222) * (1882) 7 Cal 499 (503) * (1912) 13 Cri L-Jour 65 (118) (Cal).]

[8] Act of public officer not essential part of cause of action disclosed by plaint — But having regard to his position in relation to subject-matter of suit, he is necessary party — No notice is necessary. (Vol 19) 1932 All 657 (658, 659) * (Vol 14) 1927 All 132 (136):48 All 821. (Suit against receiver for realizing a charge on property of debtor.) * (Vol 17) 1930 Bom 11 (15). (Receiver appointed under Provincial Insolvency Act is public officer — But mortgage suit, being not in respect of any act done by receiver as such, is maintainable without notice.) * (Vol 10) 1923 Bom 392 (393). (Official Assignee — Suit for declaration against.) * (1889) 13 Bom 343 (347). (Collector made party to protect minor's title — Notice not necessary.) * (Vol 31) 1944 Cal 206 (210). (Suit for declaration that remarks in cadastral survey that suit plot was "pirostan" were wrong and that order of Commissioner enrolling plot as wakf was illegal—Notice to Commissioner held was not necessary.) * (Vol 29) 1942 Cal 394 (399). (Suit to declare mortgage by receiver in partition suit not binding on parties to suit or estate— Suit against mortgagee and receiver — No relief sought against receiver—Notice not necessary.) * (Vol 22) 1935 Cal 726 (727). (Assessment by Municipality—Subsequent supersession of Municipality and public officer appointed by Government to perform duties of Commissioner — Suit for declaring assessment illegal and *ultra vires* — Notice under S. 80 is not necessary.) * (1905) 32 Cal 1130 (1134). (Sale under Public Demands Recovery Act — Suit against auction-purchaser on ground of fraud — No relief claimed against Secretary of State on that ground — There is no cause of action against him and no notice is necessary.) * (1903) 30 Cal 36 (72). (No notice is required against Sub-Collector who is joined

in an action with the Secretary of State, if he is not sued for any act done by him independently of the Government.) * (Vol 25) 1938 Mad 612 (613). (Suit concerning title between plaint charity and temple represented by ward—Ward represented by Collector — Case held did not fall under. S. 80.) * (1888) 11 Mad 317 (318, 319). (Collector, as guardian of ward is not entitled to any notice.) * (Vol 20) 1933 Sind 1 (3). (Partition suit — During suit Manager, Encumbered Estates, taking charge of defendant's estate — Notice under S. 80 is not necessary.)

[9] Official Receiver or Official Assignee sued in respect of act done by him—Notice is necessary. (Vol 27) 1940 Cal 578 (579). (Suit against Official Receiver by insolvent's wife for retention of property until her dower debt is satisfied.) * (Vol 19) 1932 All 575 (577) : 54 All 879 * (Vol 12) 1925 All 241 (242, 243) : 47 All 291 * (Vol 11) 1924 All 40 (43) : 46 All 16 * (Vol 7) 1920 Bom 50 (50) : 44 Bom 895 * (Vol 17) 1930 Cal 721 (721). (Suit against Receiver for accounts.) * (Vol 24) 1937 Lah 386 (387). (Suit attacking sale by Official Receiver— Official Receiver impleaded as defendant.) * (Vol 17) 1930 Lah 708 (709). (Official Receiver selling insolvent's property — Suit for declaration that property belonged to plaintiff.) * (Vol 17) 1930 Mad 458 (463, 464). (Official Assignee taking possession of goods believing them to be insolvent's—Suit for damages.)

[10] Suit to recover money paid voluntarily by plaintiff to Official Liquidator to save his property which had been wrongfully attached by latter—Notice is necessary. (Vol 21) 1934 Oudh 158 (162) : 9 Luck 577.

[11] Liquidator appointed under S. 42, Co-operative Societies Act is public officer—Suit against him in respect of act done by him—Notice is necessary. (Vol 26) 1939 Nag 232 (233). (Suit under O. 21, R. 63 in respect of attachment by liquidator.) * (Vol 21) 1934 Nag 201 (202) : 30 Nag L R 240. (Suit by mortgagee to declare that mortgaged property be sold in satisfaction of his mortgage in priority to claim of liquidator.)

[But see (Vol 27) 1940 Mad 831 (833) : I L R (1940) Mad 929. (Liquidator is not public officer.)]

[12] Collector acting as agent of Court of Wards sued for acts done in that capacity—Notice is necessary. (1881) 3 All 20 (24) (F B).

[13] Suit for accounts against common manager appointed under S. 95, Bengal Tenancy Act — Notice under S. 80 is essential. (Vol 7) 1920 Cal 575 (579).

[14] Suit against person who was public officer at the time of cause of action but ceasing to be so at time of suit—Notice is not necessary. (Vol 29) 1942 Mad 238 (238).

[But see (Vol 17) 1930 Cal 737 (738). (Suit against receiver in respect of acts done in course of duty — Notice is necessary even if suit is brought after discharge.)]

[15] Deputy Magistrate appointed as returning officer — Suit in respect of act done in that capacity—Returning officer is not public officer—No notice is necessary. (Vol 22) 1935 All 106 (109).

[16] A Government school-master though his services are lent to the municipality is a public officer and is entitled to the notice under the section. (Vol 15) 1928 Nag 33 (33).

[17] Panch or member of Village Panchayat under C. P. Village Panchayat Act (S. 66) is public servant for Penal Code only—No notice to him is necessary under S. 80 before suit is filed against him. (Vol 31) 1944 Nag 130 (132) : I L R (1944) Nag 687.

[18] Manager appointed under Bengal Court of Wards Act is public officer — He is entitled to notice under S. 80. (Vol 26) 1939 Cal 720 (721, 722) : I L R (1940) 1 Cal 73.

[But see (Vol 7) 1920 Cal 167 (168).]

Section 80 (*contd.*)

2. Applicability, object and scope.—[1] Section 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. (Vol 14) 1927 P C 176 (183) : 54 Ind App 338 : 51 Bom 725 (P C) * (Vol 20) 1933 All 53 (54) * (Vol 14) 1927 Bom 649 (650) * (Vol 17) 1930 Lah 708 (709). (Section 80 applies even to suit for declaratory decree.) * (Vol 31) 1944 Mad 544 (545) : I L R (1945) Mad 263 * (Vol 28) 1941 Mad 446 (447, 448) * (Vol 18) 1931 Mad 175 (176) : 54 Mad 416. (Consideration of hardship or absence of prejudice is immaterial.) * (Vol 28) 1941 Pat 517 (519) : 20 Pat 394 * (Vol 26) 1939 Pat 82 (83) * (Vol 24) 1937 Sind 291 (292) : 32 Sind L R 67.

[2] Suit in contravention of S. 80 is unsustainable in limine. (Vol 28) 1941 Pat 461 (463).

[3] Non-compliance with S. 80 — Suit should be wholly dismissed. (Vol 18) 1931 Mad 175 (176) : 54 Mad 416 * (Vol 27) 1940 Cal 1 (4) * (Vol 28) 1941 Pat 461 (463) * (Vol 25) 1938 Pat 137 (128).

[4] Secretary of State or public officer only *pro forma* defendant — Notice is not necessary. (Vol 32) 1945 Mad 224 (225) * (Vol 26) 1939 Pat 32 (33) * (Vol 25) 1938 Pat 127 (129).

[But see (Vol 23) 1936 Pat 339 (339, 340) : 15 Pat 353. (No claim against Secretary of State though impleaded—Notice must still be given.)]

[5] Two or more causes of action united in one suit—Suit failing for want of notice with regard to one cause of action — Entire suit need not be dismissed. (Vol 27) 1940 Cal 1 (4).

[6] Decision that notice under S. 80 is necessary before institution of suit does not necessarily amount to preliminary decree. (Vol 5) 1918 Upp Bur 28 (30) : 3 Upp Bur Rul 1.

[7] Object of S. 80 is to give to the public officer concerned notice of the claim which is going to be made against him, and to give him reasonable time in which to consider his reactions. (Vol 30) 1943 Bom 138 (139) : I L R (1943) Bom 128 * (1903) 27 Bom 189 (206) * (Vol 27) 1940 Cal 1 (4) * (1907) 34 Cal 257 (282) * (1881) 6 Cal 8 (10) (F B) * (Vol 29) 1942 Mad 288 (288) * (Vol 13) 1926 Mad 408 (409) * (Vol 25) 1938 Nag 415 (417) : I L R (1939) Nag 206.

[8] Section 80 applies to a suit brought under S. 14, Madras Survey and Boundaries Act. (Vol 30) 1943 Mad 284 (285).

[9] Suit under S. 104 (h), Bengal Tenancy Act — S. 80 applies. (1913) 18 Cal L Jour 566 (567).

[10] Suit for compulsory registration under S. 77, Registration Act — S. 80 does not apply. (Vol 27) 1940 All 108 (111).

[11] Suit on account of land revenue brought under Bombay City Land Revenue Act—S. 80 does not apply. (Vol 21) 1934 Bom 162 (163).

[12] Suit under O. 21, R. 63 — Notice is not necessary as suit is continuation of claim proceedings. (Vol 30) 1943 Mad 341 (342).

[13] Application under para. 17, Sch. II of Code, is not suit within S. 80. (Vol 19) 1932 Lah 374 (376) : 13 Lah 672.

3. Computation of period of notice.—[1] In computing period of two months, day on which notice was served should be excluded. (Vol 32) 1945 Cal 341 (345). (Notice served on 11th November 1938—Suit filed on 11th January 1939 is premature and hence not maintainable.) * (Vol 30) 1943 Mad 284 (286) * (Vol 28) 1941 Mad 446 (447, 448).

[2] Section 10, General Clauses Act, does not apply. (Vol 30) 1943 Mad 284 (284).

4. Fact of service of notice must be stated in plaint. — [1] No averment in plaint that notice under S. 80 has been served even though he has been served

with notice—Amendment of plaint to include such averment must be allowed. (Vol 22) 1935 Pat 86 (87) * (1904) 8 Cal W N 913 (916).

[2] No statement in plaint about issue of notice under S. 80—Plaint is defective and is liable to be rejected as a whole. (Vol 25) 1938 Pat 127 (128, 129) * (Vol 18) 1931 Cal 503 (504) : 58 Cal 850.

[3] Averment in plaint that notice is 'sent' held not in compliance with S. 80. (Vol 24) 1937 Sind 291 (292) : 32 Sind L R 67.

5. Limitation — Exclusion of period of notice. — [1] Suit against Government — Notice under S. 80 necessary—Time required by notice can be excluded under S. 15 (2), Limitation Act. (Vol 4) 1917 Lah 212 (212, 213) : 1917 Pun Re No. 52.

[2] In the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under S. 80. (Vol 8) 1921 Cal 661 (671).

[3] Section 15 (2) does not apply to suit under S. 104-H, Bengal Tenancy Act—Period of notice under S. 80 is not excluded. (Vol 6) 1919 Cal 949 (949) * (Vol 6) 1919 Cal 1001 (1002) * (Vol 6) 1919 Cal 819 (821) : 46 Cal 199.

[4] Joint tort-feasors — One tort-feasor requiring notice under S. 80 thereby extending time by two months against him—Extension must be granted as against other. (Vol 24) 1937 Sind 281 (284) : 32 Sind L R 106.

6. Notice, if necessary for amendment. — [1] There is nothing in law to show that in case of any amendment, necessitated by alleged discovery of facts previously unknown to the plaintiff, a further notice should be given. (1903) 80 Cal 86 (72).

[2] After institution of suit Manager, Encumbered Estates, made party as original defendant went under his protection — Notice to manager is unnecessary. (Vol 18) 1931 Sind 158 (159) : 25 Sind L R 200.

[3] Defendant's interest devolving on Government during suit — No notice under S. 80 need be given—Matter is governed by O. 22, R. 10. (Vol 13) 1926 All 585 (586).

[4] Notice under Railways Act, S. 77 properly given — Railway taken over by Secretary of State after such notice but before suit—No second notice to Secretary of State under S. 80 is necessary. (Vol 15) 1928 Mad 599 (601).

[5] Notice pointing to suit based on negligence—Original plaint proceeding on that basis — Amendment of plaint seeking to set up cause of action based on nuisance—Amendment cannot be permitted. (1911) 38 Cal 797 (804).

7. Notice — Requisites and sufficiency of. — [1] Notice must not be too strictly or too narrowly construed. (1903) 27 Bom 189 (206) * (Vol 13) 1926 Mad 408 (409).

[2] Notice is sufficient if it substantially fulfils its object in informing the parties concerned of the nature of the suit intended to be filed. (1903) 27 Bom 189 (206) * (Vol 21) 1934 Cal 187 (189). (Notice which says that cause of action and reliefs are described in the annexed copy of plaint which forms part of notice is substantial compliance.) * (Vol 13) 1926 Mad 408 (409) * (1891) 14 Mad 386 (390) * (Vol 25) 1938 Nag 415 (418) : I L R (1939) Nag 206. (Object of notice achieved — No violation of spirit and intention of S. 80—Notice should be treated as valid.) * (Vol 25) 1938 Pat 556 (557) : 17 Pat 345 * (Vol 21) 1934 Pat 701 (704) : 14 Pat 288. (Notice need not be copy of plaint — It should give substantial information to Government with basis of claim and relief sought.) * (Vol 16) 1929 Sind 61 (63).

[3] Document, if valid notice, must be determined by common sense and after understanding it in sense

Section 80 (*contd.*)

intended by writer and understood by receiver. (Vol 20) 1933 Mad 105 (107).*

[4] Error in notice about subject-matter of suit is a substantial error which vitiates notice. (Vol 33) 1946 Mad 73 (74).

[5] Suit against Governor-General in Council — Notice stating that suit would be instituted against 'Secretary of State' for relief against him—Notice is not proper. (Vol 33) 1946 Mad 366 (367, 368, 369).

[6] Notice must be on Collector of district where suit is filed. (Vol 2) 1915 Cal 62 (63).

[7] Communication from plaintiff to Collector, without stating intention to sue or cause of action, informing Collector that he would sue him if he were evicted is not notice. (1912) 14 Bom L R 577 (578, 579).

[8] Village Headman—Suit against—Report to Sub-Divisional Officer or Deputy Commissioner is not sufficient notice. (Vol 10) 1923 Rang 250 (251).

[9] Suit against Government by two plaintiffs—Notice under S. 80 by one — S. 80 is not complied with. (Vol 31) 1944 Mad 544 (545) : I L R (1945) Mad 263 * (Vol 22) 1935 Mad 389 (390) * (Vol 18) 1931 Mad 175 (176) : 54 Mad 416 * (Vol 22) 1935 Sind 206 (207) : 29 Sind L R 404.

[But see (1901) 24 Mad 279 (282).]

[10] Notice by transferor, one of co-plaintiffs is enough for continuance of suit by other transferee co-plaintiffs after former's death—Decree passed is not a nullity. (Vol 26) 1939 Oudh 196 (202).

[11] Notice to Secretary of State under S. 80 by firm — Objection by defendant that firm was unregistered — Plaintiff amended and names of plaintiffs who were owners of firm substituted—Defendant having knowledge that plaintiffs were carrying on business in name of firm by which notice was given — Notice under S. 80 held must be deemed to be on behalf of substituted plaintiffs. (Vol 28) 1941 Pat 517 (526) : 20 Pat 394.

[12] Notice which does not contain all the names and places of residence of plaintiffs is invalid notice. (1913) 40 Cal 503 (509, 510) * (Vol 22) 1935 Bom 229 (230) * (Vol 18) 1931 Cal 61 (64) : 57 Cal 1127.

[13] Notice — Failure to give surname, caste or occupation does not make it defective. (Vol 29) 1942 Bom 161 (164, 165) : I L R (1942) Bom 357.

[14] Notice by a pleader on behalf of his client to the judicial officer is sufficient. (Vol 15) 1928 Bom 338 (339).

[15] Notice must be given by plaintiff and by no other—Notice by his father is not sufficient. (Vol 17) 1930 Bom 367 (367).

[16] Person giving notice dying before instituting suit — Fresh notice must be given by his representative before filing suit. (1903) 25 All 187 (193).

[17] Liquidator acting through Deputy Commissioner — Notice to latter is sufficient. (Vol 21) 1934 Nag 201 (202) : 30 Nag L R 240.

8 "Public Officer." — See S. 2 (17).

9. Service of notice. — [1] Words of S. 80 as to how notice is to be served are mandatory and not controlled by O. 48, R. 2—Service of notice on son of public officer is not valid service on that officer. (Vol 18) 1931 Cal 503 (504) : 58 Cal 850.

[2] Suit against Secretary of State—Notice on Collector served prior to coming into force of Government of India (Adaptation of Indian Laws) Order—Suit lodged after aforesaid Order came into force — Suit is saved by paras. 9 and 11 of Preamble to aforesaid Order. (Vol 27) 1940 Lah 455 (456).

10. "Stating cause of action." — [1] Words "cause of action" should not be construed in narrow sense — But cause of action must be stated with precision. (Vol 28) 1941 Oudh 355 (358) : 16 Luck 421* (Vol 15)

1928 Cal 74 (83) : 54 Cal 969* (1904) 8 Cal W N 913 (916)* (1901) 24 Mad 279 (282).

[2] To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as damages for breach of contract and damages for negligence. (Vol 25) 1938 Pat 556 (557) : 17 Pat 345.

[3] Notice given jointly by several plaintiffs in different suits—Total amount payable mentioned — Sum of all amounts claimed not exceeding amount in notice — Notice is not illegal merely because notified claim is split up. (Vol 21) 1934 Pat 346 (349).

[4] An alternative and a lesser claim which is not mentioned in the notice cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. (Vol 25) 1938 Nag 415 (417) : I L R (1939) Nag 206.

[5] To state a future cause of action is not compliance with S. 80. (Vol 30) 1943 Bom 138 (139) : I L R (1943) Bom 128* (Vol 15) 1928 Cal 74 (83) : 54 Cal 969.

[6] Where a cause of action exists of which notice is given notice is not rendered bad because it refers to a possible further claim which may arise before a suit can be brought. (Vol 30) 1943 Bom 138 (139) : I L R (1943) Bom 128.

[7] Notice itself cannot constitute cause of action. (1912) 6 Sind L R 210 (212).

11. Suit during currency of notice. — [1] Suit against officials for acts purporting to be done in discharge of their duties—Plaintiff cannot bring suit before two months' time has expired. (Vol 14) 1927 P C 176 (183) : 54 Ind App 338 : 51 Bom 725 (P C). (35 Bom 362 ; 37 Bom 243 and (Vol 3) 1916 Bom 296 : 40 Bom 392, overruled.) * (Vol 28) 1941 Pat 517 (519) : 20 Pat 346.

[2] Notice served on Secretary of State under S. 80—Subsequently it being discovered that certain plot has been omitted from first notice, another notice including that plot served—Suit brought more than two months after first notice is not premature. (Vol 26) 1939 Cal 758 (760).

[3] Notice to file suit given under S. 80 and suit filed before expiry of two months — Plaintiff permitted to withdraw suit with liberty to file fresh suit — Fresh notice is not necessary. (Vol 22) 1935 Bom 21 (22, 23) : 59 Bom 149.

12. Suits against Municipalities. — [1] S. 86, Bombay District Municipal Act, 1873, requires notice to be given to Municipality. (1884) 8 Bom 421 (423).

[2] Sanction to build given by Municipality suspended after supersession of Municipality under S. 238, Punjab Municipal Act, 1911—Notice of suit by owner addressed to Secretary of State through Deputy Commissioner — Notice described as one under S. 80, Civil P. C. and S. 49, Municipal Act—Notice held valid. (Vol 27) 1940 Lah 451 (454).

[3] A Municipality constituted under District Municipalities Act, 1884, cannot be described as a 'public officer' and therefore notice is not required. (Vol 17) 1930 Mad 844 (853, 854)* (Vol 18) 1931 Mad 808 (811) : 55 Mad 207.

13. Suits against Railways. — [1] Suit against Railway Administration owned by Government — S. 80 at once comes into operation and notice under S. 80 is indispensable (Vol 18) 1931 Pat 393 (394)* (Vol 18) 1931 Nag 96 (97)

[2] Notice under S. 77, Railways Act, does not dispense with notice under S. 80. (Vol 20) 1933 All 53 (54)* (Vol 17) 1930 All 476 (477) : 52 All 837.

[3] Suit against Railway company whose administration vests in Government—Notice to Agent or Manager is not sufficient notice under S. 80. (Vol 18) 1931 Pat 326 (328) : 10 Pat 466.

Exemption from arrest and personal appearance.

81. In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

Section 80 (contd.)

[4] Suit against Secretary of State as representing G. I. P. Railway—Notice to Collector held wholly defective. (Vol 30) 1943 All 158 (160) : I L R (1943) All 228.

[5] Notice to be served under S. 140, Railways Act, on the manager of a railway administered by Government is not a substitute for a notice necessary under S. 80. (Vol 15) 1928 Bom 421 (424) : 52 Bom 548.

[6] Suit against State Railway—Notice under S. 80 is not sufficient— Notice under S. 77, Railways Act is also necessary. (Vol 22) 1935 All 900 (901).

[7] State Railway — Combined notice under S. 77, Railways Act, and S. 80, Civil P. C. can be given. (Vol 15) 1928 Mad 599 (600).

14. Suits on contracts and injunction. — [1] Section 80 has application to suits on contract. (Vol 21) 1934 P C 96 (97) : 61 Cal 470 : 61 Ind App 171 (P C) (Vol 19) 1932 Cal 275 (281) : 59 Cal 961 (Vol 2) 1915 Cal 62 (63).

[2] Section 80 applies to a case wherein part or whole of relief claimed is injunction. (Vol 14) 1927 P C 176 (183) : 54 Ind App 338 : 51 Bom 725 (P C) (Vol 19) 1932 Cal 163 (165) : 58 Cal 1288 (Vol 33) 1946 Lah 247 (254) (S B). (Court-martial of accused on various charges, started — Suit by accused to restrain members of Court-martial from proceeding with trial— Notice under S. 80 not given—Suit held was not maintainable.) (Vol 20) 1933 Lah 203 (207) : 14 Lah 380 (Vol 7) 1920 Mad 723 (727) (Vol 1) 1914 Mad 502 (504) : 37 Mad 113 (Vol 20) 1933 Sind 4 (5). (Subsequent abandonment of plea of injunction cannot validate suit as same was unsustainable in limine.) (Vol 15) 1928 Sind 76 (77) : 22 Sind L R 63 (1912) 6 Sind L R 250 (251, 252) (1912) 6 Sind L R 123 (124).

[3] Suit for injunction in respect of act threatened to be done—S. 80 applies. (Vol 18) 1931 Lah 703 (703) : 12 Lah 260 (Vol 7) 1920 Mad 723 (727).

[But see (Vol 14) 1927 Mad 166 (166, 168) : 50 Mad 289. (Suit for declaration and injunction restraining the Official Receiver from selling the suit properties is maintainable without notice.)]

15. Variance between notice and plaint. — [1] Suit against Secretary of State for recovery of possession of land forming Noabad taluk — Variation between notice under S. 80 and plaint — Amendment of plaint— Variance held to be not such as to lead to dismissal of suit. (Vol 4) 1917 Cal 614 (614).

[2] Relief not covered by notice added in plaint — Entire suit should not be dismissed, but plaint should be amended. (Vol 21) 1934 Pat 701 (704) : 14 Pat 283.

[3] Notice under, mentioning two reliefs while in plaint only one relief claimed—Valuation of suit in plaint presented in Court and in plaint attached to notice not same—Defects held mere technicalities. (Vol 30) 1943 All 345 (351) : I L R (1943) All 860.

[4] Case set up in plaint different from that stated in notice—Suit instituted upon such notice cannot be maintained. (Vol 3) 1916 Cal 66 (67).

16. Waiver of notice. — [1] There is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading want of notice at the trial. (1907) 34 Cal 257 (282) (Vol 29)

1942 Bom 339 (340) (1913) 43 Cal 503 (509). (Notice though invalid may be waived.) (Vol 20) 1933 Mad 917 (919).

[But see (Vol 31) 1944 Mad 544 (545) : I L R (1945) Mad 263. (There can be no question of waiver or of estoppel.) (Vol 28) 1941 Mad 446 (447, 448) (Vol 24) 1937 Sind 291 (292) : 32 Sind L R 67.]

[2] Notice would be deemed to have been waived if no issue is joined at the time of settlement of issues. (1913) 40 Cal 503 (510) (1907) 34 Cal 257 (282).

[3] Plea of want of notice under S. 80 must be taken at the earliest opportunity and specifically pleaded. (Vol 18) 1931 Cal 175 (178) (Vol 31) 1944 Mad 544 (545) : I L R (1945) Mad 263. (But failure to do so will not deprive the section of its form.)

[4] No objection in written statement or first appeal — Objection as to want of notice cannot be allowed in second appeal. (Vol 21) 1934 Nag 201 (202) : 30 Nag L R 240.

[5] Where applicability of S. 80 depends upon proof of certain facts and Secretary of State does not deny facts alleged in plaint he would be held to have waived his objection to the proof of those facts. (Vol 28) 1941 Pat 517 (519) : 20 Pat 394.

[6] Notice under S. 80 — Plea of want of notice not taken by defendant for over two years—Another suit by plaintiff on same cause of action impossible—Plea must be taken to have been waived. (Vol 21) 1934 Pat 354 (355).

[7] Notice under S. 80 given—Averment in plaint not traversed — Amendment of written statement after five years should not be allowed if plaintiff's right of suit is then barred. (Vol 30) 1943 Bom 160 (163, 164) : I L R (1943) Bom 186.

[8] No question of waiver of notice arises by reason of fact that objection to maintainability of suit was not taken in written statement but was raised only at the time of hearing when second suit would be barred. (Vol 28) 1941 Pat 517 (519) : 20 Pat 394.

[9] Notice of claim not given — Trial Court through negligence omitting to frame issue on point of want of notice — Government Pleader also through negligence omitting to make application regarding it but all along resisting suit—Point regarding notice cannot be deemed to have been waived by Secretary of State. (Vol 25) 1938 Mad 583 (584, 585).

[10] Failure to raise objection as to want of notice in written statement cannot *per se* be regarded as waiver; objection can be raised before trial commences and before any prejudice is caused to plaintiff. (Vol 12) 1925 All 241 (243) : 47 All 291.

[11] Notice can be waived only by the party concerned for whose benefit it is intended. Want of notice cannot be pleaded by third person. (Vol 29) 1942 Bom 339 (340) (1913) 40 Cal 503 (509, 510) (1905) 32 Cal 1130 (1134) (Vol 20) 1933 Pat 49 (49).

Section 81—Note 1

[1] *Clause (a).*—In a suit against a public officer the public officer is not liable to arrest, nor his property is attachable, otherwise than in execution of a decree; see O. 27, R. 8, proviso.

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

[1882—Ss. 427, 428; 1877—Ss. 425, 428; 1859—S. 72; See O. 27, R. 8.]

Objects and Reasons.

"*Clause 81.*—The Committee thinks that the same measure of protection should be afforded to the defendant where Government undertakes the defence as where the Government makes no application for the

purpose, and it appears to the Committee that the proper protection should be that the defendant should be exempt from mesne arrest and his property from mesne attachment."—S. O. R.

82. (1) Where the decree is against ^a[the Crown] or against a public officer in respect of any *Execution of decree*, such act as aforesaid a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the ^b[Provincial Government].

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

[1882—S. 429. See Ss. 80 and 81.]

[a] *Substituted* by A. O. for "the Secretary of State for India in Council". [b] *Substituted, ibid* for "Local Government".

SUITS BY ALIENS AND BY OR AGAINST ^a[FOREIGN RULERS AND RULERS OF INDIAN STATES.]

83. (1) Alien enemies residing in British India with the permission of the ^b[Central Government] *When aliens may sue.* and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the ^c[Central Government] shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

[1882—S. 430; 1877—S. 430.]

[a] *Substituted* by A. O. for "Foreign and Native Rulers". [b] *Substituted, ibid* for "Governor-General in Council". [c] *Substituted, ibid* for "Government of India".

Section 82—Note 1

[1] Applicability—Award made by Calcutta Improvement Trust Tribunal is not decree and S. 82 does not apply. (Vol 29) 1942 Cal 569 (570) : 1 L R (1942) 2 Cal 528.

SECTION 83—SYNOPSIS.

1. Alien enemy.

2. Scope.

1. Alien enemy.—[1] No nationality but place of residence or place of business is test — Permanent residence is not necessary — Residence for substantial period in hostile country is sufficient unless it is with consent of Crown. (Vol 7) 1920 Lah 4 (6) : 1 Lah 276.

[2] The mere fact that a person has been interned by the Government of India does not make that person alien enemy. (Vol 31) 1944 All 97 (100) : 1 L R (1944) All 118.

[3] Plaintiff going to Federated Malay States in 1941 — Malay States occupied by Japan — Plaintiff held not alien enemy — Neither S. 83 nor Defence of India Act held applicable. (Vol 30) 1943 Mad 743 (748).

2. Scope.—[1] An alien enemy who has been licensed to trade in British India has a right to bring suits in Indian Courts. (Vol 2) 1915 Low Bur 33 (34).

[2] Enemy subjects permitted to remain in British India are not alien enemies and can sue. (Vol 5) 1918 Mad 1294 (1295).

[3] If one of the partners in a firm is an alien enemy, neither he nor his partner who does not bear an

enemy character can recover money owing to the firm in the English Courts. (Vol 7) 1920 Lah 4 (6) : 1 Lah 276.

[4] Firm in Singapore consisting of partners, who were British Indian Subjects residing at Madras — Outbreak of war with Japan — Contract in Madras — Parties residents of Madras — Money payable at Madras — Suit by firm at Madras for return of money paid under contract — Partners held could not be said to be alien enemies — Order of return would not also offend Defence of India Rules. (Vol 31) 1944 Mad 239 (242) : 1 L R (1944) Mad 124.

[5] Suit by alien enemy — Application for service of summons in foreign enemy country is maintainable. (Vol 4) 1917 All 374 (375) : 39 All 377.

[6] Whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the laws of procedure, and it makes no difference that he was interned at the time. (Vol 4) 1917 Cal 838 (841) : 43 Cal 1140 & (Vol 31) 1944 All 97 (101) : 1 L R (1944) All 118 & (Vol 1) 1914 Sind 107 (108) : 8 Sind L R 329. (Decree against alien enemy is effective against his property subject to any rights of Crown.)

[7] Foreign country must be at war with Great Britain — Residence or carrying on business in any other foreign territory does not disqualify person from suing in British Indian Courts. (Vol 31) 1944 Mad 239 (241) : 1 L R (1944) Mad 124.

When foreign States may sue. **84. (1)** A foreign State may sue in any Court of British India:

Provided that such State has been recognized by His Majesty or by the ^a[Central Government]:

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the ^a[Central Government].

[1882—S. 431, cl. (b); 1877—S. 431.]

[a] *Substituted* by A. O. for "Governor-General in Council".

85. (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

^a[*Explanation.* — For the purposes of this sub-section the expression "the Government" means —

(a) in the case of any Indian State, the Crown Representative; and

(b) in any other case, the Central Government.]

(2) An appointment under this section may be made for the purpose of specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

[1882—S. 432; 1877—Ss. 37, 38, 417 and 432; 1859—S. 17. See O. 3.]

[a] *Explanation* was added to S. 85 (1) by A. O.

Section 83 (*contd.*)

[8] Government prevailing temporarily in enemy occupied territory not recognised by Great Britain is not Government at war within S. 83. (Vol 31) 1944 Mad 239 (241) : I L R (1944) Mad 124.

[9] It is not all contracts whatever, but only all dealings of a commercial nature between hostile aliens that are tainted with illegality. A contract whose tendency is to increase the enemy's resources is prohibited, but not an agreement for payment of money from funds accruing there. (Vol 5) 1918 Mad 1294 (1295).

[10] Lease granted by enemy on behalf of non-enemy subject as agent can be enforced. (Vol 5) 1918 Mad 1294 (1295).

Section 84 — Note 1

[1] Gadwal Samasthanam is in no sense a Sovereign State or foreign State for the purpose of S. 84. (Vol 17) 1930 Mad 1004 (1006) : 53 Mad 968. (Characteristic of 'foreign State' stated.)

[2] The 'private rights' spoken of in S. 84 do not mean individual rights as opposed to those of the body politic or State but those private rights of the State which must be enforced in a Court of justice as distinguished from its political or territorial rights which must, from their very nature, be made the subject of arrangement between one State and another. (1885) 11 Cal 17 (24).

Section 85 — Note 1

[1] Provisions of S. 85 merely enable Prince or Chief to institute suits through agent specially authorized. (Vol 27) 1940 Bom 172 (177) : I L R (1940) Bom 225.

[2] Section 85 does not prevent the institution of a suit by an independent Prince in his own name or through a recognised agent other than one appointed

under that section. (1897) 19 All 510 (513) * (1884) 10 Cal 136 (137).

[3] Provisions of S. 85 must be strictly observed — Suit on behalf of Indian State filed by dastardar not authorized agent under O. 3, R. 2 and without authority required by S. 85 — Suit being defective must be dismissed — Subsequent authority under S. 85 obtained after presentation of appeal upon dismissal of suit cannot cure defect. (Vol 27) 1940 Bom 172 (177) : I L R (1940) Bom 225.

[4] Section applies to suits brought in Revenue Courts. (1903) 25 All 635 (637).

[5] The Rajah of Tipperah is a Sovereign Prince. (1888) 9 Cal 535 (552).

[6] The Desai of Patadi is a 'ruling chief'. (1884) 8 Bom 415 (418, 421).

[7] Though S. 85 (3) does not require that a person appointed under this section should authorise or appoint persons to make appearances by any writing, still it implies necessarily an active appointment. (Vol 27) 1940 Bom 172 (179, 180) : I L R (1940) Bom 225.

[8] Order of 1935 appointing agent to prosecute or defend suits on behalf of Native States unless revoked is valid even after the Government of India (Adaptation of Indian Laws) Order, 1937. (Vol 26) 1939 Lah 279 (279, 280).

[9] Person appointed to prosecute or institute suit in British Indian Court on behalf of State has *locus standi* to continue or file suit. (Vol 20) 1933 Lah 456 (458).

[10] The recognised agent can sign and verify the plaint. He can do so even before his appointment under this section provided that the appointment is made before the period of limitation for the suit has expired. (1903) 25 All 635 (638).

86. (1) Any such Prince or chief, and any ambassador or envoy of a foreign State, may, *Suits against Princes, Chiefs, ambassadors and envoys.* [in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative, certified by the signature of the Political Secretary, and in any other case with the consent of the Central Government, certified by the signature of a Secretary to that Government], but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to ^b[the consenting authority] that the Prince, Chief, ambassador or envoy —

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

SECTION 86 — SYNOPSIS.

1. Applicability and scope.
2. Consent.
3. Sub-section (2) cl. (c).
4. Sub-section (5).
5. Suit against Sovereign Prince or Ruling Chief.

1. Applicability and scope. — [1] Section 86 is exhaustive and lays down the cases where a Prince or Ruling Chief can be brought on record whether he is suing or sued as such or in any other capacity. (Vol 3) 1916 Mad 308 (309) : 38 Mad 635.

[2] Section 86 applies to "suits" and not to insolvency proceedings; within meaning of S. 141. (Vol 27) 1940 Cal 244 (245, 249) : I L R (1940) 1 Cal 344.

[3] Proceeding under U P. Encumbered Estates Act is not suit. (Vol 31) 1944 Lah 302 (318) : I L R (1944) Lah 79. (Whether procedure under S. 86 applies by virtue of S. 141 (*Quare*.)

[4] Section 86 does not apply to proceedings under S. 184, but applies to Ss. 186 and 187, Companies Act. (Vol 23) 1936 All 826 (827) : 58 All 742 (FB).

[5] The provisions of S. 86, Civil P. C. do not apply to a defence put forward by way of set-off. Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General. (1921) 62 Ind Cas 778 (778, 779) (Lah).

[6] The provisions contained in Ss. 86 and 87 are imperative and the privilege of provisions cannot be waived. (Vol 25) 1938 P C 165 (169) : 65 Ind App 182; I L R (1938) All 601 : 32 Sind L R 531 (C) (Vol 27) 1940 Cal 244 (248) : I L R (1940) 1 Cal 344. (Immunity arising under S. 86 cannot be waived.)

[7] Limitation Act, Section 13, must be read consistently with provisions in Part IV, Civil P. C.—Chiefs of foreign States can be held to reside in British India in so far as they actually carry on their business through representatives in British India. (Vol 16) 1929 Bom 14 (20) : 53 Bom 12.

2. Consent.—[1] Section 86 requires the fulfilment of one or other of the three conditions specified therein to the satisfaction of the Crown Representative. That is not a matter to be established by Court. A certificate granted by the Crown Representative would be binding on the Court unless on the face of the certificate it appeared that the Crown Representative did not appear to be satisfied about the existence of one of the conditions. (Vol 32) 1945 Bom 187 (193, 194) (Vol 22) 1935 Oudh 164 (164, 165) (Court cannot question propriety of order of refusal of consent).

[2] The consent must be obtained before the institu-

tion of a suit. A consent obtained after the institution of a suit will violate the section and will not validate the suit. (1897) 21 Bom 351 (365) (1909) 1909 Pun Re No. 21 page 45 (46).

[3] Suit against Ruling Prince—Consent under S. 86 (2) is to be given to "specified suit" and not to particular plaintiff. (Vol 32) 1945 Bom 187 (189).

[4] Ruling Chief whether as principal or *pro forma* defendant—Consent is necessary. (Vol 3) 1916 Mad 445 (446).

[5] Defendant becoming Ruling Prince subsequent to filing of suit — Section 86 applies and suit cannot be continued without sanction. But if defendant acquiesces in continuance of suit, he will be debarred from questioning jurisdiction afterwards. (Vol 8) 1921 Pat 23 (24) : 6 Pat L Jour 185.

[6] Declaratory suit against Ruling Chief with consent of Governor-General—Plaint amended by adding prayer for possession—Consent for suit for recovery of possession subsequently obtained. Held that it would be safer for the plaintiff to withdraw the whole suit and file a fresh suit for possession. (1913) 17 Cal W N 1242 (1244, 1245).

3. Sub-section (2), Cl. (c).—[1] A suit for maintenance or for maintenance coupled with a creation of a charge therefor on certain properties is not a suit for 'money charged' on those properties within the meaning of Cl. (c) of the section. (1883) 9 Cal 535 (555).

[2] Word "property" includes public property only and therefore section will not apply unless the suit relates to the public property of the foreign State. (Vol 27) 1940 Cal 244 (247) : I L R (1940) 1 Cal 344.

4. Sub-section (5).—[1] Sub-section (5) is entirely distinct from sub-s. (3) — Sub-s. (5) refers to suit and does not dispense with consent required under sub-s. (3) for execution against Ruling Chief. (Vol 22) 1935 Cal 664 (665)

[2] Plaintiff holding lands of defendant, Ruling Chief, for which he paid no rent—Defendant applying for resumption and Court assessing rent—Suit for declaration that plaintiff held heritable right to remain in possession without payment of rent is not by plaintiff as tenant of immovable property within the meaning of sub-s. (5) and should be dismissed if no consent of Governor-General in Council is obtained. (Vol 7) 1920 Oudh 203 (204).

5. Suit against Sovereign Prince or Ruling Chief. — [1] No suit can be maintained against a Ruling Chief without the consent of Governor-General in Council. (Vol 3) 1916 Mad 835 (835) : 39 Mad 661 (Vol 1) 1914 All 493 (494). (Raja of Tipperah s a Ruling Chief.) (Vol 6) 1919 Bom 122 (126). (The Kurund-

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with [such consent as is mentioned in sub-section (1)], certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

^d[(4) The Central Government or the Crown Representative, as the case may be, may by notification in the Gazette of India authorise a Provincial Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub-sections to the consenting authority and a certifying officer respectively.]

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

[1882—S. 433; 1877—S. 433.]

[a] *Substituted* by A. O. for "with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India". [b] *Substituted, ibid* for "the Government". [c] *Substituted, ibid* for "the consent of the Governor-General in Council". [d] *Substituted, ibid* for the original sub-section (4).

Style of Princes and Chiefs as parties to suits.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section ^a[the Central Government, the Crown Representative or the Provincial Government], as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

[1882—S. 434.]

[a] *Substituted* by A. O. for "the Governor-General in Council or the Local Government".

INTERPLEADER

88. Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself :

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

[1882—S. 470; 1877—S. 470; R. S. C., O. 57 Rr. 1 and 2. See O. 35.]

Section 86 (contd.)

wad Jagirdars are Ruling Chiefs.) * (1912) 23 Mad L Jour 605 (606). (A State cannot be sued apart from its Ruling Chief—9 Cal 535, followed).

[2] Suit as framed against 'Gaekwar Baroda State Railway, through its Manager and Engineer-in-Chief' is not maintainable—Such suit is in reality suit against Ruling Prince and must comply with provisions of Ss. 86 and 87. (Vol 25) 1938 P O 165 (167) : 65 Ind App 182 : 1 L R (1938) All 601 : 32 Sind L R 531 (P O). (Vol 21) 1934 All 740 : 56 All 828, reversed.)

[8] Suit against Gwalior Light Railway which is managed by the Durbar of the State is not against Sovereign Prince or Ruling Chief. (Vol 19) 1932 Lah 186 (187).

[4] Suit against Patiala State Bank cannot be instituted without consent of Crown Representative. (Vol 31) 1944 Lah 302 (318) : 1 L R (1944) Lah 79. (*Obiter*).

[5] Suit against Ruling Chief in his capacity as co-sharer in respect of property in British India is governed by S. 86. (Vol 11) 1924 All 422 (423, 424) : 46 All 355.

[6] Suit for wrongful dismissal by Ruling Chief alleged to have usurped powers of trustee of temple requires sanction. (Vol 3) 1916 Mad 835 (835) : 39 Mad 661.

[7] Contracts on behalf of a foreign State not coming within S. 86—Agent personally liable—Permis-

sion to sue need not be asked and even if granted suit does not lie against the State. (Vol 15) 1928 Sind 189 (190).

[8] Where the defendant Prince is simply sued for arrears of pay said to be due to the plaintiff as his servant, the Court has no jurisdiction to entertain the suit in as much as it is not one falling within the purview of S. 86. (1907) 29 All 379 (381).

Section 88 — Note 1

[1] In an interpleader suit it is not necessary that each of the defendants must claim the whole of the subject-matter of the suit. (1862-63) 1 Mad H C R 361 (361).

[2] The plaintiff in order to be entitled to bring an interpleader suit must satisfy the Court that he has no claim or interest in the subject-matter in dispute and that he does not collude with any of the claimants. (Vol 14) 1927 Rang 91 (98) : 4 Rang 465. (Plaintiff identifying himself with one of the parties so as to make a difference to him as to which party succeeds—Plaintiff is disentitled to sue.)

[3] Defendants not claiming adversely to one another from plaintiff—Latter not ready to pay either—Suit is not an interpleader suit. (Vol 9) 1922 Cal 188 (189).

[4] Plaintiff in interpleader suit can apply on completion of pleadings that he should be removed from proceedings—Court can grant such relief under S. 151. (Vol 25) 1938 Cal 287 (290) : 1 L R (1938) 1 Cal 55.

PART V.

SPECIAL PROCEEDINGS

ARBITRATION

89. [Arbitration.] [*Repealed by the Arbitration Act, 1940, (10 [X] of 1940), S. 49 and Sch. III.*]

SPECIAL CASE

Power to state case for opinion of Court.

90. Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

[1882—Ss. 527; 1877—Ss. 527, 528; 1859—S. 328. See O. 36, C. P. C.]

SUITS RELATING TO PUBLIC MATTERS

91. (1) In the case of a public nuisance the Advocate-General, or two or more persons having *Public nuisances.* obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

Section 88 (*contd.*)

[5] All contesting defendants are in the position of plaintiffs. (Vol 12) 1925 Mad 497 (562) : 48 Mad 1.

[6] Defendants though arrayed on same side are deemed to have adverse interests and therefore a decision given on their claims will operate as *res judicata* as between them. (Vol 15) 1928 Oudh 155 (179, 181).

[7] Suit by A against Bank for recovery of amount deposited in Bank — C, a rival claimant impleaded as defendant—Deposit money brought into Court by Bank — *Held*, Bank was entitled to costs of the suit. (1890) 14 Bom 498 (506).

[8] A letting out shop on rent to B and then selling it to C—A subsequently repudiating sale-deed — Interpleader suit by B against A and C — Subject-matter in dispute is title to property and not right to receive rent — Valuation for jurisdiction should therefore be made on the value of the shop. (Vol 27) 1940 All 452 (452).

[9] Interpleader suit — Neither party in possession of suit property — Receiver appointed — *Prima facie* title of parties established by trial Court's decree — Appeal — Appointment of fresh receiver or continuation of the same receiver by appellate Court held not just and convenient. (Vol 31) 1944 Oudh 225 (227, 228).

Section 90 — Note 1

[1] Court should not interfere when Legislature has provided special tribunal. (Vol 17) 1930 Bom 232 (234); 54 Bom 825.

[2] "*In the manner prescribed*".—See Order 36.

SECTION 91—SYNOPSIS.

1. Scope and applicability.
2. Public nuisance.
3. Special damage.
4. Declaration.
5. Consent of Advocate-General.
6. Sub-section (2).

1. Scope and applicability.—[1] Section 91 is a provision for procedure. It does not purport to create a right which did not exist nor does it purport to deprive anybody of a right derived from the general law of the land. It is not a prohibitive section. (Vol 11) 1924 All 599 (603) : 46 All 470 & (Vol 21) 1934 All 941 (943).

[2] Section 91 is not controlled by Calcutta Municipal Act (1899), S. 366. (Vol 5) 1918 Cal 497 (497, 498).

[3] All members of the public suffering inconvenience or damage—Action by an individual will not lie except as indicated by S. 91—Real test is whether it is a public nuisance or not. (Vol 24) 1937 Pat 481 (482) : 16 Pat 190.

[4] Special restrictions of S. 91 can be evaded by proof of special damage or by proof of invasion of special rights of limited class. (Vol 27) 1940 Pat 449 (465) : 19 Pat 208.

[5] Application of section depends on form of pleadings and relief claimed. (Vol 33) 1946 Nag 223 (230) : I L R (1946) Nag 246.

[6] Though constructive public nuisance does not fall under S. 91, the Advocate-General has special power to take action in respect of such class of nuisance. (1910) 12 Bom L R 274 (297, 298, 301).

[7] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, see section 7 (b). For the exercise of powers of Advocate-General outside Presidency Towns, see section 93.

2. Public nuisance. — [1] For the definition of this term, see S. 3 (44), General Clauses Act, 1897.

[2] Definition of public nuisance as given in S. 268, Penal Code, applies to Civil P. C. (Vol 23) 1936 Oudh 154 (155).

[3] The essence of a public nuisance is that it causes damage, injury or annoyance to the public or the people in general. (Vol 29) 1942 Cal 360 (361) : ILR (1942) 1 Cal 533.

[4] Offending the sentiments of a particular class or sect is not a public nuisance. (Vol 3) 1916 Nag 81 (83) : 12 Nag L R 130.

[5] Obstruction which aims at preventing only a particular class from using the highway in a particular manner does not amount to public nuisance. (Vol 29) 1942 Cal 360 (361) : I L R (1942) 1 Cal 533 & (Vol 26) 1939 All 586 (588) : I L R (1939) All 754.

[6] Taking of Granth Sahib to cremation ground is not public nuisance. (Vol 24) 1937 Pesh 81 (81).

[7] Suit for vindication of community's right to take out procession along certain route is not claim for removal of public nuisance under S. 91 (Vol 21) 1934 All 941 (943).

[8] An obstruction of a public thoroughfare is always a public nuisance, and where it is not legalised by law or contract it is indictable and gives a cause of action

92. (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the ^b[Provin.

Section 91 (contd.)

for a public suit under S. 91. (Vol 3) 1916 Nag 81 (82):12 Nag L R 130*(Vol 28) 1941 Pat 249 (250).

[9] Making constructions upon a road which is used as of right by the public constitutes public nuisance. (Vol 23) 1936 Oudh 154 (155).

[10] Section 91 is inapplicable to issues arising on encroachments on village roads kept open by right of easement. (Vol 16) 1929 All 790 (790)* (Vol 6) 1919 Cal 123 (124)* (Vol 5) 1918 Cal 212 (213)* (Vol 24) 1937 Pat 54 (54, 55).

[But see (Vol 27) 1940 Pat 449 (462, 465): 19 Pat 208. ("Public nuisance" in S. 91 includes obstruction to village pathways).]

[11] Lane open to public and serving as access to many houses—Encroachment in it amounts to public nuisance. (Vol 22) 1935 Pesh 190 (190).

[12] Right of immediate access to highway from adjoining property if infringed causes special damage to justify action. (Vol 11) 1924 All 715 (716):46 All 573.

[See also (Vol 22) 1935 All 789 (790). (Case of encroachment of private easement—Sanction of Advocate-General is not necessary.)]

[13] Encroachment on public thoroughfare causing nuisance and inconvenience to public—Person living in immediate neighbourhood is entitled to have encroachment removed without proving special damage. (Vol 24) 1937 Pat 620 (621)* (Vol 28) 1941 Pat 249 (250).

[14] Construction of a channel through village is a public nuisance (Vol 25) 1938 Mad 338 (338, 339).

3. Special damage.—[1] In a suit by a private person for the removal of public nuisance, he must prove special damage to himself. (Vol 5) 1918 Nag 159 (159)* (Vol 29) 1942 Cal 360 (361, 364): I L R (1942) 1 Cal 533* (Vol 28) 1941 Mad 669 (670, 671) (Defendant constructing wall six feet high across public way close to plaintiff's house—Due to obstruction plaintiff unable to approach his house from left—Enjoyment of plaintiff's property interfered with—Suit by plaintiff for removal of wall—Plaintiff held suffered special damage.)* (Vol 28) 1941 Oudh 52 (54, 55):16 Luck 173.

[But see (Vol 26) 1939 Mad 691 (691, 692): I L R (1939) Mad 870.]

[2] Plaintiff relying on special damage must allege same in plaint giving particulars and details—Mere general allegation is not sufficient. (Vol 13) 1926 Cal 549 (550)* (Vol 28) 1941 Mad 669 (670, 671).

[3] Doctrine of special damage based on principle of English common law that there can be no private action for public wrong applies to India—It is limited to cases regarding public rights in full sense and invasion of special rights—It does not apply to quasi-public rights such as village roads. (Vol 27) 1940 Pat 449 (463, 464): 19 Pat 208.

[4] Obstruction of a way without any special damage can afford no cause of action to a member of the public. (1912) 23 Mad L Jour 539 (541, 542) (8 All L Jour 19 not approved.)* (Vol 12) 1925 Bom 367 (368).

[5] Obstruction to public road causing special damage to a person—He can sue without consent of Advocate-General. (Vol 16) 1929 Bom 94 (95): 53 Bom 187.

[6] Special damage need not always be only pecuniary—It should, however, be something substantial and not merely pecuniary damage to the extent of four or eight annas. (1912) 23 Mad L Jour 539 (541, 542).

[7] Very great inconvenience constitutes special damage or a more particular form of nuisance suffered by plaintiff than by the general public. (Vol 11) 1924 All 599 (602): 46 All 470.

[But see (Vol 5) 1918 Nag 159 (159). (Special degree of inconvenience suffered by plaintiff cannot be said to cause him special damage.)]

[8] Road in front of plaintiff's house narrowed by encroachment—Special damage to plaintiff cannot be presumed. (Vol 29) 1942 Cal 360 (367): I L R (1942) 1 Cal 533.

[9] Mere placing of obstruction in front of plaintiff's house which does not impede his coming in or going out from his house cannot be said to cause special damage to plaintiff. (Vol 28) 1941 Oudh 52 (54, 55): 16 Luck 173.

4. Declaration.—[1] No relief in respect of public nuisance but right of easement sought—No declaration as to public character of the place can be given. (Vol 10) 1923 Lah 546 (548).

5. Consent of Advocate-General.—[1] Permission of Advocate-General not taken—Objections not raised at early stage—Suit held maintainable. (Vol 25) 1938 Mad 338 (339).

[2] Plea of want of sanction under S. 91 cannot be raised for the first time in appeal. (Vol 15) 1928 Nag 39 (40).

6. Sub-section (2).—Section 91 does not overrule O. 1, R. 8 and take away right of suit under O. 1, R. 8 even in case of public nuisance. (Vol 27) 1940 Pat 449 (462, 465): 19 Pat 208* (Vol 8) 1921 Cal 405 (406)* (Vol 12) 1925 Cal 1233 (1233).

[2] Representative suit by limited class of persons is maintainable without consent of Advocate-General and without proof of special damage. (Vol 27) 1940 Pat 160 (160)* (Vol 33) 1946 Nag 228 (230): ILR (1946) Nag 246.

[See also (Vol 18) 1931 All 341 (346): 53 All 484. (Few self-leaders or those chosen by officials do not represent entire community.)]

[3] Public nuisance—Suit by private individual—Necessity to prove special damage is not obviated by bringing suit under O. 1, R. 8. (Vol 29) 1942 Cal 360 (364): I L R (1942) 1 Cal 533.

SECTION 92 — SYNOPSIS.

1. Abatement of suit.
2. Alleged breach of trust or direction of Court.
3. Analogous law.
4. Appeal.
5. Applicability and scope.
6. Arbitration.
7. Compromise of suit.
8. Consent of Advocate-General.
9. Consent when necessary—Effect of consent.
10. Cypres doctrine—Application of.
11. Jurisdiction to entertain suit.
12. Parties to suit.
13. Res judicata.
14. Retrospective effect.
15. Revision.
16. Scheme decree—Execution of.
17. Section is mandatory—Sub-section (2).

cial Government] within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

[1882—S. 539; 1877—S. 539.]

[a] Section 92 has no application as regards Tirumalai-Tirupati Devasthanams: See the Tirumalai-Tirupati Devasthanams Act, 1932 (Madras Act 19 [XIX] of 1933), S. 44 (2).

[b]. Substituted by A. O. for "Local Government".

Objects and Reasons.

See paragraph 8 of the Statement of Objects and Reasons given at the beginning of this Code.

"Clause 92 (Public charities)—As a doubt has been expressed in at least one reported decision whether section 539 is or is not mandatory, the Committee have thought it desirable, in order to settle this question, to introduce sub-clause (2)."—S. O. R.

"Clause 92 (1). — It has been suggested to us by several authorities that Local Government should be empowered to invest Courts subordinate to District Courts with power to try cases under this clause, and we think that this suggestion should be accepted. The necessary words have been added."—S. C. R.

Section 92 (contd.)

18. Suit if can be instituted in forma pauperis.
19. Suit must be for reliefs specified.
 20. Clause (a)—Removing trustee.
 21. Clause (b)—Appointment of new trustee.
 22. Clause (c)—Vesting property.
 23. Clause (d)—Directing accounts.
 24. Clause (f)—Authorising alienation.
 25. Clause (g)—Settling scheme.
 26. Clause (h)—"Such further or other relief".
 27. Costs.
 28. Declarations.
29. Suit must be in representative capacity.
 30. "Two or more persons having an interest".
31. Trust must be for public purposes.
32. Valuation of suit.

1. Abatement of suit. — [1] A suit under S. 92 does not fail on the death of the parties who originally filed the suit. (Vol 8) 1921 P C 123 (124): 48 Cal 493: 48 I A 12: 17 Nag L R 37 (P O).

[2] The death of one of the plaintiffs who have obtained sanction in a scheme suit does not cause abatement of the suit. (Vol 5) 1918 Lah 146 (147): 1918 Pun Re No 97*(Vol 21) 1934 All 1 (1): 55 All 687*(Vol 12) 1925 Mad 244 (244).

[3] Death of some plaintiffs after institution of suit—Surviving plaintiff appellant competent to carry on appeal. (Vol 2) 1915 Oudh 181 (182).

[4] Leave obtained by some to file suit — Suit or appeal is not competent by some of them, if others are alive and have not concurred in presentation of suit or appeal. But suit or appeal filed by all does not abate on death of some. (Vol 22) 1935 Lah 251 (255): 16 Lah 782.

[5] Suit for removal of trustee for breach of trust and framing of scheme — Defendant dying pending suit —

Suit as regards scheme does not abate. (Vol 13) 1926 Mad 162 (162, 163): 48 Mad 688.

[6] In suit under S. 92 if trustee defendant dies his successor-in-office can be brought on record especially when it is alleged that he had acted as agent of the last trustee and had contributed to mismanagement. (Vol 3) 1916 Mad 318 (320).

2. Alleged breach of trust or direction of Court. — [1] To bring S. 92 into operation, there must be suit alleging breach of express or constructive trust for public purposes of a charitable or religious nature, or direction of Court must be necessary for administration of the trust. (Vol 18) 1931 Bom 33 (35, 36) * (Vol 29) 1942 Bom 125 (128): I L R (1942) Bom 293. (Suit by trustee against co-trustee alleging breach of trust.) * (Vol 6) 1919 Cal 179 (180). (A suit under O. 1, R. 8, by the worshipper to set aside an alienation of mosque property by the *mutwalli* is maintainable without sanction. The mere fact that the trustee was a defendant in the suit did not attract the application of S. 92, if no relief was claimed against him, or the Court was not asked to give any direction for the administration of the trust.) * (Vol 20) 1933 Mad 70 (71).

[2] When a Judge decides that there is no misfeasance, he cannot record a decision that the trust is public nor about costs as his power ends with the first decision. (Vol 3) 1916 Pat 306 (307).

[3] Neglect by trustee to take steps to save property from consequences of breach of trust by predecessor is breach of trust. (Vol 12) 1925 All 683 (685): 47 All 770.

[4] Breach of trust by archakas in respect of income of inam lands granted to temple—S. 92 applies. (Vol 4) 1917 Mad 248 (249).

[5] Where a compromise decree in a suit for removal of trustees, accounts, etc., was attacked as fraudulent by a regular suit, held that the consent of the Advocate-General was necessary for such suit, as it involved an

Section 92 (*contd.*)

allegation of breach of trust, taking accounts, etc. (Vol 1) 1914 Low Bur 169 (171) : 7 Low Bur Rul 333.

[6] Merely setting up a claim does not amount to breach of trust. (Vol 20) 1933 Sind 213 (219).

[7] Settlor creating primary trust for benefit of members of family and secondary trust for charitable and religious purposes — Secondary trust to take effect only when there were no primary objects or when those objects did not exhaust whole income—Suit against trustee for breach of trust brought by beneficiaries under the primary trust held did not come under S. 92 (1). (Vol 26) 1939 Rang 254 (257, 258) : 1939 Rang L R 140.

[8] Trustee—Assertion of private ownership — Onus is heavily upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition. (Vol 9) 1922 P C 325 (329) : 45 Mad 565 : 49 I A 237 (P C).

[9] Breach of express or constructive trust is not necessary for asking direction of Court. (Vol 21) 1934 Bom 26 (27). (Suit for declaration of ownership of share of income of public temples and to act as pujari and for loss having been deprived of such right falls within S. 92.)

[10] Expression "where the direction of the Court is deemed necessary for the administration of any such trust" must be interpreted as meaning "where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of trust". (Vol 15) 1928 Cal 368 (369, 370) : 55 Cal 1284.

[11] A charity does not change its nature merely by a change of name; and further the change of name is not such a serious breach of trust as to justify the removal of the trustees. (Vol 31) 1944 P C 39 (41) : 71 I A 47 : I L R (1944) Kar P C 193 (P C).

[12] Sanction of the Advocate-General or District Judge is not necessary where individual persons claim as citizens, rights of worship or performing certain festivals in a temple. The case is one for direction that the officer in charge of the trust should perform the duties according to usual practice. (Vol 4) 1917 Mad 868 (870).

*3. Analogous law.— [1] There is much which is common between S. 14, Religious Endowments Act, and this section. The latter is wider and provides *inter alia* for settling a scheme which is a jurisdiction of a very wide and beneficial nature. If a party elects to proceed under one Act, he is not prevented from so doing under the other. (Vol 5) 1918 Bom 134 (136, 137) : 42 Bom 742 * (Vol 1) 1914 Mad 593 (593, 594) : 37 Mad 184.

[2] Section 92 (2), Civil P. C., saves the special jurisdiction of the District Court under Religious Endowments Act, so that a person desiring to sue for removal of a trustee or for such other specific relief as can be given under that Act, can do so without complying with S. 92. (Vol 5) 1918 Mad 1179 (1181).

[3] But a suit for removal of a trustee and for settling a scheme is governed by S. 92, Civil P. C., and not by the Religious Endowments Act. (1913) 24 Mad L Jour 658 (658, 659).

[4] Scheme can be made only under this section and not under S. 14, Religious Endowments Act. (Vol 12) 1925 Pat 544 (546) : 4 Pat 741.

[5] Sanction granted under the Religious Endowments Act can be utilised by another, but under S. 92, Civil P. C., the person obtaining sanction must be identical with the one instituting the suit. (Vol 5) 1918 Mad 560 (561, 562) : 41 Mad 237.

[6] Religious Endowments Act (1863), S. 14 — Suit under S. 14 is representative suit — Death of any party does not cause abatement of suit. (Vol 5) 1918 Mad 560 (562) : 41 Mad 237.

[7] Religious Endowments Act (1863), S. 18 and Civil P. C., S. 92 — Two remedies provided by sections are alternative. (Vol 21) 1934 Pat 443 (446).

[8] Prior suit under S. 5, Religious Endowments Act — Public not made parties — Second suit by public under S. 92, Civil P. C., is not barred. (Vol 8) 1921 Cal 425 (426).

[9] A suit in respect of religious endowments, which do not charge the trustee with misfeasance, breach of trust or neglect of duty is outside the scope of the Religious Endowments Act. It will fall within the scope of S. 92, Civil P. C. (Vol 6) 1919 Mad 159 (160) : 42 Mad 668.

[10] Madras Hindu Religious Endowments Act (1927), S. 73 (2)—Cl. 2, S. 73 repeals S. 92, Civil P. C.— Clause is fatal to suits relating to trusts of religious endowments except as provided for by Act. (Vol 22) 1935 Mad 855 (856).

[11] Trust fund— Part of fund meant for maintenance of Veda Pathshala imparting spiritual knowledge — Object of the part being of religious nature under S. 92, Civil P. C., such part cannot be governed by S. 73, Madras Hindu Religious Endowments Act. (Vol 22) 1935 Mad 983 (985).

[12] Suit for removal of trustee of kattalai does not lie either under S. 73, Madras Hindu Religious Endowments Act, or this section. (Vol 21) 1934 Mad 126 (127) : 57 Mad 362.

[13] Madras Hindu Religious Endowments Act (1911), S. 77—Endowments partly religious and partly secular —After allocation by Board such endowment is controlled by Act—Trusts before such allocation is governed by this section. (Vol 17) 1930 Mad 216 (218).

[14] The Madras Hindu Religious Endowments Act, particularly S. 73, does not embrace any relief which could not formerly have been obtained under the procedure set out in this section. (Vol 19) 1932 Mad 234 (235) : 55 Mad 549.

[15] Madras Hindu Religious Endowments Act (2 [II] of 1927), S. 75 — Section 75 has no retrospective effect with regard to scheme settled under this section. (Vol 16) 1929 Mad 322 (322).

[16] Suit to vindicate private right of co-trusteeship —This section does not apply—Madras Hindu Religious Endowments Act (1 [I] of 1925) does not prohibit such a suit. (Vol 14) 1927 Mad 338 (339).

[17] Suit instituted on basis of S. 6, Charitable and Religious Trusts Act—District Judge can grant any reliefs under sub-s. (1) of this section. (Vol 17) 1930 All 582 (583) : 52 All 863.

[18] The requirements of the section cannot be evaded by asking for a bare declaration under the Specific Relief Act. (Vol 13) 1926 Mad 1029 (1030) * (Vol 15) 1928 Rang 143 (143, 144) : 6 Rang 188.

4. Appeal. — [1] Orders merely for carrying out scheme are appealable. (Vol 25) 1933 Rang 363 (364).

[2] Provision in scheme for any application to amend the same — Order on such application is not appealable order as it is not in execution. (Vol 13) 1926 Mad 559 (560) : 49 Mad 580.

[3] Application under scheme by worshippers to remove trustee on ground of misconduct—Order refusing to remove is not appealable — Fresh disposal can be directed under S. 115. (Vol 14) 1927 Mad 427 (429).

[4] A clause in a scheme provided for an appeal from an order removing or appointing a trustee will not apply to an order declining to remove a trustee. (Vol 5) 1918 Mad 927 (928).

[5] Suit under S. 92 — Scheme prepared—Right of appeal not reserved in scheme — Order in execution proceedings held did not confer right of appeal under S. 47. (Vol 5) 1918 Mad 927 (927, 928).

Section 92 (*contd.*)

[6] Scheme of election of trustees framed by Court—Court reserving right to confirm them — Application for confirmation made and opposed — Order thereon is a decree and hence appealable. (Vol 15) 1928 Rang 168 (171) : 6 Rang 97 * (Vol 1) 1914 Low Bur 226 (228).

[7] Suit under S. 92 — New mahant appointed, scheme of management framed and committee appointed — In case of difficulty, doubt or disagreement with regard to any work connected with shrine or its property and for making alterations in scheme, mahant and committee given right to apply to District Judge in suit itself — Suit kept pending for aforesaid purpose — Application by mahant — District Judge interpreting scheme and deciding general questions concerning rights of parties before him and leaving some of points raised to be decided by parties themselves—Order does not fall under S. 47—Order held decree within S. 2, and hence appealable — Even assuming order to be not appealable, order held came within S. 115 (c) and hence was open to revision. (Vol 28) 1941 Cal 618 (621).

[8] Where a suit is brought by the Advocate-General, he is the proper party to appeal and not the relators as they were not a party to the suit. (1908) 32 Bom 155 (156).

[9] District Judge formulating scheme in pursuance of High Court's order — Person appointed as manager — Another person not party to original action has no *locus standi* to appeal from order of District Judge. (Vol 22) 1935 Pat 261 (263) : 14 Pat 236.

[10] Neither appeal nor revision lies from an order of District Judge passed as *persona designata*. (Vol 13) 1926 Bom 167 (167)* (Vol 14) 1927 Bom 422 (423).

[11] In consequence of decree, order made in miscellaneous application appointing committee which was to appoint mahant—Order is not appealable. (Vol 21) 1934 Pesh 43 (44).

[12] Appeal against order by person not party but interested in proceedings — District Judge cannot be made respondent. (Vol 20) 1933 All 151 (152).

[13] Scheme suit — Appeal returned for re-presentation but not represented in time — Other persons interested in suit-temple-property filing the appeal — Non-representation by original appellants not *bona fide* — Delay should be excused. (Vol 15) 1928 Mad 456 (457, 458).

[14] Mutawalli prosecuted for failure to publish accounts—Persistent disobedience of settlor's directions — Lower Court though finding him grossly negligent, retaining him for sentimental reasons — High Court held justified in interfering with lower Court's discretion. (Vol 25) 1938 Rang 166 (168).

[15] Directions on matters left undecided by trial Court cannot be given by Appellate Court. (Vol 17) 1930 Lah 1056 (1057, 1058).

[16] Appeal against order amending scheme prepared under S. 92 is incompetent — Appeal can, however, be treated as revision application if jurisdiction of Court to make amendment is challenged. (Vol 27) 1940 Oudh 421 (422) : 15 Luck 730.

5. Applicability and scope.—[1] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see Section 7 (b). For the exercise of powers of Advocate-General outside Presidency-towns, see Section 93.

[2] Conditions necessary to invoke application of S. 92 are: (1) the trust must be for a public purpose of a charitable or religious nature, (2) the plaintiff must allege that there is breach of trust or that the direction of Court is necessary, (3) the suit must be in the interest of the public, and (4) the relief claimed must be one of the

reliefs mentioned in the section. (Vol 27) 1940 Pat 425 (428) * (Vol 10) 1923 Bom 67 (70) : 46 Bom 101 * (1931) 1931 Mad W N 898 (900, 901).

[3] Section does not affect substantive rights but only prescribes the mode of enforcing them. (Vol 15) 1928 All 660 (662) : 51 All 30.

[4] Object of S. 92 is to safeguard not only rights of public but also those of institution and trustees. (Vol 17) 1930 Mad 129 (131):53 Mad 223*(1913) 25 Mad L Jour 373 (378).

[5] The Courts in India, under this Section, possess the same practically unlimited jurisdiction as the Court of Chancery in the administration of public charities. (1905) 28 Mad 319 (324).

[6] Section must be construed strictly but not so as to perpetrate fraud upon section itself. (Vol 23) 1936 Sind 179 (181) : 30 Sind L R 104.

[7] Abuse of trust confers no rights on party abusing it. (Vol 19) 1932 Rang 132 (133) : 10 Rang 342.

[8] Applicability — Substance and not wording of plaint should be looked to. (Vol 27) 1940 Pat 425 (428, 429).

[See also (Vol 29) 1942 Cal 343 (346) : I L R (1942) 1 Cal 211 (Whether suit falls under S. 92 depends on form of suit as revealed by plaint).]

[9] Applicability of Section does not depend upon whether defendants had or had not objected to form of suit. (Vol 28) 1941 Sind 88 (90) : I L R (1941) Kar 204.

[10] In deciding whether a suit falls within S. 92, Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. (Vol 30) 1943 Mad 466 (469) : I L R (1943) Mad 619 (F B). ((Vol 22) 1935 Mad 825 : 58 Mad 988 (FB), overruled)

[11] Suit under Section is competent without sanction of Advocate-General even by person other than individual who obtains order under S. 6, Charitable and Religious Trusts Act, 1920. (Vol 20) 1933 Mad 854 (854) : 57 Mad 153.

[12] Section 92 deals with complete trusts. It is inapplicable to a suit to enforce the terms of a will which contains provisions for administration of a public trust, since the property has to be administered before a completed trust arises. (1922) 16 Mad L W 922 (923).

[13] Procedure under the Section is not summary. (Vol 23) 1936 Mad 449 (452).

6. Arbitration.—[1] Suit under S. 92 cannot be referred to arbitration. (Vol 10) 1923 Nag 112 (114).

[2] Suit for declaration that certain property was plaintiff's private property—Suit does not fall under S. 92—Suit referred to arbitration—Award that suit property was public, charitable and religious trust and scheme framed for its administration—Award made decree—Award held without jurisdiction, as it offended against S. 92—Award must be limited to declaration that property was trust property. (Vol 24) 1937 Sind 174 (175, 176) : 30 Sind L R 478.

[3] Disputes regarding management of public charities referred by parties to arbitration—Arbitrator drawing award stating conclusions about management and framing scheme for future management of trusts—Suit by one party for award being made decree of Court held precluded by S. 92 (2). (Vol 26) 1939 Mad 170 (172.)

[4] Parties litigating for title and possession of muth in their own right — Muth not of nature of public charity—Dispute between parties *inter se* can be referred to arbitrator. (Vol 21) 1934 All 368 (370) : 56 All 721.

7. Compromise of suit.—[1] Suit under S. 92 cannot be compromised if endowment is public—Compromise cannot be recognized unless question whether endowment is public or private is decided. (Vol 2) 1915 Cal 193 (194).

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[2] A Court should not sanction a compromise of a suit under S. 92 under which any portion of the trust properties is given to any of the parties. (Vol 6) 1919 Mad 659 (661).

8. Consent of Advocate-General.—[1] Consent of Advocate-General is a condition precedent to the institution of a suit under S. 92. (1904) 26 All 162 (165, 166) * (Vol 2) 1915 Bom 38 (40) : 39 Bom 580. (Provisions of S. 92 are imperative.) (1912) 36 Bom 168 (172) * (Vol 22) 1935 Oudh 96 (108). (Suit without consent is invalid.)

[2] Trust falling under S. 92—Consent of Advocate-General applied for and refused does not relax provisions of S. 92 (2). (Vol 26) 1939 Rang 254 (255) : 1939 Rang L R 140.

[3] The object of requiring consent for the institution of the suit is not only to safeguard the rights of the public, but also to safeguard the rights of the institution and the trustees. (Vol 28) 1941 Sind 88 (90) : I L R (1941) Kar 204 * (Vol 4) 1917 All 319 (320). (Institution of suit under S. 92 for private purposes is abuse of process of Court.)

[4] Procedure laid down in O. 1, R. 8 need not be followed in suits under S. 92. (Vol 12) 1925 Mad 1070 (1071, 1072) (FB) * (Vol 28) 1941 Bom 317 (319) : I L R (1941) Bom 556.

[5] Absence of consent—Objection as to, cannot be waived. (Vol 13) 1926 Mad 970 (970).

[6] Application to Legal Remembrancer for permission to bring suit under S. 92—Reason for and object of intended suit should be stated—Legal Remembrancer should satisfy himself that suit is *bona fide* and applicants are interested in trust. (Vol 4) 1917 All 319 (320).

[7] Defendant to be joined as a party need not obtain Government Advocate's permission. (Vol 14) 1927 Rang 180 (180) : 5 Rang 263.

[8] Advocate-General should go into question of *bona fides* of would-be plaintiffs. (Vol 31) 1944 All 231 (231) * (1897) 24 Cal 418 (428) * (Vol 17) 1930 Mad 129 (131) : 53 Mad 223. (Status and position of those who come forward to represent community must be considered before giving sanction under S. 92.)

[9] Although a Collector did not consider whether the persons suing were persons who had an interest in the trust or whether the trust was a public trust and whether there were *prima facie* grounds for holding that there had been a breach of such trust, yet his omission to consider those points would not invalidate a sanction granted by him. (1921) 60 Ind Cas 570 (570, 571) (Lah).

[10] Conditional consent is no consent at all. (Vol 2) 1915 Bom 38 (39, 40) : 39 Bom 580.

[11] Collector declining sanction may change his mind and give it. (Vol 21) 1934 Bom 257 (259).

[12] Permission required by S. 92 must be given to two or more named persons. It is not sufficient to nominate one person and give him a blank cheque to join any other person as co-plaintiff. (Vol 29) 1942 Bom 291 (292) * (1904) 26 All 162 (165).

[13] Omission to set out names of all applicants in permission order does not render it invalid. (Vol 29) 1942 Bom 291 (292).

[14] Sanction given to one of the applicants by name and other applicants is sufficient. (1911) 13 Bom L R 49 (53, 54).

[15] Permission is not limited to any particular species of suits mentioned in it. (Vol 8) 1921 P C 123 (124) : 17 Nag L R 37:48 Cal 493:48 I A 12 (P C).

[16] Names of defendants and reliefs need not be stated in sanction. (Vol 20) 1933 Oudh 22 (24) : 8 Luck 268.

[17] Sanction is not invalidated by want of notice to defendants. (1930) 1930 Mad W N 456 (469).

[18] Suit against stranger to recover trust property—S. 92 does not apply and consent of Advocate-General is not necessary. (Vol 28) 1941 P C 1 (6) : 67 I A 448 : I L R (1941) Mad 175: I L R (1941) Kar P C 1 (PC).

9. Consent, when necessary—Effect of consent. — [1] Applicability of S. 92 depends upon prayers in plaint at institution of suit — Amendment at later date cannot evade provisions of S. 92. (Vol 23) 1936 Bom 412 (416) * (Vol 26) 1939 Sind 13 (15) : I L R (1939) Kar 325.

[2] For every suit relating to trust consent of Advocate-General is not necessary — Only for relief specified in section consent is necessary. (Vol 23) 1936 Mad 449 (453) * (Vol 6) 1919 Low Bur 56 (57, 58). (Right to exclusive worship—Suit to restrain interference—Consent not necessary.)

[3] After sanction defendant added as party — Addition if changes nature or scope of suit, sanction previous to his addition is necessary — Suit is otherwise not maintainable. (Vol 31) 1944 Cal 163 (172) : I L R (1944) 1 Cal 329 * (1912) 36 Bom 168 (172) * (1930) 1930 Mad W N 456 (468) * (Vol 13) 1926 Mad 970 (970) * (Vol 7) 1920 Mad 238 (238).

[4] New party added but scope of suit not enlarged — Fresh sanction is not needed. (Vol 16) 1929 Mad 635 (638) * (Vol 12) 1925 Cal 187 (190) * (Vol 10) 1923 Sind 35 (37) : 16 Sind L R 221.

[5] Suit by persons not interested—Others interested having obtained sanction joined as plaintiffs—Suit held properly instituted and maintainable. (Vol 7) 1920 Mad 134 (134) : 43 Mad 720.

[6] Suit against alleged trustees after sanction — Plea that a third person was the real trustee—Collector's sanction to join the third party as defendant is necessary. (Vol 15) 1928 Lah 717 (718) * (Vol 13) 1926 Mad 970 (970).

[7] Amendment not substantially changing character of suit can be allowed by Court without sanction of Collector — Amendment changing character is not permissible even with sanction. (Vol 28) 1941 Bom 317 (321) : I L R (1941) Bom 556.

[8] Suit filed by one plaintiff with consent—Amendment of plaint by addition of another plaintiff with Advocate-General's consent cannot be allowed. (1906) 30 Bom 603 (606).

[9] Suit by A with sanction—B subsequently joined as co-plaintiff after obtaining sanction — Sanction to B held related back to institution of suit. (1887) 10 Mad 185 (186) * (Vol 7) 1920 Mad 134 (134) : 43 Mad 720. (Suit under Section 92—One of plaintiffs found to have no interest — Two other men having interest obtaining sanction and joined as plaintiffs — Suit could not be dismissed on ground that it was bad as laid.)

[10] Plaintiffs instituting suit with consent — Each fresh party can be added without consent. (1935) 62 Cal 1132 (1135).

[11] Suit filed with sanction but amended without sanction — Stranger defendants and reliefs not covered by S. 92 added — Suit compromised by some plaintiffs—Civil P. C. S. 11, Expl. VI does not apply. (Vol 15) 1923 P C 16 (20) : 55 I A 96 : 55 Cal 519 (P C).

[12] Suit under Section 92 must be limited to matters included in sanction. (Vol 6) 1919 Lah 82 (82) : 1919 Pun Re No. 144 * (1897) 21 Bom 257 (266, 267) * (Vol 17) 1930 Mad 129 (129) : 53 Mad 223.

[13] Fact that some relief in suit cannot be granted without consent in writing of Advocate-General does not disentitle plaintiff to other relief. (Vol 20) 1933 Pat 246 (248) : 13 Pat 65 * (Vol 29) 1942 Bom 291 (293) * (Vol 10) 1923 Bom 428 (428). (Sanction obtained for some reliefs — Other reliefs joined — Whole suit should not be dismissed).

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[14] Prayer not sanctioned included in plaint but withdrawn later on — Suit is not bad. (Vol 14) 1927 Mad 1033 (1034).

[15] No consent is necessary for striking out of relief not within S. 92. (1910) 12 Cal L Jour 211 (213, 214).

[16] Suit omitting some reliefs for which sanction was obtained — Suit is not maintainable. (Vol 12) 1925 Mad 636 (636, 638).

[17] Consent to institute suit given to certain individuals — Suit instituted by some of them only is not validly instituted. (Vol 28) 1941 Sind 88 (90) : I L R (1941) Kar 204 (Vol 30) 1943 All 74 (76, 77) : I L R (1943) All 112. (Person left out till stage of argument cannot be impleaded before pronouncing judgment — Suit should be dismissed) (Vol 17) 1930 Mad 129 (131) : 53 Mad 223 (Vol 3) 1916 Mad 762 (762).

[18] Point that suit instituted under S. 92 was not validly instituted as it was not instituted by all those to whom consent was given raised for first time in appeal — Facts not in dispute — Point can be allowed to be raised for first time in appeal. (Vol 28) 1941 Sind 88 (89) : I L R (1941) Kar 204.

[19] Several persons obtaining leave to institute suit do not constitute one plaintiff — Appeal by some of them is competent. (Vol 25) 1938 P C 184 (186) : 65 I A 198; ILR (1938) Lah 383; 32 Sind L R 749 (PC). (Reversing (Vol 22) 1935 Lah 251 : 16 Lah 782.)

[20] Sanction obtained by several persons — One of them dying before institution of suit — Suit by rest is regular. (Vol 27) 1940 Lah 356 (358).

[21] Person originally obtaining permission dying during suit — Others can continue the suit. (Vol 8) 1921 P C 123 (124); 48 Cal 493 : 48 Ind App 12 : 17 Nag L R 37 (PC).

[22] Conduct by one relator with Advocate-General's sanction is valid where all cannot join for good cause, but the living relators must be joined as parties. (Vol 12) 1925 Sind 1 (1, 2).

[23] Sanction granted to plaintiffs — Death of one plaintiff — Leave enures for benefit of new plaintiff brought on record in place of deceased plaintiff. (Vol 32) 1945 Bom 74 (76) (Vol 4) 1917 Mad 389 (390) : 40 Mad 110.

[24] Plaintiffs given sanction to file suit under S. 92 — All plaintiffs may not actively continue to prosecute suit. (Vol 29) 1942 Sind 137 (138) : I L R (1942) Kar 179.

[25] Some plaintiffs dropping out of suit — Others can proceed with it. (Vol 20) 1933 Mad 854 (855) : 57 Mad 153.

[26] Suit under S. 92 — Plaintiff withdrawing not *bona fide* — Court can continue suit by making some defendants as plaintiffs. (Vol 7) 1920 Mad 732 (735).

[27] Presumption is that the Legal Remembrancer when he sanctioned the institution of suit acted properly and in accordance with law. (Vol 30) 1943 All 74 (76) : I L R (1943) All 112.

[28] Suit for removal of mutwalli — District Judge in appeal can settle scheme under S. 92, Civil P. C., without the sanction of Collector. (Vol 23) 1936 Lah 361 (362).

10. Cypres doctrine — Application of. — [1] Scheme suit — Charitable bequest by testator — Object mentioned not exhausting corpus of fund — General intention to devote whole fund to charity found — Court can apply doctrine of cypres and carry out testator's intention. (Vol 6) 1919 Mad 659 (663, 664).

[2] Where the trustees named by a testator for making and completing the trust have died and the object of the trust as named by him is specific and definite, the Court will administer the trust. (1912) 36 Bom 29 (33, 34).

11. Jurisdiction to entertain suit. — [1] Words referring to subject-matter of trust are referable to both Courts mentioned. (Vol 19) 1932 Cal 444 (445) : 59 Cal 357. (Section 92 overrides Letters Patent (Calcutta), Cl. 12).

[2] Suit under S. 92, Civil P. C. — Proper Court is where subject-matter of trust or any part of it is situate. (Vol 22) 1935 Mad 983 (986) (Vol 11) 1924 P C 95 (102) : 51 Ind App 72 : 20 Nag L R 33 : 51 Cal 361 (PC).

[3] Suit under S. 92 — Compromise decree by District Judge — Suit in Munsif's Court for declaration that consent decree is nullity being vitiated by fraud — Munsif has no jurisdiction to make new decree — Only District Judge can do so. (Vol 29) 1942 Pat 79 (80).

[4] Additional Judge by virtue of assignment of District Judge's functions under Bengal Civil Courts Act (1887), S. 8 (2) can try suit under Civil P. C., S. 92. (Vol 8) 1921 Cal 210 (211) : 48 Cal 53.

[5] If the assignment of the duties referred to in S. 7 of the Oudh Civil Courts Act has been sanctioned in the manner required by law, suits instituted under S. 92 of the C. P. C., can be transferred for trial by a District Judge to the Court of an Additional Judge. (Vol 6) 1919 Oudh 311 (313) : 22 Oudh Cas 93.

[6] Additional Judge appointed by Local Government but not empowered to receive suits under S. 92, Civil P. C., or perform functions of District Judge has no jurisdiction to try suit under S. 92 instituted before District Judge but transferred to Court under Civil P. C., S. 24. (Vol 1) 1914 Cal 616 (616) : 41 Cal 866.

[7] A notification by a Local Government empowering a Sub-Judge to try a particular suit pending before the District Judge is not one contemplated by S. 92 of the Code. (1912) 39 Cal 146 (148).

[8] Government Notification empowering Mr. H, First Class Sub-Judge, Dharwar, to hear suits instituted under S. 92 — Notification held did not empower Mr. H, as *persona designata* but empowered Court of First Class Sub-Judge, Dharwar, presided over by Mr. H within meaning of S. 92 (1), even to entertain plaints. (Vol 24) 1937 Bom 275 (279) : I L R (1937) Bom 665 (F B).

[9] Jurisdiction under S. 92 also conferred on First Class Sub-Judge's Court by amendment — That Court and District Court have concurrent jurisdiction. (Vol 31) 1944 Bom 300 (302).

[10] Suit instituted in District Court — Subsequent notification empowering First Class Subordinate Judge to hear such suits — *Held* notification was *ultra vires* and that District Judge had no power to transfer case to such Subordinate Judge. (Vol 22) 1935 Bom 172 (174) : 49 Bom 412.

[11] Where a Sub-Judge tries case under S. 92 on transfer of it by District Judge and is empowered to try such suit but whose local jurisdiction is subsequently restricted he will be deemed to be competent to try that case. (Vol 3) 1916 Mad 960 (961).

[12] In this case it was held that although the District Judge had the powers of a *kasi* under the Muhammadan law to deal with an application for appointment of a *mutawalli* it did not necessarily follow that the District Judge had no power to relegate the petitioner to a suit under S. 92. (Vol 6) 1919 Cal 615 (616).

[13] In a scheme framed by the District Court and confirmed by the High Court an application for modification of the scheme can be entertained only by the High Court but the District Court can give necessary directions to carry out the modified scheme. (1912) 16 Cal L Jour 431 (434, 435).

[14] An application, by some person interested in the religious trust for the amendment of the scheme of S. 92, for the removal of a trustee from his office,

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cannot be entertained by the High Court. (Vol 23) 1936 All 97 (101) : 58 All 538.

[15] Section 92 does not confer on the High Court power to entertain Scheme suits in its original jurisdiction about charities in the mofussil. (1910) 20 Mad L Jour 387 (391, 392).

[16] Trust-Charitable hospital in foreign country—Bombay High Court can act *in personam* if trustees are in Bombay but it is not advisable to remove trustees—Plaintiffs should be left to their remedies in Courts of foreign country where hospital is situate and people from which are beneficiaries. (Vol 31) 1944 P C 39 (41, 42) : 71 Ind App 47 : I L R (1944) Kar P C 193 (P C).

12. Parties to suit —[1] Suits against strangers to a trust whether alienees from trustees or trespassers are not governed by S. 92. The expression 'granting further or other relief' must be read along with the specified reliefs and those that should be granted under clause (h) should be of the character, as those expressly mentioned. (Vol 4) 1917 Mad 112 (119, 120) : 40 Mad 212 (F B)* (Vol 15) 1928 P C 16 (19) : 55 Ind App 96 : 55 Cal 519 (P C).

[2] An order for accounts and inquiries can be passed against third parties in possession only in a suit properly framed and not one under S. 92. (Vol 3) 1916 Sind 60 (61) : 10 Sind L R 12.

[3] Section 92 does not cover a claim to recover possession of trust property from a trespasser or a transferee from a trustee. (Vol 5) 1918 Cal 5 (7) (S B)* (Vol 15) 1928 All 33 (33, 34) : 50 All 165* (Vol 10) 1923 All 319 (319) : 45 All 335* (Vol 10) 1923 All 120 (121) : 45 All 215. (Suit by idol against persons interfering with its property)* (Vol 8) 1921 All 116 (117)* (1918) 37 Bom 95 (96)* (1884) 8 Bom 365 (367) (F B)* (Vol 31) 1944 Cal 163 (174, 175) : I L R (1944) 1 Cal 329. (Wakf.)* (Vol 1) 1914 Cal 356 (357) : 41 Cal 749* (1906) 33 Cal 789 (805)* (Vol 20) 1933 Lah 395 (396)* (Vol 23) 1936 Mad 449 (451)* (Vol 4) 1917 Mad 112 (113) : 40 Mad 212 (F B)* (Vol 1) 1914 Oudh 237 (237)* (1911) 14 Oudh Cas 65 (67).

[4] The consent of the Advocate-General is not necessary in order that a trustee may recover trust property in the hands of a stranger to the trust. (Vol 28) 1941 P C 1 (6) : 67 Ind App 448 : I L R (1941) Mad 175 : I L R (1941) Kar P C 1 (P C)* (Vol 24) 1937 Rang 483 (484).

[5] Suit by person calling himself trustee against defendant alleged to be trespasser—Plaintiff can ignore S. 92 and bring suit for possession of wakf property and office of mutwalli by dispossession of defendant. (Vol 28) 1941 All 1 (7) : I L R (1940) All 815.

[6] In a suit under S. 92 Court cannot pass a decree for recovery of the trust property in possession of alienees. The remedy left to the plaintiff is to obtain decree for appointment of trustees, declaring what properties are affected by the trust and directing trustee to institute regular suit in proper Court on payment of full Court fee for possession. (1906) 28 All 112 (121).

[7] Bringing new trustees on record instead of old ones in evasion of S. 92 is without jurisdiction. (Vol 18) 1931 Cal 281 (282).

[8] A suit by the disciples of a mutt in a representative capacity to set aside an alienation of mutt properties by the head of the mutt and for delivery of possession of the properties to the persons lawfully entitled to manage the mutt, is maintainable without sanction under S. 92. (Vol 5) 1918 Mad 464 (464) : 41 Mad 124.

[9] Any member of the Hindu community can sue on behalf of his community with the permission of the Court and without the permission of the Legal Remembrancer to eject a trespasser from *Thakurdevara* property in a village. (1913) 19 Ind Cas 973 (973, 974) (All).

[10] The Calcutta High Court has held that a transferee of trust property or a stranger cannot be made a party to a suit under S. 92. (Vol 22) 1935 Cal 805 (808, 809). (Stranger receiving property from trustee—Knowledge that property is trust—Stranger is constructive trustee—Hence relief against him can be claimed in suit under S. 92.)* (Vol 5) 1918 Cal 5 (7) (SB). ((Vol 3) 1916 Cal 935 : 42 Cal 1135, reversed).

[11] The High Court of Rangoon also has held that strangers are not necessary parties to such suit and if plaintiffs have wrongly impleaded them they cannot pray in aid provisions of Civil P. C. (1908), O. 1, R. 3 or R. 10. (Vol 19) 1932 Rang 132 (135) : 10 Rang 342* (Vol 6) 1919 Low Bur 56 (56). (Trustees are necessary parties.)

[12] The Patna High Court holds that only the trustee is necessary party. (Vol 19) 1932 Pat 33 (52) : 11 Pat 288.

[13] The Judicial Commissioner's Court, Sind has held that in a suit under S. 92 an alienee from a trustee is not a necessary party. (1911) 5 Sind L R 103 (104).

[14] The High Court of Madras has held that alienee is a proper party, but is not necessary party. (Vol 2) 1915 Mad 517 (517, 518, 519). (No decree for possession or for declaration can be passed against alienee.)* (Vol 28) 1936 Mad 449 (460). (Person in possession of property as heir of or claiming through settlor or trustee, but denying trust is proper party and should be impleaded though no relief can be given against him in such suit.)* (Vol 5) 1918 Mad 1071 (1072). (Suit under S. 92—Court has power to add any party under O. 1, R. 10.)* (Vol 3) 1916 Mad 979 (980). (Declaration and decree for possession against him cannot be given in it.)

[See also (Vol 5) 1918 Mad 1179 (1181). (Joinder of alienees from trustees will not entail dismissal of whole suit.)* (Vol 1) 1914 Mad 708 (711) : 38 Mad 1064. (It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under S. 92.)]

[15] The Allahabad High Court has also held that trespassers, though not necessary parties, are not improper parties. (Vol 12) 1925 All 759 (761) : 47 All 867 * (Vol 31) 1944 All 1 (3) : I L R (1944) All 20. (Third party transferees can be impleaded—Declaration that property is trust property can be granted against them.)* (Vol 12) 1925 All 683 (685) : 47 All 770. (Transferees of trust property can be impleaded.)

[16] The Bombay High Court has held that where the plaint alleges that the alienee took the property from the trustee with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to the trust the alienee is a necessary party as the question whether the alienee is a constructive trustee in virtue of the alienation and by reason of his conduct may arise. (1911) 35 Bom 470 (472, 473).

[17] Suit for scheme and appointment of trustee is maintainable against trespasser claiming trust property. (Vol 14) 1927 Mad 710 (712).

[18] In a suit for framing a scheme for a public charity, the persons who *bona fide* allege to be trustees thereto should be made parties. (Vol 6) 1919 Mad 439 (439, 440).

[19] Suit under S. 92 for framing of scheme for management of certain charitable trust—Close relation of person creating trust not only beneficiary but also entitled to some voice in management of trust property applying to be made defendant to scheme suit—If defendant not objecting to proposed scheme, scheme likely to go unchallenged—Such person if not added will have no right of appeal—Such person should be added as defendant in suit in order to enable Court to properly and completely adjudicate upon questions in-

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volved in suit. (Vol 24) 1937 Oudh 229 (232) : 13 Luck 255.

[20] A suit is not taken out of the scope of S. 92 because the defendant denies the trust and claims to be the owner of the property. (1911) 13 Bom L R 49 (53).

[21] Trust of charitable or religious nature — Suit lies for settling scheme — Heir-at-law is a proper party to the suit. (Vol 10) 1923 Mad 376 (377) : 46 Mad 300.

[22] Suit for settlement of scheme — Mutawali in possession is necessary party. (Vol 16) 1929 Mad 635 (638).

[23] In a suit under S. 92, the Court has power under O. 1, R. 10 to add parties for the effectual adjudication of those questions. A suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue or by the Advocate-General in conjunction with those persons. The right of each to sue in his own name is not exclusive of the right of the other. (Vol 7) 1920 Mad 133 (133, 134) : 43 Mad 707.

[24] Appellate Court reversing trial Court's judgment holding that plaintiff had no interest within S. 92 — Advocate-General held should not be allowed to be impleaded as co-plaintiff at stage of appeal. (Vol 29) 1942 All 315 (319).

13. *Res judicata*. — [1] Decree under S. 92 binds all persons interested in the trust. (Vol 12) 1925 Mad 1070 (1071) (F B).

[2] The transferee of a *wakf* property who is made a party to a suit under this section is bound by decision in the suit and he is barred from going behind it, in a subsequent suit. (1911) 33 All 752 (756).

[3] Scheme suit under S. 92 — Previous suit fraudulently withdrawn does not operate as *res judicata*. (Vol 15) 1923 Mad 268 (271).

[4] Suit under S. 92 decided on 24th November 1930 — Collector's permission obtained — No sanction however obtained from Local Government — Subsequent Privy Council decision saying sanction from Local Government compulsory — Decision is not without jurisdiction and is *res judicata*. (Vol 22) 1935 Nag 28 (29).

[5] Even where a scheme has been settled under S. 92, a stranger may institute a suit for purpose of asserting a title which is paramount to the trust altogether. (Vol 33) 1946 All 148 (149) : 1 I L R (1946) All 107.

[6] Suit filed with sanction by seven plaintiffs, but amended without sanction — Stranger defendants and reliefs not covered by S. 92 added — Suit compromised by six plaintiffs — *Held* that the nature of the suit was changed, that it ceased to be one of representative character and the decree based on compromise however binding as against the consenting parties, did not bind the rest of the public. Section 11, Expl. VI, had no application to such a suit. (Vol 15) 1923 P C 16 (20) : 55 Ind App 96 : 55 Cal 519 (P O).

14. *Retrospective effect*. — [1] Amendments of 1889 and 1908 of S. 92 as it originally stood were intended to be retrospective. (Vol 29) 1942 Cal 343 (348) : 1 I L R (1942) 1 Cal 211.

[2] Section 92 (2) was enacted to settle the point if the provisions of the old S. 539 were directory or mandatory and so it operates retrospectively, especially when there is no saving of pending suits under the section. (1911) 5 Sind L R 184 (188, 190).

15. *Revision*. — [1] Order by District Judge, even with consent of parties to have decision from Sub-Judge on a point whether certain trust is or is not public trust — Order is revisable. (Vol 18) 1931 All 332 (332).

[2] Decision on one of issues in appealable case — High Court ought not to interfere unless particular point can be shortly and conveniently disposed of —

Decision on issue as to maintainability of suit under S. 92 — *Held* High Court could entertain revision. (Vol 22) 1935 Mad 282 (283) : 58 Mad 771.

[3] The Chief Court cannot revise an order of a Collector granting permission under S. 92 to sue for removal of a *mahant* as such order is executive and in granting sanction, the Collector does not act as a Court. (1911) 1911 Pun L R No. 40 page 204 : 1910 Pun Re No. 104.

16. *Scheme decree* — Execution of. — There is a conflict of decisions on the question whether a scheme decree can be executed and the following views have been expressed.

[1] Orders in relation to a scheme already framed in a scheme suit are not orders in execution. (Vol 14) 1927 Mad 1110 (1110).

[2] Scheme of management framed — No appeal lies in the matter of execution of the scheme but if order is without jurisdiction revision lies. (Vol 13) 1926 Mad 659 (661).

[3] Scheme decree can be executable — Application to Court to enforce the executable part is one in execution and order thereon is appealable. (Vol 15) 1928 Mad 61 (64).

[4] Appointment of trustee under tentative scheme — He can only be removed by regular suit — Any order of removal is not one in execution and is not appealable. (Vol 13) 1926 Mad 799 (799).

[5] Scheme decree setting out conditions of management — No provision to remove manager on failure to perform conditions — Mismanagement by manager — Application for execution is not competent to remove manager. (Vol 24) 1937 Lah 490 (491).

[6] Decree for removal of old trustees — It is not only directory but executable — It can be executed independently of scheme framed. (Vol 31) 1944 Oudh 289 (290, 291) : 20 Luck 32.

[7] Scheme — Remedy not asked in suit but given in the scheme cannot be or need not be asked in execution and order thereon is not appealable under S. 47, Civil P. C. (Vol 11) 1924 Mad 369 (370, 371) : 47 Mad 139.

[8] When a decree directs a trustee of a Hindu temple to perform a festival, a Court has no jurisdiction to give certain directions for the same. (Vol 3) 1916 Mad 549 (549).

[9] A decree which directs the delivery of trust property to new trustees is perfectly correct. Such decree is an executable one and not merely declaratory. (Vol 19) 1932 Mad 41 (44) : 54 Mad 345.

[10] Particular field in possession of defendants declared to be under trust and scheme framed — Plaintiffs can recover possession from defendants in execution. (Vol 13) 1926 Nag 326 (327).

[11] Scheme decree regarding constitution of temple, allowing arrears of pay and padithram expenses of archakas from date of suit to date of judgment — Such payments cannot form part of scheme and can be recovered by way of execution of decree — Amounts becoming due subsequent to decree cannot be recovered by execution. (Vol 24) 1937 Mad 326 (327).

[12] Scheme decree clause directing trustees to make payment to treasurer — Failure by trustees to make collections and payment — Proper remedy is not by appointment of receiver in execution but by a suit under S. 92. (Vol 23) 1936 Mad 581 (583) : 59 Mad 751.

[13] Direction in scheme decree in regard to realisation of trust properties including certain amount as belonging to trust held not money decree and not executable. (Vol 29) 1942 Mad 748 (750, 751).

[14] Where a decree provides for a scheme, the proper way of dealing with such decree is to separate scheme part from the rest of the decree and when that is done, no provision in the scheme part is executable,

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whether it is directory or declaratory. (Vol 24) 1937 Mad 326 (327)* (Vol 25) 1938 Mad 256 (256)* (Vol 28) 1936 Mad 581 (581); 59 Mad 751*(1933) 1933 Mad W N 183 (184).

[15] Temple scheme entrusting Subordinate Judge with appointment of trustees—Judge fixing certain date for hearing and on that day appointing certain persons as trustees—Other candidates applying for cancellation of order on ground that they were informed (by whom they could not tell) that petition was adjourned—Judge acts as a Court and not as a *persona designata*—Order held could not be cancelled under inherent jurisdiction. (Vol 26) 1939 Mad 969 (971).

[16] High Court can modify or alter rules framed by scheme of management of an institution. (Vol 13) 1926 Bom 179 (186).

[17] A scheme cannot be modified in execution proceedings. A separate suit will lie to modify the scheme or to clear doubtful points. (Vol 1) 1914 Low Bur 226 (228).

17. Section is mandatory—Sub-s. (2) —[1] The provisions of S. 92 are mandatory. It is not merely the right of the plaintiff that has to be looked to but also the nature of the relief which the plaintiff seeks and if the relief asked for is one which is specified in sub-s. (1) the direction laid down in the section must be obeyed. (Vol 6) 1919 All 203 (205). (A suit by a plaintiff for accounts from the defendants who were managing certain *wakf* property as trustees under a compromise comes within S. 92.)* (Vol 14) 1927 All 526 (529) : 49 All 191. (Suit not constituted as required by S. 92 — Question of the true nature of an endowment cannot be decided.)* (Vol 5) 1918 All 2 (8) : 41 All 1 * (Vol 2) 1915 Bom 38 (39, 40) : 39 Bom 580. (Collector's consent depending on Court's decision about applicability of the section is no consent.)* (Vol 4) 1917 Cal 678 (678, 679) * (Vol 5) 1918 Mad 1179 (1181) * (Vol 12) 1925 Pat 544 (547) : 4 Pat 741.

[2] When the District Judge exercises any of the powers vested in him under S. 92 without a suit, he acts without jurisdiction and the High Court in its revisional jurisdiction can set aside the order of the District Judge suspending a Mohunt on a mere report when there was no suit before him under S. 92. (Vol 5) 1918 All 218 (219).

18. Suit if can be instituted in forma pauperis.—[1] A suit under S. 92 cannot be instituted in *forma pauperis*. The sanction granted by the Legal Remembrancer to institute such a suit cannot be a good permission until, at the time of granting it, the fact that the plaintiffs were paupers had been brought to his notice. (1912) 15 Oudh Cas 202 (205, 206).

19. Suit must be for reliefs specified. —[1] It is only where the suit is for one or more of the reliefs in S. 92 (1) that it must be brought under that section. (Vol 5) 1918 Cal 483 (483) * (Vol 12) 1925 All 683 (685) : 47 All 770. (Reliefs declaring alienations invalid.)* (Vol 11) 1924 All 850 (851) : 46 All 813. (Suit lies by some members of the public for demolition of constructions raised on *wagf* property.)* (1911) 33 All 660 (664). (Suit for declaration but not a suit for possession of certain property alleged to be *wagf*.) * (Vol 27) 1940 Bom 242 (246). (Suit for declaration that suit property belonged to religious institution of Ramdwara sect coupled with prayer for injunction and accounts — Claim for accounts deleted — Suit held fell under S. 92.)* (Vol 5) 1918 Bom 134 (136) : 42 Bom 742. (Suit to recover trust property from persons claiming as trustees is governed by S. 92.)* (Vol 31) 1944 Cal 163 (186) : I L R (1944) 1 Cal 329 * (Vol 6) 1919 Lah 190 (192). (*Wakf*—Mortgage by manager — Suit

to set aside alienation and for restoration of property to trust is maintainable.)* (Vol 12) 1925 Mad 689 (689, 690). (Suit to recover trust property transferred by trustee.)* (Vol 4) 1917 Mad 214 (217). (Claim of reversioners for possession of a public trust on alienation made by Hindu widow.)* (Vol 21) 1934 Nag 48 (50). (Possession from person appointed manager, but wrongfully taking possession and mismanaging can be granted under S. 92.)* (Vol 1) 1914 Low Bur 169 (171) : 7 Low Bur Rul 333. (Suit against trustees under S. 92 compromised—Old trustees discharged without taking accounts and new trustees appointed — Beneficiaries' suit for setting aside decree discharging old trustees on ground of collusion, involving taking of accounts falls under Section 92.)

[2] Relief claimed not one mentioned in section — Section 92 does not apply. (Vol 6) 1919 Lah 190 (191) * (Vol 4) 1917 All 123 (124) : 39 All 651. (Suit for the partition of the right of management and superintendence in respect of property of a temple.)* (Vol 26) 1939 Bom 354 (358). (Hindu disposing of his property in favour of charitable institution by will and trust deed — Will providing certain sum as maintenance for his widow — Suit by widow, in spite of trust, for maintenance suitable to her according to Hindu law.)* (Vol 17) 1930 Bom 167 (168). (Prayer for declaration that property is public charitable property and not personal property of defendant.)* (Vol 16) 1929 Bom 153 (154, 155). (Suit by religious institution against trustees not of institution but of different fund for recovering certain portion of the fund.)* (Vol 29) 1942 Cal 343 (347) : I L R (1942) 1 Cal 211 * (Vol 17) 1930 Cal 787 (795) : 58 Cal 474. (Suit for declaration that property is *wakf*.) * (Vol 5) 1918 Cal 483 (483). (Suit by the worshippers of temple for declaration that certain land is temple land and for an injunction restraining defendant's alienation of the same.)* (Vol 3) 1916 Cal 712 (713). (Suit for mere declaration of being a *mutawalli* without claiming possession is not tenable.)* (1935) 62 Cal L Jour 153 (166). (Section does not apply where plaintiff comes to Court alleging that he is the Mohunt rightly appointed to that office and that he, as a shebait of the deities named in the cause title to the plaint, is entitled to the properties and asked to be put into their possession.)* (Vol 6) 1919 Lah 190 (191). (Suit by worshippers at a mosque to set aside an alienation of the *wakf* property by the trustee.)* (Vol 30) 1943 Mad 466 (469) : I L R (1943) Mad 619 (FB). (Suit by trustees of one temple against trustees of another temple for account and recovery of collections made by latter on behalf of former.)* (Vol 13) 1926 Mad 280 (280). (Founder appointing himself to be trustee and after his death, his heirs — Founder's widow alienating trust property — Reversioners to challenge alienation by widow must obtain sanction under S. 92 and get the widow removed from trusteeship.)* (Vol 4) 1917 Mad 214 (215). (Suit to establish claim to trusteeship on ground that person in possession is not rightful trustee.)* (Vol 4) 1917 Mad 112 (119, 120) : 40 Mad 212 (FB). (Alienation by Temple Committee of offerings to deity is invalid — Suit for declaration of its invalidity without sanction is maintainable.)* (Vol 21) 1934 Nag 48 (50). (Money decree cannot be claimed under S. 92.)* (Vol 20) 1933 Pat 246 (247) : 13 Pat 65. (Suit for permanent injunction restraining defendant from preventing general public from going to certain place for puja.)* (Vol 12) 1925 Pat 544 (547) : 4 Pat 741. (Suit for establishing right to office of *mutawalli*.) * (Vol 6) 1919 Low Bur 56 (57, 58). (Suit to enforce right to exclusive worship.)

[3] Suit not specifically asking for relief mentioned in S. 92 but doing so by implication — Sanction is necessary. (Vol 14) 1927 Mad 886 (886).

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[4] Relief claimed by plaintiff in effect nothing more than prayer for framing scheme for reconstitution of obsolete temple office — Consent of Advocate-General under S. 92 is necessary. (Vol 26) 1939 Mad 102 (105).

[5] Issue as to trust character of properties incidental — Main relief by way of scheme for management — Suit not maintainable without sanction under S. 92 — Declaration as to trust character held could not be given. (Vol 22) 1935 Mad 855 (856).

[6] Question whether particular property appertains to public trust or whether trustee has been validly appointed or not can be determined in suit under S. 92 if determination of such questions is necessary to grant reliefs which properly come under S. 92. (Vol 28) 1941 Cal 68 (72).

[7] An omission as regards relief, if material, affects the suit — An addition of a claim does not make the whole suit liable to be dismissed. (Vol 15) 1928 Mad 205 (207)* (Vol 12) 1925 All 683 (684): 47 All 770. (Section 92 — Suit under — Claim for possession included — Plaintiff should not be returned.)

[8] A suit for removal of a Mahant from the Gadi and for a declaration that the property under his control is a trust property must be brought in conformity with S. 92 (1). (1910) 13 Oudh Cas 177 (178, 179).

[9] One out of about four lambardars and two other residents of a village sued for the removal of the *Bhai* or *Mahant* of a *Dharmasala* and for the cancellation of alienations of the endowed property effected by him. Held, that the sanction of the Collector was necessary. (1910) 1910 Pun L Re No. 198 page 566.

[10] In proceedings under S. 92, Civil P. C. onus of establishing case for reliefs asked for is on plaintiff — Onus is immaterial when evidence on both sides is adduced. (Vol 24) 1937 Cal 67 (70, 71): 1 I L R (1937) 1 Cal 515.

20. Clause (a) — Removing trustee. — [1] Suit to remove trustee can be instituted only under S. 92. (1913) 35 All 98 (101). (Suit for removal of mutwalli)* (Vol 9) 1922 All 499 (500): 44 All 721. (Trustee appointed by founder cannot be removed by him except under S. 92)* (Vol 5) 1918 Bom 134 (136, 137): 42 Bom 742* (Vol 5) 1918 Lah 76 (77, 78). (Suit by alleged gaddinashin of takia to eject trespasser — Trespasser found to be trustee and manager of wakf property — Sanction of Collector is necessary — Absence of sanction — Suit is not maintainable)* (Vol 6) 1919 Mad 515 (524): 42 Mad 161* (Vol 6) 1919 Mad 159 (159): 42 Mad 668. (Appointment of trustee by temple committee if not in good faith can be questioned in suit)* (Vol 2) 1915 Mad 1044 (1047)* (Vol 24) 1937 Oudh 381 (383, 384): 13 Luck 523. (Application to be appointed as trustee — Purpose of application being removal of trustees — S. 92 bars application)* (Vol 21) 1934 Pat 321 (323).

[2] In suit under S. 92 person appointed trustee by compromise — Trustee adjudged insolvent — Application to remove him is not in continuation — Fresh suit lies. (Vol 2) 1915 All 335 (335).

[3] Suit to remove person who is *de facto* and not *de jure* trustee falls under S. 92. (Vol 5) 1918 Lah 146 (147): 1918 Pun Re No 97.

[4] Defendant claiming under trust — Plaintiff challenging defendant's appointment as trustee — Suit under S. 92 is maintainable. (Vol 12) 1925 Cal 1106 (1107).

[5] Suit to remove Sajjadahnashin from his office when there is breach of trust does not lie under S. 92. (1909) 6 All L Jour 632 (635).

[6] Sajjadahnashin, if of immoral character and repugnant to public, can be removed. (Vol 19) 1932 Pat 33 (52): 11 Pat 288.

[7] Suit for removal of Mahant — Consent given in appeal by some plaintiffs to maintain original Mahant

— Consent does not affect validity of suit or jurisdiction to hear appeal. (Vol 4) 1917 Oudh 375 (376): 20 Oudh Cas 49.

[8] Constant visitors of trust temple, who are also close relatives of founder can sue for trustee's removal. (Vol 16) 1929 All 433 (434).

[9] Persons who are not trustees can sue for removal of trustees without asking for possession. (1911) 21 Mad L Jour 450 (451).

[10] Next reversioner can sue under S. 92 for removal of widow holding hereditary office of trustee. (1913) 25 Mad L Jour 373 (374, 378).

[11] Founder of trust or his heirs may sue for removal of trustee. (Vol 7) 1920 Cal 210 (215).

[12] Scheme originally drawn up in proceeding under S. 92 — Application for removal of trustee and appointment of another to District Judge — District Judge has no jurisdiction in the matter — Proper procedure is by way of suit after obtaining sanction under S. 92. (Vol 22) 1935 All 273 (275)* (Vol 23) 1936 All 97 (102): 58 All 538. (High Court cannot take action on miscellaneous application for amendment nor pass orders under inherent jurisdiction)* (Vol 13) 1926 Mad 130 (130)* (Vol 29) 1942 Oudh 135 (137, 139): 17 Luck 391.

[13] Power given to District Judge under scheme to suspend and remove any trustee for specific reasons — District Judge can very well remove all trustees even for dishonesty or breach of trust — Removal of trustee under scheme for breach of trust is not contrary to S. 92 — Power to remove trustee must include power to suspend him. (Vol 24) 1937 Bom 124 (126, 127).

[14] The question whether there are sufficient grounds for the removal of a trustee is within the judicial discretion of the Court and the Court will be guided by considerations of the welfare of the trust. (Vol 7) 1920 Cal 210 (215)* (Vol 28) 1941 Bom 317 (322): 1 I L R (1941) Bom 556* (Vol 15) 1928 Cal 225 (226)* (Vol 11) 1924 Cal 1024 (1025)* (Vol 7) 1920 Cal 379 (380): 47 Cal 866. (Removal of trustee — Mahomedan waqf — Power of Court to remove mutawalli and appoint a stranger as such)* (Vol 12) 1925 Mad 1011 (1012). (Trustees who have not misappropriated any funds and who are interested in maintaining temple should not be removed)* (Vol 5) 1918 Mad 56 (59, 60). (A hereditary trustee is liable to be removed, if his continuation in office is likely to endanger the interests of the institution.)

[15] Charitable trusts — Court has to consider interests of the public for whom trust is ordered. (Vol 21) 1934 P C 53 (54) (P C).

[16] Not the views of majority of persons entitled to sue but the original purposes of trust must be looked to. (Vol 13) 1926 Lah 100 (107, 108): 7 Lah 275.

[17] Suit for removal of trustee — It is to the interest of the public to have it determined whether the defendant was guilty of having committed a breach of trust, malfeasance, misfeasance and misappropriation and whether he was at all competent to manage the affairs of the trust. (Vol 31) 1944 Pat 115 (116, 117).

[18] It is not every mismanagement or neglect of duty which will induce the Court to remove a trustee. There must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. (Vol 15) 1928 Cal 225 (226)* (Vol 18) 1931 P C 121 (123): 53 All 910: 58 I A 460 (P C). (Misappropriation of trust funds)* (Vol 16) 1929 All 433 (436). (Trustee's being guilty of neglect of his duty in not keeping proper accounts is not adequate cause for his removal from office)* (Vol 28) 1941 Bom 317 (322): 1 I L R (1941) Bom 556* (Vol 18) 1931 Bom 170 (172). (Misconduct)* (Vol 11) 1924 Cal 1024 (1025). (Trustee can be removed on grounds of grave mismanagement)* (Vol 5) 1918

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Mad 56 (59, 60). (Want of capacity to manage trust property is ground for removal.)

[19] Evidence not justifying removal on ground of misconduct or negligence — Trustee may be removed if the interest of institution is being served. (Vol 12) 1925 Mad 1070 (1078) (FB) * (Vol 6) 1919 Mad 575 (578) * (Vol 2) 1915 Mad 1044 (1047) * (Vol 13) 1926 Mad 1150 (1153).

[20] A trustee may be removed if he fraudulently misapplies the revenues of the trust property and grossly misbehaves himself in the execution of the trust. (Vol 15) 1928 Cal 225 (226) * (Vol 5) 1918 Mad 1155 (1157). (Misconduct.) * (1910) 20 Mad L Jour 726 (727).

[21] Suit to remove mahant — His fitness to remain in office in issue — His moral character can be considered. (Vol 27) 1940 P C 24 (27) : I L R (1940) Kar P C 47 : I L R (1940) 1 Cal 266 : 67 Ind App 32 (PC).

[22] Trustee's false assertion of ownership of trust property is sufficient ground for his removal. (Vol 9) 1922 P C 325 (332) : 45 Mad 565 : 49 Ind App 237 (PC) * (Vol 11) 1924 Lah 107 (108) : 4 Lah 364 * (Vol 16) 1929 Mad 635 (638) (Mutawali devoting bulk of income to himself and treating property as his own.) * (Vol 14) 1927 Mad 1033 (1034). (Trustee's personal acts or omissions and not those of his predecessor should be considered.) * (Vol 32) 1945 Nag 64 (66) : I L R (1944) Nag 788. (Shebait setting up private ownership and denying obligations of office.) * (Vol 21) 1934 Pesh 57 (68).

[23] Mere assertion by trustee that trust properties are private properties is not sufficient ground for his removal. (Vol 28) 1941 Cal 68 (74) * (Vol 15) 1928 Mad 879 (886).

[24] Founder trustee spending about seven lacs on trust—His removal from trusteeship is drastic and cannot be readily justified in the interest of charity. (Vol 31) 1944 P C 39 (41) : 71 Ind App 47 : I L R (1944) Kar P C 193 (PC).

[25] Secular and religious duties of mahant in temple interdependent and inseparably blended—Civil Court in suit under S. 92 will have jurisdiction, in proper case, to remove him from performance of both functions. (Vol 27) 1940 P C 24 (29) : I L R (1940) Kar P C 47 : 67 Ind App 32 : I L R (1940) 1 Cal 266 (PC).

[26] Suit for removal of trustee — Transferee from trustee is not necessary party. (Vol 25) 1938 Cal 278 (281).

[27] *Bona fide* suit for removal of trustee on substantial allegations — Plaintiffs are entitled to costs out of trust estate. (1936) 63 Cal L Jour 573 (578).

21. Clause (b)—Appointment of new trustee.—

[1] Suit for appointment of new trustees on ground that there do not exist any lawful trustees falls within S. 92. (Vol 25) 1938 Rang 339 (341, 342) * (1903) 26 Mad 450 (452, 453) * (1911) 21 Mad L Jour 450 (451).

[2] Person claiming to be trustee of fund — Proper remedy is suit under S. 92 and not application under Trusts Act (1882), S. 34 or S. 74. (Vol 21) 1934 Oudh 118 (121) : 9 Luck 507.

[3] Clauses (a) and (b) of S. 92 are distinct and the appointment of a new trustee is not limited to cases where it is necessary because of the removal of an old one. (Vol 17) 1930 Mad 226 (228).

[4] Under Mahomedan law, Court has power of appointing mutawali directly without his having recourse to S. 92. (Vol 17) 1930 Mad 226 (228) * (Vol 15) 1928 Cal 368 (370) : 55 Cal 1284 * (Vol 20) 1933 Lah 27 (28).

[5] Suit by descendant of founder for declaration of being mutawali and for injunction against defendants appointed mutawali by District Judge in another suit — *Held*, Subordinate Judge cannot supersede District

Judge's order — *Held further* wakf being found to be public trust, plaintiff's remedy was by suit under S. 92 and get herself appointed on strength of her preferential right. (Vol 3) 1916 Cal 894 (900) : 43 Cal 467.

[6] In appointing new trustees, Court is entitled to take into consideration not merely the wishes of the founder but also the past history of the institution. (Vol 3) 1916 P C 132 (135) : 43 Ind App 127 : 43 Cal 1085 : 8 Low Bur Rul 517 (P C).

[7] Will directing appointment of members of testator's family as members of committee—Suitable persons not available—Strangers may be appointed. (Vol 6) 1919 All 83 (89).

[8] Association with institution is factor to be considered in appointing manager of institution. (Vol 28) 1941 Bom 317 (322) : I L R (1941) Bom 556.

[9] Appointment of representative of community on Board of Trustees when such community has contributed largely is not improper. (Vol 7) 1920 Mad 146 (146).

[10] Once a clear case is made out for Court's interference under cl. (b) the form of the final order should be governed by what appears to be in the interests of the institution. (Vol 22) 1935 Pat 111 (116) : 14 Pat 379.

[11] Trust-deed enjoining only one trustee at a time—Additional trustees can be appointed by Court if interests of institution demand it — Rights of members of family to take part in management should be respected. (Vol 15) 1928 Mad 955 (957) * (Vol 13) 1926 Mad 1150 (1153) * (Vol 7) 1920 Mad 146 (146).

[12] When new trustees are appointed direction to deliver property to them can be given. (Vol 6) 1919 All 83 (89).

[13] New trustee appointed — He is entitled to trust property—Possession not given—He is entitled to bring suit in ejectment. (1903) 26 Mad 450 (452, 453).

[14] New trustees appointed—Possession to them can be given in execution. (Vol 31) 1944 Oudh 289 (289) : 20 Luck 32.

22. Clause (c)—Vesting property. — [1] Words "vesting any property in a trustee" refer to cases where new trustee is appointed and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it. (Vol 19) 1932 Rang 132 (136) : 10 Rang 342 * (Vol 4) 1917 Mad 112 (119) : 40 Mad 212 (F B).

23. Clause (d)—Directing accounts. — [1] Section 92 is wide enough to entitle the Court to direct an account against a trustee and to order him to pay the amount found due upon taking those accounts. (Vol 2) 1915 All 69 (69).

[2] Suit by general trustee against subordinate trustee for recovery of balance of amount due by defendant and not paid to temple — Suit is bad for want of sanction. (Vol 8) 1921 Mad 479 (479) (F B).

[3] Suit by trustees against co-trustee for accounts can be instituted only in conformity with S. 92, Cl. (1). (Vol 8) 1921 Mad 696 (699).

[4] Scheme suit — Decree for damages for loss by trustee's misconduct cannot be passed. (Vol 13) 1926 Mad 509 (510).

[5] In a suit by a trustee to recover trust property a prayer for accounts of the trust property cannot be asked for in the Privy Council appeal for the first time. (Vol 28) 1941 P C 1 (6) : 67 Ind App 448 : I L R (1941) Mad 175 : I L R (1941) Kar P C 1 (P C).

[6] Inquiry into state of accounts under S. 92 for ascertaining trustee's liability is covered by R. 42, O. 21. (Vol 4) 1917 All 153 (154).

[7] Suit for removal of trustee—Decree can be given to him for amount due to him on taking account though

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his claim against trust is barred by limitation. (Vol 3) 1916 Mad 720 (723) : 39 Mad 365.

[8] A direction for accounts in a suit in which the administrator of the estate is not made party as such administrator must necessarily be fruitless. (Vol 2) 1915 Low Bur 67 (69).

24. Clause (f)—Authorising alienation. — [1] A sanction given by the District Judge on an application by the *mutwalli* may be sufficient authority for the *mutwalli* for letting out the *wagf* property for more than three years. It is not necessary to bring a suit under S. 92, Civil P. C., for obtaining such sanction. (Vol 7) 1920 Cal 129 (130) : 47 Cal 592.

25. Clause (g) — Settling scheme. — [1] In settling a scheme of management the Court has a wide discretion; the wishes of the founder regarding the management if conformable to the changed conditions and circumstances of the present day as well as the past history of the institution, might be taken into consideration; but the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution. (Vol 3) 1916 P C 132 (135, 136) : 43 Ind App 127 : 43 Cal 1085 : 8 Low Bur Rul 517 (P C). (Case of Mahomedan mosque.) * (Vol 33) 1946 P C 34 (35) (P C). (New scheme framed by trial Court — Scheme approved by Chief Court but inconsistency in Chief Court's judgment — *Held*, in spite of inconsistency, Privy Council will not disturb safeguards in scheme.) * (Vol 16) 1929 P C 27 (29) (P C). (Settlement of scheme for conduct of institution—Interest of beneficiaries should be protected from waste.) * (Vol 4) 1917 All 331 (334) * (1906) 8 Bom L R 756 (757) * (Vol 29) 1942 Cal 343 (350) : I L R (1942) 1 Cal 211. (Essence of S. 92 (1) (e) and (g) is directions from the Court concerning the management of the trust — A direction that in the administration of the trust the trustee should do a certain thing or abstain from doing a certain thing is not alien to a scheme of management.) * (Vol 13) 1926 Mad 1150 (1153) * (Vol 9) 1922 Mad 409 (411). (Hereditary trustee — Court cannot impose control not part of original trust—But S. 92 gives Court very wide powers.) * (Vol 4) 1917 Mad 426 (428). (In absence of evidence of intentions of founder past user how far useful in framing scheme pointed out.) * (1913) 24 Mad L Jour 199 (204) (P C). (The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds.)

[2] A Court in framing a scheme must have regard to the existing rights of individuals to the trusteeship. But Courts are generally averse to the creation of a hereditary right to the office of a public trustee. (1912) 23 Mad L Jour 134 (141, 152).

[3] Court's jurisdiction to frame a scheme under S. 92, Civil P. C., is not excluded by the fact that the temple for which the scheme is to be framed is one subject to a Temple Committee but in framing the scheme the Court should not unduly interfere with the power entrusted by the statute to the Committee, *e. g.*, by appointing a Board of Control between the trustees and the Temple Committee. (Vol 4) 1917 Mad 551 (559, 560) : 39 Mad 700.

[4] Temple owned by one caste but subject of public charitable trust — Scheme under S. 92 can be framed. * (Vol 4) 1917 Mad 426 (427, 428).

[5] Scheme for management—Court is not bound to follow terms of grant. (Vol 19) 1932 Pat 33 (54) : 11 Pat 288.

[6] Court has power to disregard arrangement in

wakfnamah but should not do so as a general rule. (Vol 10) 1928 Pat 420 (421, 422).

[7] The Court while sanctioning a scheme under this section, may provide for the appointment of a new or additional trustee and such new appointment may not be in conformity with the original constitution of the trust or with its rules. (1905) 28 Mad 319 (323) * (1912) 23 Mad L Jour 134 (141, 152). (Courts in India have the same powers as the Courts of Chancery in England to appoint additional trustees even where there are hereditary trustees.)

[8] Scheme for mosque with largely predominating majority of Bengalee worshippers should provide majority of Bengalee trustees. (Vol 11) 1924 Rang 134 (135).

[9] Framing scheme may involve removal or appointment of trustees. (Vol 28) 1941 Bom 317 (321) : I L R (1941) Bom 556.

[10] Association of strangers with trustee likely to lead to friction should be avoided. (Vol 6) 1919 Mad 575 (578) : 42 Mad 283.

[11] The relief by way of settlement of a scheme does not depend upon any charges against the trustees. If mismanagement is averred and a large surplus is left after meeting the expenditure to seek the aid of the Court to frame a proper scheme to render the recurrence of the state of affairs impracticable that is sufficient to seek the aid of the Court. (Vol 3) 1916 Mad 318 (320).

[12] Trustee not guilty of mismanagement or misappropriation—Still Court may frame scheme for better management. (Vol 5) 1918 Oudh 207 (210) * (Vol 4) 1917 Mad 389 (390) : 40 Mad 110. (Scheme can be framed to avoid uncertainty and future disputes though no misconduct is proved—In such case trustees need not be removed.)

[But see (Vol 15) 1928 Mad 401 (402). (No scheme can be framed if malversation, mismanagement, misappropriation or adverse claim of title is not proved.)]

[13] Allegations of malversation on the part of the trustees afford no ground for a modification of the scheme though they may sustain a suit for their removal from office. (Vol 3) 1916 Mad 530 (530, 531).

[14] Temple having temple properties and kattalai properties dedicated for special purposes — Separate schemes should be framed for each. (Vol 15) 1928 Mad 955 (956).

[15] Settlement of a scheme when there may never be any property to which it may be applied is premature. (Vol 2) 1915 Low Bur 67 (70).

[16] Court should enquire what properties belong to the charity and for this purpose, may go into questions not directly arising in suit. (Vol 8) 1921 Mad 563 (565).

[17] A scheme which does not ascertain the income of the properties of the trust, the expenses and the remuneration of the person in charge thereof is inadequate and unsatisfactory scheme. (Vol 5) 1918 Mad 1006 (1009) * (Vol 4) 1917 Mad 355 (358).

[18] The Court should provide for somebody to supervise the administration by the trustees where there are several trustees. All of them should not participate in every detail of the administration. (1912) 23 Mad L Jour 134 (141, 152).

[19] But Court cannot be invested with wide general powers over institution—Such clause in scheme is *ultra vires*. (Vol 22) 1935 Mad 474 (475).

[20] The Court can provide that any person interested besides the trustee shall be at liberty to apply to the Court for directions to carry out the scheme. (Vol 26) 1939 Mad 605 (606, 607, 608) * (Vol 17) 1930 Mad 918 (920, 921) : 54 Mad 315. (Scheme providing that Court should fill up vacancies occurring in office of trustees appointed for five years — Such provision does not amount to modification of scheme and so Court can

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entertain application to fill up vacancies.) * (Vol 10) 1923 Pat 420 (421, 422).

[21] In the undermentioned cases it has been held that a reservation of a right to a person to ask the Court by way of application for a relief coming within S. 92 is *ultra vires*. (Vol 22) 1935 Mad 474 (475) * (Vol 15) 1928 Mad 268 (271) : 29 Cri L Jour 422 * (Vol 13) 1926 Mad 655 (655) * (Vol 13) 1926 Mad 557 (557, 558) * (Vol 18) 1931 Nag 82 (82) (F B).

[22] A contrary view is taken in the following cases. (Vol 5) 1918 Cal 530 (531) * (Vol 21) 1934 Pat 443 (446).

[23] The following cases held that a reservation of a right to seek by way of application, a modification or alteration of the scheme later on is *ultra vires*. (Vol 31) 1944 Mad 421 (421) * (Vol 16) 1929 Mad 625 (626) * (Vol 14) 1927 Mad 1073 (1078) : 51 Mad 81 (F B) * (Vol 13) 1926 Mad 559 (560, 561) : 49 Mad 580 * (Vol 16) 1929 Rang 20 (20) : 6 Rang 594 * (Vol 22) 1935 Sind 210 (210, 211) : 29 Sind L R 308 * (Vol 14) 1927 Sind 1 (10) : 21 Sind L R 220.

[But see (Vol 9) 1922 Mad 413 (414).]

[24] The undermentioned cases have taken a contrary view. (Vol 33) 1946 All 148 (149) : I L R (1946) All 107 * (Vol 23) 1936 All 97 (100) : 58 All 538 * (Vol 18) 1931 Bom 391 (394, 395) : 55 Bom 414 * (Vol 18) 1931 Bom 388 (389) * (Vol 28) 1941 Cal 618 (622).

[25] The undermentioned cases held that a scheme once framed by the Court can be modified or altered by the Court on sufficient grounds. (Vol 23) 1936 All 97 (101) : 58 All 538 * (Vol 11) 1924 Cal 330 (331) * (1913) 36 Mad 364 (368, 369). (A scheme framed by a Court under S. 92 bars a subsequent suit by a trustee not a party to the scheme suit, to establish his private rights to trust, which if established, would interfere with a charitable scheme made by Court.) * (1905) 23 Mad 319 (325) * (Vol 27) 1940 Oudh 421 (423) : 15 Luck 730 * (Vol 22) 1935 Pat 88 (89, 90) * (Vol 29) 1942 Rang 75 (75, 76).

[26] Appointment of a trustee—Provision in scheme giving authority to Court to appoint new trustee in place of deceased trustee—No modification of original scheme—Provision is not *ultra vires*. (Vol 24) 1937 Oudh 193 (194) : 13 Luck 81.

[27] Liberty to apply reserved in scheme to certain persons—No others can apply. (Vol 17) 1930 Mad 226 (227).

[28] Public trust—Scheme for management settled in decree in suit under S. 92—Alteration of scheme by persons not parties to previous decree—Suit under S. 92 is only remedy. (Vol 32) 1945 Sind 177 (180) : I L R (1945) Kar 224.

[29] Power to alter or modify—Any person interested in the institution can apply to modify scheme even if he was or was not party or representative to suit in which scheme was originally framed. (Vol 24) 1937 Bom 124 (129).

[30] Where an institution is governed by scheme, the power of Court to deal with matters arising under it being dependent upon the scheme itself, it has no jurisdiction to interfere except by some method provided by scheme itself even where trustee omits to comply with terms of scheme. (Vol 16) 1929 Mad 526 (527).

[31] Scheme under S. 92 is to be interpreted like an Act, and where District Court is referred to it is not the person but the tribunal that is meant. (Vol 11) 1924 Mad 369 (370, 371) : 47 Mad 139.

[32] As reasonable a construction as possible should be given to the scheme when the provisions are doubtful or defective. (Vol 1) 1914 Low Bur 226 (228).

[33] Scheme can be formed only if trust is public one. (Vol 21) 1934 All 315 (317).

[34] Where the gift was a private trust, the settlement of a scheme under S. 92 could not be ordered. (Vol 9) 1922 P C 253 (256) : 49 Ind App 100 : 49 Cal 459 (P C).

[But see (Vol 24) 1937 Cal 338 (341) : I L R (1937) 2 Cal 105. (Private trust—Civil Court is competent to entertain suit to establish scheme for administration of private debutter.)]

[35] Alterations in a scheme of management provided by the consent of all the persons interested in the endowment can be made only by a suit filed under S. 92 of the C. P. C. Where the scheme is the result of an award it cannot be altered by the consent of the parties. (Vol 6) 1919 Mad 731 (731, 732) (F B).

26. Clause (h)—“Such further or other relief.”

[1] “Such further or other relief” must be read *ejusdem generis* with Cls. (a) to (g). (Vol 19) 1932 Bom 65 (66) * (Vol 15) 1928 P C 16 (18) : 55 Ind App 96 : 55 Cal 519 (P C) * (Vol 12) 1925 All 683 (684) : 47 All 770. (Actual possession cannot be decreed against transferees.) * (1909) 33 Bom 509 (528, 530) * (Vol 4) 1917 Mad 112 (119) : 40 Mad 212 (F B).

[2] In S. 92, Civil P. C., the words “such further relief as the nature of the case may require” cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. (Vol 4) 1917 All 336 (337).

[3] Words “such further or other relief” do not imply some relief in addition to reliefs in Cls. (a) to (g)—Cls. (a) to (f) contemplate existence of trust whereas Cl. (g) refers to settling of scheme—Relief under Cl. (h) does not fall under any of Cls. (a) to (g). (Vol 23) 1936 Sind 179 (183) : 30 Sind L R 104.

[4] A Court has inherent power to pass a decree in a suit relating to trust, under S. 92 (h) appointing new trustees and directing old ones to deliver the properties to them. (Vol 6) 1919 All 83 (89).

[5] Suit for declaration of invalidity of appointment of a trustee by temple committee and for injunction for restraining him from acting is one under S. 92—Sanction is essential—It is one for direction for administration of public trust and falls under Cl. (1) (h)—It does not fall under Religious Endowments Act (20 [XX] of 1863), S. 14. (Vol 6) 1919 Mad 159 (160) : 42 Mad 668.

[6] Suit against trustee of temple for declaration that property in suit is public charitable property and injunction restraining trustee alienating it—Relief claimed is covered by S. 92, Cl. (h), and sanction is necessary. (Vol 23) 1936 Sind 179 (180, 183) : 30 Sind L R 104.

[7] Charitable trust—Relief claiming injunction restraining defendants from preventing plaintiffs from enjoying the uses and objects to which the property is dedicated—Collector's sanction is necessary for such suit. (Vol 17) 1930 Sind 204 (208).

[8] Prayer asking that property should not be permitted to be sold falls within Cl. (h). (Vol 23) 1936 Sind 179 (184) : 30 Sind L R 104.

[9] Clause (h) does not make S. 92 applicable to suits against strangers—Person in possession asserting property as his but admitting that he is executing trust—Such person is not stranger and suit under S. 92 can be brought against him. (Vol 24) 1937 Sind 230 (232) : 31 Sind L R 510.

[10] Relief to compel trustee to cease spending wakt income on secular objects and to apply entire income to religious purposes falls under S. 92 (1) (h) as it is of same nature as contemplated in S. 92 (1) (e). (Vol 29) 1942 Cal 343 (347) : I L R (1942) 1 Cal 211.

[11] Successor Mahant bringing suit for possession of debutter property mortgaged by previous Mahant—

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Section 92 (1) (h) is not applicable—Sanction under S. 92 is not necessary for such suit. (Vol 24) 1937 Lah 660 (662).

[12] A decree for payment of money is not outside S. 92. (Vol 14) 1927 Mad 416 (417).

[13] Succession Act (1925), S. 307 (2) (ii)—Object of S. 307 (2) (ii) is to enable District Judge as Court of testamentary jurisdiction to see that transfer applied for is necessary in the interests of administration of estate—Society to whom property is bequeathed desirous of converting it into money—Proper course is not under S. 307 but a suit under Civil P. C., S. 92. (Vol 18) 1931 All 212 (214) : 53 All 422.

[14] Suit under S. 92—No prayer for removal of trustee—Receiver can still be appointed by Court *pendente lite*. (Vol 10) 1923 Mad 224 (224).

27. Costs.—[1] Absence of misfeasance—Jurisdiction of Court in the matter ends—Order for costs from estate of trust cannot be passed. (Vol 3) 1916 Pat 306 (307).

[2] It is not customary to make a trustee personally liable unless he has done something that is not merely technically wrong but unreasonable and unrighteous. Where a trustee has utterly failed to carry out the directions in a trust and takes up an obstructing attitude during the course of litigation, Courts will be justified in awarding costs against the trustee. (Vol 23) 1936 Mad 495 (496, 497).

[3] Under S. 10, Charitable and Religious Trusts Act (14 [XIV] of 1920), the Court trying a suit under S. 92, Civil P. C., can direct the defendant either to furnish security for expenditure of the plaintiff's suit or to deposit a sum from money in his hands as trustee.

28. Declarations.—[1] Section 92 pre-supposes the existence of a trust. A suit for a declaration that certain property is trust property is not within the section. (Vol 29) 1942 Cal 1 (13) : I L R (1941) 2 Cal 434. (Declaration as to validity of wakf and that suit properties belong to wakf is beyond S. 92—Court can grant relief even if some of reliefs claimed could only be obtained under S. 92.) * (1903) 25 All 631 (634) * (Vol 27) 1940 Cal 236 (241) : I L R (1940) 1 Cal 14. (Request for education of Hindu boys and girls—Representative suit on behalf of Hindu boys and girls for declaration of trust in their favour—Suit does not fall under S. 92.) * (Vol 16) 1929 Lah 740 (741) * (Vol 15) 1928 Lah 888 (889) * (Vol 14) 1927 Lah 350 (350, 351) : 8 Lah 111 * (Vol 7) 1920 Lah 455 (455) * (Vol 6) 1919 Lah 56 (57) * (Vol 27) 1940 Mad 81 (81). (Suit by certain persons on behalf of villagers for declaration that alienations of temple property by pujaris thereof are void and not binding on temple is maintainable apart from S. 92.) * (Vol 20) 1933 Pat 246 (247) : 13 Pat 65 * (Vol 13) 1926 Pat 321 (326) : 5 Pat 539 * (Vol 29) 1942 Sind 137 (139) : I L R (1942) Kar 179.

[But see (Vol 18) 1931 Sind 87 (88). (Suit for declaration that certain property is charitable trust property and for injunction against pujari of temple against alienating same is governed by S. 92.)]

[2] The section does not bar a suit for declaration that the plaintiff is duly constituted mahant. (Vol 3) 1916 All 225 (225).

[3] Section 92 has no application to a suit for a declaration that the plaintiff and the defendant are co-mutwallis of wakf property and are entitled to manage it jointly. (Vol 6) 1919 All 335 (336).

[4] Suit for declaration of right to appoint trustees by founder of trust after death of original trustees without appointing their successors is not covered by S. 92. (Vol 14) 1927 All 257 (258) : 49 All 435.

[5] Public trust—Alienation by trustee—Suit for declaration—Section 92 applies—Specific Relief Act,

S. 42—Further relief not asked—Declaration should not be made. (Vol 9) 1922 All 349 (351, 352) : 44 All 622.

29. Suit must be in representative capacity.—[1] A suit brought under S. 92 is a representative suit. (Vol 4) 1917 Mad 389 (390) : 40 Mad 110 * (1906) 33 Cal 789 (804) * (Vol 6) 1919 Mad 1143 (1144) (Scheme of management can be claimed in representative capacity.) * (1911) 10 Mad L Tim 514 (514, 515) (A suit under S. 92 by two worshippers for removal of trustees and for framing a scheme is a representative suit.)

[2] Section 92 is inapplicable to the suits instituted by whole body of persons legally authorised to administer the trust under the will. (1907) 29 All 27 (28).

[3] Suit relating to public trust but merely relating to vindication of private rights—Suit does not fall within S. 92. (Vol 22) 1935 Mad 855 (856) * (Vol 11) 1924 Lah 181 (181) : 4 Lah 295 (Suit to protect private right as mahant.) * (Vol 14) 1927 Mad 338 (339) (Suit to vindicate public right—Section 92 applies.) * (1910) 7 Mad L Tim 45 (47, 48) * (Vol 11) 1924 Pat 502 (503) (Suit wherein questions as between two rival claimants have to be determined is not within the purview of S. 92.) * (Vol 8) 1921 Pat 511 (512).

[4] Public wakfs—Any person whose personal rights are infringed can sue in his individual capacity in respect of the wakf (Vol 14) 1927 Cal 130 (135).

[5] Plaintiff not suing in representative capacity but claiming to enforce his personal right as duly appointed mahant—Section 92 does not apply. (Vol 18) 1931 Lah 727 (728).

[6] Suit brought in individual capacity to establish individual claim as trustee does not come within S. 92. (Vol 18) 1931 Mad 801 (801) : 54 Mad 1011 * (Vol 14) 1927 Mad 820 (823).

[7] Claim based on plaintiff's personal right of possession, mingled with a claim based on breach of trust—Section 92 does not apply. (Vol 10) 1923 Pat 309 (316, 317).

[8] A general trustee whose duty it was to see that the temple funds in the hands of a special trustee were duly appropriated, can file a suit against special trustee without the previous sanction under this section, for the recovery of the amounts misappropriated and for appointment of another person in his place. (1898) 21 Mad 406 (408, 409).

[9] Suit by individual worshipper against trustee is competent without sanction under S. 92 where his individual rights are infringed. (Vol 14) 1927 Mad 551 (552, 555) * (Vol 4) 1917 Mad 868 (870).

[10] Suit by some worshippers as representing others against mutwalli for setting aside perpetual lease—Neither S. 14, Religious Endowments Act, nor S. 92, Civil P. C., applies. (Vol 6) 1919 Cal 179 (180, 181).

[11] Suit by one trustee against another for accounts—Sanction is not necessary. (Vol 10) 1923 Nag 298 (299) * (Vol 26) 1939 Mad 757 (759) * (Vol 25) 1938 Mad 92 (94) : I L R (1938) Mad 39 * (Vol 9) 1922 Mad 17 (20, 21) : 45 Mad 113 (FB).

[But see (1910) 4 Sind L R 152 (156).]

[12] Suit between trustee and non-trustee for recovery of trust property and for submission of accounts—Preliminary formalities are unnecessary. (Vol 12) 1925 Pat 544 (547) : 4 Pat 741.

[13] For a suit by a person having a special right such as one next entitled to be trustee, no sanction under the section is necessary. (1913) 24 Mad L Jour 48 (48, 49).

[14] A suit by the disciples of a mutt under O. I, R. 10, to set aside a compromise decree entered into by the head of the mutt or an alienation by him for purposes not binding on the mutt, can be maintained.

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Sanction under S. 92, is not necessary for the purpose. (Vol 2) 1915 Mad 915 (917, 918).

[15] Suit by co-trustee to establish his joint right of management—Section 92 does not apply. (Vol 14) 1927 Mad 948 (950).

[16] Hindu religious endowment—Suit for declaration of right of joint possession by an heir of founder against another in possession—No prayer for scheme—Suit is maintainable. (Vol 8) 1921 Mad 388 (392) : 44 Mad 205.

[17] Suit by person claiming to be trustee of property dedicated for religious purposes, against rival trustee, for declaration that he is trustee and entitled to manage institution as such does not fall under S. 92. (Vol 25) 1938 Lah 869 (874, 875) (Vol 26) 1939 Mad 594 (594) * (Vol 18) 1931 Nag 198 (198, 200) : 27 Nag L R 299 * (Vol 18) 1931 Rang 322 (324) : 9 Rang 459.

[18] Section 92 does not cover suits relating to disputes between parties as to who is to be a mutwalli on the ground of family relationship. (Vol 2) 1915 All 25 (26) : 37 All 86.

[19] Suit by trustee against banker for trust money—Section 92 does not apply. (Vol 25) 1938 Mad 999 (1004) : 1 L R (1939) Mad 121.

[20] Suit by trustee against dismissed servant for account of trust money—Section 92 does not apply. (Vol 8) 1921 Mad 403 (403).

[21] Suit by trustees on their own behalf and in discharge of their own functions as trustees is outside scope of S. 92. (Vol 27) 1940 Cal 376 (377).

[22] Dispute between beneficiary and trust through mutwalli does not come within S. 92—Decree in favour of beneficiary cannot be passed in suit under S. 92. (Vol 32) 1945 All 69 (70) : 1 L R (1944) All 561.

[23] Trustee of public charitable trust dying leaving behind him his widow as trustee—Suit by next reversioner to office of trusteeship against widow alleging mismanagement of trust and praying for appointment of receiver for management of property—Suit is governed by S. 92 and must be in conformity with its provisions. (Vol 26) 1939 Mad 65 (65, 66).

30. "Two or more persons having an interest".—

[1] Phrase "two or more persons" means two or more individuals who are named or so described in the consent that they can be identified. (Vol 28) 1941 Sind 88 (91) : 1 L R 1941 Kar 204.

[2] Two persons referred to in S. 92 are two individuals and the fact that the two persons were father and son and members of a joint Hindu family would not convert them into one person. (Vol 31) 1944 All 1 (3) : 1 L R (1944) All 20.

[3] The "person" in S. 92 need not necessarily be *sui juris*. An infant may, through a properly represented next friend, bring a suit, if he is interested in the public charitable or religious trust. (1910) 6 Ind Cas 119 (119) (Cal).

[4] Where the object of suit is to secure certain advantages to a trust, any two persons can sue in that behalf with the sanction of the Advocate-General or the Collector of the district concerned. (Vol 4) 1917 Mad 868 (870).

[5] Plaintiff's absence of interest in trust—Advocate-General's written consent is useless. (Vol 11) 1924 P C 221 (223) : 4 Pat 34: 51 Ind App 332 (P C).

[6] A suit relating to public should not be brought except with the consent of the Advocate-General, unless the plaintiffs have a special claim or claim a special interest under and by virtue of the trust. (Vol 4) 1917 Cal 678 (678) * (Vol 2) 1915 Mad 915 (916) (Person specially interested in mutt property can sue for setting aside fraudulent decree without sanction.)

[7] Persons suing need not be personally affected—

It is enough if they have interest in the trust. (Vol 14) 1927 Mad 462 (464) : 50 Mad 726.

[8] The interest must be a clear or a present and substantial interest and not a remote, fictitious or purely illusory interest; it must be an existing interest and not a mere contingency. (Vol 6) 1919 Mad 384 (396) : 42 Mad 360 (S B) * (Vol 29) 1942 All 315 (318). (Plaintiffs, local Hindus and Brahmans, not asserting interest of any kind abstract or concrete—They cannot maintain suit under S. 92.) * (Vol 10) 1923 Lah 518 (519) * (Vol 13) 1926 Mad 466 (467, 468) * (Vol 13) 1926 Mad 267 (268) (Temple trust—Hindus of neighbouring villages attending the temple on important occasions can sue under S. 92.) * (Vol 7) 1920 Mad 238 (240) * (Vol 25) 1938 Rang 339 (342) : 1938 Rang L R 276.

[9] Whether plaintiff has interest within S. 92—Each case must be considered on its own facts—It is dangerous to apply conclusions of decided cases—But it is useful to observe what principles have been applied: (Vol 29) 1942 All 315 (317) * (Vol 8) 1921 Mad 563 (564) * (Vol 6) 1919 Mad 384 (396) : 42 Mad 360 (S B) (Whether plaintiffs have necessary interest is question of fact.) * (1909) 32 Mad 131 (132, 133) (Subscribers of society suing office-bearers for their removal—Advocate-General's consent not obtained—Suit is not maintainable.)

[10] Definition of "interest" in S. 15, Religious Endowments Act, should not be imported in S. 92. (Vol 6) 1919 Mad 384 (396) : 42 Mad 360 (S B).

[11] Persons who are in the habit of worshipping at a temple have sufficient interest within S. 92 to enable them to institute a suit under that section. (Vol 19) 1932 All 708 (709) * (1897) 24 Cal 418 (427) * (Vol 5) 1918 Lah 76 (77, 78) * (Vol 23) 1936 Mad 495 (496). (Trust for establishment of choultry and for building temple—Temple not built—Still, persons interested in the temple being built can bring scheme suit.) * (Vol 12) 1925 Mad 1011 (1012) * (Vol 20) 1933 Oudh 22 (24) : 8 Luck 266 * (Vol 11) 1924 Oudh 261 (263, 264) : 27 Oudh Cas 149.

[12] Mere right to worship in a temple is not such an interest as is sufficient to enable the plaintiffs to sue under S. 92. (Vol 6) 1919 Mad 384 (396) : 42 Mad 360 (S B) * (Vol 17) 1930 Lah 1 (6) : 11 Lah 142 * (Vol 13) 1926 Lah 425 (425) * (Vol 12) 1925 Rang 294 (294) : 3 Rang 213.

[13] Persons entitled to worship can sue. (Vol 32) 1945 Sind 177 (187) : 1 L R (1945) Kar 224. (Temple with Granth Sahib as only object of worship—Sikhs have interest within S. 92 in temple and its property.) * (Vol 12) 1925 Lah 189 (191) : 5 Lah 455 * (Vol 5) 1918 Oudh 207 (209) * (Vol 20) 1933 Sind 213 (220) * (1913) 7 Sind L R 129 (131).

[14] The residents of the locality where the choultry is situate and who are also members of the community for whose benefit the charity was founded are persons having an interest in the charity within the meaning of S. 92. (Vol 6) 1919 Mad 943 (944) * (Vol 10) 1923 Lah 513 (519) (Trust providing for maintenance of widows and orphans of certain caste and dedicating building as *dharamsala*—Some members of caste living in *mohalla* in which institution is situate can maintain suit.) * (Vol 7) 1920 Mad 238 (240) * (Vol 21) 1934 Pesh 57 (61). (Residents of locality using mosque.)

[15] Mere residence in the locality of mosque does not give necessary interest. (Vol 13) 1926 Mad 466 (467, 468).

[16] Founder laying down persons in whom right of control is vested—It is not only such persons that can sue. (Vol 16) 1929 Lah 428 (428).

[17] Descendants or collaterals of founder of trust have interest therein and can sue. (Vol 11) 1924 P C

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221 (224) : 51 Ind App 282; 47 Mad 884 (PC) (Descendants in female line from founder.) * (Vol 31) 1944 All 1 (3) : I L R (1944) All 20 (Plaintiffs descendants of founder and interested in upkeep of temple and dharamshala.) * (Vol 16) 1929 Lah 428 (428) (Collaterals.) * (Vol 8) 1921 Mad 563 (564) (Descendants of founder in female line.)

[18] Beneficiaries can sue trustees in respect of trust. (Vol 14) 1927 All 518 (519) * (Vol 8) 1921 Bom 297 (299) : 45 Bom 683 (Pujari suing temple servants for share in offerings.) * (Vol 15) 1928 Mad 263 (270) (Property dedicated to chattram under trust — Persons entitled to receive food in the chattram can sue.)

[19] Any person interested in management though not mutawalli is entitled to question alienation. (Vol 2) 1915 Mad 1044 (1045).

[20] A trustee is a person interested in the trust and can be a plaintiff. (Vol 12) 1925 Mad 820 (821).

[21] Persons who contribute to trust fund are entitled to sue. (Vol 19) 1932 All 708 (709) * (Vol 12) 1925 Mad 1011 (1012).

[22] Suit by person in private capacity is not barred. (Vol 16) 1929 Bom 193 (194).

[23] A member of a church need not sue by virtue of an office. (Vol 4) 1917 Mad 431 (435) : 39 Mad 1056.

[24] Sikhs have no such interest in an udasi shrine as to entitle them to institute suit in respect thereof. (Vol 13) 1926 Lah 100 (106) : 7 Lah 275.

31. Trust must be for public purposes.—[1] For suit under S. 92, plaintiff must prove creation of trust for public purpose and that it has been broken. (Vol 23) 1936 Mad 449 (460).

[2] Absence of dispute about existence of trust is not necessary for application of the section. (Vol 11) 1924 Pat 657 (659, 660) : 3 Pat 842.

[3] Section is not confined to admitted trust—Nature of institution can be determined. (Vol 21) 1934 Bom 257 (260).

[4] Mere denial by trustee of existence of trust to property in his possession does not oust jurisdiction of Court. (Vol 23) 1936 Mad 449 (451) * (Vol 21) 1934 Nag 277 (277) (Defendant denying trust — Suit for mere declaration without further relief of possession can be brought.) * (Vol 19) 1932 Pat 33 (52) : 11 Pat 288 (Section 92 applies although trust is not admitted.)

[5] The words “any express or constructive trust” in S. 92 should be construed liberally and in a sense as favourable as possible to the assumption of jurisdiction by a Court under that section wherever there is a fair ground for affirming the existence of a trust. (1911) 8 All L Jour 1120 (1124, 1126).

[6] “Express or constructive trust” is not limited to “trust” as in English law—Constructive trustee includes the head of a mutt. (Vol 14) 1927 Mad 614 (617) : 50 Mad 567.

[7] Suit to enforce trust contained in will and other trust not completed are not contemplated by this section. (Vol 4) 1917 Mad 1008 (1008).

[8] Section 92 applies only in cases of an express or constructive trust created for a public charitable purpose. It applies only to a suit against a trustee and not to a suit against a trespasser. (1912) 23 Mad L Jour 347 (347) * (Vol 1) 1914 All 408 (410) : 37 All 12 * (Vol 1) 1914 All 394 (395) * (Vol 7) 1920 Cal 210 (215) (Section 92 cannot be extended to private trusts.) * (Vol 14) 1927 Oudh 604 (604) * (Vol 19) 1932 Pat 33 (48) : 11 Pat 288.

[9] Suit under S. 92 — Court can decide whether trust is public charitable trust — Separate suit is not necessary. (Vol 22) 1935 Cal 805 (807, 808) : 63 Cal 74 * (Vol 4) 1917 Oudh 375 (376, 378) : 20 Oudh Cas 49 (Court may consider the nature of the traditions or the

usages of an Asthal to determine whether the trust is a public or a private trust.) * (Vol 8) 1921 Pat 511 (512).

[10] Public or private — Presumption is in favour of public dedication. (Vol 21) 1934 P C 230 (231, 233, 234) : 61

Ind App 405 : 58 Mad 91 (P C). (There is no presumption as regards temples in Malabar that they are public charitable trusts — They must be established to be so on evidence.)

[11] Court should be slow to interfere in matter which is more private than public. (Vol 2) 1915 Low Bur 67 (70).

[12] The act of a trustee of a private trust cannot be impeached by a person having no interest in the trust property. (Vol 7) 1920 Oudh 120 (122) * (Vol 7) 1920 Cal 210 (215) * (1910) 33 Mad 265 (283, 284).

[13] Advocate-General is not concerned with private trusts. (Vol 8) 1921 Bom 338 (350).

[14] Beneficial interest in private trusts is vested in definite individuals — In public trust it is vested in a fluctuating body. (Vol 9) 1922 All 519 (520).

[15] In the following cases it was held that trusts were for public purposes:—

(a) Deed of endowment silent as to nature of trust—Trust held to be public trust on basis of extrinsic evidence. (Vol 5) 1918 Oudh 207 (208).

(b) Tope utilized as a place of shelter for villagers and cattle. (Vol 24) 1937 Mad 862 (863).

(c) Mosque founded to perpetuate the memory of a departed man is a public religious institution if the public use it as a matter of right and an inam has been granted for its upkeep. (Vol 5) 1918 Mad 1155 (1157, 1158).

(d) Provision for maintenance of khankah. (Vol 19) 1932 Pat 33 (51) : 11 Pat 288.

(e) Only one-third income dedicated to public purposes — Trust held public trust. (Vol 25) 1938 Cal 278 (280).

(f) Facts *prima facie* indicating temple to be for public charitable purpose. (Vol 25) 1938 Bom 471 (476, 477).

(g) Use, worship and offerings by the public are obvious indications. (Vol 11) 1924 Pat 502 (503).

(h) Creating scheme of loans for educational purposes at low rate of interest. (Vol 26) 1939 Mad 920 (921, 922) : I L R (1940) Mad 300.

[16] In the following cases it was held that trusts were not for public purposes:—

(i) Fact that the income of certain property has been for long spent in feeding an idol and in maintaining and taking care of pilgrims. (1911) 8 All L Jour 1120 (1124).

(ii) Major portion of trust property assigned to private trust — Small portion reserved for charity. (Vol 22) 1935 Sind 235 (242).

(iii) Suit by an executor of a Hindu will against his co-executor for restraining him from meddling with property — Plaint containing no suggestion that there was a charitable trust. (Vol 3) 1916 Bom 281 (281, 282) : 40 Bom 439.

(iv) Suit for a declaration that a certain property is wakf. (Vol 23) 1936 Lah 283 (285) * (Vol 15) 1928 All 660 (663) : 51 All 30.

(v) Person building a temple either out of his own funds or funds collected from subscriptions. (Vol 13) 1926 Mad 1150 (1152).

(vi) Suit for declaration that a pathway is public and for injunction to remove obstruction. (Vol 8) 1921 Cal 405 (406). (Such a suit is one under O. 1, R. 8.)

[17] Public trust—Misappropriation of trust property, trustees and beneficiaries colluding—Suit by descendant of founder challenging misappropriation is maintainable and is not covered by S. 92. (Vol 20) 1933 Lah 670 (671).

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[18] Constructive trustee—Such person intermeddling with charitable property and making himself trustee—Action is within S. 92. (Vol 23) 1936 Sind 179 (182) : 30 Sind L R 104.

[19] Section applies to the case of persons who are trustees '*de son tort*'. (Vol 4) 1917 All 264 (265) * (Vol 11) 1924 All 884 (890) : 47 All 17* (Vol 9) 1922 All 542 (544) : 44 All 652* (Vol 12) 1925 Mad 212 (213)* (Vol 1) 1914 Oudh 408 (409, 410) : 18 Oudh Cas 38 * (Vol 21) 1934 Pat 321 (324).

[20] Public charities—Defendant neither constructive trustee nor a trustee *de son tort*—Suit does not lie. (Vol 10) 1923 All 247 (248)* (1906) 33 Cal 789 (807).

[21] Person succeeding to religious institution as son and chela of his father held could not be described as trustee *de son tort*. (Vol 27) 1940 Lah 356 (358).

[22] Trust must be for public purpose and of charitable or religious nature. (Vol 10) 1923 Mad 376 (378) : 46 Mad 300.

[23] In construing S. 92, "public trust of a charitable or religious nature" should be given their ordinary meaning and cannot be made to vary according to the classification of trusts which may be adopted in different systems of law. (1936) 14 Rang 575 (592).

[24] Religious endowment—Essential ingredients are Sankalp and Samarpans, whereby owner completely divests himself of the ownership in property dedicated. (Vol 20) 1933 Lah 189 (191).

[25] Public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion. (Vol 29) 1942 Cal 343 (346, 349) : ILR (1942) 1 Cal 211.

[26] In the following cases it was held that trust was for charitable and religious purposes :

(a) Mutts. (Vol 3) 1916 Mad 332 (337) : 38 Mad 356.

(b) Grant to specific persons as servants of a mosque for expenses of lamp, oil, etc. (Vol 6) 1919 Mad 225 (226).

(c) Where a temple is open to public worship and the usual religious festivals are conducted. (Vol 5) 1918 Oudh 207 (208, 209, 210).

(d) Gift for charitable purposes should be construed as one for public purposes unless contrary intention is clearly expressed—In creating charitable trust settlor directing preference to be given to relations—Trust still deemed for public purposes. (Vol 26) 1939 Rang 203 (204, 205) : 1939 Rang L R 520.

(e) Providing for the maintenance of the trustee, for fakirs to go about preaching the faith of the Guru and for the visitors. (1911) 11 Ind Cas 166 (167, 170) (All).

(f) Wakf—Distributing alms to or feeding poor. (Vol 29) 1942 Sind 137 (139) : I L R (1942) Kar 179.

(g) The mausoleum, mosque and *Khangah* of a religious Mahomedan who was the founder of a new religious order and to whom there could be no succession under any recognised rules. (Vol 4) 1917 Oudh 81 (85).

(h) Library. (Vol 28) 1941 Cal 68 (72, 77).

(i) Allotting property for benefit of poor members of particular community. (Vol 26) 1939 Sind 13 (14, 15) : I L R (1939) Kar 325.

[27] In the following cases it was held that trust was not for charitable and religious purposes :—

(i) Trust for the benefit only of the members of testator's own family. (1936) 14 Rang 575 (593).

(ii) Part of income of property spent in upkeep of temple dedicated for public worship is insufficient to prove that the corpus of the property is dedicated to the use of the temple. (Vol 2) 1915 Oudh 181 (184).

(iii) Inam grant for service of Acharyapurusha exclusively. (Vol 3) 1916 Mad 331 (332).

[28] The fact that a temple is used for caste meetings and that moneys belonging to temple have not been spent on the temple itself but on various objects tending to promote the benefit of the caste, does not prove that the temple is private property of the caste. (Vol 4) 1917 Mad 426 (428).

[29] Charitable corporations being trustees of the corporate properties are subject to jurisdiction of Court. (Vol 18) 1931 Mad 12 (14) : 53 Mad 737.

[30] The head of the *mutt* holds the devasthanams and other properties with which they are endowed as a trustee whether he is to be considered as a trustee of the *mutt* itself or not. (Vol 8) 1921 P C 84 (86) : 44 Mad 283 : 48 Ind App 1 (P C)* (1935) 62 Cal L Jour 153 (171)* (Vol 14) 1927 Mad 614 (615, 617) : 50 Mad 567* (Vol 5) 1918 Mad 984 (985) : 40 Mad 745 * (1909) 19 Mad L Jour 772 (777, 778).

[But see (Vol 5) 1918 Mad 1016 (1017).]

[31] Mutwallis of wakf property are not trustees within the meaning of this section. (Vol 25) 1938 Rang 339 (342) : 1938 Rang L R 276.

[32] Religious endowment—Trust property—Dharmakarta claiming trust property as his own—Entry in revenue records in the name of his ancestor but as Dharmakarta—*Held*, the property belonged to the temple and was not private property of the trustee. (Vol 9) 1922 P C 325 (332) : 45 Mad 565 : 49 Ind App 237 (P C).

[33] The only law as to Mahants and their offices, functions, and duties, is to be found in the customs and practice, which is to be proved by testimony. (1867) 11 Moo Ind App 405 (428) (P C) * (Vol 22) 1935 Pat 111 (113, 114) : 14 Pat 379.

[34] The onus of proving that a temple is a public temple in respect of which the reliefs are claimable under section 92 is on the plaintiff. (Vol 5) 1918 Mad 1179 (1181, 1182).

[35] Question whether temple is public or private is one of fact—Hindu public freely using a temple for centuries without permission—Strong evidence is required to prove the temple to be private. (Vol 15) 1928 Mad 879 (884).

[36] Temple whether public or private—Comparative evidence of other temples being public or private even if admitted by parties or held by Court to be proved should be excluded. (Vol 15) 1928 Mad 879 (881).

[37] Inam proceedings are of great importance in deciding the question as to whether a temple is public or private. (Vol 15) 1928 Mad 879 (883).

32. Valuation of suit. — [1] A suit under S. 92 generally involves a question upon which no pecuniary value can be placed and the case clearly falls under Art. 17, Cl. (6) of Sch. II of the Court-fees Act. (1910) 12 Cal L Jour 211 (215) * (Vol 15) 1928 Lah 113 (113) : 8 Lah 730 * (Vol 30) 1943 Oudh 186 (190) : 18 Luck 788.

[2] Suit under S. 92—No beneficial interest asked for by plaintiff—Prayer to compel trustees to restore to trust misappropriated sums—Art. 17 Cl. (6) of Court-fees Act applies. (Vol 12) 1925 Mad 722 (722).

[3] Suit for removal of old Mahant, appointment of new Mahant and vesting of trust property in new Mahant is competent under S. 92—*Ad valorem* court-fee on value of trust property is necessary. (Vol 5) 1918 Lah 146 (147) : 1918 Pun Re No. 97.

[4] Suits under S. 92 are not exempt from court-fee. (Vol 14) 1927 Mad 940 (942).

^a93. The powers conferred by sections 91 and 92 on the Advocate-General may, outside the *Exercise of powers of Advocate-General outside Presidency-towns.* Presidency-towns, be, with the previous sanction of the ^b[Provincial Government] exercised also by the Collector or by such officer as the ^b[Provincial Government] may appoint in this behalf.

[1882—S. 539, last para ; 1877—S. 539, last para.]

[a] This section has no application as regards Tirumalai-Tirupati Devasthanams : See the Tirumalai-Tirupati Devasthanams Act (Madras Act 19 [XIX] of 1933), S. 44 (2).

[b] Substituted by A. O. for "Local Government".

PART VI.

SUPPLEMENTAL PROCEEDINGS.

94. In order to prevent the ends of justice from being defeated the Court may, if it is so pre-
Supplemental proceedings. scribed,—

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

[See Orders 38, 39, 40.]

Section 93—Note 1.

[1] Previous sanction of Local Government is necessary even when suit is instituted by Collector or with consent of Collector or officer appointed by Local Government and a suit instituted without such sanction is liable to be dismissed. (Vol 19) 1932 P O 51 (54) : 59 Ind App 121: 53 All 990 (PC) (Case decided before the passing of the Public Suits Validation Act (11 [XI] of 1932).)

[2] Where the suit was pending on the date of the passing of the Public Suits Validation Act, it was held that it was not necessary for the plaintiffs to obtain sanction from the Provincial Government during the pendency of the suit. (Vol 20) 1933 Oudh 22 (24) : 8 Luck 266.

[3] Legal Remembrancer invested with duties of Advocate-General in U. P. — Suit outside presidency-town may be brought either by Collector or any officer appointed by Local Government for it. (Vol 18) 1931 P C 121 (124) : 53 All 910 : 58 Ind App 460 (PC).

[4] Suit under S. 92, Civil P. C., dismissed as consent of Collector not being in order—Subsequent passing of Public Suits Validation Act (11 [XI] of 1932)—Restoration of suit on petition under S. 3 of the Act—Court has to proceed with the suit and cannot enquire into the validity of consent and dismiss suit on that ground. (Vol 23) 1936 Cal 815 (816).

[5] Where the Collector fixes time within which the suit should be instituted, it is illegal—Suit may be instituted beyond time. (1937) 1937 Mad W N 1319 (1320).

[6] The consent of the Collector in Sind is enough, and that of the Advocate-General of Bombay is unnecessary, in order to institute a suit under the section. (1913) 7 Sind L R 129 (132).

"Previous sanction of the Provincial Government."
— [7] See the Public Suits Validation Act, 1932, which was enacted to validate certain suits instituted under Ss. 91 and 92 which were held to be invalid by reason of the previous sanction of the Provincial Government in respect thereof not having been obtained as required by this section.

Section 94—Note 1.

[1] As to the applicability of the provisions of this section to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, see section 7 (b).

[2] 'Prescribed' in S. 94 means 'prescribed by rules.' (Vol 25) 1938 Mad 190 (191).

[3] By virtue of S. 7, Cls. (c) and (e) of S. 94 do not extend to Provincial Small Cause Courts. (Vol 6) 1919 Cal 6 (6) : 46 Cal 717.

[4] Section 94 and O. 39 must be read together. (Vol 5) 1918 Mad 340(341) (Vol 13) 1926 Mad 258(258).

[5] Order 39, R. 2 (8) applies also to disobedience of all injunctions issued under S. 94. (Vol 13) 1926 Mad 574 (575).

[6] Interlocutory injunction — Applicant must make out a *prima facie* case that he is entitled to relief. (Vol 15) 1923 Cal 464 (465) : 55 Cal 978.

[7] Breach already committed — Injunction though cannot be granted under O. 39, R. 2, Court can grant it in its inherent powers. (Vol 20) 1933 Lah 73 (74).

[8] Court dismissing application for attachment before judgment on party's undertaking not to do certain act—Order amounts to injunction and Court has power to deal with breach of such undertaking. (Vol 23) 1936 Mad 651 (652).

[9] Powers of Subordinate Courts to issue injunction and punish disobedience thereof are confined within O. 39—Section 151 cannot be invoked to add to powers conferred by O. 39 — Mere act of taking possession in execution of decree after 'interim stay' order does not amount to breach of injunction punishable under O. 39. (Vol 25) 1938 Mad 190 (192).

[10] Suit for money due under agreement—Plaintiff, District Local Board, Karachi, receiving part of money due from defendant pending suit and attempting to recover the rest by summary procedure under District Local Boards Act — Court held should issue interim injunction by exercising its inherent power. (Vol 21) 1934 Sind 179 (179, 180).

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

95. (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section, —

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

[1882—Ss. 491, 497 ; 1877—Ss. 491, 497 ; 1859—Ss. 88, 96; See S. 94 and O. 38 to O. 40.]

Section 94 (*conid.*)

[11] One Court cannot issue injunction to another Court—Court has no sanction to enforce such injunction under S. 94. (Vol 22) 1935 Pesh 182 (184).

[12] Bengal Tenancy Act (1885), S. 40—Civil Court is not competent to issue injunction to party to proceedings under S. 40 restraining him from proceeding with his application. (Vol 7) 1920 Pat 423 (423) ; 5 Pat L Jour 76.

[13] See also O. 39, Rr. 1 and 2.

"*Interlocutory orders.*"—[14] Documents in possession of panchayat—Court can compel production. (Vol 15) 1928 Mad 299 (305) ; 51 Mad 1 (FB).

[15] An order directing the furnishing of security and submission of accounts passed on an application for the issue of temporary injunction is one under S. 94 (e), for the ends of justice and the High Court should not set it aside under S. 115. (1913) 17 Cal W N 318 (319).

[16] Court has summary power to pass interim order in respect of property to which *prima facie* company is entitled under S. 185, Companies Act. (Vol 20) 1933 Lah 437 (439) ; 14 Lah 68.

SECTION 95 — SYNOPSIS.

1. Scope of the section.
2. Arrest or attachment before judgment.
3. Attachment or arrest must have been on insufficient grounds.
4. "Or the suit of the plaintiff fails."
5. Procedure for obtaining compensation under this section.
6. Compensation, amount and basis of.
7. Court, which can grant compensation.
8. Provincial Small Cause Court.
9. Regular suit, when barred.

1. Scope of the section.—[1] Section 95 is not inapplicable to cases in which plaintiff happens to be minor. (Vol 22) 1935 Mad 886 (887) ; 59 Mad 415.

[2] Word "plaintiff" in S. 95 is confined to the plaintiff and does not include next friend—Injured party however can sue to recover compensation from next friend. (Vol 28) 1941 Mad 719 (720) ; I L R (1941) Mad 985.

[3] Section 95 is not applicable to suits under ordinary original civil jurisdiction by virtue of Bombay High Court Rules (Original Side), R. 329. (Vol 13) 1926 Bom 523 (524).

[4] See also S. 250, Criminal P. C., which is analogous to this section.

2. Arrest or attachment before judgment.—[1] Suit for damages for attachment before judgment on insufficient grounds—Attachment not effected—No cause of action exists. (Vol 12) 1925 Bom 357 (357, 359) ; 49 Bom 629 & (Vol 26) 1939 Rang 260 (261). (Mere order for attachment not enough.)

[2] A defendant who has been arrested can be granted compensation though he did not receive the summons. (1891) 15 Bom 160 (162, 163).

[3] Section 95 does not exclude attachments under O. 38, R. 5 (3). (Vol 6) 1919 Mad 20 (20) & (Vol 19) 1932 Cal 92 (93).

3. Attachment or arrest must have been on insufficient grounds.—[1] To get compensation the party should affirmatively prove that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. (Vol 27) 1940 Mad 77 (80).

[2] Attachment granted only on ground of difficulty to plaintiff to realize his decree is on insufficient grounds. (Vol 21) 1934 Oudh 429 (430).

[3] Question under 95 (a) is whether there are sufficient grounds and not whether sufficient grounds are stated in application for attachment. (Vol 24) 1937 Nag 126 (126, 127) ; I L R (1938) Nag 361.

[4] Application for removal of attachment dismissed and attachment withdrawn on deposit of amount—No allegation in application that attachment was obtained on insufficient grounds—Subsequent application for compensation under S. 95 held was not maintainable. (Vol 29) 1942 All 261 (263) ; I L R (1942) All 360.

4. "Or the suit of the plaintiff fails."—[1] Per *Fletcher J.* : The want of probable cause is not to be inferred because of mere evidence of malice. (Vol 2) 1915 Cal 173 (175) ; 42 Cal 550.

5. Procedure for obtaining compensation under this section.—[1] Section does not prescribe any particular procedure by which a defendant wrongfully arrested should claim compensation; it is enough if the Court becomes seised of the matter on an application made. (Vol 4) 1917 Mad 885 (885) (Counter petition held sufficient.)

[2] Injunction passed after hearing both parties on sufficient grounds being found—Injunction dissolved after payment of security—Order for compensation, if it is to be passed, should not be passed till disposal of suit. (Vol 10) 1923 Mad 352 (353).

[3] Where an attachment before judgment is ordered and the property is attached, unless the order of attach-

P A R T VII.

A P P E A L S.

APPEALS FROM ORIGINAL DECREES.

96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree⁶ passed by *Appeal from original decree.* any Court exercising original jurisdiction to the Court authorized to hear appeals⁷ from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.⁸

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.⁹

[1882—S. 540; 1877—Ss. 540, 575; 1861—S. 28; See Order 41.]

Objects and Reasons.

See paragraph 11 of the Statement of Objects and Reasons given at the beginning of this Code.

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ment is set aside, an application for compensation cannot be entertained. (Vol 21) 1934 Mad 638 (639).

[But see (Vol 27) 1940 Mad 77 (78) ((Vol 21) 1934 Mad 638, dissented from.)]

6. Compensation, amount and basis of.—[1] Order refusing application under S. 95 without reasons is not according to law. (Vol 21) 1934 Oudh 429 (431).

[2] The words "expense or injury caused to the defendant" are not confined only to some tangible injury that can be measured directly in money but include also general damages for injury to reputation or the humiliation caused of necessity by the arrest. (Vol 4) 1917 Mad 885 (886) & (Vol 27) 1940 Mad 77 (79).

[See also (Vol 13) 1926 Mad 962 (962). (Arrest on insufficient grounds—No evidence as to damages—General damages should be awarded.)]

[But see (Vol 19) 1932 Cal 695 (696) : 59 Cal 1082 & (1936) 164 Ind Cas 73 (73, 74) (Cal) (Humiliation and loss of prestige will not be included in the term 'injury').]

7. Court, which can grant compensation.—[1] A defendant has to apply for compensation only to the Court ordering arrest, etc. (1865) 3 Suth W R (Misc) 28 (28).

8. Provincial Small Cause Court.—[1] As to the applicability of the provisions of this section to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, see S. 7 (b).

[2] A Small Cause Court can order attachment of moveables and also award compensation for a wrongful attachment thereof under this section, though it cannot do it with respect to immovable property. (Vol 2) 1915 Mad 1072 (1075) & (1903) 26 Mad 504 (504, 505).

9. Regular suit, when barred.—[1] Malicious proceedings—Attachment before judgment obtained maliciously—Order of attachment not vacated and rights of parties determined on basis that it was right—Suit does not lie. (Vol 19) 1932 Cal 821 (822) : 59 Cal 1073.

[2] A claim for compensation for wrongful attachment of property before judgment made in a counter affidavit disputing the propriety of the interim order is no bar to a suit for damages. (Vol 7) 1920 Mad 397 (398).

[3] Application under S. 95 does not bar a subsequent suit for damage caused by reaping and removal of the crop from the land which the plaintiff was prevented from entering by the Court's injunction. (1932) 1932 Mad W N 536 (536).

[4] It is not sufficient to show that the injunction was obtained on insufficient grounds; it must be proved also that the defendant knew them to be insufficient and acted from an improper motive. (Vol 31) 1944 Cal

289 (292, 293) : I L R (1944) 2 Cal 358. (Position if the order of the Court was void for want of jurisdiction or the act could be regarded as the act of the defendant himself or of the ministerial officer of the Court, fully discussed—English law on the point also discussed.) & (Vol 15) 1928 Cal 1 (6, 7).

[But see (1910) 13 Oudh Cas 357 (364, 365).]

[5] Malice is not necessarily hatred or enmity but any improper motive—If the motive for attachment is to enforce speedy payment, then also it is improper motive. (1912) 35 Mad 598 (602).

[6] Malice can be inferred from want of sufficient cause for application for injunction. (Vol 9) 1922 Lah 303 (304).

[7] A suit lies for maliciously and wrongfully obtaining a temporary injunction. (Vol 13) 1926 Cal 757 (760) (Plaintiffs' goods detained under S. 19A, Sea Customs Act, at the instance of defendant without reasonable cause—Plaintiff can recover damages.) & (Vol 14) 1927 Cal 247 (249) : 53 Cal 1008 & (Vol 9) 1922 Lah 303 (304).

[See (Vol 2) 1915 Cal 173 (176) : 42 Cal 550 (Per Richardson J.—Doubtful whether such a suit is maintainable in the absence of undertaking to pay compensation.)]

[8] A suit for damages cannot be maintained for obtaining maliciously and without reasonable cause a decree for perpetual injunction, which is set aside in appeal. (Vol 2) 1915 Cal 173 (175) : 42 Cal 550.

[9] Damages resulting from wrong attachment of stranger's property can be recovered from the decree-holder though he acts in good faith. (Vol 12) 1925 Nag 390 (391) & (1890) 17 Cal 436 (442) : 17 Ind App 17 (PC) & (Vol 16) 1929 Lah 200 (201).

SECTION 96 — SYNOPSIS.

1. Appeal against amended decree.
2. Appeal against consent decrees.
3. Appeal against ex parte decree.
4. Appeal—Meaning of.
5. "Appeal shall lie from every decree".
6. Applicability and scope.
7. "Court authorized to hear appeals".
8. Costs—Appeal as to—See S. 35.
9. Execution proceedings.
10. Nature of grounds—See O. 41, R. 1.
11. Powers of Appellate Court—See S. 107.
12. Right of appeal when lost.
13. Valuation for purposes of appeal.
14. Who can appeal.

1. Appeal against amended decree.—[1] An appeal lies from an amended decree where an amend-

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ment has the effect of appreciably adding to the right of the decree-holder. (Vol 2) 1915 Nag 37 (38):11 Nag L R 92.

[See also (Vol 19) 1932 Nag 143 (144): 28 Nag L R 245 (Appeal against decree passed on review — Appellant can ask for increase of amount awarded by original decree.)]

[2] No appeal lies against an order of amendment of decree but an appeal does lie from the amended decree. (1910) 11 Cal L Jour 81 (82).

[3] Decree amended by way of review or under S. 152. — Decree to be appealed against is amended decree. (Vol 18) 1931 Cal 578 (579).

2. Appeal against consent decrees.—[1] Compromise decree is not appealable. (Vol 20) 1933 Pat 306 (427):12 Pat 359*(Vol 7) 1920 Pat 721 (722):5 Pat L Jour 389 (No appeal to Privy Council.)*(1935) 156 Ind Cas 1035 (1035) (Pesh)*(Vol 20) 1933 Sind 29 (32):26 Sind L R 895.

[2] Indian Court declaring decree appealed from to be by consent—Appeal is incompetent. (Vol 19) 1932 P C 251 (251) (P C).

[3] Parties to suit agreeing that if party alleged to be deaf and dumb can talk and hear in presence of Court his claim to inheritance would be decreed—Decision of Court in pursuance of this agreement is consent decree —Appeal does not lie. (Vol 27) 1940 All 190 (192):1 L R (1940) All 185.

[4] Agreement arrived at during suit and signed by both parties—Decree passed in terms of the agreement —No appeal lies. (Vol 13) 1926 Bom 39 (40).

[5] Workmen's Compensation Act (8 [VIII] of 1923), Ss. 28 and 30 — Commissioner has power to pass any decree or order by consent of parties — Such decree or order is not appealable. (Vol 16) 1929 Bom 68 (69).

[6] Decree in accordance with adjustment—No appeal lies. (Vol 9) 1922 Lah 309 (311): 3 Lah 175.

[7] Objection against award decided—No appeal lies against decree which is in accord with terms of award. (Vol 16) 1929 Nag 264 (265):26 Nag L R 168.

[8] Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. (Vol 7) 1920 P C 139 (140): 47 Ind App 200 (P C).

[9] Parties agreeing to be bound by Court's finding — No appeal lies against finding. (Vol 8) 1921 All 310 (310): 43 All 266 *(Vol 13) 1926 All 90 (92) (Parties agreeing to produce only documentary evidence and to be bound by the decision thereon.)

[10] Parties agreeing that Judge should decide case after hearing documentary evidence and making local investigation — They further agreeing to accept his decision — Decision being virtually award is not appealable. (Vol 16) 1929 All 577 (577): 51 All 886 *(Vol 17) 1930 All 127 (128) (Parties calling upon Court to inspect spot and decide question from oral statements at spot — Court deciding question accordingly—No appeal lies.)*(Vol 21) 1934 Lah 176 (177): 15 Lah 726 *(Vol 23) 1936 Mad 856 (857) *(Vol 26) 1939 Pat 514 (516): 18 Pat 261.

[But see (Vol 10) 1923 Mad 444 (445): 47 Mad 39. (Parties requesting the Court to have a local inspection and agreeing to abide by its decision after such inspection—Right of appeal is not lost.)]

[11] Consent decree — Consent originally given but subsequently resiled from — Decree may yet be consent decree and no appeal will lie. (Vol 8) 1921 Mad 696 (699) *(Vol 9) 1922 Lah 309 (310, 311): 3 Lah 175 *(Vol 22) 1935 Cal 239 (240): 62 Cal 229 *(Vol 20) 1933 Pat 306 (427): 12 Pat 359.

[But see (Vol 2) 1915 Mad 322 (322).]

[12] Decree based on finding against consent of

one party is not consent decree. (Vol 5) 1918 Nag 129 (131).

[See (Vol 16) 1929 Sind 32 (35) (Person denying to be party to compromise can appeal.)]

[13] Every decree incorporating compromise under O. 23, R. 3 is not *ipso facto* consent decree — It may deal with only part of subject-matter of suit. (Vol 5) 1918 Nag 129 (130) (Sub-section (3) is limited to cases where parties invite Court to pass particular decree and Court acts accordingly.)

[14] Suit under S. 92 — Plaintiff approving appointment of persons as committee — No consent in other matters—Decree passed is not consent decree. (Vol 14) 1927 Lah 382 (382).

[15] Party offering to be bound by statement of certain person on oath — Decree passed on basis of such statement is not consent decree. (Vol 21) 1934 Lah 67 (67): 15 Lah 305.

[But see (1913) 1913 Pun L R No. 80, p. 304.]

[16] Consent to decree on Court's compulsion — Decree is not consent decree — Parties are not estopped from appealing. (Vol 10) 1923 Lah 129 (130).

[17] The fact that defendant does not raise any objection to a particular relief cannot make the decree a consent decree when the relief is eventually decreed. (Vol 5) 1918 Nag 66 (67): 15 Nag L R 39.

[18] Compromise decree passed without previous order that compromise be recorded — Decree is appealable. (Vol 4) 1917 Cal 607 (607): 43 Cal 85.

[19] Agreement to be bound by evidence of witness is not agreement to compromise the suit—Decree passed on such evidence — Decree is not consent decree and is appealable. (Vol 25) 1938 Nag 64 (65): 1 L R (1940) Nag 310.

[20] Decree given to avoid any further litigation though given with other party's consent is not consent decree and is appealable. (Vol 15) 1928 Mad 127 (128).

[21] Consent decree not limited to subject-matter of suit is appealable. (Vol 16) 1929 Sind 32 (36).

[22] A person who is not a party to the compromise, though a party to suit, can appeal against the compromise decree. (Vol 3) 1916 Cal 733 (735) *(Vol 12) 1925 Cal 421 (422) *(Vol 2) 1915 Cal 473 (474).

[23] Consent decree passed — One party remaining absent — Such party can appeal. (Vol 15) 1928 Mad 922 (922).

[24] Decree on compromise — Party verifying or admitting compromise on behalf of other without authority — Other party can appeal against decree. (Vol 16) 1929 Oudh 385 (387): 4 Luck 562 (F B).

[25] An appeal lies against a decree passed on compromise entered into by a vakil without reference to his client. (Vol 5) 1918 Mad 656 (657): 41 Mad 233.

[See however (Vol 20) 1933 Bom 205 (206): 57 Bom 206. (Compromise decree passed — In appeal party disowning authority of pleader or agent to compromise — Still then appeal does not lie under O. 43, R. 1 (m) — Such appeal is barred under S. 96 (3) — Remedy is to apply for review or under S. 151 to lower Court.)]

[26] *Per Roy J.* — Where the dispute is over the nature of a compromise, the party appealing has a right in appeal to show what the compromise was. (Vol 15) 1928 Cal 108 (109).

[27] Order of recording compromise does not cease to be appealable because it includes direction that decree be drawn up. (Vol 1) 1914 Lah 112 (113): 1914 Pun Re No. 96 *(Vol 31) 1944 Bom 239 (241): 1 L R (1944) Bom 405 *(Vol 23) 1936 Sind 59 (60): 29 Sind L R 437.

[But see (Vol 9) 1922 Mad 446 (446).]

[28] No appeal lies from an order made by consent of parties especially if the appellant has derived some

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benefit under it. (Vol 7) 1920 Cal 724 (724) * (Vol 3) 1916 Mad 795 (797) (Appointment of Commissioner by consent — Section 96 (3) does not apply.)

[See also (Vol 15) 1928 Lah 352 (353) : 9 Lah 176. (Suit compromised — Judgment omitting certain terms of compromise — Order correcting the omission can be made under S. 152 and is not appealable.)]

3. Appeal against *ex parte* decree. — [1] Appeal lies from an *ex parte* decree. (1886) 9 Mad 445 (446).

[2] Application to set aside *ex parte* decree rejected under O. 9, R. 13 — Same question cannot be re-agitated in appeal from decree. (Vol 7) 1920 Mad 962 (963) * (Vol 4) 1917 All 475 (477) : 39 All 143 * (Vol 14) 1927 Mad 1114 (1114).

[3] *Ex parte* decree passed — Application under O. 9, R. 13 dismissed in default — Appellate Court has power to consider propriety of *ex parte* order. (Vol 24) 1937 Nag 268 (269) : I L R (1937) Nag 519

[4] *Ex parte* decree — No application under O. 9, R. 13 — Appeal against decree — Appellate Court can question propriety of *ex parte* order. (1907) 30 Mad 54 (60) (F B) * (Vol 9) 1922 Bom 267 (270) : 46 Bom 184 * (Vol 15) 1928 Cal 812 (814) * (Vol 6) 1919 Cal 727 (728) * (Vol 9) 1922 Lah 439 (440) : 3 Lah 357 * (Vol 11) 1924 Mad 107 (108) * (Vol 16) 1929 Pat 609 (612) : 9 Pat 408 * (Vol 3) 1916 Sind 34 (34) : 9 Sind L R 191.

[But see (Vol 4) 1917 All 475 (476) : 39 All 143. (*Ex parte* decree — Remedy is to apply for restoration — Question of non-appearance cannot be considered in appeal.) * (Vol 12) 1925 Oudh 645 (646) : 28 Oudh Cas 85 * (Vol 11) 1924 Rang 137 (138) : 2 Rang 108 (In appeal from *ex parte* decree, question of service of summons cannot be considered which can be considered only under O. 9.)]

4. Appeal Meaning of. — [1] "Appeal" is any application by party to appellate Court to set aside or revise decision of subordinate Court. (Vol 19) 1932 P C 165 (167) : 60 Cal 1 : 59 Ind App 283 (P C).

[2] Appeal is a complaint made to the higher Court that the decree of the lower Court is unsound and wrong. (1874) 6 N W P H C R 19 (21) (F B).

[3] Appeal being a continuation of the original proceeding, the appellate Court's decree is the decree in the suit. (Vol 4) 1917 Mad 597 (598).

[4] There is no analogy between appeal and reference. (Vol 19) 1932 All 651 (653) : 54 All 891.

[5] Right of appeal is substantive right and the powers of the appellate Court are counterminous with those of the trial Court. Even when the appeal is dismissed, the appellate Court exercises its jurisdiction. But powers of Court of revision are entirely discretionary and even this power is limited. (Vol 18) 1931 Nag 17 (18) : 27 Nag L R 251.

[6] The words "an appeal" in S. 96 do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. (Vol 10) 1923 Pat 514 (516) : 2 Pat 789.

[7] If an appeal, even if it were successful, would be fruitless, it should be dismissed as incompetent. (1912) 15 Ind Cas 529 (529) (Cal).

5. "Appeal shall lie from every decree." — [1] No appeal lies from judgment but only from decree. (Vol 11) 1924 Cal 1006 (1007).

[2] In order to be decree for purposes of appeal a decision must be a final disposal whichever way it has been or may be decided. (Vol 16) 1929 Mad 404 (405).

[3] Unless a finding is of such a nature as to be sufficient for the decision of the suit and gives formal expression to its adjudication in the form of a decree it cannot give rise to a right of appeal in view of the plain terms of S. 96. (Vol 30) 1943 Nag 204 (207) : I L R

(1943) Nag 241 (F B) * (Vol 29) 1942 Bom 279 (280) * (Vol 11) 1924 Bom 33 (35).

[But see (Vol 6) 1919 Lah 53 (54) : 1919 Pun Re No. 66 (Failure to prepare decree — Appellant is not deprived of his right of appeal.)]

[4] Court finally deciding controversial matter in issue — Decision misnamed as "decretal order" — Decision forms decree over which appeal is remedy and not revision. (Vol 18) 1931 Mad 471 (474) : 54 Mad 387.

[5] Application for adjournment opposed — Court refusing adjournment and dismissing suit — Order is a decree and is appealable as such. (Vol 14) 1927 Rang 148 (149) : 5 Rang 338.

[6] Order striking off defendants against whom suit held not maintainable is decree and is appealable. (Vol 28) 1941 Pat 385 (387) : 20 Pat 417 : 42 Cri L Jour 375 * (Vol 18) 1931 All 333 (336) : 53 All 466.

[7] Order dismissing application for personal decree is a decree and is appealable. (Vol 32) 1945 Nag 289 (290) : I L R (1945) Nag 643.

[8] Mortgage decree — Dismissal of application for final decree for sale is decree — Order is not under S. 47 but is appealable under S. 96. (Vol 6) 1919 Mad 709 (710) : 42 Mad 52.

[9] An order declaring a suit to have abated is a decree from which an appeal lies. (Vol 4) 1917 Mad 285 (286).

[10] Order for staying execution being decree is appealable. (Vol 17) 1930 Lah 187 (189) : 11 Lah 402.

[11] Remand under inherent power is appealable as a decree. (Vol 10) 1923 Cal 606 (607).

[12] An appeal lies from a decree in a suit transferred from the Small Cause Court to the original side under S. 23 of the Provincial Small Cause Courts Act. (Vol 6) 1919 Cal 1065 (1066).

[13] Small cause suit instituted as regular suit before Judge not invested with small cause powers but decided by Judge having those powers — It remains regular suit and appeal lies. (Vol 6) 1919 Cal 389 (389).

[14] Suit for account under U. P. Agriculturists' Relief Act — Trial Court not exercising special jurisdiction under U. P. Agriculturists' Relief Act — Right of appeal is governed by S. 96 — Order by Court declaring certain amount due by plaintiff amounts to decree and appeal lies from it under Section 96. (Vol 26) 1939 All 233 (234).

[15] No finding or interlocutory order which is not sufficient to dispose of the suit as a whole can in itself give rise to a right of appeal except where an appeal is expressly provided. (Vol 30) 1943 Nag 204 (207) : I L R (1943) Nag 241 (F B).

[16] An order of Assistant Commissioner refusing to restore a suit dismissed for default is not appealable. (1910) 7 All L Jour 675 (681).

[17] Order of appellate Court under O. 41, R. 5 refusing to stay execution is not appealable. (Vol 26) 1939 Bom 65 (65)

[18] Interlocutory order for the examination of the account of the Receiver is not a decree and is not appealable. (1911) 13 Cal L Jour 459 (462).

[19] No appeal lies against an order of dismissal of a suit under O. 23, R. 3. (Vol 3) 1916 Cal 80 (81).

[20] Order of District Judge under S. 84, Madras Hindu Religious Endowments Act (2 [II] of 1927) on application to set aside decision of Board under S. 84 (1) is not decree and is therefore not appealable. (Vol 21) 1934 Mad 103 (110) : 57 Mad 271.

[21] No appeal lies against an order passed by a Court on a petition under S. 7, Madras City Tenants' Protection Act (3 [III] of 1922) for fixing of reasonable rent. (Vol 26) 1939 Mad 430 (430) : I L R (1939) Mad 213.

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[22] Order dismissing petition under S. 34, Trusts Act, is not a decree and no appeal lies. (Vol 22) 1935 Oudh 72 (73).

[23] Court ordering appointment of certain persons as trustees of wakf on their mere applications, not as Civil Court but as kazi under Mahomedan law — Order appointing mutawallis not being 'decree' as not having been made in suit, appeal therefrom is not competent under S. 96. (Vol 24) 1937 Oudh 381 (383) : 13 Luck 523.

[24] Partition suit—Preliminary decree passed—Subsequent order refusing to take accounts from particular year before final decree — Order is not appealable. (Vol 32) 1945 Oudh 312 (313) : 20 Luck 557.

[25] Order passed by District Judge setting aside rejection of plaint—It is not appealable order—Nor does such order amount to decree. (Vol 21) 1934 Pesh 88 (89).

[26] Order under S. 152 directing amendment of decree, not in conformity with judgment is not decree and is consequently not appealable. (1911) 1911 Pun L R No. 186, page 687 (688) : 1911 Pun Re No. 24.

[27] Suit for damages for breach of contract—Defendant claiming set-off — Court deciding that plaintiff's claim was barred by limitation — Decision held did not embrace set-off and therefore no decree could be passed and hence no appeal lay. (1912) 6 Sind L R 287 (290).

6. Applicability and scope.—[1] Right of appeal is not to be implied but should be given by express enactment or by rules having force of law. (1913) 40 Cal 21 (27) : 39 Ind App 197 (P C) * (1906) 28 All 545 (549, 550) * (Vol 1) 1914 Bom 32 (32) : 38 Bom 337 * (Vol 29) 1942 Lah 201 (203) : I L R (1943) Lah 569 * (1888) 11 Mad 26 (34) : 14 Ind App 160 (P C) * (Vol 28) 1941 Oudh 590 (591) * (Vol 24) 1937 Oudh 381 (383) : 13 Luck 523 * (Vol 16) 1929 Rang 198 (199) (In cases under the Code, unless the right is given by the Code, there can be no appeal.)

[2] Interpretation of statutes — Right to appeal is substantive right and cannot be taken away by subsequent enactment passed during pendency of action. (Vol 17) 1930 All 706 (709) : 52 All 886.

[3] Right of appeal from decree of single Judge to High Court is not governed by S. 96 or S. 100 or S. 104 but by Letters Patent. (Vol 27) 1940 Nag 39 (39) : I L R (1940) Nag 141 (F B) * (Vol 10) 1923 Bom 218 (224, 225) * (1907) 34 Cal 619 (624) (S B) * (1906) 33 Cal 1923 (1341, 1343) (S B) * (Vol 24) 1937 Rang 268 (269) : 1937 Rang L R 97.

[4] Right of appeal under Civil P. C., exists in civil proceedings though not called suits unless expressly taken away. (Vol 16) 1929 Mad 223 (225) (Decision in reference under S. 30, Land Acquisition Act, though not under S. 54 of the Act, is appealable under S. 96.)

[5] Consolidation of suits but separate decrees and judgments—No separate appeals are necessary. (Vol 17) 1930 All 706 (707) : 52 All 886.

[6] Upon the death of a respondent pending appeal, the assignee of his interest has a right to be substituted in his place. (1885) 9 Bom 151 (157).

[7] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, *see* S. 7 (b).

7. "Court authorized to hear appeals." — [1] Section 96 confers right of appeal on parties and not jurisdiction on Court. (1886) 13 Cal 232 (235).

[2] It is only the Court to which the jurisdiction is given to entertain an appeal in a particular matter by various Acts in the different Provinces which can hear the appeal. (1896) 18 All 375 (378).

[3] Failure to raise plea of want of jurisdiction in appellate Court does not clothe that Court with jurisdiction not given to it. (1912) 16 Cal L Jour 77 (81).

[4] Territorial jurisdiction transferred to another Court after decree on contract — Appeal lies in Court authorized to hear appeal of latter Court. (Vol 2) 1915 Mad 362 (363) : 37 Mad 477.

[5] The expression "Court authorised to hear appeals" means either the Court authorized to hear appeals from the Courts in question generally, or else the Court authorised to hear such appeals as the appeal in question. (1886) 13 Cal 322 (325).

8. Costs, appeals to.—See Section 35.

9. Execution proceedings. — [1] Section 96, Cl. (3) does not apply to execution proceedings but is restricted to suits only. (Vol 11) 1924 Pat 346 (347).

[2] Execution proceedings — Every order made in proceedings under S. 47 is not necessarily appealable. (Vol 11) 1924 Pat 633 (635).

[3] Order in exercise of inherent jurisdiction in execution proceeding is not appealable. (Vol 23) 1936 Sind 166 (167) : 30 Sind L R 170.

[4] No appeal lies from an order refusing to restore an application in the execution department. (Vol 11) 1924 All 794 (795).

10. Nature of grounds.—See Order 41, Rule 1.

11. Powers of appellate Court.—See Section 107.

12. Right of appeal when lost. — [1] Agreement not to appeal—Appeal filed in violation of agreement — Appellate Court is bound to give effect to agreement and refuse to allow appellant to proceed with appeal. (1877) 1 All 267 (268) (F B) * (1872) 14 Moo Ind App 204 (207) (P C) * (Vol 22) 1935 Cal 239 (240) : 62 Cal 229 (Under-taking by parties that decision by third persons to be final.) * (1882) 8 Cal 455 (459) * (Vol 18) 1931 Nag 126 (127) * (Vol 16) 1929 Oudh 451 (452) : 5 Luck 391. (Agreement to abide by decision of Court.)

[2] Failure to abide by terms of decree does not disentitle party to appeal. (Vol 21) 1934 All 531 (533).

[3] District Board's resolution that no appeal be preferred — It is no reason for throwing out appeal as incompetent when preferred by Board itself. (Vol 17) 1930 Oudh 434 (437).

[4] Return of plaint for re-representation — Plaintiff complying with order without giving up right of appeal — Plaintiff does not lose his right of appeal. (Vol 6) 1919 Cal 447 (448).

[5] Decree imposing conditions on plaintiff — Conditions not complied with—He does not thereby lose right of appeal. (Vol 7) 1920 Cal 96 (97).

[6] A's election as Municipal Commissioner declared invalid by lower Court's decree — Afterwards Local Government nominating A Municipal Commissioner—A accepting appointment is not precluded from appealing against decree. (Vol 23) 1936 Cal 424 (425, 426).

[7] Mere application by vendee to withdraw price of pre-emption deposited in Court does not take away his right of appeal. (Vol 2) 1915 All 325 (325).

[8] Appeal by vendee in pre-emption suit — Vendee obtaining stay of execution on making deposit—Deposit withdrawn by him before appeal heard—He will lose his right of appeal. (1906) 1906 Pun L R No. 70, page 227 (230) : 1906 Pun Re No. 19.

[9] A party who has adopted an order of the Court and enjoyed a benefit under the order cannot contend that it is valid for one purpose and invalid for another. But if the party accepts the order under protest, he can appeal against it. (1910) 12 Cal L Jour 556 (559).

13. Valuation for purposes of appeal. — [1] Value of original suit determines pecuniary jurisdiction of appellate Court. (1874) 7 Mad H C R 356 (357) (S B) (Suit for over Rs. 5000 — Decree for less — Appeal lies

97. Where any party aggrieved by a preliminary decree passed after the commencement of *Appeal from final decree* this Code does not appeal from such decree, he shall be precluded from *where no appeal from preliminary decree.* disputing its correctness in any appeal which may be preferred from the final decree.

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to High Court.)*(1891) 13 All 320 (322)*(Vol 18) 1931 Cal 159 (160) : 58 Cal 829 (Mortgage suit for less than Rs. 5000 — Preliminary decree for sale for more than Rs. 5000 — Appeal lies to District Judge and not to High Court.)

[2] Value of suit is value of main relief and not incidental relief. (1911) 33 All 634 (636, 637).

[3] Course of appeal is determined by value of claim as brought and not by decision upon it. (1895) 1895 Pun Re No. 106, page 497(498) (FB)*(1910) 14 Cal W N 343 (845) *(Vol 20) 1933 Lah 8 (9).

[4] Plaintiff valuing claim definitely — Value determines appellate forum. (1895) 1895 Bom P J 228 (228)*(1913) 1913 Pun L R No. 229, page 770 (771).

[5] Plaintiff entitled to value his suit approximately or tentatively—Court to which appeal lies must be determined by value given in plaint. (Vol 5) 1918 Mad 998 (1002) : 40 Mad 1(FB)*(Vol 12) 1925 All 376 (377) : 47 All 534*(1894) 8 Bom 31 (33)*(Vol 12) 1925 Cal 1076 (1081) : 53 Cal 14 (FB) *(Vol 20) 1933 Mad 721 (722) : 57 Mad 186 *(Vol 20) 1933 Mad 330 (331, 332) : 56 Mad 705 *(Vol 22) 1935 Pat 396 (400) : 14 Pat 658 (S B).

[But see (Vol 13) 1926 Cal 378 (379)*(Vol 12) 1925 Cal 212 (212) *(1907) 34 Cal 954 (959, 960) (F B) *(Vol 21) 1934 Lah 488 (491, 492) : 15 Lah 151 (F B) *(Vol 15) 1928 Lah 670 (671) *(Vol 15) 1928 Lah 157 (158) : 9 Lah 23.]

[6] In a suit for accounts where the plaintiff has valued his claim below Rs. 5000 an appeal against the preliminary decree lies to the Divisional Court, and not to the Chief Court. (1909) 1909 Pun L R No. 87, page 323.

[7] Redemption suit on payment of Rs. 1000 — Preliminary decree for possession on payment of Rs. 9050 passed by Sub-Judge — Appeal by mortgagee for enhancement of the amount lies to the High Court and not District Court. (Vol 20) 1933 Lah 155 (156).

14. Who can appeal. — [1] If the competency of an appeal is in question the appellant must establish that he has a right of appeal. (Vol 3) 1916 Cal 361 (364) : 43 Cal 857.

[2] Appellant claiming right of appeal against trial Court's finding must show that it amounts to decree within S. 2 (2). (Vol 28) 1941 Oudh 590 (591).

[3] No person can appeal unless he is party to suit. (Vol 6) 1919 Lah 180 (181) : 1919 Pun Re No. 79*(1910) 11 Cal L Jour 580 (586).

[4] Suit against manager of joint Hindu family in his individual and representative capacity — Coparcener not mentioned in suit as separate party — Coparcener though adversely affected by decree is not party and has no right of appeal. (Vol 24) 1937 Sind 94 (95) : 30 Sind L R 467.

[5] Suit in which Official Receiver is party—Official Receiver not appealing from decree in suit—Appeal not one under Insolvency Act—Creditor not party to suit is not entitled to appeal. (Vol 21) 1934 Mad 360 (363) : 57 Mad 670*(Vol 28) 1941 Mad 577 (578).

[6] Person made defendant under order of Court has right of appeal. (1909) 12 Oudh Cas 390 (392).

[7] Party appealing must have been adversely affected by decree. (Vol 29) 1942 Cal 1 (17) : I L R (1941) 2 Cal 434*(1881) 3 All 152 (157) (F B)*(Vol 19) 1932 Bom 78 (79) : 56 Bom 16*(1910) 11 Cal L Jour 580 (586)*(1905) 9 Cal W N 534 (538).

[8] Decree refusing exclusive but awarding joint possession with defendant aggrieves plaintiff and he has a right to appeal. (Vol 11) 1924 Cal 850 (851).

[9] A party against whom no decree is passed can appeal if the result of the decree is to make him aggrieved by it. (1910) 1910 M W N 719 (719, 720).

[10] Person adversely affected by decree only on some matters—He can appeal only on such matters and not from every part of decree. (Vol 21) 1934 All 677 (679).

[11] To determine whether adjudication is appealable, it is open to the parties to go behind the decree and see really what the adjudication is. (1913) 25 Mad L Jour 379 (384).

[12] Decree on face of it entirely in favour of party — Some issues found against him—Party has no right of appeal. (1885) 7 All 606 (611) (F B) *(Vol 1) 1914 All 83 (83) *(Vol 17) 1930 Lah 190 (191) (Prayer of party granted—No appeal lies by party.)*(Vol 6) 1919 Lah 418 (418). (Decree in favour of party — Appeal against opinions in judgment not tenable.)*(Vol 32) 1945 Mad 39 (39) (Partition suit dismissed on defendant's contention that suit was not maintainable as partial partition was asked for — Defendant's appeal held not maintainable as no finding would operate as *res judicata*.) *(Vol 11) 1924 Mad 858 (858) (Where suit is dismissed, findings in judgments as between co-defendants not embodied nor implied in decree are neither *res judicata* nor appealable.)*(Vol 3) 1916 Mad 618 (618) (Suit dismissed — Adverse finding against defendant—No right of appeal.)*(1896) 6 Mad L Jour 86 (88)*(Vol 5) 1918 Nag 91 (91)*(Vol 16) 1929 Pat 586 (587) : 8 Pat 617*(Vol 3) 1916 Pat 306 (306).

[13] Appeal will lie against favourable decree if point substantially in issue has been decided against the appellant. (Vol 11) 1924 Mad 689 (690) : 47 Mad 633*(1907) 30 Mad 447 (448)*(1913) 25 Mad L Jour 379 (383)*(Vol 4) 1917 Pat 350 (352).

[14] Person having interest in subject-matter of suit, has right of appeal. (1910) 11 Cal L Jour 580 (586)*(Vol 19) 1932 Bom 78 (79) : 56 Bom 16.

[15] Title of mortgagor to property negatived — Mortgagee not party to decree — Mortgagee purchasing property in execution resisted in taking possession — Mortgagee can appeal against decree passed against mortgagor. (Vol 5) 1918 Mad 409 (410).

[16] Legal representative of party has right of appeal. (1910) 11 Cal L Jour 580 (586) *(1903) 26 Mad 101 (102, 103).

[17] Plaintiff or defendant can appeal without concurrence of any of the parties to the suit. (1898) 22 Bom 718 (722).

[18] Stranger to a decree brought on record after decree on ground that he is real owner of property in dispute has no right to appeal. (Vol 7) 1920 Pat 142 (143) : 5 Pat L Jour 256.

[19] Suit decreed against defendants present and dismissed against defendants unrepresented—Plaintiff's appeal is barred. (Vol 16) 1929 Cal 669 (670).

SECTION 97 — SYNOPSIS.

1. Applicability, scope and object.
2. Court-fees.
3. Effect of final decree passed pending appeal against preliminary decree.
4. Preliminary decree.

Objects and Reasons.

"Clause 97. — The Committee have inserted an express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on their failure to do so, from raising objections to such decrees in appeals from final decrees. On this point they accept

the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs to be incurred if they intend to rely upon objections which could be taken at an earlier stage." — S. O. R.

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5. Preliminary decree—Effect of not drawing up.

6. Reversal of preliminary decree — Effect on final decree.

7. Miscellaneous.

1. Applicability, scope and object.—[1] Under the old Code, objections to a preliminary decree could be taken in an appeal against the final decree, without appealing from the preliminary decree. (Vol 2) 1915 Cal 118 (118).

[2] The Legislature in enacting S. 97 of the present Civil Procedure Code, intended to prevent preliminary questions being raised in the form of an appeal after the decision of a case on merits. (1912) 36 Bom 536 (539).

[3] Appeal on preliminary decree is obligatory. (Vol 3) 1916 Cal 249 (249).

[4] The right to appeal under S. 97 lies only from a preliminary decree and not from a preliminary finding in a suit directing accounts to be taken. (Vol 1) 1914 Bom 23 (24) : 38 Bom 331.

[5] No separate appeal against each finding lies—Decision of preliminary issue of limitation is not decree—Question is not barred in appeal against final decision—Even if technically barred time can be extended under S. 5, Limitation Act. (Vol 4) 1917 Lah 153 (153, 154) : 1917 Pun Re No. 7.

[6] Where no appeal is preferred against a preliminary decree for sale in mortgage suit the points which could have been raised in that appeal had it been filed, could not be urged in an appeal against the final decree in the same suit. (Vol 3) 1916 Bom 305 (307) : 40 Bom 321 & (Vol 22) 1935 Oudh 11 (12) : 10 Luck 233 (Provision as to personal liability of mortgagor.) & (Vol 17) 1930 Oudh 10 (12) (Do.) & (Vol 6) 1919 Pat 420 (422) : 4 Pat L Jour 306 & (Vol 24) 1937 Rang 494 (496) (Provision as to personal liability of mortgagor in preliminary decree.)

[7] Mortgage suit — Preliminary decree allowed to become final — Decree-holder applying for personal decree under O. 34, R. 6 — Judgment-debtors cannot ask Court to amend preliminary decree by deleting clause granting personal decree—Order granting amendment is entirely wrong. (Vol 23) 1936 Oudh 81 (82, 83).

[8] Preliminary decree for sale on mortgage drawn in form of decree laid down in No. 4 of Appendix D — No appeal filed from preliminary decree—Subsequent application for passing personal decree cannot be contested. (Vol 20) 1933 Oudh 352 (354) : 9 Luck 51 (F B).

[9] Order passed that party entitled to mesne profits — Another order determining amount — Second order appealed against when appeal against first order time barred — First order being appealable could not be attacked in appeal against second order. (Vol 17) 1930 Lah 24 (26).

[10] A party not pleading limitation as a bar to the suit before passing the preliminary decree cannot plead it in appeal from the final decree. (Vol 6) 1919 Cal 538 (539).

[11] Court while passing final decree cannot reopen questions determined by preliminary decree. (Vol 16) 1929 All 252 (253) & (Vol 16) 1929 All 65 (66).

[12] Adjudication regarding partnership—No objection nor appeal — It cannot be subsequently questioned by reason of omission to appeal. (Vol 2) 1915 P C 116 (117, 118) : 42 Cal 914 : 42 Ind App 91 (P C).

[13] Mortgage suit—Preliminary decree not appealed against — Rate of interest, even if higher, cannot be questioned at time of final decree. (Vol 6) 1919 Pat 420 (422) : 4 Pat L Jour 306.

[14] Preliminary decree for partition proceeds on finding of jointness — Partition effected by institution of previous suit cannot therefore be pleaded in final decree proceedings. (Vol 17) 1930 Pat 260 (264).

[15] Suit for partnership accounts — Preliminary decree directing accounts for certain period—Appellate Court varying decree by directing accounts for shorter period—No appeal against appellate decree — Direction for accounts for shorter period cannot be challenged in appeal against final decree (Vol 33) 1946 Sind 28 (29) : 1 L R (1945) Kar 368.

[16] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905. See Section 7 (b).

2. Court-fees. — [1] Suit for accounts—Preliminary and final decrees — Single appeal from both is permissible but court-fee merely in respect of final decree is not enough. (Vol 8) 1921 Mad 406 (406).

3. Effect of final decree passed pending appeal against preliminary decree. — [1] Appeal against preliminary decree—Final decree passed pending appeal — Appeal can be heard. (Vol 3) 1916 Cal 43 (46) & (1938) 40 Pun L R 123 (123) & (Vol 6) 1919 Mad 91 (91, 92) (Specially if it is in conformity with preliminary decree.) & (1913) 24 Mad L Jour 190 (191).

[But see (Vol 1) 1914 All 380 (380, 381) : 36 All 532 (F B) (Case under the old Code.)]

[2] The passing of a final decree does not preclude a party from preferring an appeal against the preliminary decree. (Vol 1) 1914 Mad 473 (474) : 37 Mad 455 & (Vol 15) 1928 All 192 (192) & (Vol 16) 1929 Cal 689 (696, 697) : 57 Cal 1013 (F B) (Appeal from preliminary decree only can be filed — In view of this decision the following cases cannot be deemed to be good law: (Vol 14) 1927 Cal 492:54 Cal 328 ; (Vol 13) 1926 Cal 557 ; (Vol 11) 1924 Cal 543 ; (Vol 8) 1921 Cal 109 : 48 Cal 1036 ; (Vol 3) 1916 Cal 178 : 36 Cal 762 ; 18 Cal L Jour 321.) & (Vol 15) 1928 Cal 720 (721) & (Vol 15) 1928 Cal 167 (167) & (Vol 6) 1919 Cal 893 (894) & (Vol 3) 1916 Cal 249 (250) & (Vol 22) 1935 Lah 482 (483) : 17 Lah 53 & (1913) 1913 Mad W N 140 (140) & (Vol 16) 1929 Nag 349 (350) : 27 Nag L R 197 & (Vol 17) 1930 Pat 177 (177) (F B) & (Vol 3) 1916 Pat 370 (371) : 1 Pat L Jour 406 (F B).

[But see (1910) 32 All 225 (226, 227) (Case under the old Code.) & (Vol 3) 1916 Bom 228 (228, 229) (Appeal against preliminary decree only does not lie.) & (Vol 15) 1928 Lah 73 (74) (Do.) & (Vol 8) 1921 Lah 265 (266) (Do.) & (Vol 9) 1922 Nag 179 (180).]

[3] A final decree, passed before the appeal from the preliminary decree must be brought to the appellate Court's notice, otherwise the appellate Court's decree supersedes the final decree also. (1913) 18 Cal L Jour 209 (213, 214) & (Vol 13) 1926 Bom 43 (44).

[4] Preliminary decree revised or modified substantially in appeal — Final decree passed before result

Decision where appeal heard by two or more Judges.

98. (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

^a(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.

[1882—S. 575 ; 1877—S. 575; see Letters Patent (Cal.), Cl. 36.]

[a] *Inserted by the Repealing and Amending Act, 1928 (18 [XVIII] of 1928), Section 2 and Schedule I.*

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of appeal is inoperative. (Vol 6) 1919 Mad 870 (871) * (1912) 34 All 493 (495) * (Vol 3) 1916 Cal 249 (250) (If appeal on preliminary decree succeeds final decree must be varied even though not appealed against.) * (1913) 18 Cal L Jour 223 (226, 227) * (1913) 18 Cal L Jour 214 (219).

[5] Combined appeal against preliminary and final decree is legal. (Vol 3) 1916 Bom 202 (202).

[6] Final decree passed — Appeal from preliminary decree already filed and dismissed — Right to second appeal is not barred by the passing of the final decree. (Vol 14) 1927 Cal 559 (560).

[7] Appeal from preliminary decree pending — Final decree passed is valid. (Vol 16) 1929 All 287 (289) : 51 All 640.

[8] Appeal from preliminary decree in a redemption suit when filed before the passing of final decree therein cannot be treated as one from final decree when such final decree has been passed. (Vol 11) 1924 Oudh 299 (300).

4. Preliminary decree.—[1] Finding that a party is an agriculturist is not by itself an adjudication and therefore not a preliminary decree within S. 97. (Vol 8) 1921 Bom 220 (222) : 45 Bom 627.

[2] Adjudication — Whether final or not — Test is whether it does or does not amount to preliminary decree. (Vol 4) 1917 Cal 701 (704).

[3] Decision on preliminary defence that matters in dispute were caste questions and hence outside Civil Court's jurisdiction is not preliminary decree within meaning of S. 97. (Vol 1) 1914 Bom 149 (152) : 39 Bom 339 (F B).

[4] Suit for dissolution of partnership and accounts — Court after passing of preliminary decree but before final decree ordering Commissioner to credit plaintiff with certain sum — Order is not supplementary preliminary decree but interlocutory order (Per *Mohamad Noor and Manohar Lal JJ.*). (Vol 27) 1940 Pat 204 (208) : 19 Pat 1.

[5] Findings on preliminary issues as to jurisdiction, limitation or *res judicata* are not preliminary decrees. (Vol 8) 1921 Bom 220 (222) : 45 Bom 627 * (Vol 1) 1914 Bom 149 (152) : 39 Bom 339 (F B) (Decision as to misjoinder, limitation or jurisdiction.)

[6] Suit for specific performance of contract — Decree is not preliminary decree. (Vol 6) 1919 Cal 361 (361, 362).

[7] A decree is an order granting or refusing any of the reliefs and hence the decision that notice was necessary under S. 80, does not amount to a preliminary decree, when the plaintiff alleges that he has given

notice and the decision is not therefore appealable. (Vol 5) 1918 Upp Bur 23 (30) : 3 Upp Bur Rul 1.

[8] The order remanding after settling certain issues is a preliminary decree. (Vol 4) 1917 Cal 701 (704).

[9] See also under S. 2 (2).

5. Preliminary decree — Effect of not drawing up.—[1] Right of appeal under S. 97 only arises when a preliminary decree is drawn up. (Vol 11) 1924 Bom 33 (34) * (Vol 1) 1914 Bom 23 (24) : 38 Bom 331 (Preliminary finding directing accounts to be taken — There is no right of appeal.) * (1913) 37 Bom 480 (482, 483) * (1913) 37 Bom 60 (63) (Overruled on another point in (Vol 1) 1914 Bom 149 : 39 Bom 339 (F B).)

6. Reversal of preliminary decree — Effect on final decree.—[1] If the preliminary decree is reversed and there is nothing for the appellant to comply with, the final decree so far as it is dependent on the other falls with it and becomes inoperative. (1913) 24 Mad L Jour 190 (191) * (Vol 6) 1919 Mad 870 (871).

[2] Preliminary decree set aside on appeal — Appeal against final decree is not necessary. (Vol 13) 1926 Lah 534 (534).

[3] See also Note 3.

7. Miscellaneous.—[1] Appeal from preliminary order in execution — Execution subsequently dismissed — Appeal is still maintainable — Execution will proceed as per appellate judgment. (Vol 15) 1928 Cal 804 (804, 805).

[2] Mortgage suit — Preliminary decree — Defendants appealing — Final decree obtained and put into execution — Appellate Court varying preliminary decree — Defendant's application under S. 144 held competent. (Vol 18) 1931 All 655 (656).

[3] Suit for partnership accounts — Preliminary decree — Appeal — Proceedings are not necessarily stayed — Appeal does not oust jurisdiction of Court to entertain application for compromise under O. 23, R. 3 — Decree in accordance with compromise can be passed. (Vol 6) 1919 Sind 64 (65) : 13 Sind L R 135.

[4] Appeal from preliminary order allowed — Appeal from final order on same grounds is unnecessary. (Vol 15) 1928 Mad 107 (115).

SECTION 98 — SYNOPSIS.

1. Applicability and scope.

2. Sub-section (3).

1. Applicability and scope.—[1] This section does not apply to a difference of opinion in the decision of a preliminary objection to the hearing of the appeal on the ground that the appeal was time barred. (1889) 11 All 176 (181).

99. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

[1882—S. 578; 1877—Ss. 577 and 578; 1859—S. 350; see O. 1, Rr. 1 and 3 and O. 2, R. 3.]

Section 98 (contd.)

[2] Under the old Code when two Judges differed, the whole appeal was referred to a third Judge, but under the new Code, it is only the point of law that has to be referred. (1912) 39 Cal 353 (369) (F B) & (Vol 20) 1933 All 861 (874) : 56 All 39 (S B).

[3] Where the Judges differ on a point of law, they should come to a complete decision except the question of law on which they differ, so that, by their judgment, they should make it clear that a final result would be arrived at on the decision of the question of law one way or the other. (Vol 1) 1914 Cal 592 (594).

[4] Where two Judges of a Division Bench differ on a point of law and refer the matter to a third Judge, the latter must confine his opinion to the specific point and not dispose of the case *de novo* on the merits. (1913) 35 All 487 (498) : 16 Oudh Cas 247 : 40 Ind App 182 (P C) & (Vol 9) 1922 Cal 544 (549) (The third Judge to dispose of the appeal as indicated by the referring Judges after deciding the point of law referred.)

[5] Where two Judges refer the point of law under S. 98 to a third Judge and the latter agrees with neither he is competent only to express his opinion. (Vol 9) 1922 Cal 544 (549).

[6] Though the reference is to be heard by a Judge or Judges other than those who heard the case originally the decision upon the point must be according to the opinion of the majority of Judges who heard the appeal including those who first heard it. (1903) 6 Bom L R 131 (208, 211).

[7] Decree should be varied so far as Judges composing Bench agree that it should be varied and it should be confirmed as regards rest. (Vol 20) 1933 All 473 (474) : 55 All 672 & (Vol 3) 1916 Cal 582 (588) (S B) & (Vol 15) 1928 Mad 180 (188, 190) : 51 Mad 291 & (Vol 12) 1925 Mad 1032 (1033).

[But see (Vol 13) 1926 Lah 65 (71) : 7 Lah 179 (Confirmation of decree is rule and its modification is exception. No complete agreement between the Judges as to variation or reversal—Case is governed by rule in S. 98 (2) and decree of Court of first instance should be confirmed.)]

[8] Where there is a difference of opinion, between the two Judges who heard the appeal, on a question of fact, the judgment which is in accordance with that of the Court below will prevail under S. 575 of old Code, with the result that the judgment of the lower Court will be confirmed. (1890) 17 Cal 3 (11) : 16 Ind App 137 (P C).

[9] Land acquisitions appeal — Judges composing Bench differing as to amount of additional compensation — Procedure prescribed in S. 98 should be followed and award of lower Court confirmed. (Vol 6) 1919 Mad 626 (628, 629) : 41 Mad 943 (F B).

[10] Judges of Division Bench differing in revision—Proceedings are regulated by Cl. 36, Letters Patent (Madras), and not by Cl. 98. (Vol 2) 1915 Mad 1193 (1196) : 17 Cri L Jour 42 & (Vol 12) 1925 Mad 281 (285) (Revision under S. 25, Provincial Small Cause Courts Act.)

[11] C. P. Courts Act (1917), S. 10 (b) applies to all cases, while S. 98, Civil P. C., applies to appeals only. (Vol 19) 1932 Nag 88 (89) : 28 Nag L R 80.

[12] Punjab Courts Act (8 [III] of 1914), S. 10 (2) (b)—Division Bench differing on point of law—Reference under S. 10 (2) (b) is incompetent — Proper remedy is

one provided by S. 98. (Vol 3) 1916 Lah 113 (125) : 1917 Pun Re No. 71 (F B).

[13] Bench of two Judges divided in opinion — Point of law noted in order sheet—Case referred to third Judge—Section 98 (2) proviso is complied with. (Vol 30) 1943 Pat 433 (445).

[14] Decree contains adjudications regarding several items — Each such adjudication is decree — Section 98 should be applied with reference to adjudication of each item. (Vol 20) 1933 All 473 (474) : 55 All 672.

[15] Principles governing question as to right of Letters Patent appeal or Privy Council appeal has no application to S. 98. (Vol 6) 1919 Mad 626 (628) : 41 Mad 943 (F B).

[16] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see S. 7 (b).

2. Sub-section (3). — [1] Where two Judges comprising a Division Bench hearing a first appeal have disagreed either in law or in fact, the procedure to be followed is that laid down in Cl. 27 of the Letters Patent of the Allahabad High Court and not that laid down in S. 98. (Vol 25) 1938 All 641 (648, 649) : I L R (1938) All 972 (FB).

[2] Difference of opinion in Division Bench of Chartered High Court — Section 98 has no application, but Cl. 26, Letters Patent, applies and point of difference should be stated by Division Bench. (Vol 21) 1934 Lah 371 (379) : 15 Lah 425 (F B) & (Vol 20) 1933 Lah 648 (648).

[3] Procedure to be adopted by High Court in case of equal division is to be governed by Letters Patent Cl. 36 and not by S. 98. (Vol 16) 1929 Mad 641 (659) : 52 Mad 563 (F B).

[4] Chartered High Courts are removed from operation of S. 98. (Vol 20) 1933 Pat 67 (67) : 11 Pat 772 (F B).

[5] Difference between two Judges in appeal from subordinate Court—Reference under Cl. 28, Letters Patent (Pat), is competent—Section 98 has no application. (Vol 20) 1933 Pat 67 (69) : 11 Pat 772.

[6] Section 98 and Letters Patent Cl. 36, unlike Letters Patent Cl. 15, are rules of procedure. (Vol 16) 1929 Mad 641 (656) : 52 Mad 563 (F B).

[7] Section 98 would apply only when there is no similar provision in Letters Patent. (Vol 20) 1933 All 861 (875) : 56 All 39 (S B).

[8] As to the law prior to the introduction of sub-section (3) and the amendment of Cl. 36, Letters Patent, in 1928, see the undermentioned cases:—(Vol 10) 1923 Bom 218 (224) & (Vol 6) 1919 Bom 1 (4) : 43 Bom 433 (492) (F B) & (Vol 12) 1925 Cal 845 (847) : 52 Cal 894 (F B) & (Vol 13) 1926 Lah 65 (69) : 7 Lah 179 & (Vol 12) 1925 Pat 625 (667) : 4 Pat 510.

SECTION 99 — SYNOPSIS.

1. Scope.
- 1a. Error, defect or irregularity, not affecting merits.
2. Error, defect or irregularity — Illustrations.
3. Execution proceedings.
4. Jurisdiction of Court.
5. Misjoinder of parties or causes of action.
6. Remand, irregular order of.

Objects and Reasons.

"Clause 99. — The Committee have extended this clause in order to give the Courts a large discretion in dealing with irregularities in proceedings, and they

have inserted express words to meet the point decided in I. L. R. 26 Bombay 259 and I. L. R. 27 Madras 80 and in a recent decision of the Calcutta High Court." — S. O. R.

Section 99 (*contd.*)

1. Scope. — [1] Section 99, Civil P. C., applies to proceedings under Agra Tenancy Act. (Vol 23) 1936 All 200 (202).

[2] Provisions of Civil P. C. do not regulate procedure of hearing appeals in Privy Council — Still principle of S. 99 can be applied. (Vol 24) 1937 P C 233 (234) : 64 Ind App 250 : I L R (1937) All 665: 31 Sind L R 590 (P C).

[3] Sections 99 and 105 are not mutually destructive. (Vol 14) 1927 Rang 150 (154) : 5 Rang 80.

[4] It is doubtful whether S. 99 applies to question about the constitution of or the right to maintain a suit. (Vol 16) 1929 Cal 445 (447).

[5] Lower Court not paying heed to S. 99 acts with material irregularity and its decision can be set aside in revision under S. 115. (Vol 13) 1926 Lah 402 (403).

[6] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905 : see section 7 (b) — As to misjoinder of parties or causes of action, see O. 2, R. 3.

1a. Error, defect or irregularity, not affecting merits. — [1] Every irregularity does not vitiate whole proceeding — It depends upon nature, scope and object of provisions contravened. (Vol 7) 1920 Cal 597 (598, 599) : 46 Cal 978 * (1941) 22 Pat L Tim 196 (199) * (Vol 28) 1941 Pat 139 (140) : 19 Pat 838.

[2] This section applies only to errors or defects or irregularities in the suit or proceedings out of which the appeal then being heard arises and not to previous suits or proceedings which have come to an end. (1901) 23 All 499 (500, 501).

2. Error, defect or irregularity—Illustrations. — *Appointment of guardian ad litem.* — [1] The want of a formal order appointing a mother as guardian *ad litem* and the fact that the service of summons was not made on her, are not errors vitiating the proceedings ; but the irregularities, if they are shown to have prejudicially affected the minors, will invalidate the suit or the proceedings following it. (1903) 30 Cal 1021 (1026) : 30 Ind App 182 (PC) * (1887) 9 All 508 (510) (The absence of a certificate of guardianship not fatal in a suit on behalf of a minor by his mother.) * (Vol 3) 1916 Pat 375 (378) * (Vol 3) 1916 Low Bur 87 (88).

[2] Though the irregularities in appointing a guardian before the date fixed for deciding that matter and the absence of the minor's consent may be condoned by S. 99 of Civil P. C., yet where the Court sanctions a compromise injurious to minor, it can be set aside. (Vol 22) 1935 Oudh 287 (288) : 11 Luck 30.

[3] Non-representation of a minor is fatal. (Vol 8) 1921 Cal 534 (535).

Appointment of Commissioner. — [4] When a Commissioner is not formally appointed but the parties conducted themselves in such a manner as to show that they accepted the appointment neither party, in view of S. 99, can go back upon this. (Vol 1) 1914 Lah 337 (341.)

[5] Commission issued behind back of the defendant — Irregularity not causing prejudice to defendant — Decree cannot be varied in second appeal. (Vol 25) 1938 Nag 530 (532.)

Error as to court-fees. — [6] Error as to court-fees — Merits or jurisdiction not affected — Reversal of decree is not justified. (Vol 12) 1925 Rang 65 (67) : 2 Rang 462 * (1913) 17 Cal L Jour 365 (366, 367) (FB).

Irregularities as to evidence. — [7] Judge's failure to examine witnesses himself and allowing them to be examined by some one else is an irregularity but is no good ground for reversing the decision in the case. (Vol 15) 1928 Pat 438 (439).

[8] Deposition not signed by Judge does not vitiate trial. (Vol 10) 1923 Nag 7 (7).

[9] Failure to record the evidence in full in language of the Court is merely an irregularity which may be cured by the application of S. 99 of the Code of Civil Procedure. (1907) 34 Cal 396 (398, 399).

[10] Refusal of summons under O. 16, R. 1 — Party producing copy of document sought to be produced in Court but neither proving that it was original nor that it was true copy — There was no miscarriage of justice due to refusal. (Vol 16) 1929 Cal 459 (461).

[11] Court refusing to summon witnesses or to examine witness produced — Order must be set aside. (Vol 10) 1923 Nag 58 (59).

[12] View of Court as to onus wrong — But decision not affected on merits — Appellate Court will not interfere. (Vol 10) 1923 Nag 62 (63).

[13] Case not covered by O. 41, R. 27 — Additional evidence taken — Merits not affected — Section 99 applies. (Vol 8) 1921 Sind 155 (157) : 16 Sind L R 17 * (Vol 6) 1919 Cal 311 (312) * (Vol 2) 1915 Mad 762 (762).

[14] The omission of the Commissioner to record his reasons for the admission of additional evidence as required by O. 41, R. 27 (2) does not invalidate the proceedings. (1933) 17 Rev Dec 507 (508).

[15] Document alleged to be lost — Loss should be proved before tendering secondary evidence — Omission to do so is only irregularity. (Vol 6) 1919 Nag 3 (5).

[16] The exclusion of evidence alone is not a sufficient ground for reversing the lower Court's decree unless the appellate Court comes to the conclusion that such evidence if it had been received ought to have varied the decision. (1884) 8 Bom 408 (410).

[17] Admitted documents cannot be objected to on the ground that they are used for some other purpose. (Vol 4) 1917 Cal 28 (28).

Framing of issues—Irregularity. — [18] Mere omission to frame an issue is not fatal to the trial of a suit. (Vol 13) 1926 Bom 384 (385) * (Vol 29) 1942 Pat 366 (368).

[19] Form of issue erroneous — No prejudice — No ground for setting aside decree. (1913) 17 Cal L Jour 38 (47).

[20] Suit by plaintiffs as reversioners for declaration that alienation by widow was void and injunction to restrain widow from committing waste — Right of some of plaintiffs to sue admitted — Issue whether remaining plaintiffs were entitled to sue not decided — Suit can proceed — Remand is not necessary. (Vol 30) 1943 Oudh 109 (112) : 18 Luck 501.

Judgment — Irregularity as to. — [21] Colleague of Judge who heard the case and wrote and signed judgment, pronouncing it — Judgment is valid. (Vol 6) 1919 Cal 799 (799).

[22] Irregularity by non-compliance with O. 41, R. 31 is curable by S. 99. (Vol 7) 1920 Sind 12 (13) : 14 Sind L R 132.

[23] A decree passed without hearing arguments cannot be reversed on that score when the irregularity did not affect the merits of the case or the jurisdiction of the Court. (1926) 93 Ind Cas 291 (292) (Oudh).

[24] Where order passed under O. 39, R. 5 and 6 should have been passed under O. 21, R. 42 the High

Section 99 (*contd.*)

Court refused to set it aside as in substance the order was right. (Vol 4) 1917 All 153 (154).

[25] Order impliedly amounting to one of redemption may be treated as such under S. 99. (Vol 1) 1914 Nag 8 (10) : 10 Nag L R 150.

[26] Disposing of a case on Sunday is mere irregularity which is covered by the provisions of S. 99. (1907) 29 All 562 (563).

[27] Court instead of passing separate order with respect to filing of award combining it and judgment into one — *Held* that the procedure was not irregular. At any rate even if it was an irregularity, it did not mislead either of the parties and hence would be curable under S. 99. (Vol 23) 1936 Nag 246 (248).

[28] Judgment delivered according to award but without giving ten days for objection — Judgment cannot be reversed. (Vol 18) 1931 All 453 (454) : 53 All 669.

[29] Preliminary decree passed — Order for making decree for sale absolute made but formal decree not passed — Irregularity can be condoned under S. 99 if Court's jurisdiction or merits of case are not affected. (Vol 14) 1927 Bom 131 (133) : 51 Bom 125.

[30] Judgment written, signed by Judge at home, and communicated to parties by clerk in absence of Judge on account of illness — Case remanded for fresh hearing — Section did not apply to the case. (Vol 18) 1931 Cal 164 (165).

Pleadings, defects in. — [31] Omission to sign and to verify the plaint are mere irregularities within S. 99. (Vol 17) 1930 Lah 735 (735)* (Vol 20) 1933 All 295 (297) : 55 All 216 (Application to sue as pauper not properly verified)* (1913) 17 Cal W N 989 (990, 991)* (Vol 15) 1928 Pat 51 (53, 54)* (Vol 7) 1920 Pat 636 (638)* (Vol 10) 1923 Rang 206 (206) : 1 Rang 42.

[32] Omission to comply with provisions regarding presentation of plaint is irregularity which can be cured if plaintiff has acted in good faith. (Vol 18) 1931 All 507 (511) : 54 All 57 (SB)* (Vol 33) 1946 Bom 174 (179).

[33] The defendant could not object to the frame of the plaint in appeal, where it stated all the facts fully and did not in fact mislead the defendant. (Vol 3) 1916 Nag 84 (86) : 12 Nag L R 90* (1910) 34 Bom 72 (75, 82)* (Vol 22) 1935 Rang 240 (242, 243).

[34] Partner served — Omission to obtain directions of Court under O. 30, R. 3, is not an error, defect or irregularity affecting jurisdiction of Court in relation to defendant firm. (Vol 19) 1932 Cal 541 (542) : 59 Cal 496.

[35] Where on the construction of the plaint and pleadings it is found that the minor is really a party to the suit the mere objection that the minor is not properly described, is not fatal to the suit. (1887) 14 Cal 159 (163).

[36] In previous suit by Secretary of Samaj, defendant objecting to maintainability of suit under O. 1, R. 8 — Court overruling objection and holding suit maintainable without aid of R. 8 — In subsequent suit defendant contending that R. 8 was bar to suit as Court's permission was not obtained — Executive committee of Samaj authorizing Secretary to maintain suit — Questions raised in two suits were different and *res judicata* could not apply — Objection being technical case will be covered by S. 99. (Vol 16) 1929 Cal 445 (446, 447).

[37] In lower Court case treated under Dekkhan Agriculturists' Relief Act — In appeal case not treated under that Act — Amendment of plaint not affecting merits of case — Formality of amendment was dispensed with. (Vol 15) 1928 Bom 425 (427).

Vakalatnama or power of attorney, defects

[38] *Vakalatnama* signed by a person orally

authorised to sign — Irregularity is curable under S. 99. (Vol 11) 1924 Pat 114 (117).

[39] *Plaint presented by agent without valid power of attorney* — *Plaint not signed by principal* — *Suit decreed* — *Defect held cured by S. 99.* (Vol 24) 1917 Rang 432 (433).

[40] *Bombay High Court Rules for appearances by agents of parties within jurisdiction* — *Non-compliance with, will not vitiate decree.* (Vol 10) 1923 Bom 44 (44) : 47 Bom 227.

Production and admission of documents. —

[41] The Appellate Court cannot reverse the decision of the first Court only on the ground that leave to produce a document at the late stage of suit, is granted under O. 7, R. 18 unless it is satisfied that the grant of leave has affected the merits of the case. (1909) 10 Cal L Jour 33 (37, 38).

[42] The document could not be received in evidence on payment of any penalty. It should not then have been received in evidence, but it having been admitted by the Court of first instance the lower appellate Court was not justified, in reversing the decree of the Court of first instance and dismissing the suit for the irregularity did not affect the merits. (1877) 1 All 725 (726).

Valuation—Error in. — [43] Errors in the valuation of claims are not errors, defects or irregularities which affect the merits of the case and that when such errors, real or supposed, do not affect the jurisdiction of the Court which originally tried the cause the appellate Court is restrained by S. 99 from ordering the reversal of the decree on account of such errors. (1862) 1 Bom H C R 163 (164)* (Vol 5) 1918 Lah 369 (370) : 1918 Pun Re No. 21

Withdrawal of suit. — [44] Plaintiff allowed to withdraw suit with permission to bring fresh suit on payment of defendant's costs — Order fixing no date for payment — Plaintiff in tituting second suit without paying costs — It is irregularity curable under S. 99. (Vol 22) 1935 Nag 56 (56) : 31 Nag L R 266.

Substitution of legal representative. — [45] Irregularity — *Rent suit by landlord* — *Heirs of deceased tenant already on record as parties but not formally substituted as his heirs* — *Mere want of formal substitution of heirs of deceased tenant is not a material irregularity* — *It does not reduce the rent decree to a money decree.* (Vol 24) 1937 Pat 147 (148).

3. *Execution proceedings.* — [1] *Appeal* — *Sale confirmed during pendency of* — *No loss or prejudice to party caused* — *Sale should not be set aside.* (Vol 5) 1918 Mad 1262 (1264).

[2] *Attachment* is only a step in execution the omission of which does not vitiate a sale of property unless material loss results therefrom. After the confirmation of sale, there can be no objection as to attachment, the want of which, being a mere irregularity, does not interfere with the executing Court's power to sell the property. (Vol 5) 1918 Mad 1262 (1263).

[3] *Execution proceedings* — *Application for substituting legal representative's name can be made to the Court passing the decree* — *If it is not made to that Court it is mere irregularity curable by S. 99.* (Vol 13) 1926 Lah 34 (35)* (Vol 12) 1925 Oudh 448 (450) : 28 Oudh Cas 330.

[4] *Appeal against original decree* — *Execution proceedings of original decree kept pending* — *Application for revival only of execution is bad but S. 99 is available* — *Non-compliance with condition specifically stated in appellate decree however renders S. 99 unavailable.* (Vol 17) 1930 Bom 225 (227).

[5] *Merits not affected* — *Decree in rent suit by Court having jurisdiction* — *Property brought to sale in rent decree, already purchased by plaintiff in money decree* — *Plaintiff not party to rent suit* — *Suit by plaintiff for*

APPEALS FROM APPELLATE DECREES.

100. (1) Save where otherwise expressly provided in the body of this Code or by any other law² for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal³ by any Court subordinate to a High Court, on any of the following grounds, namely:—

- (a) the decision being contrary to law⁴ or to some usage having the force of law;¹⁰
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure¹¹ provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.⁴³

[1882—S. 584; 1877—S. 584; 1859, S. 372.]

Second appeal on no other grounds. **101.** No second appeal shall lie except on the grounds mentioned in section 100.

[1882—S. 585; 1877—S. 585.]

Section 99 (contd.)

possession on declaring rent decree and sale thereunder fraudulent and therefore void—Fraud not being proved, rent decree cannot be varied or modified in plaintiff's suit, even though there might have been illegal exercise of jurisdiction by Court in rent decree. (Vol 24) 1937 Pat 147 (148).

4. Jurisdiction of Court.—[1] In S. 99 by 'jurisdiction of the Court' is meant the jurisdiction of the trial Court. (Vol 13) 1926 Lah 402 (402).

[2] The term 'jurisdiction' could only have been intended to be used in S. 99 in the sense of pecuniary or local jurisdiction or jurisdiction relating to the subject-matter. (1901) 28 Cal 324 (330) * (1911) 7 Nag L R 33 (34, 35) * (Vol 22) 1935 Pesh 151 (152).

[3] Jurisdiction, want of — Appellate Court will interfere although no miscarriage of justice is caused. (Vol 13) 1926 All 650 (652) * (1909) 2 Ind Cas 677 (680, 681) (All) * (Vol 5) 1918 Cal 435 (436) : 45 Cal 926 * (Vol 4) 1917 Nag 99 (101) : 14 Nag L R 71 * (Vol 29) 1942 Pat 1 (25) : 21 Pat 1 (FB).

5. Misjoinder of parties or causes of action. — [1] "Misjoinder" in S. 99 includes non-joinder. (1910) 38 Mad 436 (438) * (Vol 6) 1919 Bom 135 (135) : 43 Bom 575.

[2] Misjoinder—Merits not affected — Merits of case satisfactorily disposed of by trial Court in spite of complication of proceedings—No objection as to misjoinder can be given effect to in appeal—Joinder of parties and causes of action once made, striking out is discretionary with Court. (Vol 24) 1937 P C 42 (45) : 16 Pat 149 (PC) * (1909) 36 Cal 780 (798) : 36 Ind App 103 : 1909 Pun Re No. 93 (PC).

[3] The Appellate Court may in order to meet the ends of justice allow a party to amend the plaint or to withdraw the suit against the *misjoined defendants* with liberty to bring fresh suit. (1893) 15 All 380 (381).

[4] An objection as to misjoinder cannot be taken for the first time in appeal especially when the suit is decided on the amendments in the first Court. (1912) 17 Ind Cas 97 (99) (Mad * (1913) 18 Cal L Jour 260 (261)).

[5] Section 99 does not prevent Appellate Court from interfering on ground of misjoinder or non-joinder which affects jurisdiction of trial Court. (Vol 17) 1930 Mad 714 (718) * (Vol 7) 1920 Lah 19 (20) : 1 Lah 295.

[6] Misjoinder affecting the merits of the case cannot be passed over as a mere irregularity and condoned as suits under S. 99. (1904) 27 Mad 80 (84).

[7] The joinder of an unnecessary party to a mortgage suit does not involve its dismissal but is a mere irregularity. (Vol 6) 1919 Pat 325 (327).

[8] One suit by four plaintiffs owning separate plots of land against the same defendant for trespassing on all plots at the same time is bad for misjoinder, which is not a mere irregularity capable of being cured by S. 99. (1911) 34 Mad 55 (57).

[9] Non-joinder of Receiver is not fatal where order is in his favour. (Vol 9) 1922 Mad 439 (440).

[10] Misjoinder of both, of parties and of causes of action—Section 99 applies. (Vol 13) 1926 Lah 145 (146).

[11] Failure to obtain leave under O. 2, R. 4 is no ground to reverse or vary decree. (Vol 28) 1941 Bom 247 (250) : 1 L R (1941) Bom 361.

[12] If a defendant is sued by one only of two persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action dismissed unless the other is joined. This is not merely technical (Vol 10) 1923 Mad 337 (337).

[13] Non-joinder of necessary party in spite of objection taken from start — Suit should be dismissed. (Vol 20) 1933 Mad 664 (667).

6. Remand, irregular order of. — [1] Remand order though case decided on merits by trial Court is irregular—But order, not affecting merits, would not be set aside by High Court. (Vol 1) 1914 Cal 163 (164) : 41 Cal 108 * (1907) 5 Cal L Jour 328 (333).

[2] An appellant is not entitled to ask the Court to reverse the decree of the Court below on the ground that it has been passed after an erroneous order of remand unless he satisfies that such erroneous order has affected the merits of the case. (1907) 5 Cal L Jour 71 (77, 78) * (1889) 13 Bom 449 (457).

[3] Assuming that an illegal order of remand can be validated by consent or waiver, the failure of parties to appeal against the order cannot be presumed to be consent or waiver. (1909) 32 Mad 83 (85).

SECTIONS 100 & 101—SYNOPSIS.

1. Scope, object and applicability of the sections.
2. "Save where otherwise expressly provided in the body of this Code or by any other law."
3. "Appeal shall lie to the High Court from every decree passed in appeal."
4. Contrary to law — General.
5. Decision not based on legal evidence.
6. Appellate Court assuming jurisdiction.
7. Exercise of discretion by the lower Appellate Court.
8. Omission to consider facts, evidence and proof.

Sections 100 & 101 (*contd.*)

9. Misappreciation of evidence.
10. Contrary to usage having the force of law.
11. Errors or defects in procedure — General — Clause (c).
12. Omission to frame or try issues of facts properly.
13. Defective judgment.
14. Admission or rejection of evidence.
15. Question of law, question of fact and mixed questions of law and fact — General.
16. Questions of fact.
17. Questions of law.
18. Mixed question of law and fact.
19. Partition.
20. Construction of documents.
21. Inference from proved facts.
22. Onus of proof, error as to.
23. Relevancy and sufficiency of evidence.
24. Nature of tenancy.
25. Nature of possession.
26. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, etc.,
27. Malicious prosecution, suit for.
28. Existence of legal necessity for, and binding nature of, transaction.
29. Existence of nuisance.
30. Acquisition of easement and customary rights of privacy.
31. Finding of fact binding in second appeal.
32. Finding of fact, when not binding in second appeal.
33. Concurrent findings of fact.
34. New case — General.
 35. Plea as to admissibility of evidence.
 36. New point involving pure question of law.
 37. New case of mixed questions of law and fact.
 38. Plea going to the root of the case.
 39. Plea of jurisdiction.
 40. Plea of limitation, estoppel or *res judicata*.
 41. Plea abandoned or waived is barred.
42. Remand — See O. 41, Rr. 23 and 25.
43. *Ex parte* appellate decree is subject to second appeal.

1. Scope, object and applicability of the sections.— [1] Plain reading of S. 100 cannot be modified by inferences from judicial rulings. (Vol 22) 1935 Mad 70 (71).

[2] Section 100 is an enabling section and confers a right of second appeal. Section 101 restricts the grounds of such appeal only to grounds mentioned in S. 100. The restriction is imposed on the party appealing, hence a respondent in appeal under S. 100 is not debarred from challenging findings of fact against him. (Vol 26) 1939 Rang 59 (58).

[3] A right of appeal is a statutory right and cannot be inferred by implication. (Vol 29) 1942 Mad 73 (75) : I L R (1942) Mad 236.

[4] On a second appeal the decision of the lower Appellate Court is the only one to be referred in the grounds of appeal and not the decision of the original Court. (1913) 7 Low Bur Rul 39 (40).

[5] Appeal to District Judge from order of Collector under S. 74, Madras Estates Land Act—Order affirmed by District Judge — No appeal lies under S. 100 as order of District Judge is not a decree. (Vol 29) 1942

Mad 73 (74) : I L R (1942) Mad 236 (Vol 29) 1942 Mad 599 (600) : I L R (1942) Mad 959.

[6] Registration of a claim by Forest Settlement Officer — Appeal under S. 10, Madras Forest Act, to District Court — Decision is one of ordinary Courts and provisions of Civil P. C. apply — Second appeal is competent. (Vol 3) 1916 P C 21 (23) : 43 Ind App 192: 39 Mad 617 (P C).

[7] The right of appeal to the High Court under S. 109A of the Bengal Tenancy Act is subject to S. 584 of the Civil P. C. of 1882 and can only be exercised upon the grounds therein mentioned. (Vol 5) 1918 P C 92 (94) : 45 Ind App 183 : 46 Cal 189 (P C).

[8] Burma Courts Act (1922), S. 11 — All appeals which can be brought under S. 11, Burma Courts Act, are in addition to appeals which will lie under S. 100, Civil P. C. (Vol 18) 1931 Rang 56 (57) : 8 Rang 485.

[9] Suit for rent of agricultural land of value below Rs. 500 not coming under S. 13 (1), Burma Laws Act—Second appeal lies under S. 100 and not under S. 11, Burma Courts Act. (Vol 26) 1939 Rang 350 (350) : 1939 Rang L R 472.

[10] Appeal to High Court under Calcutta Municipal Act S. 142 is not a second appeal within S. 100 and therefore a finding of fact can be challenged. (Vol 14) 1927 Cal 802 (804) : 55 Cal 228 (Vol 15) 1928 Cal 450 (451, 452) (FB).

[11] Provincial Insolvency Act (1920), S. 75—Appeal under S. 75 lies on grounds similar to those under Civil P. C. (1908), S. 100 (1). (Vol 19) 1932 Cal 642 (643) : 59 Cal 1135.

[12] The provisions of these sections do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, see section 7 (b).

2. "Save where otherwise expressly provided in the body of this Code or by any other law."—"Otherwise expressly provided."—[1] See Sections 102, 104 (2) and O. 47, R. 7 (1).

[2] No second appeal lies in the following cases by reason of S. 104, Civil P. C.: (Vol 23) 1936 All 763 (764) (Order rejecting application under O. 21, R. 90) (Vol 9) 1922 All 113 (114). (Order of abatement of appeal) (Vol 20) 1933 Mad 388 (388) (Case falling under O. 21, R. 90) (Vol 23) 1936 Pat 119 (120). (Order allowing a deposit and setting aside a sale in execution under O. 21, R. 92.) (Vol 11) 1924 Pat 803 (803) (Order of District Judge reversing order of Sub-Judge and setting aside sale under O. 21, R. 90).

[3] Execution proceedings—A second appeal will not lie in an execution matter, if a second appeal would not have laid in the suit itself by reason of S. 102, Civil P. C. (Vol 8) 1921 All 55 (55) : 43 All 403.

[4] There can be no second appeal from the decision of a Revenue Officer under S. 87, Chota Nagpur Tenancy Act. (1912) 39 Cal 241 (244).

[5] No second appeal lies to the High Court from a decision of the District Judge under S. 16, Gujrat Talukdars Act; (Vol 12) 1925 Bom 241 (241, 242) : 49 Bom 442 (F B) (16 Bom 408, overruled.)

[But see (Vol 24) 1937 Bom 401 (403, 406) : I L R (1937) Bom 602. (Second appeal lies from decision of District Judge under S. 16, Gujrat Talukdars Act).

"Any other law for the time being in force."—[6] For example, see (a) Arbitration Act, 1940, Ss. 17 and 39 (1); (b) Provincial Insolvency Act, 1920, S. 75; (c) Provincial Small Cause Courts Act, 1887, S. 27; (d) Succession Act, 1925, S. 388 (3).

3. "Appeal shall lie to the High Court from every decree passed in appeal."—[1] Rejection of appeal memo amounts to decree and is appealable. (Vol 28) 1941 Pat 108 (109).

Sections 100 & 101 (*contd.*)

[2] Mere dismissal of appeal summarily does not bar second appeal. (Vol 25) 1938 Pat 330 (332).

[3] Order dismissing appeal for deficiency of court-fee is appealable — Dismissal raising question of law — Second appeal lies. (Vol 14) 1927 Nag 100 (100).

[4] Decree disallowing cross-objections is a decree passed in appeal within the meaning of S. 100 and a second appeal lies therefrom. (1887) 10 Mad 292 (294)* (Vol 20) 1933 Lah 400 (402).

[5] Order rejecting cross-objections in limine is not decree — No second appeal lies. (Vol 5) 1918 Lah 201 (202) : 1918 Pun Re No. 20.

[6] Suit for enforcement of award praying also that award be filed — Second appeal lies. (Vol 16) 1929 Rang 166 (166) : 7 Rang 136.

[7] Where an appellant presented a second appeal pending an application for review to the lower Appellate Court and subsequently the lower Appellate Court set aside its decree. *Held* that as the decree appealed from had ceased to exist, the second appeal could not be heard. (Vol 7) 1920 Lah 18 (18) : 1919 Pun Re No 166.

[8] A special appeal from the decision of the Civil Judge at Vinchur under Bombay Regulation 18 of 1830 Cl. 5, lies to the High Court. (Vol 1) 1914 Bom 30 (31) : 38 Bom 340.

[9] Madras Agency Tracts Interest and Land Transfer Act (1 [I] of 1917), S. 4 (2) — Application under S. 4 (2) is not suit and order refusing it is not decree. (Vol 20) 1933 Mad 695 (696) : 56 Mad 984.

[10] Suit dismissed — Appeal — Application by appellant's pleader for adjournment on the ground of inability to argue — Appeal dismissed for want of prosecution — Disposal of appeal amounts to decree, from which a second appeal lies. (Vol 24) 1937 All 284 (285).

[11] Appellate Court dismissing suit, but granting permission to bring fresh suit — Appeal against decision granting permission to bring fresh suit is maintainable. (Vol 4) 1917 All 134 (135, 136).

[12] A decree of a Deputy Collector in a suit under S. 213, Madras Estates Land Act, is open to second appeal in accordance with the provisions of the Civil Procedure Code. (Vol 1) 1914 Mad 135 (136, 137) : 38 Mad 655.* (Vol 1) 1914 P C 87 (89) : 41 Ind App 258 : 37 Mad 443 (PO). (Case under the Rent Recovery Act (now Madras Estates Land Act.))

4. Contrary to law — General. — [1] Failure to appreciate and determine question of fact to be tried is error of law. (Vol 30) 1943 P C 208 (211) : 70 Ind App 225 : I L R (1944) Kar P C 40 (P C).

[2] High Court can come to a conclusion on the evidence on the record, as to a new question when the lower Courts have misconceived the real question to be decided. (Vol 6) 1919 P C 29 (31) : 46 Ind App 140 : 47 Cal 107 : 15 Nag L R 97 (P C).

[3] Question of fact vitally affecting case — Whether it was misconceived or not is question of law. (Vol 31) 1944 Sind 209 (212) : I L R (1944) Kar 223.

[4] Finding of fact — Lower Court misdirecting itself as to conclusions to be drawn — Finding is not binding. (Vol 15) 1928 All 39 (41) : 50 All 180.

[5] Judgment based on wrong assumptions — Second appeal lies. (Vol 14) 1927 Lah 614 (615)* (Vol 30) 1943 Cal 211 (213)* (Vol 23) 1936 Lah 1005 (1006)* (Vol 33) 1946 Nag 152 (157) : I L R (1946) Nag 73.

[6] Finding of fact based on conjectures can be reopened in second appeal. (Vol 18) 1931 Lah 213 (214)* (Vol 6) 1919 Cal 1091 (1093) * (Vol 17) 1930 Lah 238 (239)* (Vol 14) 1927 Nag 392 (394). (Finding based on theories and assumptions is open to challenge.)

[7] Misconception of law, pleadings and effect of evidence are grounds for interference. (Vol 13) 1926 Nag 416 (417)* (Vol 8) 1921 Cal 71 (72). (Lower Court

holding that there was no evidence while there was evidence actually before Court — Finding of fact can be challenged.) * (1918) 17 Cal W N 224 (227) * (Vol 26) 1939 Lah 510 (511). (Misunderstanding of evidence.)* (Vol 19) 1932 Lah 128 (128). (Misconception of evidence.) * (Vol 25) 1938 Nag 470 (472, 473) : I L R (1938) Nag 535.

[8] Failure to make presumption allowed by law amounts to error of law. (Vol 7) 1920 Lah 354 (355) : 1 Lah 206 * (Vol 7) 1920 Lah 476 (476). (Marriage — Legitimacy — Lower Appellate Court ignoring important evidence and presumption — Finding on question of legitimacy is not binding in second appeal.)

[9] Finding of fact based entirely on presumption arising out of a rule of Mahomedan law can be attacked in second appeal on the ground of the non-applicability of the rule. (Vol 17) 1930 Lah 97 (98).

[10] Wrong finding through misreading of record is ground for second appeal. (Vol 2) 1915 Lah 189 (190) * (Vol 4) 1917 Lah 193 (194) : 1917 Pun Re No 73. (Misreading document.)

[11] Omission by lower Court to give effect to admission by party — Second appeal lies. (Vol 20) 1933 Sind 121 (122).

[12] High Court will always interfere in second appeal when the lower Court has wrongly refused to grant an equitable relief. (Vol 24) 1937 Mad 520 (522).

[13] Decree resulting from decision of question of fact decided as question of law — Decree ought to be set aside. (Vol 28) 1941 All 289 (289).

[14] Where the lower Appellate Court was obsessed with the idea that a certain question did not arise at all, and it came only to a perfunctory finding, such a finding cannot be considered a definite finding based upon a consideration of the evidence and binding in second appeal. High Court can go into the evidence itself and determine question without remanding a case. (Vol 29) 1942 Pat 188 (189).

5. Decision not based on legal evidence. —

[1] Finding of lower Appellate Court is binding on High Court unless there is no evidence to support it. (Vol 14) 1927 P C 257 (260) (P C) * (Vol 6) 1919 P C 29 (30, 31) : 46 Ind App 140 : 47 Cal 107 : 15 Nag L R 97 (P C).

[2] A decision that there is no evidence to support a finding is a decision of law. (Vol 1) 1914 P C 67 (71) : 41 Ind App 110 : 41 Cal 972 (P C). (On which Privy Council will interfere with the findings of fact of the Courts below.) * (Vol 22) 1935 Mad 26 (26).

[3] Finding based wholly on surmise without any positive evidence to support it can be set aside. (Vol 22) 1935 Mad 190 (191) * (1941) 1941 Nag L Jour 230 (232).

[4] Decree not based on evidence — High Court can interfere. (Vol 1) 1914 Low Bur 198 (200).

[5] No evidence in support of finding of fact — High Court can interfere. (Vol 17) 1930 Cal 815 (820) : 58 Cal 585 * (Vol 26) 1939 Lah 88 (89) * (Vol 19) 1932 Lah 293 (294) : 13 Lah 399. (Concurrent finding not based on evidence can be challenged.) * (Vol 14) 1927 Mad 1167 (1174) * (Vol 11) 1924 Mad 617 (617) * (1935) 18 Nag L J 104 (105) * (Vol 5) 1918 Nag 215 (216) * (Vol 18) 1931 Oudh 382 (383) * (Vol 18) 1931 Oudh 136 (137) * (Vol 27) 1940 Pat 137 (140) : 18 Pat 768. (Finding of trial Court based on Record of Rights cannot be disturbed by Appellate Court by ignoring that document.) * (Vol 25) 1938 Pat 622 (624) * (Vol 23) 1936 Rang 488 (490). (Finding of fact — No evidence — Court in second appeal is not precluded from coming to a different finding.) * (Vol 16) 1929 Rang 257 (258) : 7 Rang 751. (When Court arrives at finding, there being no evidence, there is error of law.)

Sections 100 & 101 (*contd.*)

[See however (Vol 1) 1914 Mad 118 (119). (High Court cannot interfere on a finding of fact based upon no positive evidence but only on probabilities.)]

[6] Finding not based on legal evidence is not binding. (Vol 12) 1925 Cal 302 (303).

[7] Finding of fact based only on local investigation cannot be sustained. (Vol 10) 1923 Lah 208 (208).

[8] Decision in lower appellate Court on supposed admission by plaintiff — Decision can be challenged in second appeal. (Vol 15) 1928 Oudh 333 (334).

[9] Document obviously of importance and weight — Omission to mention in judgment would be regarded by appellate Court as sufficient proof that it was not taken into consideration. (Vol 6) 1919 Oudh 44 (44, 45): 22 Oudh Cas 312.

[10] See also Note 32.

6. Appellate Court assuming jurisdiction.—[1] First appeal entertained without jurisdiction — Second appeal lies from the appellate decree. (Vol 12) 1925 Cal 1032 (1032) * (Vol 26) 1939 All 22 (23) * (Vol 21) 1934 All 825 (826) * (Vol 6) 1919 Cal 363 (369) * (Vol 22) 1935 Lah 319 (319) * (Vol 17) 1930 Lah 1065 (1066) (Court incompetent to hear appeal—Decision being contrary to law is appealable). * (Vol 15) 1928 Oudh 224 (225) (Interference of lower Appellate Court with a non-appealable order (of awarding costs) — Second appeal lies) * (Vol 29) 1942 Pat 369 (370) * (Vol 28) 1941 Pat 616 (616) (Appellate Court entertaining appeal which did not lie — Second appeal may be competent from such decision — Even if not competent, revision lies).

[But see (Vol 21) 1934 Lah 79 (80). (Whether second appeal is competent is doubtful—But revision is competent) * (Vol 8) 1921 Mad 612 (614) (Lower Court entertaining appeal in matter in which appeal is incompetent in law — Remedy is by way of revision petition and not by second appeal)].

[2] Lower Appellate Court having no jurisdiction is no ground for second appeal when such second appeal is disallowed by Civil P. C. (Vol 8) 1921 Lah 156 (157).

[3] Where lower Appellate Court has wrongly assumed an appellate jurisdiction but has declined to interfere with trial Court's decree, no right of second appeal is conferred. (Vol 30) 1943 Mad 185 (186): I L R (1943) Mad 297.

7. Exercise of discretion by the lower Appellate Court.—[1] Discretion exercised by lower Appellate Court—High Court will not interfere in second appeal unless strong case is made out for so doing. (Vol 20) 1933 Lah 867 (868) * (Vol 7) 1920 Cal 24 (25) * (Vol 19) 1932 Lah 43 (44) (Lower Appellate Court drawing presumption, not arbitrarily, or as a matter of course but after considering various circumstances—There is no justification for interfering in second appeal with discretion exercised by it.) * (Vol 6) 1919 Mad 990 (993): 41 Mad 109. (High Court should not interfere with discretion exercised by Revenue Courts in cases relating to commutation of rent except on very clear grounds.) * (Vol 21) 1934 Oudh 366 (367). (Discretion of trial Court confirmed by Appellate Court cannot be interfered in second appeal.) * (1912) 17 Ind Cas 315 (316) (Oudh). (Lower Court exercising discretion in granting plaintiff declaration some what different from that asked for in the plaint without formal amendment, the Court of second appeal should not interfere.)

[See however (Vol 21) 1934 Cal 5 (6, 7). (Whether or not there has been a proper discretion in issuing certificates is question of fact).]

[2] Matter of discretion—Appellate Court is always reluctant to interfere. (Vol 16) 1929 Rang 221 (222): 7 Rang 561.

[3] Discretion arbitrarily exercised can be questioned

in second appeal. (Vol 20) 1933 All 294 (295) * (Vol 27) 1940 Pat 502 (504). (Discretion not exercised judicially).

[4] Exercise of discretion by trial Court and Appellate Court—High Court can see which discretion is proper. (Vol 26) 1939 Nag 110 (112): I L R (1939) Nag 452.

[5] Exercise of discretion by trial Court in judicial manner should not be interfered with by Appellate Court—If it so interferes, High Court can interfere in second appeal. (Vol 21) 1934 Oudh 259 (260).

[6] Dismissal of an application for adjournment of appeal by the lower Appellate Court in exercise of its discretion, is not a matter which can be a subject of second appeal. (Vol 24) 1937 All 284 (285) * (Vol 4) 1917 Mad 408 (409). (Lower Court taking up big suit at 5-30 p. m. and finding that defendant's Vakil was not prepared to cross-examine plaintiff's witness, giving decree for plaintiff. High Court would not interfere if there is no affidavit explaining how he was prejudiced.)

[7] Rate of interest—Finding as to, is one of fact—Discretion exercised by lower Court — Appellate Court will not interfere. (Vol 9) 1922 All 335 (335) * (Vol 22) 1935 Lah 440 (440). (Finding that interest is not excessive cannot be interfered with in appeal.)

[See also (Vol 8) 1916 Oudh 334 (335): 19 Oudh Cas 159. (Mortgage by father at high rate of interest — Suit for redemption — Power of Court to vary rate — Mortgagee must justify rate of interest — Burden of proof — Discretion on point of interest can be challenged in second appeal — Held there was no cause for interference.)]

[8] Question whether in directing payment of decretal amount by instalments Court below has exercised judicial discretion cannot be raised in second appeal. (1911) 15 Cal W N 1083 (1084) * (Vol 9) 1922 Lah 355 (355).

[9] Discretion as to admissibility of secondary evidence should not be disturbed. (Vol 11) 1924 Lah 303 (304).

[See also (Vol 11) 1924 Oudh 306 (307): 27 Oudh Cas 26.]

[10] The High Court in second appeal should not interfere with the discretion of the lower appellate Court in admitting or rejecting a certain document in evidence to enable it to pronounce judgment. (Vol 22) 1935 Pat 470 (471).

[11] The exercise of the discretion for or against the genuineness of a document may be challenged in second appeal where it is shown that the exercise was made arbitrarily and not on judicial grounds. (Vol 13) 1926 Oudh 362 (363).

[12] Second appeal does not lie as to exercise of discretion under Limitation Act (1908), S. 5. (Vol 8) 1916 Lah 146 (148): 1916 Pun Re No. 88 * (1930) 123 Ind Cas 83 (83, 84) (Lah).

[13] Where plaint was returned firstly to have it amended and secondly for presentation to proper Court, and the trial Court while computing period of limitation excluded both the periods, High Court did not interfere in second appeal with the discretion exercised by trial Court. (Vol 18) 1931 Mad 632 (634).

[14] Exercise of discretion under S. 5, Limitation Act, not on right principles—High Court can interfere. (Vol 13) 1926 Lah 445 (446) * (Vol 18) 1931 All 28 (28) * (1912) 9 All L Jour 15 (16) * (Vol 23) 1936 Lah 742 (743). (Discretion not judicially exercised.) * (Vol 6) 1919 Pat 503 (505): 4 Pat L Jour 381.

[15] Appellate Court has discretion to decide case with or without taking additional evidence. (Vol 20) 1933 Lah 1014 (1014).

[16] Where the Appellate Court has exercised a discretion regarding the admission of additional evi-

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dence under O. 41, R. 27 in a judicial manner, there is no error either of law or of procedure and consequently such exercise of discretion should not be interfered with in second appeal. (Vol 29) 1942 Oudh 485 (487) : 18 Luck 464. ((Vol 25) 1938 Oudh 135, reversed.) * (Vol 24) 1937 Lah 115 (116).

[See (Vol 10) 1923 All 413 (413). (Additional evidence admitted in first appeal without recording reasons — Finding is not binding in second appeal.)]

[17] No second appeal lies from refusal to admit fresh evidence under O. 41, R. 27. (Vol 18) 1931 Lah 506 (506) * (Vol 10) 1923 Lah 30 (31) * (Vol 14) 1927 Mad 1099 (1099) * (Vol 6) 1919 Mad 1166 (1171, 1172) : 42 Mad 737 (F B).

[18] Additional evidence rejected by Appellate Court not in exercise of discretion but due to supposed insuperable legal difficulty — Second appeal lies. (Vol 12) 1925 All 288 (289) : 47 All 412.

[19] Discretion of the trial Court as to costs can be interfered with in appeal only when it is improperly exercised. (Vol 27) 1940 Mad 589 (589) * (Vol 13) 1926 All 419 (420). (When no substantial point on merits arises, no appeal lies under S. 100 as to costs.) * (Vol 20) 1933 Oudh 455 (457) * (Vol 16) 1929 Oudh 406 (412) : 6 Luck 497 (F B).

[20] Discretion as to costs decided arbitrarily in appeal — Second appeal to High Court will lie on question of costs. (Vol 6) 1919 All 214 (216) : 41 All 254 * (Vol 5) 1918 Lah 247 (247) * (Vol 27) 1940 Mad 589 (589)

[21] Costs—Question of principle involved — Second appeal lies. (Vol 8) 1921 Cal 604 (605).

[See also (1920) 2 Lah L Jour 310 (312).]

[22] Refusal to act under O. 41, R. 33, is not error of law and need not be interfered with in second appeal. (Vol 17) 1930 Mad 707 (707).

[23] High Court cannot interfere in second appeal with lower Appellate Court's discretion in granting mandatory injunction unless it is wrongly exercised. (Vol 4) 1917 Lah 69 (70).

[24] Appellate Court refusing to entertain point not raised in memorandum of appeal — Second appeal does not lie. (Vol 15) 1928 Lah 536 (537).

8. Omission to consider facts, evidence and proof. — [1] Misreading or ignoring of important documentary evidence amounts to substantial error. (Vol 18) 1931 All 499 (503) : 54 All 6 (S B) * (Vol 19) 1938 Lah 54 (55). (Important document not considered by lower Court.) * (Vol 28) 1941 Mad 393 (393). (Lower Appellate Court not advertent to documentary evidence of party.) * (Vol 22) 1935 Mad 701 (703). (Lower Court not referring to important evidence in conclusions drawn and assuming wrong legal principles.) * (1912) 13 Ind Cas 629-630 (Oudh). (Misinterpreting certain documentary evidence.) * (Vol 18) 1926 Pat 49 (51). (Misreading of documentary evidence.)

[2] Finding of fact — First Appellate Court neither appreciating existence of document nor giving effect to statutory presumption arising therefrom — Questions of fact as well as law are open in second appeal as well as before Privy Council. (Vol 27) 1940 P C 192 (196, 197) : ILR (1941) Bom 107 : ILR (1940) Kar PC 380 (PC).

[3] Judgment of lower Appellate Court based on misreading of evidence is liable to be set aside in second appeal. (Vol 13) 1926 Lah 541 (542).

[4] Finding of fact on a misreading of evidence — Second appeal lies. (Vol 10) 1923 Lah 585 (587) * (Vol 4) 1917 Lah 193 (194) : 1917 Pun Re No. 73.

[See however (1909) 8 Ind Cas 101 (101, 102) (Cal.) (Misreading of evidence as opposed to misconstruction of document is not a ground of second appeal especially when the whole deposition has not been misread.)]

[5] First Appellate Court omitting to consider most important evidence or misreading or misconstruing evidence — Finding of fact is not binding in second appeal. (Vol 13) 1926 Oudh 578 (584) : 1 Luck 489.

[6] Finding of fact—Evidence ignored—High Court will interfere. (Vol 9) 1922 Lah 149 (153) * (1909) 3 Ind Cas 173 (174) (Cal). (Only a total omission to consider an important part of the evidence and not an erroneous view of evidence is an error of law.) * (Vol 26) 1939 Lah 504 (507) * (Vol 20) 1933 Mad 163 (163) * (Vol 12) 1925 Mad 447 (448) * (Vol 28) 1941 Oudh 615 (617) : 17 Luck 109 * (Vol 5) 1918 Oudh 221 (222) * (Vol 8) 1921 Pat 18 (20) : 6 Pat L Jour 72. (Lower Court not considering oral evidence at all and confining itself to documentary evidence.)

[7] Failure of Appellate Court to consider evidence relied on by trial Court is an error of law. (Vol 9) 1922 Pat 562 (563).

[8] Evidence not brought to notice of Courts—High Court will not interfere in second appeal. (Vol 4) 1917 Pat 578 (579) : 2 Pat L Jour 231.

[9] Finding of fact by lower Appellate Court not to be disturbed though it has not specifically referred to every piece of evidence on record. (Vol 33) 1946 Oudh 72 (72) * (Vol 21) 1934 All 941 (942) * (Vol 26) 1939 Lah 548 (553) * (1919) 1 Lah L Jour 72 (73, 74) * (Vol 26) 1939 Nag 221 (223) : I L R (1939) Nag 510 * (Vol 30) 1943 Oudh 429 (430, 431). (It does not amount to substantial error or defect in procedure.) * (Vol 5) 1918 Pat 291 (294, 295).

[10] Though discussion of evidence in judgment of lower Appellate Court may not be satisfactory, yet that by itself is not sufficient ground for interference in second appeal like absence of evidence or disregard of it. (Vol 2) 1915 Mad 463 (464).

[11] Judgment of lower Court based on misconception of evidence and containing several mistakes—High Court in second appeal will go into evidence and come to a finding on question in dispute. (Vol 4) 1917 Lah 225 (226).

9. Misappreciation of evidence.—[1] Appreciation of evidence by lower Appellate Court cannot be questioned in second appeal. (Vol 27) 1940 Pat 510 (511) : 19 Pat 382 * (Vol 27) 1940 Cal 532 (534). (Positive evidence on record justifying finding of lower Appellate Court—Mere fact that Judge did not refer to particular contradiction does not justify High Court in rejecting his finding.) * (Vol 18) 1931 Lah 607 (608) : 12 Lah 540. (Finding of fact proceeding upon appreciation of evidence cannot be agitated in second appeal.) * (Vol 8) 1921 Lah 284 (286). (Evidence not properly construed by lower Court — Finding of fact cannot be challenged.) * (Vol 4) 1917 Lah 381 (382). (Appreciation of documentary evidence is not question of law.) * (Vol 29) 1942 Mad 730 (730). (Do.) * (Vol 20) 1933 Pat 698 (700). (Cognency of evidence of admission must be determined by Court of fact and not in second appeal.) * (Vol 3) 1916 Pat 59 (60). (Failure of lower Appellate Court to appreciate document put in evidence is not a ground for second appeal.)

[2] Weight or value of evidence is not subject for discussion in second appeal. (Vol 2) 1915 Oudh 194 (195) : 18 Oudh Cas 160 * (Vol 23) 1936 All 124 (127). (Simple question of fact involved—Nothing to show that lower Court did not weigh evidence fairly and properly — High Court cannot differ from lower Court's view.) * (Vol 22) 1935 Bom 371 (376). (Question what witnesses are to be believed is entirely one of appreciation of evidence and not open to second appeal.) * (Vol 6) 1919 Cal 721 (721) : 46 Cal 152 * (Vol 5) 1918 Cal 685 (685) * (Vol 4) 1917 Cal 407 (408). (The question that lower Appellate Court gave undue preference to *thak* map involves a pure question of fact and as such can-

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not be raised in second appeal. *Halabadi Chittas* cannot be called documents of title and, therefore, what effect is to be given to them in evidence is not a question of law which can be raised in second appeal.) * (1875) 24 Suth WR 61 (61). (Inference from facts against the credibility of plaintiff's witnesses.) * (Vol 6) 1919 Lah 42 (43, 44) : 1 Lah 83. (Mere error in weighing evidence is not sufficient ground for second appeal.) * (Vol 13) 1926 Mad 173 (173). (Finding of fact based on oral evidence—High Court is loth to disturb.) * (Vol 1) 1914 Mad 106 (106). (First appeal Court not giving as much weight to certain circumstances as High Court might have done if it were first appeal Court—Finding of first appeal Court based also on other facts cannot be called illegal.) * (Vol 16) 1929 Nag 117 (117). (Extremely strong grounds are necessary for interfering with the finding of the trial Judge who heard the witnesses, that they were unworthy of belief.) * (Vol 12) 1925 Oudh 537 (537). (Trial Court disbelieving witnesses with reference to certain statements—Appellate Court believing them as to other statements—No second appeal lies.) * (1926) 13 Oudh L Jour 590 (591) * (Vol 7) 1920 Pat 726 (726) * (Vol 23) 1936 Sind 7 (8, 9). (Finding of fact—One witness preferred to another—Finding is not based on no evidence.)

[3] Value to be attached and relevancy of evidence can be determined in second appeal also. (Vol 5) 1918 Mad 1 (16) : 41 Mad 374 (F B).

[4] Evidence not assessed at its true value—High Court will interfere. (Vol 9) 1922 Nag 226 (226).

[5] Where evidence is disbelieved simply because the witness is a *patwari* or a relative of the party producing him and such other general reasons, it is an error in law and a second appeal will lie. (1914) 25 Ind Cas 660 (660, 661) (Oudh).

[6] See also Notes 31 and 32.

10. Contrary to usage having the force of law.—[1] Usage having the force of law means a local (or family) usage as distinguished from the general law. (1893) 20 Cal 93 (99) : 19 Ind App 228 (P C). (7 All 649 overruled.)

[But see (Vol 5) 1918 Mad 1166 (1167) : 40 Mad 1108. (Expression "usage having the force of law" in S. 100 should ordinarily be confined to the usages of the country or of the community.)]

[2] Under the section the usage must be in derogation of the law, and the question at issue should be not only whether such a usage exists but also whether it is a usage having the force of law. (Vol 4) 1917 Mad 255 (256).

[3] Decision as to what system of law applies is not decision on usage and cannot be interfered with in appeal. (Vol 4) 1917 Mad 255 (256).

[4] Under S. 100, Civil P. C., in a case where a custom differing from the general law is set up, the High Court in second appeal should consider whether the evidence adduced suffices to establish all the elements of antiquity and certainly necessary to constitute a valid custom. (Vol 4) 1917 Nag 147 (148).

[5] Questions as to the existence of an ancient custom are questions of mixed law and fact. The Judge must find what were the things actually done in alleged pursuance of the custom and then determine whether these facts so found satisfy the requirements of the law. The latter is a question of law, not of fact. (Vol 4) 1917 P C 33 (39) : 44 Ind App 147 : 40 Mad 709 (P C).

[6] Finding as to the existence of custom is finding of fact. (Vol 17) 1930 P C 234 (235) : 57 Ind App 264 : 53 Mad 597 (P C) * (Vol 1) 1914 Oudh 123 (123, 124) : 17 Oudh Cas 1. (Whether proof sufficient or not is question of law.)

[7] Finding as to existence of instance is one of fact but whether from such instances custom is proved is

question of law. (Vol 21) 1934 All 890 (890, 891) * (Vol 30) 1943 P C 111 (113) : I L R (1943) Nag 705 : I L R (1943) Kar P C 152 (P C). (Whether custom can be inferred from facts proved is a question of law.)

[8] Findings as to usages, genuineness of document in support of usages and credibility of witnesses are findings of fact and cannot be disturbed. (Vol 5) 1918 Mad 1 (14, 15) : 41 Mad 374 (F B) (29 Mad 24, overruled.)

[9] District Judge's finding on remanded issue as to custom can be challenged in second appeal. (Vol 19) 1932 Lah 274 (275) : 13 Lah 31.

[10] Custom—Whether from facts found, essential attributes of legal custom are established or not is question of law. (Vol 29) 1942 Cal 26 (28, 29) : I L R (1941) 2 Cal 258.

[11] Custom—Value to be attached to evidence for proving custom is entirely within jurisdiction of Court of first appeal and Court of second appeal cannot reverse finding. (Vol 17) 1930 Oudh 330 (332) * (1911) 9 Ind Cas 839 (839) (Cal).

[12] Custom reasonable or not, is question of law. (Vol 3) 1916 Cal 67 (68) * (Vol 24) 1937 Cal 245 (250) : I L R (1937) 2 Cal 86.

[13] Where the record of rights and village note are ignored while arriving at finding of custom, this finding of fact must be set aside in second appeal. (Vol 29) 1942 Pat 140 (141) : 20 Pat 870.

[14] If the decision of the lower Court that a certain custom does not exist is based on the rejection of evidence which should not have been rejected, the decision can be questioned in second appeal. (Vol 28) 1941 Oudh 468 (472) : 16 Luck 626.

[15] A question of custom cannot be taken up in a second appeal without the required certificate under S. 41, cl. (3), Punjab Courts Act, 1918. (Vol 1) 1914 Lah 422 (423).

[16] No wider power is conferred in disturbing findings about custom than other finding of fact. (Vol 5) 1918 Mad 1 (14) : 41 Mad 374 (F B).

[17] Whether case involves question of custom can be considered. (Vol 12) 1925 Lah 82 (82).

[18] Finding whether certain practice does or does not prevail is finding of fact—Whether practice has attributes of binding custom is question of law. (Vol 18) 1931 All 499 (502) : 54 All 6 (S D) * (Vol 20) 1933 All 306 (307).

[19] Practice—Appellate Court—Finding of lower Court on trade usage will not be ordinarily set aside by High Court (Vol 18) 1931 All 533 (534).

11. Errors on defects in procedure—General—Clause (c)—[1] For a second appeal it is not enough to show that there was a defect in procedure of the trial Court. It must be shown that alleged defect in procedure may possibly have produced error or defect in the decision of the case upon the merits by lower Appellate Court. (Vol 24) 1937 All 105 (107) * (Vol 5) 1918 Cal 685 (686) * (Vol 4) 1917 Cal 284 (285) * (Vol 6) 1919 Lah 418 (418) * (Vol 5) 1918 Mad 811 (812). (Judgment of the Appellate Court was meagre and not in conformity with the rule) * (Vol 4) 1917 Nag 147 (149) * (Vol 27) 1940 Pat 33 * (Vol 22) 1935 Pat 478 (479) * (Vol 18) 1931 Sind 128 (134) : 25 Sind L R 511.

[2] A decision by the lower Appellate Court opposed to the admissions of the parties amounts to a substantial error or defect in procedure. (Vol 4) 1917 Lah 297 (300) : 1917 Pun Re No 106.

[3] The failure by an Appellate Court to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the defendant is a substantial error of procedure. (Vol 7) 1920 Pat 359 (362) * (Vol 2) 1915 Cal 819 (820).

Sections 100 & 101 (*contd.*)

[4] Appellate Court rejecting Commissioner's report without directing further enquiry — Decision on other materials on record—*Held* decision involved substantial error or defect in procedure. (Vol 4) 1917 Cal 578 (578).

[5] Disposal of an appeal while a party was dead is a defect covered by Cl. (c). (Vol 16) 1929 Lah 119 (119).

[6] Agreement by both sides to proceed on the evidence before the Court and also before the Commissioner — Its violation by Court is a defect calling for interference in second appeal (Vol 15) 1928 Cal 136 (137).

[7] An Appellate Court cannot go into a question not raised in the pleadings and commits material irregularity if it misapplies the law relating to a case and decides it on a point not raised in an appeal. (1910) 1910 Pun W R No. 80, p. (196).

[8] Decision of point not raised in memorandum of appeal is not invalid on ground of defect of procedure within S. 100. (Vol 6) 1919 Mad 130 (132).

[9] Misconception of law of evidence and wrong procedure vitiate finding. (Vol 11) 1924 Pat 310 (311) : 2 Pat 919.

[10] Refusal by the Appellate Court in the exercise of its discretion to admit additional evidence given under O. 41, R. 27 is not a substantial defect or error in procedure. (1911) 33 All 379 (381).

[11] Appellate Court can reverse *ex parte* decree on ground of wrong procedure. (Vol 9) 1922 Lah 439 (440) : 3 Lah 357.

[12] Appeal — Abatement—Legal representative of *pro forma* respondent not brought on record — Appeal does not abate in toto—Order that whole appeal abates is appealable. (Vol 25) 1938 Cal 639 (640).

[13] High Court has power to reverse a finding arrived at by wrong procedure. (Vol 2) 1915 Bom 68 (71) : 37 Bom 149 * (Vol 26) 1939 Mad 61 (64).

12. Omission to frame or try issues of facts properly.—[1] Finding on question of fact not put in issue can be contested in second appeal. (Vol 8) 1921 Lah 256 (257, 258) * (Vol 18) 1931 Rang 312 (314).

[2] Appellate Court failing to decide question raised and put in issue — Decision is liable to be set aside in second appeal. (Vol 7) 1920 Lah 322 (323) * (Vol 7) 1920 Pat 359 (362).

[3] Objection as to frame of issue cannot be entertained. (Vol 4) 1917 Lah 68 (69).

[4] A party insisting upon the adjudication of an unnecessary issue cannot in appeal be allowed to get rid of such adjudication. (Vol 13) 1926 Nag 164 (167).

13. Defective judgment.—[1] In a second appeal High Court will interfere with the decision of the first Appellate Court, which fails to give reasons for a finding and the judgment is based on legally insufficient evidence. (Vol 7) 1920 Pat 829 (830) * (1909) 1 Ind Cas 205 (206) (Cal) (Lower Appellate Court not considering the evidence dealt with by the Court of first instance.) * (1940) 42 Pun L R 136 (138) (Lower Appellate Court should examine the entire evidence and its judgment should indicate that it has done so.) * (Vol 13) 1926 Lah 158 (159) (Appellate Court merely endorsing trial Court's finding.) * (Vol 4) 1917 Lah 267 (267) (Lower Appellate Court not making effort whatever to refer to or deal with the evidence.) * (Vol 7) 1920 Mad 688 (691) (Appellate Court failing to come into close quarters with the evidence.) * (1912) 1912 Mad W N 175 (176) (High Court will in second appeal satisfy itself with regard to the lower Appellate Court having applied its mind to the evidence on record and pronounced its finding upon a consideration of the evidence.) * (Vol 12) 1925 Oudh 384 (385) (Evidence not viewed legally — Question can be re-opened.) * (Vol 25) 1938 Pat 609 (610) (Lower Appellate Court reiterating the findings of

the trial Court and not discussing the oral or documentary evidence.) * (Vol 4) 1917 Pat 443 (443) (Finding that "on a consideration of all the circumstances of the case the suit is barred by limitation" is defective and unsatisfactory.)

[2] First Appellate Court must come to its own findings on evidence—Otherwise those findings even of fact can be set aside in second appeal. (Vol 3) 1916 Lah 394 (395)

[3] Judgment of reversal must show that the evidence and reasons of trial Court are considered. (Vol 10) 1923 Pat 275 (276).

[4] In judgment of reversal lower Appellate Court must give reasons for disbelieving the evidence and disagreeing with lower Court's finding. (Vol 12) 1925 Cal 408 (410) * (1910) 5 Ind Cas 160 (161, 162) (Cal).

[5] Lower Appellate Court reversing finding of fact of primary Court must consider all important materials. (Vol 12) 1925 Cal 993 (994) * (Vol 25) 1938 Mad 568 (569, 570) (Appellate Court, while reversing considered judgment of trial Judge, failing to refer to material piece of evidence militating against its own view.)

[6] Appellate Court upsetting reasoned and elaborate judgment of trial Court on general ground that evidence was not satisfactory—No discussion of evidence whatever—Finding is contrary to law. (Vol 24) 1937 Mad 282 (283).

[7] Mere fact that trial Court's judgment is reversed without considering all circumstances — Second appeal does not lie. (Vol 12) 1925 Oudh 313 (314).

[8] Judge sitting in appeal basing his judgment on new case made out for first time in appeal and in doing so failing to adequately consider more important aspect of the case and arriving at wrong conclusion—His judgment is liable to be set aside in second appeal. (Vol 25) 1938 Sind 198 (200) : I L R (1939) Kar 111.

[9] Judge disposing of suit on point taken by himself on appeal without affording parties opportunity of proving what is necessary to meet the point, commits error of law. (Vol 5) 1918 Low Bur 69 (70).

[10] Lower Appellate Court setting aside preliminary decree of trial Court but not actually passing decree—Second appeal lies. (Vol 17) 1930 Lah 125 (126).

[11] Question of law considered by trial Court but ignored in appeal—High Court must take notice of such question. (Vol 12) 1925 Oudh 506 (507).

[12] A judgment can be set aside for uncertainty of meaning. (Vol 1) 1914 Cal 784 (784).

[13] A wrong decision based upon findings contrary to the facts found raises a point of law. (1913) 18 Ind Cas 814 (815) (Cal).

[14] Finding based on misreading of judgment can be contested. (Vol 10) 1923 Lah 502 (503).

[15] Not considering oral evidence and failure to give finding thereon is ground for second appeal. (Vol 2) 1915 Lah 414 (415).

14. Admission or rejection of evidence. — [1] Relying on inadmissible evidence amounts to substantial error. (Vol 18) 1931 All 499 (504) : 54 All 6 (SB).

[2] A finding of fact which is vitiated by being based on inadmissible evidence is not such a finding of fact as is binding on High Court in second appeal. (Vol 23) 1936 Oudh 189 (190) * (Vol 27) 1940 All 441 (443) * (Vol 16) 1929 All 481 (483) * (1912) 15 Ind Cas 459 (460) (Cal) * (Vol 27) 1940 Lah 245 (246, 247) * (Vol 25) 1938 Lah 303 (304) * (Vol 20) 1933 Nag 383 (383) * (Vol 13) 1926 Nag 99 (107) * (1911) 11 Ind Cas 536 (536) (Oudh) * (Vol 28) 1941 Pat 118 (127).

[3] Finding based firstly on oral evidence and secondly on some documents objected to as inadmissible — It is finding of fact and cannot be interfered with in second appeal. (Vol 17) 1930 Lah 1067 (1068).

Sections 100 & 101 (*contd.*)

[4] Insufficiently stamped pro-note used in evidence without objection from defendant—No point of law can arise in second appeal. (Vol 18) 1931 Cal 480 (480).

[5] Evidence wrongly rejected—Finding is not binding. (Vol 21) 1934 Nag 44 (45) * (1938) 40 Pun L R 705 (706) * (1928) 29 Pun L R 287 (288). (Judge excluding from consideration a piece of documentary evidence on erroneous ground that the document was inadmissible in evidence for want of registration.) * (Vol 30) 1943 Nag 265 (266) : I L R (1943) Nag 340 * (Vol 1) 1914 Oudh 123 (124) : 17 Oudh Cas 1 * (Vol 21) 1934 Pat 48 (49). (Finding as to jointness or separateness is one of fact, but when arrived at on illegal exclusion of documentary evidence as inadmissible can be interfered with.)

[6] Finding of fact based on legal evidence on record—It is binding in second appeal even if inadmissible evidence has been admitted. (Vol 24) 1937 Lah 26 (27).

[7] Where the lower Court has based its decision partly on irrelevant evidence, the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at. (Vol 8) 1921 Pat 61 (63) : 5 Pat L Jour 410. * (Vol 12) 1925 Cal 1034 (1036). (Case should be remanded for decision on other evidence.)

[See also (Vol 11) 1924 Cal 1042 (1043). (On second appeal, though the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence, after exclusion of evidence erroneously admitted, is sufficient to warrant the finding of the Court below, the case may be disposed of by the High Court without a remand where the lower Court has arrived at its conclusions upon other grounds.)]

[But see (1934) 35 Pun L R 360 (361).]

[8] Refusal to admit document produced late is a ground for second appeal. (Vol 11) 1924 Pat 208 (208).

[9] Trial Court recording whole evidence, but deciding case without considering some evidence as being inadmissible—Appellate Court holding such evidence admissible and confirming decree on the whole evidence—Second appeal does not lie. (Vol 20) 1933 Rang 35 (36, 37).

[10] Documentary evidence held by lower Appellate Court to be irrelevant but discussed—High Court will not interfere. (Vol 8) 1921 Oudh 116 (117).

[11] High Court holding in second appeal that certain evidence was improperly rejected in lower Court cannot weigh the evidence and decide question of fact but must remand the case. (Vol 9) 1922 Pat 417 (417, 418).

15. Question of law, question of fact and mixed questions of law and fact—General.—[1] Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other. But the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. (Vol 5) 1918 P C 92 (93) : 45 I A 183 : 46 Cal 189 (P C) * (Vol 4) 1917 P C 77 (77) (P C) * (Vol 19) 1932 Oudh 283 (284) : 7 Luck 116 * (Vol 9) 1922 Oudh 98 (98).

[2] It is the duty of the High Court to carefully disentangle the findings of fact from the inferences which may be drawn from these facts and review erroneous legal conclusions. (Vol 25) 1938 Pat 413 (415) : 17 Pat 507.

[3] The word 'fact' should be understood to have the meaning assigned to it in S. 3, Evidence Act. (Vol

18) 1931 All 499 (501) : 54 All 6 (SB). (Vol 28) 1936 Nag 186 (188).

[4] Where the conclusion arrived at by the Court below is one which hinges upon a balance of evidence produced in the case, the conclusion is one of fact and not of law. (Vol 17) 1930 All 218 (219).

[5] Where the sole question in a case is one of fact and the inference is to be drawn from facts, a second appeal is not competent. (Vol 6) 1919 Lah 221 (222) * (Vol 29) 1942 Cal 261 (265) * (Vol 11) 1924 Pat 305 (306). (Correctness of inferences from facts regarding consideration for a bond.)

[6] Inferences from facts are not always questions of law. (Vol 24) 1937 Nag 230 (231, 232).

[7] Inference deducible from facts involves mixed question of law and fact. (Vol 4) 1917 Cal 496 (496) : 44 Cal 119.

[8] Where the lower Court states the law correctly and comes to a particular conclusion, he decides the point as a question of law and not of fact. (Vol 23) 1936 Pat 136 (139).

16. Questions of fact.—[1] Abandonment of tenancy is a question of fact (Vol 16) 1929 Cal 120 (121) * (Vol 13) 1926 Cal 751 (752) * (Vol 11) 1924 Cal 366 (367) * (Vol 15) 1928 Lah 924 (925) : 9 Lah 487. (Abandonment of a particular design depends on intention.) * (Vol 8) 1921 Lah 162 (162) * (Vol 7) 1920 Lah 293 (294) : 1919 Pun Re No. 170 * (Vol 12) 1925 Pat 741 (743) : 4 Pat 888.

[See however (Vol 23) 1936 All 553 (554). (Abandonment of house is not necessarily question of fact.)]

[2] Second appeal on question of fact does not lie (Vol 10) 1923 P C 187 (189) (P C).

[3] But inference from facts found as to whether there was abandonment or not is a question of law. (Vol 15) 1928 Cal 891 (891) * (Vol 22) 1935 Cal 80 (82) : 61 Cal 937 * (Vol 19) 1932 Cal 405 (408). (Abandonment is mixed question of law and fact.) * (Vol 17) 1930 Lah 215 (215) * (Vol 8) 1921 Lah 229 (231) * (Vol 18) 1931 Pat 236 (238) : 10 Pat 264.

[4] The finding that adoption was proved as a fact is finding of fact. (Vol 32) 1945 All 394 (394) * (Vol 21) 1934 Lah 968 (969) * (Vol 2) 1915 Lah 159 (159) * (Vol 32) 1945 Nag 60 (62) : I L R (1944) Nag 796. (Whether there was necessary giving and taking is question of fact.) * (Vol 30) 1943 Pat 68 (68, 69). (Whether adoption is proved and plaintiff came to know of adoption after more than six years of suit are questions of fact.)

[5] Existence of agreement is finding of fact. (Vol 31) 1944 Nag 124 (126) : I L R (1944) Nag 101 * (Vol 29) 1942 All 331 (332) * (Vol 16) 1929 Bom 68 (69). (Whether parties to a suit agreed or not to a certain decree.) * (1936) 19 Nag L Jour 301 (304) * (Vol 13) 1926 Pat 156 (157).

[See however (Vol 16) 1929 All 519 (520). (Finding whether agreement is intended to settle immediate trouble or is binding for future is not one of fact.)]

[6] Ancestral nature of land is a question of fact (Vol 9) 1922 Lah 65 (66) * (Vol 21) 1934 Lah 517 (518) * (Vol 21) 1934 Lah 406 (407) * (Vol 21) 1934 Lah 351 (352) : 15 Lah 791 * (Vol 21) 1934 Lah 274 (275) : 15 Lah 645.

[7] Question whether particular transaction is or is not benami is one of fact. (Vol 23) 1936 Bom 160 (161) : 60 Bom 226 * (Vol 21) 1934 All 866 (867) * (Vol 33) 1946 Mad 122 (123) * (Vol 31) 1944 Nag 57 (58) : I L R (1943) Nag 796 * (Vol 16) 1929 Oudh 83 (84) : 4 Luck 265 * (Vol 29) 1942 Pat 386 (387).

[8] The finding as to the nature or existence of the consideration is one of fact. (Vol 14) 1927 Lah 530 (531) * (Vol 27) 1940 All 414 (414) * (Vol 30) 1943 Bom 447 (448). (Finding that no cash consideration passed based on probabilities and inference from docu-

Sections 100 & 101 (*contd.*)

ments is one of fact.) * (Vol 14) 1927 Cal 538 (542). (Whether new pronote is in substitution of old one.) * (Vol 19) 1932 Lah 30 (31). (Whether pronote is for cash consideration.) * (Vol 29) 1942 Mad 730 (730) * (Vol 18) 1931 Oudh 424 (425).

[9] Whether bargain unconscionable is question of fact. (Vol 5) 1918 Nag 82 (83) : 14 Nag L R 21 * (Vol 7) 1920 Cal 884 (885). (Rate of interest.)

[10] Finding that document is genuine being one of fact is binding in second appeal. (Vol 32) 1945 Cal 492 (495) * (Vol 25) 1938 Lah 557 (359, 360) * (1937) 1937 Mad W N 188 (188, 189) * (Vol 13) 1926 Oudh 257 (258) * (Vol 22) 1935 Pat 349 (350).

[11] There can be no doubt that questions about the adequacy of damages are ordinarily questions of fact which cannot be entertained in second appeal. (Vol 23) 1936 Nag 70 (70) * (Vol 20) 1933 Nag 29 (30) : 28 Nag L R 320. (But may be interfered with in second appeal in special case.)

[12] Question whether description is sufficient to identify property is question of fact and cannot be raised in second appeal. (Vol 17) 1930 Cal 235 (237) * (Vol 12) 1925 Cal 1195 (1199).

[13] Finding as to *bona fides* of a party in taking a certain action is a finding of fact. (Vol 12) 1925 Lah 505 (506) * (Vol 3) 1916 Lah 57 (57, 58) : 1916 Pun Re No. 63. (*Bona fide* consent.) * (Vol 26) 1939 Oudh 230 (231) : 14 Luck 621. (*Bona fide* transferee.)

[See however (Vol 12) 1925 Cal 152 (152). (*Bona fide* mistake—Not a question of fact.)]

[14] The question whether a particular person did a certain act with a particular intention or not is a question of fact. (Vol 5) 1918 Pat 593 (594) * (Vol 20) 1933 Lah 33 (33) * (Vol 17) 1930 Lah 806 (807). (Question whether sale-deed is meant to be joint transaction making vendees jointly liable or is really several transactions making each vendee responsible for his share is a question of fact depending upon intention of parties.) * (Vol 18) 1931 Pat 72 (75).

[15] Question whether a person has knowledge of certain fact is one of fact. (Vol 29) 1942 Mad 468 (469) * (Vol 3) 1945 Mad 77 (79) * (1909) 4 Ind Cas 889 (890) : (1909) Pun W R 49.

[16] Finding as to legitimacy is one of fact. (Vol 14) 1927 All 410 (411) * (Vol 7) 1920 Lah 480 (480) * (Vol 22) 1935 Oudh 80 (81) : 10 Luck 499.

[17] Finding as to the market value is one of fact. (Vol 17) 1930 All 363 (365) : 52 All 532 * (Vol 16) 1929 Lah 137 (139) * (Vol 16) 1929 Oudh 244 (246) : 4 Luck 643.

[18] The question as to ownership is a question of fact which must be decided upon the evidence adduced. (Vol 13) 1926 Mad 1052 (1053) * (Vol 20) 1933 All 603 (604) * (Vol 32) 1945 Cal 186 (187) : I L R (1944) 1 Cal 612 * (1940) 42 Pun L R 94 (95) * (Vol 8) 1921 Lah 117 (118) * (Vol 25) 1938 Oudh 186 (187) : 14 Luck 138.

[19] Finding as to possession is one of fact. (Vol 20) 1933 Lah 721 (722) : 14 Lah 802 * (Vol 32) 1945 All 197 (201) : I L R (1945) All 109 * (Vol 32) 1945 Bom 63 (64). (Finding that possession was taken under void gift.) * (Vol 28) 1941 Cal 556 (556). (Dispossession.) * (1922) 67 Ind Cas 152 (153) (Lah). * (Vol 12) 1925 Oudh 170 (170) * (Vol 31) 1914 Pat 109 (110) * (Vol 28) 1941 Pat 422 (424) : 20 Pat 497.

[20] Dissolution of partnership is question of fact. (Vol 20) 1933 Pat 78 (79) : 12 Pat 139 * (Vol 21) 1934 Lah 557 (557).

[21] Finding that there was partition is one of fact. (Vol 27) 1940 Nag 241 (243) : I L R (1942) Nag 24 * (Vol 32) 1945 Nag 255 (256) : I L R (1945) Nag 629. (Allegation of partition found untrue — Finding is one of fact.)

[22] Question whether fact is proved is pure question of fact. (Vol 18) 1931 Oudh 142 (143) * (Vol 31) 1944 Oudh 232 (234). (Whether case of mutual assault has been established by evidence is question of fact.)

[23] Place whether town or village is question of fact. (Vol 7) 1920 Lah 118 (118) : 1919 Pun Re No. 28 * (Vol 32) 1945 Lah 256 (256). (That village has grown into town is finding of fact.)

[But see (Vol 8) 1921 Lah 121 (121). (Question of law.) * (Vol 7) 1920 Lah 888 (889, 890). (Do.)]

[24] Payment of interest is question of fact. (Vol 13) 1926 All 329 (330) * (Vol 8) 1921 Nag 94 (95).

[25] Finding as to relationship is a finding of fact. (Vol 21) 1934 Lah 688 (689) * (Vol 22) 1935 All 351 (353) * (Vol 27) 1940 Lah 278 (279). (Collateral relation.) * (Vol 32) 1945 Oudh 11 (11) * (Vol 29) 1942 Pat 230 (231) : 20 Pat 855.

[26] Presumption arising from entry in revenue papers, whether rebutted or not is question of fact. (Vol 18) 1931 Lah 605 (605) * (1922) 65 Ind Cas 527 (529) (Cal) * (Vol 5) 1918 Cal 597 (597) * (Vol 18) 1931 Lah 618 (619).

[27] Finding as to character of a property is one of fact. (Vol 10) 1923 Lah 532 (533) * (Vol 5) 1918 Cal 517 (518). (Tenancy whether jote or rayat.) * (Vol 3) 1916 Cal 477 (478). (Whether certain resumed chakran lands are chowkidari chakran lands of one mauza or another.) * (Vol 11) 1924 Lah 263 (263).

[28] Whether tenancy was properly represented is a question of fact. (Vol 16) 1929 Cal 28 (30) * (Vol 14) 1927 Cal 81 (82). (Whether certain persons are representatives.) * (Vol 14) 1927 Mad 185 (187). (Whether certain persons acted as heirs or administrators in contracting a certain debt.) * (Vol 33) 1946 Nag 139 (141) : I L R (1946) Nag 116. (Finding that agreement was entered into as manager.)

[29] Genuineness of signature is question of fact. (Vol 21) 1934 Cal 633 (635) : 61 Cal 365 * (Vol 10) 1923 Lah 695 (696).

[30] Some of cosharers mortgaging certain items of joint property — Suit by other cosharers for partition— Finding that mortgage property cannot be allotted to share of mortgagors without causing hardship to other sharers is one of fact — It cannot be interfered with in second appeal. (Per *King J., in Order of Reference*.) (Vol 29) 1942 Mad 622 (623) : I L R (1943) Mad 15 (F B).

[31] Finding on question of title is one of fact. (Vol 23) 1936 Cal 245 (246) * (Vol 32) 1945 All 197 (201) : I L R (1945) All 109 * (Vol 29) 1942 All 186 (187) * (Vol 27) 1940 Bom 255 (256). (Question whether documents relied on by party prove title.) * (Vol 7) 1920 Lah 475 (475) * (Vol 28) 1941 Oudh 429 (431) * (Vol 28) 1941 Oudh 412 (414).

[32] "Thak" map—The comparative weight to be attached to a "Thak" map and a Revenue Survey map is only a question of fact on which the decision of the lower Appellate Court should not be disturbed. (Vol 11) 1924 Cal 977 (978) * (Vol 4) 1917 Cal 407 (408).

[33] It is settled that the question whether a particular property has been dedicated for religious and charitable purpose is clearly one of fact. (1932) 33 Pun L R 288 (289) * (Vol 22) 1935 Cal 413 (418) * (Vol 20) 1933 Lah 342 (342) * (1913) 16 Oudh Cas 76 (77). (Whether certain property is *wakf* property is a question of law or at any rate a mixed question of law and fact.) * (Vol 27) 1940 Sind 43 (47) : I L R (1940) Kar 174.

[34] Rent whether payable in money or in kind is question of fact. (Vol 20) 1933 Cal 319 (320) * (Vol 33) 1946 Pat 298 (299) : 25 Pat 84.

[35] Whether presumption should be drawn from facts proved is question of fact. (Vol 21) 1934 Cal 215 (216) * (Vol 23) 1936 Cal 582 (584) * (Vol 17) 1930 Lah 557 (557).

Sections 100 & 101 (contd.)

(Presumption based on probabilities deduced from evidence.) * (Vol 19) 1932 Mad 843 (350) * (Vol 2) 1915 Mad 1118 (1119): 39 Mad 304. (Where a presumption which a Court ought to raise is fixed by no rule of law, the privilege of raising it entirely rests with the Court of fact and the High Court cannot in second appeal interfere with it.)

[36] The question whether a statutory presumption is rebutted by the evidence is always a question of fact. (Vol 17) 1930 P C 91 (93): 11 Lah 199: 57 Ind App 86 (P C).

[37] Nature of land is finding of fact. (Vol 31) 1944 Lah 349 (350).

[39] Whether person takes limited or absolute estate is not question of fact — Court in appeal can interfere with lower Court's finding thereon. (Vol 23) 1936 Mad 130 (131, 132).

[39] Question whether stipulation as to further security was condition precedent is one of fact. (Vol 16) 1929 P C 63 (65) (P C).

[40] Finding that Lawajama was not included in watan is finding of fact. (Vol 20) 1933 P C 171 (175): 60 Ind App 231: 29 Nag L R 210 (P C).

[41] Action for breach of copyright — Whether book was improperly used by another person is question of fact. (Vol 20) 1933 P C 26 (27) (P C).

[42] Finding that transaction was sham is binding in second appeal if material evidence has been considered. (Vol 31) 1944 Mad 121 (122).

[43] Orissa Money-Lenders Act (3 [III] of 1939), Ss. 2, 10 and 16—Finding that person is money-lender is one of fact (Per *Sinha and Das JJ., in Order of Reference*). (Vol 33) 1946 Pat 110 (111): 25 Pat 134 (FB).

[44] Inference as to plea not raised in the case is not a finding of fact. (Vol 10) 1923 All 75 (76).

[45] Finding that party purchased property from his private saving and was sole owner cannot be challenged in second appeal (Per *Iqbal Ahmad C. J. and Ganga Nath J.*). (Vol 29) 1942 All 233 (234): 11 L R (1942) All 832 (F B).

[46] Question whether instrument is materially altered is one of fact. (Vol 16) 1929 Mad 622 (624) * (Vol 12) 1925 Nag 243 (244). (Deed—Material alteration—Question is not purely one of law.) * (Vol 27) 1940 Pat 245 (246). (Fact that document was tampered with.)

[47] Question whether deed was acted upon is one of fact. (Vol 28) 1941 Pat. 449 (450).

[48] Finding as to execution is one of fact. (Vol 16) 1929 All 419 (420).

[49] Finding of proof of execution and consideration of mortgage is of fact. (Vol 1) 1914 Lah 209 (210).

17. Questions of law.—[1] The construction of a decree is pure question of law. (1937) 1937 Mad W N 292 (292).

[But see (Vol 22) 1935 Lah 115 (115). (Question of fact.)]

[2] Construction of application is question of law. (Vol 18) 1931 Lah 686 (687).

[3] The question of the construction of a plaint is one of law and can be interfered with in second appeal. (Vol 24) 1937 Pat 572 (574): 16 Pat 527.

[4] Question as to whether Hindu law or Succession Act governs is question of law. (Vol 19) 1932 Lah 328 (329).

[5] Question whether particular section of law applies to facts as found is question of law. (Vol 10) 1923 All 583 (584): 45 All 520.

[6] Agreement if in restraint of trade is question of law. (Vol 21) 1934 Lah 110 (111).

[7] Form of marriage is a question of law. (Vol 13) 1936 All 1 (8): 43 All 126.

[8] The question if a trustee could divest himself of

his office is a question of law. (1913) 7 Low Bur Rul 39 (41).

[9] Whether wall erected by co-owner on top of joint wall acquires the character of a joint wall, is a question of law and can be raised in second appeal. (Vol 26) 1939 Lah 28 (29).

[10] Question whether requisites for *res judicata* are proved is one of law and can be raised in second appeal. (Vol 20) 1933 Lah 606 (609).

[11] The conclusion that a certain process was not scientific involves a question of law. (Vol 13) 1926 Nag. 435 (439).

[12] Whether prudence is exercised or not is question of law. (Vol 2) 1915 Mad 80 (81).

[13] Whether *wajib-ul-arz* recording custom prejudicial to tenants but not verified by them can be enforced against tenants is pure question of law. (Vol 30) 1943 Oudh 29 (33).

[14] The question whether son was effectively represented in a former suit is really a question of law and not one of fact. (Vol 14) 1927 Mad 406 (408).

[15] Inference as to status is question of law. (Vol 3) 1916 Pat 417 (417): 1 Pat L Jour 157 * (Vol 17) 1930 Lah 824 (825) * (Vol 14) 1927 Nag 200 (201).

[But see (1928) 29 Pun L R 162 (164). (Is question of fact) * (Vol 10) 1923 Lah 626 (628). (Do.)]

[16] Whether facts proved work as estoppel or not is question of law. (Vol 3) 1916 Mad 901 (902).

[17] Question as to notice is one of law. (Vol 13) 1926 Pat 495 (497) * (Vol 25) 1938 Pat 622 (624). (Finding that on particular evidence, service of notice under S. 7, Public Demands Recovery Act, is valid is decision on point of law.)

[18] The question whether an entry of rent in the Settlement Rent Roll is conclusive or whether a party can prove by evidence that it is incorrect is undoubtedly a point of law and a party is perfectly competent to raise this question in second appeal. (Vol 26) 1939 Pat 402 (403): 18 Pat 204.

[19] Whether *wajib-ul-arz* entry is based on custom or contract is question of law. (Vol 12) 1925 Oudh 64 (64).

[20] The question whether in determining the infringement of certain legal rights the correct tests have been applied is a pure question of law. (Vol 1) 1914 P C 45 (45): 42 Cal 46: 41 Ind App 180 (PC).

[21] Decree—Future interest—Question is one of law. (Vol 10) 1923 Lah 513 (514).

18. Mixed question of law and fact.—[1] Sale certificate—What passes under, to purchaser is mixed question of law and fact. (Vol 14) 1927 Mad 311 (316) * (Vol 1) 1914 Cal 305 (306) * (Vol 13) 1926 Mad 851 (851).

[2] The question of waiver is a mixed question of law and fact; the question of fact is whether circumstances exist from which waiver may be inferred and the question of law is whether from the fact proved waiver can be inferred. The terms of the bond and the conduct of the creditor may be taken into consideration in deciding whether there has been waiver. (Vol 4) 1917 Mad 47 (49) * (1913) 37 Bom 480 (483). (Waiver is primarily and in most cases an inference from facts though in certain classes of cases this inference is looked on as an inference of law) * (1911) 13 Cal L Jour 206 (210, 211).

[3] Question of 'reasonable time' for presentment for payment is a mixed question of law and fact. (Vol 16) 1929 Lah 577 (577): 11 Lah 34 * (Vol 7) 1920 Lah 413 (413).

[4] Limitation is a mixed question of law and fact. (Vol 14) 1927 Cal 30 (31) * (Vol 3) 1916 Oudh 139 (140): 19 Oudh Cas 367. (Question of good faith within S. 14, Limitation Act.)

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[5] Question of notice is not pure question of law. (Vol 22) 1935 Cal 713 (715) * (Vol 18) 1931 Bom 430 431. (Question of constructive notice.)

[6] The question as to whether a certain provision is penal or not is a mixed question of law and fact. (Vol 16) 1929 Pat 717 (720, 721) : 9 Pat 487 * (Vol 5) 1918 Cal 334 (335). (Stipulation to pay exorbitant interest.)

[7] Question of benami or fraud is mixed question of law and fact. (Vol 5) 1918 Pat 632 (633).

[8] Question as to jointness of Hindu joint family—Question is mixed one of law and fact. (Vol 12) 1925 Nag 284 (287).

[9] Partner or agent — Question is mixed one of law and fact and is assailable in second appeal. (Vol 12) 1925 Mad 768 (769).

[10] Question of communal character of land is mixed question of fact and law—Finding can be interfered with if correct principles are not applied. (Vol 18) 1931 Mad 213 (215).

[11] Question whether agreement to sell had merged in conveyance is one of intention of parties and being one of fact or of mixed law and fact cannot be advanced in second appeal when not specifically raised in written statement. (Vol 29) 1942 Mad 716 (717).

[12] Whether the firm was or was not actually registered under the Partnership Act is a mixed question of fact and law and the point cannot be raised for the first time in second appeal. (Vol 32) 1945 Pat 286 (287).

[13] Whether evidence given by mortgagee is sufficient to show that S. 59, T. P. Act, was complied with is mixed question of law and fact. (Vol 6) 1919 Pat 195 (196).

[14] Whether vendee has acted with reasonable care under S. 41, Transfer of Property Act, is a mixed question of law and fact — High Court will interfere only where strong reasons exist. (Vol 14) 1927 All 153 (159).

[15] Question as to transferability of right to receive offerings at temple is not pure question of law. (Vol 15) 1928 All 721 (724) : 50 All 394.

[16] Question whether property is *sulka stridhan* is not question of law pure and simple. (Vol 16) 1929 All 25 (27).

[17] Question whether permanent tenancy can be presumed is a mixed question of fact and law. (Vol 11) 1924 Cal 465 (467).

[18] Crown — Escheat — On confiscation *zamidari* does not merge in the permanent right of Government — Whether there was a merger is a mixed question of law and fact. (Vol 14) 1927 Cal 186 (189).

[19] The question whether a gift is bad as offending against the doctrine of *mushaa* is a mixed question of law and fact. (Vol 15) 1928 Cal 49 (49).

[20] The question of domicile is a mixed question of fact and law. (Vol 18) 1931 Cal 383 (384) : 58 Cal 259 (SB).

[21] Finding that no operative order can be passed for want of proper investigation is mixed finding of fact and law. (Vol 4) 1917 Oudh 99 (101) : 19 Oudh Cas 357.

[22] Amount of dower is a mixed question of law and fact. (Vol 13) 1926 Oudh 128 (129).

[23] Whether a certain property is private or public is a mixed question of law and fact—Wrong application of law—Second appellate Court will interfere. (Vol 13) 1926 Oudh 578 (585) : 1 Luck 489.

[24] Finding of fact — Finding arrived at by misapplying law is one of mixed law and fact. (Vol 23) 1936 Rang 262 (265).

[25] "Necessaries" is mixed question of law and fact. (Vol 11) 1924 Nag 360 (361).

[26] The question as to when a partnership is dissolved is a mixed question of fact and law. (Vol 22) 1935 All 1008 (1010).

[27] The question whether an application in question is a fresh application within the language of S. 48 is a mixed question of fact and law and a second appeal is competent. (Vol 27) 1940 Lah 35 (35).

[28] Negligence—It is a mixed question of law and fact—Lower Court approaching it neither from wrong stand-point nor evidence pointing only to converse conclusion—No legal defect in finding—Such finding cannot be upset in second appeal. (Vol 23) 1936 All 771 (775) : 58 All 771.

[29] Whether certain land is part of occupancy holding is mixed question of law and fact. (Vol 22) 1935 All 588 (589).

[30] The question whether the power of attorney executed prior to the deed of trust was effective upto a particular time is a mixed question of law and fact. (Vol 15) 1928 P C 44 (47) : 6 Rang 113 (P C).

[31] Binding nature of award with reference to certain persons, the legal representatives of deceased person is not a pure question of law. (Vol 1) 1914 P C 33 (33) (P C).

[32] Point of law — Whether suits fall under S. 92, Civil P. C., is mixed question of law and fact—But when all facts are on record, question whether they do or do not show trust coming under S. 92, is question of law and can be taken at any time. (Vol 24) 1937 Sind 230 (231) : 31 Sind L R 510.

[33] Question whether Hindu can inherit to Mahomedan father is mixed question of law and fact. (Vol 18) 1931 Sind 170 (173) : 25 Sind L R 493.

[34] Question of custom depending entirely on interpretation of certain documents—Question is of mixed law and fact. (Vol 29) 1942 Oudh 213 (214) : 17 Luck 567.

[35] Inference of title from acts of ownership is a question of mixed law and fact. (1897) 21 Bom 91 (96).

[36] Family settlement is a question of mixed fact and law. (Vol 20) 1933 All 493 (495) : 55 All 554.

19. Partition.—[1] Finding that parties are separate in status is one of fact. (Vol 33) 1946 Pat 231 (233) : 25 Pat 1 * (Vol 20) 1933 Lah 583 (589). (Mere notice is not sufficient — Intention to separate is test and it is question of fact.) * (Vol 13) 1926 Lah 443 (443) * (Vol 20) 1933 Oudh 27 (28).

[But see (Vol 21) 1934 Nag 13 (14). (Disruption of Hindu family—Finding is not one of fact—It is inference of legal effect of facts found.)]

[2] Finding of partition based on evidence cannot be challenged. (Vol 32) 1945 Nag 53 (56) : 1 L R (1944) Nag 577.

[3] Question of partibility or otherwise of estate is of fact. (Vol 4) 1917 All 191 (193) : 38 All 590.

[4] Question of reunion of Hindu family is question of law. (Vol 7) 1920 Lah 44 (45).

* [5] Question whether *pala* is divisible is point of law. (Vol 7) 1920 Cal 448 (453) : 47 Cal 990.

[6] Question whether persons form members of Hindu joint family, is question of fact. (Vol 8) 1921 Lah 267 (267).

[7] Finding that property held by person is joint family property is question of fact. (Vol 19) 1932 Oudh 144 (145).

20. Construction of documents.—[1] The right construction of documents is a question of law which Judges in second appeal are not precluded from considering by any finding of the lower Appellate Court based on such documents. (1912) 34 All 579 (585, 586) : 39 Ind App 247 (P C) * (Vol 3) 1916 P C 126 (128) : 43 Cal 1104 : 43 Ind App 172 (P C). (Construction of a *kabuliat*) * (Vol 10) 1923 All 586 (588) : 45 All 581. (Construction of documents from language is question of law and from facts is question of fact.) * (Vol 5) 1918 Bom 158 (160) : 42 Bom 344. (Construction of sale deed.) * (Vol 21) 1934 Lah 35 (35) * (Vol 31) 1944

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Mad 468 (469, 470) : I L R (1945) Mad 194. (Whether grant was personal depending on inferences from entries in registers—Question is one of law.) * (Vol 18) 1931 Nag 25 (26) * (Vol 21) 1934 Oudh 433 (434) * (Vol 31) 1944 Pat 35 (37) * (Vol 20) 1933 Pesh 67 (69) (Concurrent findings based on misinterpretation of document can be revised.) * (Vol 12) 1925 Rang 255 (256) * (Vol 24) 1937 Sind 263 (269). (Construction of agreement to sell.)

[See also (Vol 5) 1918 Mad 82 (84). (Interpretation of deed is question of law, and taken with intention of parties is mixed question of law and fact.)]

[2] Finding based on inference from documentary evidence is a finding of fact and is binding in second appeal. (Vol 24) 1937 All 197 (197) * (Vol 23) 1936 Pat 129 (130) * (Vol 21) 1934 P C 112 (113) : 61 Ind App 163 : 57 Mad 652 (PC). (Findings of fact—Finding though erroneous unless vitiated by error of law cannot be reversed by High Court — Rule applies even though it is based on inferences from documents exhibited.) * (Vol 21) 1934 P C 5 (7) : 61 Ind App 93 : 13 Pat 254 (P C) * (Vol 20) 1933 P C 171 (175) : 60 Ind App 231 : 29 Nag L R 210 (P C) * (Vol 15) 1928 P C 243 (245) : 55 Ind App 380 (P C). (Question whether a certain sum was paid or remained unpaid or what it was paid for is a question of fact though it depends upon the construction of a document.) * (Vol 21) 1934 All 709 (710). (Question of construction of a certain document is a question of law, but the question what legal inference may be drawn from a number of documents is a question of fact.) * (Vol 33) 1946 Cal 326 (329). (Entries in Deara Survey Records.) * (1937) 39 Pnn L R 376 (376). (The document not of title, even if misconstrued, cannot be a good ground for second appeal.) * (Vol 17) 1930 Pat 319 (320). (Inference from Survey Record of Rights.)

[3] Whether certain document constitutes evidence is question of law. (Vol 32) 1945 P C 165 (167) : 72 Ind App 211 : I L R (1945) Kar P C 314 : I L R (1946) Mad 225 (P C).

[4] Document being one of title and foundation of suit — Its construction is question of law. (Vol 27) 1940 Lah 486 (487) : I L R (1941) Lah 601 * (Vol 13) 1926 All 542 (543) : 48 All 588. (Conclusions based on construction of documents of title as to legal rights based on such documents can be challenged.) * (Vol 13) 1926 Bom 493 (493) * (Vol 28) 1941 Cal 446 (448). (Interpretation of lease.) * (Vol 26) 1939 Lah 264 (264). (Where the question is which of the two alternative meanings of a certain word should in the context be held applicable, the question is one of interpretation of a document and if the document is one of title it would be open to second appeal.) * (Vol 23) 1936 Oudh 225 (226, 227) : 11 Luck 642 * (Vol 13) 1926 Pat 49 (49).

[See also (Vol 23) 1936 Oudh 97 (99). (Interpretation of documents of title — Mixed question of law and facts.) (Vol 23) 1936 Pat 287 (288). (Construction of document of title is a mixed question of law and fact and can be dealt with in second appeal.)

[5] Question to be decided by lower Appellate Court on construction of deed by itself is question of law but one to be decided on deed together with other circumstances is question of fact. (Vol 4) 1917 Lah 156 (157) * (Vol 1) 1914 P C 87 (89) : 37 Mad 443 : 41 Ind App 258 (PC) * (Vol 22) 1935 All 662 (663). (Language applying partly to one set of facts and partly to another but whole not applying correctly to either — Extrinsic evidence to show which of two applies is admissible — Finding on such point is one of fact not open to be attacked in second appeal.) * (Vol 12) 1925 Cal 656 (659). (Deed — Construction — If extrinsic evidence is admissible, construction is question of fact, otherwise it is of law.) * (Vol 15) 1928 Lah 930 (931).

[6] The construction of a deed means first ascertaining the meaning of the words, which is a question of fact and secondly their legal effect which is a question of law. (Vol 1) 1914 Cal 836 (838, 839) * (Vol 10) 1923 All 337 (337) * (Vol 25) 1938 Cal 541 (542). (Legal effects of recitals in a deed.) * (1940) I L R (1940) Lah 60 (62) * (Vol 22) 1935 Lah 877 (878) * (Vol 15) 1928 Nag 153 (157). (Concurrent finding — Lower appellate Court forming its opinion on legal effect of some of the documents—Correctness of its opinion can be challenged in second appeal.) * (Vol 24) 1937 Oudh 295 (297).

[7] Whether a word is used in a restricted sense is a point of law. (Vol 9) 1922 Bom 416 (417, 419) : 47 Bom 18.

[8] Finding on the question of fact based on misappreciation of true meaning of "sharing in cultivation" is vitiated. (Vol 13) 1926 All 465 (466).

[9] Two possible interpretations of document—Lower Courts adopting one—Interpretation cannot be refused in second appeal. (Vol 17) 1930 Lah 139 (140) * (Vol 9) 1922 Lah 240 (241) * (Vol 18) 1931 Mad 137 (138). (Provision in bond for higher rate of interest on default of payment of principal and interest by certain date held penal by lower Court — Meaning put on bond not impossible though strained — High Court refused to interfere.)

[10] Question whether a transaction is sale or mortgage is one of law. (Vol 4) 1917 Mad 368 (369) * (Vol 12) 1925 Mad 87 (88). (Whether a transaction amounts to a mortgage by conditional sale or to an absolute sale is not a pure question of fact.)

[But see (Vol 31) 1944 Lah 175 (177, 178). (Whether transaction mortgage by conditional sale or out and out sale—Question is one of fact.)]

[11] Mortgage once admitted—Whether or not there is sale is question of fact. (Vol 17) 1930 P C 91 (93) : 11 Lah 199 : 57 Ind App 86 (P C).

[12] Whether a transfer of occupancy right is a sale within the meaning of the term as used in the Punjab Pre-emption Act is a question of law. (Vol 17) 1930 Lah 141 (142).

[13] Surrender and lease whether in fact sale is not pure question of fact. (Vol 29) 1942 Nag 103 (104) : I L R (1942) Nag 349.

[14] Usufructuary mortgage — Lease of mortgaged property back to mortgagor — Whether mortgage and lease are part of same transaction is question of law. (Vol 31) 1944 Pat 5 (11) : 22 Pat 320.

[15] Finding that equity of redemption when sold to mortgagee extinguishes mortgage is point of law and can be agitated in second appeal. (Vol 19) 1932 Lah 56 (57).

[16] Mortgage deed — Whether S 77 or S. 76 (b), T. P. Act, applies is question of law—Fact that counsel did not press it in first appeal or made admission or concession cannot estop appellant from raising it in second appeal. (Vol 29) 1942 Oudh 499 (500, 501) : 18 Luck 484.

[17] Finding that rights in certain Muafi Jagirs are not connected with grant of pension within meaning of Pensions Act is one of fact — Fact that such finding involved interpretation of documents is immaterial. (Vol 27) 1940 All 373 (376) : I L R (1940) All 603 (F B).

[18] Inferences from incorrect construction—Finding can be considered. (Vol 14) 1927 Mad 1167 (1179).

[19] Court holding that document is so worded as to obscure its meaning — It is not interpretation of document. (Vol 16) 1929 Nag 343 (345).

[20] Finding on value of statement in document will not be interfered with. (Vol 5) 1918 Cal 685 (685).

21. Inference from proved facts.—[1] Inference to be drawn from proved facts is question of law. (Vol 23) 1936 P C 77 (81, 82) : 63 Ind App 140 (PC) * (Vol

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33) 1946 All 118 (120) * (Vol 27) 1940 Bom 263 (264) : I L R (1940) Bom 505 * (Vol 16) 1929 Cal 37 (39) : 56 Cal 738. (Question whether tenancy is permanent is legal inference from facts.) * (Vol 29) 1942 Lah 94 (95). (Question whether facts found constitute sufficient cause of action is one of law.) * (Vol 26) 1939 Mad 733 (736) : 41 Cri L Jour 677 * (Vol 16) 1929 Nag 270 (271) * (Vol 29) 1942 Oudh 19 (20) : 17 Luck 158 * (Vol 28) 1941 Pat 228 (231) : 20 Pat 115. (Question whether tenancy is permanent or precarious is a legal inference from facts.) * (Vol 27) 1940 Sind 188 (140).

[2] Whether facts proved establish partnership is question of law. (Vol 23) 1936 Rang 383 (385) * (Vol 24) 1937 Rang 225 (225, 226).

[3] The question whether a customary right is to be inferred from the evidence is a question of law. (1935) 18 Nag L Jour 172 (177).

[4] Legal inference from admitted facts is question of law. (Vol 17) 1930 Mad 449 (456) : 53 Mad 510 * (Vol 17) 1930 Cal 815 (816) : 53 Cal 585. (Whether on certain admitted facts certain person is agent or not is question of law.)

[5] Whether admitted facts constitute sufficient cause is question of law. (Vol 19) 1932 Lah 183 (185).

[6] Facts admitted — Question of limitation thereon is one of law. (Vol 22) 1935 All 716 (717).

[7] The question whether certain admitted facts constitute an open assertion of title is a question of law. (Vol 29) 1942 Mad 725 (725).

22. Onus of proof, error as to. — [1] Question of onus is question of law — Second appeal is competent. (Vol 4) 1917 Lah 395 (395) * (Vol 5) 1918 Oudh 103 (105).

[See however (Vol 5) 1918 Lah 338 (339) : (1918) Pun Re No. 7. (Question of onus probandi of custom is not pure question of law.)]

[2] Burden of proof — Error of principle — Appeal lies. (Vol 13) 1926 Lah 653 (654).

[3] Burden thrown on wrong party — Finding of fact is not binding. (Vol 16) 1929 P C 13 (14) : 52 Mad 83 : 56 Ind App 6 (P C) * (Vol 19) 1932 P C 28 (30) : 59 Ind App 29 : 59 Cal 1012 (P C) * (Vol 19) 1932 Cal 351 (353) * (Vol 7) 1920 Lah 295 (296) : 1 Lah 429 * (Vol 28) 1941 Nag 188 (191) : I L R (1942) Nag 441.

[4] Wrong allocation of onus of proof not preventing party from producing evidence — Appellate Court aware of wrong allocation and after considering evidence coming to conclusion — Finding is one of fact and cannot be challenged in second appeal. (Vol 18) 1931 Lah 220 (221) * (1911) 9 Ind Cas 4 (5) (Cal) * (Vol 7) 1920 Mad 789 (790).

[5] After evidence was given by both sides and the lower Court has preferred that of one side, the objection as to wrong shifting of burden of proof is groundless in second appeal. (Vol 4) 1917 Pat 703 (704) * (1909) 3 Ind Cas 431 (432) (Cal) * (Vol 2) 1915 Mad 1156 (1157) * (Vol 1) 1914 Oudh 341 (342) : 17 Oudh Cas 134.

[6] Question whether onus is discharged is one of fact. (Vol 26) 1939 Nag 78 (80) : I L R (1939) Nag 160 * (1911) 13 Bom L R 1021 (1022, 1023) * (Vol 13) 1926 Lah 307 (308, 309).

[7] Question of law — Evidence evenly balanced — Conclusion being impossible Court using onus as determining factor — Question of onus becomes one of law and not of fact. (Vol 25) 1938 Nag 522 (525).

[8] Question whether onus is shifted is question of fact. (Vol 2) 1915 Mad 12 (14).

23. Relevancy and sufficiency of evidence. — [1] In second appeal the Court cannot go into the question of sufficiency of evidence. (1911) 9 Ind Cas 427 (428) (Oudh) * (Vol 22) 1935 All 501 (501) * (Vol 11) 1924 All 146 (147). (Sufficiency of rebutting evidence is question of fact.) * (Vol 12) 1925 Cal 1133 (1134).

(Sufficiency of evidence is question of fact.) * (Vol 10) 1923 Cal 279 (279) * (Vol 22) 1935 Oudh 459 (460) : 11 Luck 397. (Question whether facts found prove existence of essentials of custom can be considered in second appeal.) * (Vol 13) 1926 Oudh 143 (143). (Whether single wajibularz establishes a custom is a question of fact.) * (Vol 16) 1929 Pat 98 (99).

[See however (Vol 1) 1914 Oudh 336 (337). (Sufficiency of evidence can be considered in second appeal.)]

24. Nature of tenancy. — [1] Question of tenancy is question of law. (Vol 17) 1930 Bom 39 (40) * (Vol 12) 1925 Cal 1238 (1239) * (1911) 38 Cal 278 (282) * (Vol 22) 1935 Mad 268 (272).

[2] Whether new tenancy has been created is mixed question of fact and law. (Vol 23) 1936 Pat 411 (412).

[3] Tenancy — Findings of fact but not conclusions as to their effect in law are binding in second appeal. (Vol 27) 1940 P C 192 (196) : I L R (1940) Kar P C 380 : I L R (1941) Bom 107 (P C).

[4] The inference to be drawn from the nature of tenancy, which is a mixed question of fact and law, becomes one of law and can be gone into in second appeal. (Vol 25) 1938 Pat 333 (334) * (Vol 21) 1934 Cal 288 (289) : 61 Cal 32. (Nature of tenancy is legal inference from facts.) * (1913) 17 Cal W N 1073 (1075, 1076). (The nature of a tenancy is a question of law when it turns on the construction of some written instrument.) * (1911) 15 Cal W N 263 (265). (Nature of tenancy — Question of law.) * (Vol 9) 1922 Lah 329 (334).

[5] The question whether a legal right, such as the right of tenant in the land, has been determined is a question of law and not of fact and the decision thereon is open to second appeal. (1912) 15 Oudh Cas 295 (299).

[6] Finding as to forfeiture of tenancy is one of fact. (Vol 20) 1933 Lah 377 (378).

[7] Whether tenancy is permanent is a question of law. (Vol 14) 1927 P C 102 (104) : 54 Ind App 178 : 8 Lah 573 (P C) * (Vol 32) 1945 Cal 283 (287) * (Vol 21) 1934 Cal 51 (53) * (Vol 5) 1918 Cal 517 (518). (Tenure whether permanent — Decision depending on construction of kabuliyaat — Question is not merely of fact.) * (Vol 31) 1944 Lah 9 (10) * (Vol 15) 1928 Lah 720 (720) * (Vol 26) 1939 Pat 350 (351). (Is a mixed question of fact and law.) * (Vol 23) 1936 Pat 384 (385). (Question whether tenancy is permanent or precarious in cases where question depends upon proof of local custom, is a legal inference from facts.)

[8] Whether property is talukdari or not is question of law. (Vol 1) 1914 Oudh 206 (207).

[9] Question of status of tenant is a question of law. (Vol 3) 1916 Pat 417 (417) : 1 Pat L Jour 157.

[But see (Vol 5) 1918 Cal 122 (122, 123).]

[10] Whether a tenant is entitled to occupancy land appurtenant to his house is not a pure question of law. (Vol 14) 1927 Oudh 37 (37).

[11] Finding as to joint tenancy is one of fact. (Vol 11) 1924 All 231 (231).

[12] Mistake as to area of tenancy is not error of law. (Vol 5) 1918 Cal 122 (122, 123).

[13] A finding on the question whether suit lands formed part of certain inam lands is one on a question of fact. (1936) 43 Mad L W 369 (370).

[14] Question whether tenant is tenure-holder or raiyat under B. T. Act ultimately depends on question of fact. (Vol 18) 1926 Pat 9 (11).

[15] Whether character of grove land has changed is question of law. (Vol 26) 1939 Oudh 48 (48) : 14 Luck 269.

[16] Land whether parjaut — Finding is one of fact. (Vol 13) 1926 All 83 (84).

[17] Recognition of tenancy by landlord — Question can be re-opened in second appeal. (Vol 12) 1925 Cal 761 (765).

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25. Nature of possession.—[1] Adverse possession is a mixed question of law and fact. (Vol 19) 1932 All 893 (396) ; 54 All 628*(Vol 25) 1938 Cal 117 (118, 119). (Lower appellate Court reversing lower Court's finding regarding adverse possession — High Court may enquire into method adopted by such Court and see whether finding is justified.) * (Vol 22) 1935 Cal 760 (760)*(Vol 23) 1936 Lah 741 (742)*(Vol 20) 1933 Lah 25 (27) : 13 Lah 677 * (Vol 29) 1942 Nag 75 (78) : ILR (1942) Nag 781. (Finding held not binding in second appeal.) * (Vol 10) 1923 Nag 65 (66). (Adverseness of possession is not a question of fact but a matter of inference) * (Vol 5) 1918 Nag 171 (173) * (Vol 30) 1943 Oudh 398 (399) : 19 Luck 216*(Vol 28) 1941 Oudh 436 (439). (Facts found by first appellate Court are binding in second appeal — Question whether facts establish adverse possession being one of law can be challenged.)*(Vol 25) 1938 Sind 132 (138) : I L R (1939) Kar 18.

[2] Question as to nature of possession is one of legal inference. (Vol 13) 1926 Nag 129 (130).

[3] Adverse possession.—Question of actual possession is question of fact — Whether that had been adverse is mixed question of fact and law. (Vol 18) 1931 All 323 (324) * (Vol 10) 1923 All 382 (382)*(Vol 27) 1940 Lah 225 (226). (Finding that party was never in possession is one of fact.) * (Vol 8) 1921 Lah 264 (264) * (Vol 28) 1941 Nag 343 (344) : I L R (1942) Nag 608 * (Vol 32) 1945 Oudh 270 (272).

[4] A question of adverse possession may be a question of law where the facts are not in dispute and where the conclusion depends upon the inferences to be drawn from admitted facts. (Vol 4) 1917 All 42 (42) * (Vol 21) 1934 All 288 (290)*(Vol 19) 1932 Lah 72 (72)*(Vol 18) 1931 Lah 489 (490) * (Vol 13) 1931 Oudh 381 (382) * (Vol 11) 1924 Oudh 266 (270) : 27 Oudh Cas 77 * (Vol 16) 1929 Pat 590 (591).

[5] Where the question of adverse possession is one of inference from documents the concurrent findings of the India Courts may be upset by Privy Council as the question is not one of fact. (Vol 6) 1919 P C 60 (61) : 42 All 152 : 46 Ind App 197 (PC)* (Vol 12) 1925 Oudh 729 (730, 731).

[6] Finding that plaintiff failed to establish title by adverse possession is of fact. (Vol 29) 1942 All 221 (222) : I L R (1942) All 667 (FB).

[7] Adverse possession — Knowledge of, is finding of fact. (Vol 21) 1934 Pat 167 (167).

[8] The term "trespasser" is a term of law and the High Court in second appeal may examine whether the finding of the lower Court on the point is correct on the evidence tendered. (Vol 3) 1916 Pat 381 (382) : 1 Pat L Jour 47.

26. State of mind, acquiescence, good faith, consent, intention, negligence, wilful neglect, misconduct, reasonable care, etc.

Acquiescence. — [1] The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. (Vol 4) 1917 Lah 439 (440) : 1917 Pun Re No. 69* (Vol 12) 1925 Cal 288 (289) * (Vol 15) 1928 Nag 87 (88) : 23 Nag L R 192. (Acquiescence for long period giving rise to presumption of grant is question of law.)*(Vol 13) 1926 Nag 416 (422).

[2] The question whether there has been a representation amounting to acquiescence or not is a question of fact. (Vol 14) 1927 Cal 220 (224).

[3] Acquiescence is sometimes a pure question of fact, but becomes a question of law when the point is whether conduct of a party not amounting to direct consent should be taken as waiver. (Vol 3) 1916 Lah 370 (371) : 1916 Pun Re No. 107.

State of mind. — [4] The question as to state of

mind of a person is one of fact. (Vol 22) 1935 Cal 168 (174) : 61 Cal 1005 * (1911) 8 All L J 1154 (1158). (Finding that deed of gift was executed when donor was in immediate apprehension of death is one of fact.) * (Vol 20) 1933 Lah 458 (459). (Finding as to person being of unsound mind is one of fact and when not based on direct evidence can be challenged in second appeal.)*(Vol 31) 1944 Nag 232 (234) : I L R (1944) Nag 698. (Question whether a person is or is not a lunatic is one of fact.)

Good faith. — [5] A finding as to *bona fides* or good faith is a finding of fact. (Vol 19) 1932 Lah 322 (323)*(Vol 32) 1945 All 227 (230) : I L R (1945) All 148 * (Vol 28) 1941 Lah 271 (272) * (Vol 21) 1934 Pat 121 (122). (Finding as to whether payment was made in good faith is one of fact.)

[6] 'Good faith' within S. 14 of Limitation Act is a question of fact. (Vol 8) 1921 Sind 13 (15) : 15 Sind L R 11.

[7] Question whether a party acted in good faith within the meaning of S. 14, Limitation Act, is a mixed question of law and fact. (Vol 25) 1938 Lah 704 (706) * (Vol 14) 1927 Pat 256 (256).

Fraud. — [8] Finding as to question of fraud is a finding of fact. (Vol 19) 1932 P C 89 (90) : 59 Ind App 147 : 7 Luck 64 (P C) * (Vol 25) 1938 All 150 (151) * (Vol 20) 1933 All 431 (432) : (Vol 29) 1942 Cal 394 (399) *(Vol 29) 1942 Mad 632 (633) : I L R (1943) Mad 47 * (Vol 29) 1942 Oudh 217 (218) : 17 Luck 341 * (Vol 29) 1942 Pat 386 (387).

[9] Whether a transaction is fraudulent is a question of fact. (Vol 13) 1926 Oudh 501 (502) * (Vol 16) 1929 All 458 (458). (Whether the existence of other property to meet the decree is sufficient evidence of genuineness of a transfer is a question of fact.) (Vol 7) 1920 Lah 24 (25). (Finding that transfer is not vitiated by S. 53, T. P. Act, is one of fact.) * (Vol 28) 1941 Pat 529 (530)*(Vol 32) 1945 Pesh 28 (28). (Question whether transaction was fictitious or not is one of fact.)

[10] The question whether a transfer is with intent to defraud creditors is a mixed question of law and fact. (Vol 10) 1923 Nag 124 (125).

[11] Finding that transaction is bogus and liable to be set aside under Transfer of Property Act, S. 53, is not proper finding of fact — High Court in second appeal can in such case record its own conclusion. (Vol 31) 1944 Nag 44 (52) : I L R (1944) Nag 342 (F B).

[12] The second appellate Court's duty is to see whether the facts found by the Court of first instance justify the inference of fraud. (1913) 17 Cal L Jour 209 (213).

Intention. — [13] A finding as to the intention of a person is a finding of fact. [Vol 15] 1928 All 61 (62) : 50 All 208 * (Vol 25) 1938 P C 34 (35) : 65 Ind App 98 : I L R (1938) Mad 551 : 32 Sind L R 328 (P C) * (Vol 15) 1928 P C 135 (137). (Question whether certain property is thrown into partnership assets is one of fact.) * (Vol 17) 1930 Lah 936 (936) * (Vol 16) 1929 Lah 530 (531). (That parties intended and effected a sale and not a mortgage by way of conditional sale is a finding of fact.) * (Vol 16) 1929 Lah 90 (90). (Intention of the executant of power-of-attorney not depending on interpretation of legal phraseology is a question of fact.) * (1925) 26 Pun L R 799 (801) * (Vol 17) 1930 Mad 590 (592) * (Vol 13) 1926 Mad 963 (964). (Question whether self-acquired property of a member of a joint Hindu family has been thrown into the common stock or not is a question of fact.) * (Vol 13) 1926 Oudh 614 (615). (Whether there was intention to partition is a question of fact.)

[14] Intention of parties is question of law. (Per *Rupchand Bilaram, A. J. C.*; *Haveliwala, A. J. C.*, contra). (Vol 24) 1937 Sind 268 (266, 269).

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[15] Where intention is to be inferred from terms of document only, question is one of law or mixed question of law and fact, depending on circumstances. (Vol 28) 1941 Lah 62 (63).

[16] Intention is question of fact. But legal inference as to intention from document of title is question of law. (Per *Din Mohammad J.*) (Vol 29) 1942 Lah 42 (45).

Misrepresentation. — [17] Finding as to representation by one inducing another to do an act is one of fact. (Vol 13) 1926 Mad 39 (39, 40).

[18] Whether particular misrepresentation affected one's mind or not is question of fact. (Vol 8) 1921 Mad 198 (198).

Reasonable care. — [19] Whether other proceedings were prosecuted diligently within S. 14, Limitation Act is question of fact. (Vol 14) 1927 Lah 909 (910) & (Vol 33) 1946 Oudh 116 (117, 118).

[20] Finding as to absence of reasonable care and good faith within S. 41, T. P. Act is of fact. (Vol 14) 1927 Nag 41 (42).

[21] Whether bailee used reasonable diligence in taking care of goods bailed is question of fact. (Vol 20) 1933 All 158 (159).

Negligence. — [22] Negligence is a question of fact. (Vol 14) 1927 Oudh 478 (478) & (Vol 32) 1945 P C 163 (169) : 72 Ind App 206 : I L R (1946) Mad 73 (P C). (A finding that accident was caused by defendant's negligence is primarily of fact.) & (Vol 20) 1933 All 214 (215). (Contributory negligence.) & (Vol 19) 1932 All 139 (139). (Finding of negligence is one of fact if approached from legal standpoint.) & (Vol 15) 1928 All 166 (168) & (Vol 30) 1943 Cal 59 (61). (Want of negligence is finding of fact.) & (Vol 3) 1916 Cal 647 (649). (Question whether the evidence is sufficient to justify the inference of negligence is one of fact.) & (Vol 20) 1933 Lah 337 (338) & (Vol 14) 1927 Mad 443 (444). (Negligence of solicitor.) & (Vol 30) 1943 Pat 111 (115) : 21 Pat 764 & (Vol 27) 1940 Pat 480 (481). (Due caution within S. 41, T. P. Act is question of fact.) & (Vol 23) 1936 Pat 84 (85) & (Vol 19) 1932 Rang 6 (8) : 9 Rang 585. (Whether collecting bank is guilty of negligence within S. 131, Negotiable Instruments Act is question of fact.) & (Vol 27) 1940 Sind 254 (255).

[23] Whether inference as to negligence is warranted by the facts is a question of law. (Vol 16) 1929 Rang 17 (18, 19) : 6 Rang 643 & (Vol 24) 1937 Mad 472 (474).

[24] Where special legal significance is attached to word "negligence", by statute the question whether there is such negligence is question of law. (Vol 9) 1922 All 421 (421) & (Vol 11) 1924 All 613 (613). (Question of lambardar's negligence under U. P. Land Revenue Act.) & (Vol 8) 1921 All 314 (316) : 43 All 29. (Whether there was negligence on lambardar's part within S. 164 Agra Tenancy Act is question of fact).

[25] Finding of negligence on wrong principles is not binding in second appeal. (Vol 16) 1929 Lah 314 (314, 315).

[26] Question as to whose negligence was proximate cause of accident is one of law and fact. (Vol 30) 1943 Nag 252 (253) : I L R (1943) Nag. 577.

[27] Gross negligence is a mixed question of law and fact. (Vol 12) 1925 Mad 258 (258).

[28] Whether particular facts found constitute gross negligence is a question of law. (Vol 13) 1926 Mad 905 (905).

Wilful neglect. — [29] Whether facts established amount to "wilful neglect" is a question of law. (Vol 15) 1928 Lah 337 (338) : 10 Lah. 329 & (Vol 15) 1928 Lah 774 (775) : 10 Lah 360 & (Vol 13) 1926 Nag 399 (401).

[30] Question whether wilful negligence has been established is question of fact. (Vol 5) 1918 Pat 413

(415) & (Vol 13) 1926 All 394 (395) : 48 All 766. (Wilful neglect—Question as to, is not purely one of law.) & (Vol 11) 1924 Lah 594 (594). (Finding that there was wilful neglect on the part of the Railway is finding of fact).

Notice. — [31] A finding as to notice is one of fact. (Vol 19) 1932 All 540 (542) : 54 All 557 & (Vol 18) 1931 All 338 (340).

Undue influence. — [32] Finding as to undue influence is one of fact. (Vol 19) 1932 P C 89 (90) : 59 Ind App 147 : 7 Luck 64 (P C) & (Vol 22) 1935 Bom 326 (327) : 59 Bom 502. (Misrepresentation and undue influence.) & (Vol 5) 1918 Cal 590 (594, 595) & (Vol 14) 1927 Mad 255 (256).

[But see (Vol 24) 1937 Oudh 254 (255, 256). (Question whether bond was executed owing to undue influence, is not purely one of fact but is a legal inference from certain facts and can therefore be considered in second appeal.)]

Misconduct. — [33] Question as to whether certain proved facts amount to misconduct on the part of Railway servants is not purely one of fact. (Vol 22) 1935 Lah 206 (208).

[34] Whether there was misconduct on the lambardar's part within S. 164, Agra Tenancy Act is not purely a question of fact and can be reinvestigated in second appeal. (Vol 28) 1921 All 314 (316) : 43 All 29.

27. Malicious prosecution, suit for. — [1] Malicious prosecution — Suit for existence or otherwise of reasonable or probable cause for prosecution is question of fact. (Vol 12) 1925 Oudh 359 (359) : 28 Oudh Cas 387 & (Vol 26) 1939 All 554 (557) : I L R (1939) All 424 & (Vol 23) 1936 All 441 (441, 442) : 37 Cri L Jour 557 & (Vol 16) 1929 All 429 (430) & (Vol 7) 1920 Mad 252 (255) & (1926) 91 Ind Cas 112 (113) (Oudh).

[2] Question of existence of malice is a question of fact. (Vol 22) 1935 Bom 355 (356) & (Vol 21) 1934 Lah 907 (908).

[3] Malicious prosecution—Presence or absence of reasonable cause is to be inferred from facts in each case — Whether inference is correct is question of law. (Vol 27) 1940 Oudh 320 (322) : 15 Luck 404 & (Vol 19) 1932 All 386 (389). (Mixed question of law and fact.) & (Vol 17) 1930 Cal 392 (396) : 57 Cal 25 (Do.) & (Vol 22) 1935 Lah 765 (767) : 17 Lah 190. (High Court is bound by facts found by lower Court—But it is open to it to see whether those facts constitute absence of reasonable and probable cause.) & (Vol 19) 1932 Mad 601 (602) & (Vol 20) 1933 Nag 23 (26) : 28 Nag L R 312 & (Vol 19) 1932 Pat 91 (92) : 11 Pat 779 : 34 Cri L Jour 215 & (Vol 26) 1939 Pat 13 (14).

[4] High Court in second appeal can inquire the absence of reasonable and probable cause in actions for malicious arrest. (Vol 26) 1939 Pat 13 (14).

[5] Question whether information given to police is directed against another is partly one of fact and partly one of law. (Vol 21) 1934 Pat 14 (15).

[6] The question of the amount of damages for malicious prosecution is a question of fact and the High Court cannot interfere in second appeal. (1909) 31 All 333 (334, 335) & (Vol 10) 1923 All 199 (201) & (1911) 9 Ind Cas 984 (985) (All) & (Vol 28) 1941 Mad 250 (262) : I L R (1941) Mad 406. (Concurrent finding as to amount of damages — Quantum of damages cannot be questioned in second appeal.) & (Vol 21) 1934 Pat 16 (18). (Reasonable compensation is question of fact.)

[But see (Vol 1) 1914 Lah 531 (534) : 15 Cri L Jour 499 (Quantum of damages can be gone into in second appeal.)]

[7] Malicious prosecution — Existence of reasonable and probable cause—Finding on, influenced by question of malice and based on no materials — Finding can be interfered with in second appeal. (Vol 33) 1946 All 204 (210) : I L R (1945) All 685.

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28. Existence of legal necessity for, and binding nature of, transaction.—[1] Finding as to existence of necessity for alienation is a finding of fact. (Vol 10) 1923 Lah 669 (670) * (Vol 30) 1943 All 63 (64) : I L R (1943) All 171. (Absence of power to bind or of legal necessity are findings of fact.) * (Vol 10) 1923 All 28 (28) * (Vol 30) 1943 Cal 203 (204) * (Vol 19) 1932 Lah 473 (474) : 13 Lah 826. (Absence of legal necessity.) * (Vol 30) 1943 Mad 57 (58). (Mortgage whether for purposes binding on mortgagor's son.) * (Vol 22) 1935 Mad 431 (432). (Debts by father whether binding is finding of fact.) * (Vol 13) 1926 Nag 486 (487) * (Vol 20) 1933 Oudh 31 (32) : 8 Luck 182 * (Vol 18) 1931 Oudh 144 (145) * (Vol 23) 1936 Pat 275 (278) * (Vol 22) 1935 Pat 175 (176).

[2] Finding that debt is for immoral purpose is binding in second appeal. (Vol 22) 1935 All 278 (278).

[3] Question of fact—Existence of antecedent debt is question of fact and cannot be disturbed in second appeal. (Vol 13) 1926 Oudh 33 (33).

[4] Finding on question of necessity though one of fact can be challenged in second appeal when there is no evidence to support it or when it proceeds on erroneous principles of law. (Vol 20) 1933 Lah 843 (843) : 14 Lah 584 * (Vol 14) 1927 Lah 896 (897) * (Vol 11) 1924 Lah 689 (690) * (Vol 10) 1923 Lah 660 (661) * (Vol 10) 1923 Lah 41 (42) * (Vol 5) 1918 Lah 8 (9, 10) * (Vol 1) 1914 Lah 96 (97). (Question of necessity inquired into—Reason unconvincing is ground to reverse judgment.)

[5] Whether particular necessity is legal or not is question of law. (Vol 3) 1916 Cal 843 (850, 855) (FB).

[6] Alienation by Hindu widow—Enquiry by alienee as to legal necessity—Sufficiency of enquiry is question of law. (Vol 12) 1925 Oudh 557 (557) : 27 Oudh Cas 329.

[7] Existence of necessity is question of fact—Whether lender should see to the application of money is a question of law. (Vol 12) 1925 Oudh 740 (741).

[8] The question whether reversioner's consent to an alienation can be inferred from the established facts is a point of law. (Vol 3) 1916 Mad 901 (902).

29. Existence of nuisance.—[1] Existence as to nuisance is a question of fact. (Vol 13) 1926 Nag 50 (50) * (Vol 12) 1925 Lah 424 (424) * (1922) 64 Ind Cas 169 (170) (Lah) * (Vol 28) 1941 Mad 650 (650).

[2] Whether facts establish nuisance is question of law. (Vol 30) 1943 Lah 306 (307).

[3] Finding that a public lane has not been narrowed down so as to cause damage to the residents in the lane is a finding of fact. (Vol 16) 1929 All 504 (505).

[4] A question whether a particular road is a public road or a private road is rather a question of law, in any case it is partly a question of law. (Vol 23) 1936 Oudh 154 (155).

30. Acquisition of easement and customary rights of privacy. — [1] A finding as to the acquisition of a right of easement is one of fact. (Vol 17) 1930 Lah 177 (177).

[But see (Vol 16) 1929 All 862 (863).]

[2] Finding as to length of user is one of fact. (Vol 22) 1935 Lah 346 (346).

[3] Inference as to the user of way being as of right would not be interfered with. (Vol 12) 1925 Nag 168 (169).

[4] Uninterrupted user for 20 years—Failure to draw presumption that user was as of right will be error of law making second appeal competent. (Vol 12) 1925 Nag 270 (271).

[5] Whether the right of privacy exists and whether it is substantially infringed is a question of fact. (1910) 6 Ind Cas 398 (399) (All) * (Vol 16) 1929 Oudh 535 (536) * (Vol 8) 1921 Sind 155 (156) : 16 Sind L R 17.

[6] Finding as to stream being artificial based on incorrect view as to what in law constitutes natural channel is not binding. (Vol 28) 1941 Pat 118 (128, 129).

[7] Whether channel is natural stream is question of fact. (Vol 28) 1941 Pat 422 (427) : 20 Pat 497.

[8] Question as to whether an easement is one of necessity is one of fact. (Vol 14) 1927 Mad 963 (963).

[9] Proof of easementary right is question of fact. (Vol 33) 1946 Mad 168 (168).

[10] Whether particular user imposes additional burden on servient heritage is question of fact. (Vol 18) 1931 Mad 128 (131).

[11] Finding as to privation of light not inconveniencing user so as to entitle him to injunction, is a finding of fact. (Vol 15) 1928 Lah 980 (982) * (Vol 22) 1935 Lah 558 (559).

[12] Acquiescence by servient owner is essential for presuming grant—Active obstruction negatives such presumption—Question as to such obstruction is question of fact. (Vol 7) 1920 Nag 26 (27, 28) : 16 Nag L R 76.

31. Finding of fact binding in second appeal.—[1] Findings of fact of first appellate Court are binding in second appeal. (Vol 14) 1927 P C 117 (119) : 54 Ind App 196 : 54 Cal 586 (P C) * (Vol 23) 1936 P C 83 : (88, 89) (P C). (Matter of facts directly decided by lower Court—High Court cannot direct inquiry by lower Court into same matter again.) * (Vol 15) 1928 P C 219 (221) (P C) * (Vol 26) 1939 Pat 267 (268). (Lower Appellate Court recording findings of fact in dismissing appeal under O. 41, R. 11. Findings are binding in second appeal.)

[2] If there is evidence to be considered, the finding of fact of the first appellate Court is final however unsatisfactory the evidence might be. (1892) 19 Cal 249 (250) : 19 Ind App 1. (P C) * (Vol 16) 1929 P C 286 (287) : 56 Ind App 388 (P C) * (Vol 19) 1932 All 293 (306) : 54 All 646 (F B) * (1893) 20 Cal 93 (99) : 19 Ind App 228 (P C). (However, the soundness of the conclusions from findings of facts is a matter of law and may be questioned in second appeal.) * (Vol 4) 1917 Mad 671 (671). (Finding as to misjoinder.) * (Vol 23) 1936 Pat 243 (244). (Mere omission to consider a piece of evidence will not alter character of finding of fact in second appeal.)

[3] The High Court will not entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may be. (1891) 18 Cal 23 (29) : 17 Ind App 122 (P C) * (Vol 16) 1929 P C 190 (193) : 56 Ind App 280 : 25 Nag L R 121 (P C) * (Vol 16) 1929 P C 152 (155) : 56 Ind App 223 : 52 Mad 538 (P C).

[4] No misconstruction of document nor misapplication of law by first appellate Court—Its findings of fact should not be disturbed in second appeal. (Vol 6) 1919 P C 39 (41) (P C).

[5] Finding of facts by lower Appellate Court—Absence of statement of reason is no ground for interference in second appeal. (Vol 3) 1916 P C 126 (128) : 43 Ind App 172 : 43 Cal 1104 (P C).

[6] Interference by High Court in second appeal is competent only on questions of law or procedure. (Vol 1) 1914 P C 87 (89) : 41 Ind App 258 : 37 Mad 443 (PC).

[7] The fact that upon the evidence, High Court would have come to a different conclusion is no ground for second appeal. (Vol 13) 1926 Nag 192 (193) * (Vol 13) 1926 Lah 672 (672). (Where two inferences can be drawn in the construction of a document the one chosen by the lower Court should be accepted.) * (Vol 10) 1923 Lah 239 (239). (Two inferences from facts possible—High Court is bound by lower Court's inference.) * (Vol 20) 1933 Nag 185 (185, 186). (Different conclusion

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possible — Interference by appellate Court is not proper.) * (1938) 1938 Oudh W N 171 (173) * (Vol 20) 1933 Oudh 115 (116).

[8] Finding of fact to be final must be clear and specific. (Vol 30) 1943 P C 24 (25) : 70 Ind App 18 : I L R (1943) 1 Cal 372 : I L R (1943) Kar PC 39 (PC). * (Vol 13) 1926 All 130 (134). (Finding of fact to be binding must be clear, unambiguous and arrived at after due circumspection) * (Vol 4) 1917 Cal 233 (234). (Findings of fact on material issues must be clear and decisive.) * (Vol 16) 1929 Lah 653 (656). (Finding of fact obiter and indefinite can be ignored.) * (Vol 4) 1917 Oudh 194 (195). (Vague finding of fact may be subject to question in second appeal.)

[9] Finding of fact need not be concurrent. (Vol 15) 1928 Rang 303 (303) : 6 Rang 586.

[10] It is open to High Court to come to finding of fact on any point on which finding is necessary and on which lower Appellate Court has omitted to come to a finding. (Vol 20) 1933 All 341 (343) * (Vol 27) 1940 All 349 (350). * (Vol 11) 1924 Oudh 266 (268) : 27 Oudh Cas 77. (High Court can decide title, if left undecided by lower Courts).

[11] Where the first Appellate Court finds that the case set up by both parties is false, the way in which the High Court ought to deal with the matter in second appeal is to decide the case upon the facts found by the lower Appellate Court irrespective of the original cases respectively made by the parties in their pleadings. (Vol 6) 1919 Cal 1037 (1039).

[12] First Appellate Court proceeding on wrong presumption in law, but basing its finding on correct principles—Question cannot be re-opened. (Vol 14) 1927 Mad 331 (335).

[13] See also Note 9.

32. Finding of fact, when not binding in second appeal.—[1] Findings of fact on erroneous view of law can be interfered with in second appeal. (Vol 23) 1941 Cal 88 (89) * (Vol 30) 1943 All 82 (84). (Finding arrived at disregarding provisions of law.) * (Vol 22) 1935 All 774 (776). (Finding of fact arrived at in complete disregard of legal proposition.) * (Vol 17) 1930 Cal 591 (592). (Onus wrongly put on parties — Finding of fact can be interfered with.) * (Vol 16) 1929 Lah 772 (773). (Finding of fact proceeding on erroneous presumption of law.) * (Vol 15) 1928 Lah 122 (125) : 9 Lah 324 * (Vol 30) 1943 Mad 38 (39). (Requiring higher standard of proof than laid down by Evidence Act.) * (Vol 25) 1938 Mad 253 (254). (Wrong view as to presumption—Evidence approached from wrong standpoint—Finding can be interfered with.) * (Vol 25) 1938 Nag 385 (388) : ILR (1938) Nag 324. (Misapplication of law of evidence.) * (Vol 16) 1929 Nag 110 (110) * (Vol 17) 1930 Oudh 17 (18, 19). (Where finding of fact is based entirely on presumption, validity of presumption can be examined in second appeal.) * (Vol 8) 1921 Oudh 137 (137) : 24 Oudh Cas 237. (*Wajib-ul-ars* rejected on erroneous view of law — High Court can interfere in second appeal) * (Vol 23) 1936 Pat 185 (187) * (Vol 22) 1935 Pat 152 (154).

[2] High Court can interfere in second appeal if findings of fact are perverse. (Vol 4) 1917 Lah 30 (31) : 1916 Pun Re No. 112 * (Vol 24) 1937 Nag 9 (10). (Finding should not be reversed unless perverse or not supported by evidence.) * (Vol 10) 1923 Rang 196 (196) : 1 Rang 135.

[3] A finding of fact can be set aside in second appeal where it is not based on any evidence or on legal evidence. (Vol 22) 1935 Cal 648 (649) * (Vol 30) 1943 All 241 (242, 243). (Finding not based on evidence on record can be interfered with.) * (Vol 5) 1918 Cal 544

(544). (Error of Judge in criticising evidence of one of the witnesses on wrong idea that the other two material witnesses were not examined vitiates his finding.) * (Vol 1) 1914 Cal 832 (832) (High Court would set aside judgment based upon evidence not on record.) * (Vol 32) 1945 Nag 138 (142) : I L R (1945) Nag 444. (High Court is bound by finding of fact only if there is evidence on which such finding can be based.) * (Vol 27) 1940 Oudh 35 (38) : 15 Luck 191. (To disregard the evidence of a witness on the ground that he has made a statement which he has in fact not made is a mistake of law.) * (Vol 22) 1935 Oudh 41 (43) : 10 Luck 423. (Finding based on inadmissible evidence, i. e. on document rejected by trial Court.) * (Vol 13) 1926 Oudh 464 (466) : 2 Luck 172. (Finding of fact based on inadmissible evidence.) * (1912) 16 Ind Cas 887 (888, 889) (Oudh). (No evidence legally sufficient to support finding.) * (Vol 14) 1927 Pat 209 (212) : 6 Pat 698 (FB). (Question of fact decided by Court not upon evidence but holding itself bound by a previous decision of its High Court — Second appeal lies.) * (Vol 11) 1924 Pat 687 (688). (Second Appellate Court can consider whether there is any evidence to support the lower Court's findings of fact.)

[4] Finding of fact based purely upon unwarranted assumption and unjustified conjectures is not binding in second appeal. (1937) 39 Pun L R No 361 (363) * (Vol 17) 1930 Lah 712 (714). (Finding of fact arrived at by erroneous and unwarranted assumption of facts and misreading of accounts.) * (Vol 5) 1918 Lah 336 (337). (Findings of fact based on conjectures.)

[But see (Vol 1) 1914 Mad 118 (119). (Finding of fact based on no positive evidence but on probabilities and circumstances—High Court will not still interfere.)]

[5] Finding of fact which has not been arrived at after a fair, honest and full consideration of the evidence on the record is not binding on the High Court in second appeal. (Vol 5) 1918 Pat 678 (680) * (Vol 11) 1924 All 848 (849) : 46 All 773. (A finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is cannot be accepted in second appeal as a legal finding on it.) * (Vol 21) 1934 Cal 633 (634) : 61 Cal 365. (Misconception or error in consideration of evidence.) * (Vol 13) 1926 Cal 603 (604). (Lower Court ignoring valuable evidence.) * (1913) 17 Cal W N 37 (38, 39). (Misconception as to existence of evidence.) * (Vol 28) 1941 Lah 10 (13) : ILR (1940) Lah 164. (Finding of fact confused and involving mistakes of fact—Material evidence not considered—Findings are not binding in second appeal.) * (Vol 22) 1935 Lah 912 (913). (Disregard of entries in revenue records.) * (Vol 4) 1917 Lah 267 (267). (First Appellate Court not dealing with evidence — Finding of fact cannot be accepted as correct) * (Vol 15) 1928 Mad 826 (827). (Question regarding person being *karnavan* — Previous judgment mentioning him as such — Failure of trial Court to take that judgment into consideration — Decision is vitiated and can be interfered with in second appeal.) * (Vol 4) 1917 Mad 689 (690). (When the Appellate Court reverses a finding of fact it ought to apply its mind to the consideration of the whole evidence in the case.) * (Vol 22) 1935 Oudh 86 (87). (Lower Court not applying its mind to evidence in judicial manner and omitting to consider important evidence) * (Vol 30) 1943 Pat 177 (180) : 22 Pat 154. (Finding of first Appellate Court being inference from facts—Facts not considered — Finding can be interfered with in second appeal.) * (Vol 21) 1934 Pat 66 (67). (Finding of fact arrived at without proper discussion of evidence.) * (Vol 9) 1922 Pat 503 (504). (Finding of fact — Whole evidence not considered — Finding is not binding.) * (Vol 4) 1917 Pat 283 (289). (Judge making pretence of considering evidence

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— Finding on question of fact is not binding in second appeal.)

[6] Finding of fact based on misapprehension as regards real point at issue cannot be upheld in second appeal. (Vol 26) 1939 Lah 301 (302) * (Vol 13) 1926 Oudh 353 (354). (Findings based on mistaken view of pleadings are not binding.)

[7] Finding of fact based on an erroneous approach to the case can be disturbed in second appeal. (Vol 25) 1938 Mad 133 (134) * (1934) 35 Pun L R 608 (610). (Question of fact not approached from proper point of view and evidence on record not properly considered — Second Appellate Court may remand case for fresh decision.)

[8] A finding of fact which contradicts another finding is open to second appeal. (Vol 15) 1928 Lah 690 (691).

[9] Conclusion of fact opposed to case set up by party in whose favour it is drawn — Second appeal lies. (Vol 13) 1926 Lah 535 (536) * (Vol 25) 1938 Pat 181 (182). (A finding of fact is not binding in second appeal when lower Appellate Court, on slenderest evidence, makes out case which is not in pleadings.)

[But see (Vol 30) 1943 All 183 (184). (High Court will not interfere on ground that finding of fact was contrary to pleadings.)]

[10] Finding of fact — Quaint reasoning of lower Court — Finding can be reversed in second appeal. (Vol 12) 1925 Oudh 386 (387).

[11] Finding capable of being interpreted both as finding of fact and of law — Untenability as finding of law — High Court is not bound to treat it as finding of fact. (Vol 12) 1925 Cal 993 (994).

[12] Finding of fact — Possibility of expert evidence given on both sides being true — Finding was held to be open to be considered in second appeal. (Vol 12) 1925 All 24 (25) : 47 All 243.

[13] First Appellate Court reversing finding of trial Court without properly appreciating or discussing reasons given by latter Court — Its finding is not binding in second appeal. (Vol 23) 1936 Cal 178 (180) : 63 Cal 846.

[14] Lower Court trying to fit facts with law — Findings of fact of lower Court can be set aside in second appeal. (Vol 17) 1930 All 510 (511).

[15] Unless it is shown that a finding of fact is not justified by the evidence in the case it cannot be challenged in second appeal. (Vol 12) 1925 Cal 469 (470) * (Vol 18) 1931 All 219 (220). (Conclusion based on nobody's pleading cannot be accepted in second appeal.) * (Vol 9) 1922 All 312 (313) : 44 All 169.

[16] Finding based on insufficient evidence and without giving reasons can be disturbed. (Vol 7) 1920 Pat 829 (830).

[17] Finding of lower Appellate Court differing from that of trial Court and based on misappreciation of evidence is not binding. (Vol 13) 1926 Nag 129 (134, 135).

[18] Finding on facts can be upset where lower Court was not in a better position than the appeal Court to judge of witnesses' reliability. (Vol 12) 1925 Rang 71 (78) : 2 Rang 495.

[19] Where a wrong inference is drawn from facts, the Chief Court will not be bound by the finding in second appeal. (Vol 4) 1917 Lah 350 (350).

[20] See also Notes 5, 9 and 23.

33. Concurrent findings of fact. — [1] Concurrent finding of fact is conclusive unless it is illegal or unjust. (Vol 19) 1932 P C 231 (234) (P C) * (Vol 16) 1929 P C 205 (209) (P C) * (Vol 33) 1946 Bom 193 (195). (Concurrent finding that certain person is not proved to be another person's legally adopted son.) * (Vol 20) 1933

Bom 114 (115) : 57 Bom 134 * (Vol 1) 1914 Lah 127 (127). (A concurrent finding as to receipt of consideration cannot be interfered with in second appeal.) * (Vol 16) 1929 Nag 180 (182) * (Vol 29) 1942 Pat 479 (480) * (Vol 20) 1933 Rang 174 (176).

[2] Finding of facts of two lower Courts same — Heavy burden lies on appellant seeking to disturb them in second appeal. (Vol 21) 1934 P C 127 (129) (P C).

[3] Concurrent finding of fact can only be disturbed in second appeal for cogent reasons. (1911) 1911 Pun L R No. 169 p. 625 (626).

[4] Concurrent finding rendering O. 1, R. 8 inapplicable supported by evidence will not be disturbed. (Vol 17) 1930 P C 232 (234) (P C).

[5] Concurrent finding of separation in family business in accordance with probabilities and conduct of parties will not be interfered with in second appeal. (Vol 18) 1931 P C 48 (50) : 27 Nag L R 131 : 58 Ind App 106 (P C).

[6] Concurrent finding is no finding if based on error of law. (Vol 16) 1929 P C 38 (39, 40) (P C).

[7] Concurrent finding of fact — Fact that first appellate Court gave no reasons for coming to finding is no reason for interference in second appeal. (Vol 3) 1916 P C 126 (128) : 43 Cal 1104 : 43 Ind App 172 (P C).

34. New case — General. — [1] In second appeal entirely new case cannot be set up. (Vol 3) 1916 Cal 236 (237) * (Vol 14) 1927 Lah 426 (427). (A claim altering nature of the case cannot be allowed in second appeal.) * (Vol 21) 1934 Mad 639 (640) * (Vol 13) 1926 Mad 635 (637).

[2] The parties are bound by the case which arises on their pleadings and which has been enquired into by the trial Court. (Vol 2) 1915 Lah 399 (400).

[3] Plaintiff cannot resile from position taken up in plaint. (Vol 3) 1916 Oudh 329 (330).

[4] Plea not taken in Courts below cannot be allowed to be taken for the first time in second appeal. (Vol 33) 1946 Lah 272 (274) * (Vol 18) 1931 PC 809 (810) (PC) * (Vol 20) 1933 All 911 (913) * (Vol 17) 1930 All 885 (886) * (Vol 9) 1922 Bom 329 (331) : 46 Bom 966 * (Vol 19) 1932 Cal 77 (79) * (Vol 11) 1924 Cal 353 (354) * (Vol 20) 1933 Lah 845 (847) * (Vol 20) 1933 Mad 382 (384) * (Vol 9) 1922 Mad 519 (520) * (Vol 19) 1932 Oudh 244 (246) : 8 Luck 87 * (1913) 21 Ind Cas 554 (555) (Oudh) * (Vol 9) 1922 Pat 68 (70) * (Vol 21) 1934 Rang 289 (290).

[5] New plea involving question of fact cannot be raised in second appeal. (Vol 10) 1923 Bom 82 (83) : 47 Bom 128 * (Vol 12) 1925 Cal 225 (230) * (Vol 10) 1923 Cal 274 (276) : 49 Cal 1048 * (Vol 33) 1946 Mad 334 (335) * (Vol 14) 1927 Mad 455 (455) * (Vol 14) 1927 Nag 129 (129) : 23 Nag L R 1 * (1933) 10 Oudh W N 1186 (1187) * (Vol 6) 1919 Oudh 283 (285) : 22 Oudh Cas 3 * (Vol 29) 1942 Pat 152 (154) * (Vol 28) 1941 Pat 600 (601).

[6] Point involving evidence cannot be taken in second appeal. (Vol 26) 1939 All 194 (197) * (Vol 14) 1927 All 763 (764) * (Vol 13) 1926 All 707 (708) * (Vol 10) 1923 Bom 37 (39) * (Vol 6) 1919 Cal 407 (408).

[7] Question for which no issue was framed cannot be allowed to be raised in second appeal. (Vol 5) 1913 Cal 177 (178) * (Vol 7) 1920 Cal 499 (500) * (Vol 7) 1920 Cal 325 (326) * (1913) 1913 Pun L R No. 255 page 870 * (Vol 27) 1940 Nag 70 (71).

[8] Second appeal — New and inconsistent pleas cannot be raised. (Vol 10) 1923 All 358 (360) : 45 All 53 * (Vol 7) 1920 Cal 177 (178) * (Vol 2) 1915 Lah 115 (116) : 1915 Pun Re No. 67 * (Vol 1) 1914 Lah 11 (13) : 1914 Pun Re No. 77 * (Vol 18) 1929 Mad 349 (350) * (Vol 12) 1925 Mad 384 (384) * (1910) 8 Mad L Tim 87 (87) * (Vol 3) 1916 Oudh 313 (314) : 19 Oudh Cas 166 * (Vol 23) 1936 Rang 260 (262) : 14 Rang 738.

Sections 100 & 101 (*contd.*)

[9] A question of notice cannot be allowed to be raised for the first time in second appeal. (Vol 1) 1914 Cal 828 (829, 830) : 41 Cal 418 * (Vol 4) 1917 Pat 469 (470) : 2 Pat L Jour 595. (Whether the notice to quit was legal and sufficient.)

[10] Objection that execution application is fraudulent or defective, not raised in first two Courts, must be disallowed in High Court. (Vol 28) 1941 Nag 152 (155).

[11] Objection as to misjoinder or non-joinder of parties cannot be taken for the first time in second appeal. (Vol 15) 1928 Mad 635 (636)* (1909) 9 Cal L Jour 91 (95).

[12] Partition suit — Plea of inconvenience cannot be urged for first time in second appeal. (Vol 7) 1920 Oudh 231 (233) : 23 Oudh Cas 281.

[13] Technical plea not allowed where if it had been raised in the lower Court the opposite party would have remedied the defect. (Vol 11) 1924 Lah 328 (328, 329).

[14] Question of court-fee will not be allowed to be first raised in second appeal. (Vol 14) 1927 Nag 321 (322).

[15] Where evidence is excluded by original Court and such exclusion is not objected to in the first Appellate Court, such objection cannot be raised in second appeal. (1912) 16 Ind Cas 213 (214) (Cal).

[16] Non-compliance with O. 13 not complained of at the earliest opportunity — Such plea cannot be raised in second appeal. (Vol 15) 1928 Lah 704 (705).

[17] Objection to validity of attachment cannot be raised for first time in second appeal. (Vol 33) 1946 Lah 134 (136) (FB).

[18] Suit against mortgagor and prior equitable mortgages — *Held* objection to equitable mortgage by deposit of copies of title deeds cannot for the first time be raised in second appeal. (Vol 3) 1916 Lah 39 (42, 43) : 1916 Pun Re No. 31.

[19] Suit by usufructuary mortgagee to recover mortgage money — Claim for profits of part of property not delivered to plaintiff by way of interest disallowed — Claim for damages or mesne profits held should not be allowed to be set up in second appeal for first time. (Vol 32) 1945 All 202 (204) : I L R (1945) All 676 : 46 Cri L Jour 743 (FB).

[20] Appellant cannot be allowed in second appeal to contend for the first time that decree obtained by one judgment-debtor against appellant's father cannot be set off against decree obtained by appellant in his own right. (Vol 1) 1914 Mad 667 (667).

[21] Tender—Question as to sufficiency of, cannot be raised for the first time in second appeal. (Vol 9) 1922 Pat 167 (169) : 1 Pat 350.

[22] The plea of want of registration or invalidity of registration cannot be entertained in second appeal when the point has not been raised in the Courts below. (Vol 2) 1915 Lah 217 (217, 218)* (Vol 14) 1927 Mad 92 (93) *(Vol 24) 1937 Nag 237 (239) : I L R (1938) Nag 221.

[23] Point which is not raised in the first appeal can be allowed in second appeal where the point may be described as involving a question of public policy or where the decision of the point would prevent future litigation. (Vol 18) 1931 All 35 (38) : 53 All 65 (FB).

35. Plea as to admissibility of evidence.—[1] Objections as to the admissibility of evidence will not, as a general rule, be entertained for the first time in second appeal. (Vol 14) 1927 Mad 1107 (1108) * (Vol 11) 1924 All 709 (710) * (Vol 9) 1922 All 493 (494) : 45 All 21 * (Vol 3) 1916 All 11 (12) (F B) * (Vol 10) 1923 Cal 378 (379) * (Vol 7) 1920 Cal 538 (539) * (Vol 6) 1919 Cal 499 (500) * (Vol 5) 1918 Cal 394 (395) * (Vol 31) 1944 Lah 9 (10). (Cannot be raised at the stage of the

Letters Patent appeal) * (Vol 16) 1929 Lah 875 (876) * (Vol 3) 1916 Mad 147 (149, 150).

[But see (Vol 12) 1925 Cal 1034 (1036). (Document inadmissible in evidence taken into consideration — Omission to take objection in time does not affect its admissibility).]

[2] An objection as to the mode of proof of certain documents taken for the first time in second appeal cannot be entertained. (Vol 6) 1919 Cal 814 (815).

[3] Where secondary evidence of the contents of a deed is led without objection by the other party, objection cannot be raised in second appeal. (Vol 22) 1935 Lah 628 (629).

[4] Objection on the ground that anonymous document cannot be taken to have been properly proved by virtue of S. 90, Evidence Act, not taken at proper time, cannot be entertained in second appeal. (Vol 26) 1939 Mad 926 (927).

[5] Finding of fact based partly on inadmissible evidence cannot be maintained. (Vol 14) 1927 Lah 448 (449) : 8 Lah 651 * (Vol 10) 1923 Cal 261 (265) * (Vol 23) 1936 Lah 1005 (1006).

[6] New plea in second appeal that is finding of fact based on inadmissible evidence cannot be entertained when defect was curable. (Vol 20) 1933 Lah 951 (951).

[7] Defendant newly added during trial not objecting to evidence already taken — His interest fully represented by another defendant — Appeal — Objection as to non-admissibility of the evidence against new defendant taken in second appeal — *Held* objection should be disallowed. (Vol 4) 1917 Mad 722 (723).

36. New point involving pure question of law. —[1] Pure question of law patent on face of record can be raised for first time in second appeal. (Vol 33) 1946 Mad 57 (58)* (Vol 12) 1925 All 361 (362) : 47 All 324* (Vol 17) 1930 Cal 616 (618)* (1910) 14 Cal W N 141 (143)* (Vol 23) 1936 Lah 612 (616)* (Vol 23) 1936 Lah 448. (448)* (Vol 20) 1933 Lah 738 (739)* (Vol 23) 1936 Pat 104 (105) : 15 Pat 356. (Law point not dependent on question of fact can be raised)* (Vol 27) 1940 Pesh 52 (53)* (Vol 20) 1933 Sind 176 (178) : 27 Sind L R 41* (1909) 8 Sind L R 106 (107).

[2] Question of law raised upon construction of document for first time in Court of appeal.—It is not only competent but expedient in interest of justice to entertain such plea. (Vol 19) 1932 P C 118 (120) : 59 Ind App 161 : 10 Rang 242 (P C) * (Vol 12) 1925 Nag 104 (106).

[3] Plea of law not raised in the grounds.—Court can allow the plea to be raised. (Vol 12) 1925 All 783 (784) : 47 All 932.

[4] The power of allowing new points of pure law to be raised for the first time in second appeal is discretionary. (Vol 8) 1921 All 337 (339) : 43 All 193 (F B).

[5] High Court can ignore even a point of law raised before it for first time.—But where equities of case require that it should give effect to such a point even though not raised before there is no bar to its taking cognizance of such point. (Vol 22) 1935 All 143 (146).

[6] Although party cannot raise new point of law in appeal, Court is not precluded from deciding case on such point, when it is important and no fresh evidence is necessary. (Vol 18) 1931 All 490 (494) : 54 All 25 (F B).

[7] Law point on face of record.—Whether it can be allowed to be raised in appeal or not depends on circumstances of case and nature of point raised. (Vol 17) 1930 Lah 937 (939).

[8] Point of law cannot be raised for first time in second appeal when it requires investigation of facts. (Vol 80) 1943 Pat 10 (12, 13) : 21 Pat 322 * (Vol 15) 1928 Pat 109 (111).

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[9] Question of law depending on facts found not raised in first appeal — It can be raised in second appeal. (Vol 30) 1943 Pat 96 (101) : 21 Pat 799 * (Vol 25) 1938 All 396 (397) : I L R (1938) All 563 (F B) * (Vol 14) 1927 Cal 393 (393) : 54 Cal 424. (Question of law not requiring fresh investigation of facts can be allowed.) * (1910) 6 Ind Cas 75 (75) (Cal) * (Vol 8) 1921 Pat 326 (328) * (Vol 25) 1938 Rang 376 (377). (Question of law raised upon admitted facts.) * (Vol 6) 1919 Low Bur 58 (58) : 10 Low Bur Rul 10.

[10] In second appeal a Court will not take up a point of law for the satisfactory determination of which there is no material in the pleadings and judgments of the lower Courts. (Vol 16) 1929 All 456 (457).

[11] Point of law depending upon fresh trial of issue, will not be allowed in second appeal. (1937) 1937 All L Jour 1252 (1253).

[12] The question of relevancy is a question of law and can be raised at any stage. (Vol 9) 1922 Pat 122 (143) * (Vol 32) 1945 Cal 492 (493, 494).

[13] New plea of part performance cannot be allowed for the first time in second appeal where there is no sufficient evidence on the record to dispose of the plea. (Vol 14) 1927 All 344 (345).

[14] Question of law can be raised for the first time in second appeal if it does not necessitate the taking of further evidence. (Vol 25) 1938 Bom 291 (293) * (Vol 9) 1922 Bom 148 (148) * (Vol 14) 1927 Mad 411 (411).

37. New case of mixed question of law and fact. — [1] Mixed question of law and fact cannot be raised for the first time in second appeal. (Vol 14) 1927 All 59 (59) * (Vol 21) 1934 All 692 (693). (Adverse possession.) * (Vol 20) 1933 All 493 (493) : 55 All 554. (Family settlement.) * (Vol 10) 1923 Cal 247 (248) * (Vol 7) 1920 Cal 754 (755) * (Vol 33) 1946 Mad 209 (212). (Question whether property was dedicated to charity by testator during his lifetime is not pure question of law.) * (Vol 11) 1924 Mad 918 (916) : 47 Mad 861 * (Vol 14) 1927 Nag 351 (352) * (Vol 13) 1926 Nag 164 (166) * (Vol 33) 1946 Pat 216 (218) * (Vol 13) 1926 Pat 401 (402) : 5 Pat 759 * (Vol 1) 1914 Low Bur 166 (168).

[2] The question whether a guardian could not convey a valid title of the minor's property is a mixed question of law and fact and cannot be raised for the first time in second appeal. (Vol 21) 1934 Lah 329 (330).

[3] Whether a partner was winding up a business and therefore had authority to bind the firm by his acknowledgment of a debt is a mixed question of law and fact and cannot be raised for the first time in second appeal. (Vol 16) 1929 Lah 266 (267).

[4] A plea that a suit is barred by S. 47, Civil P.C., not raised either in the pleadings or in either of the lower Courts, cannot be entertained in second appeal. (Vol 21) 1934 Oudh 55 (56) : 9 Luck 365.

[5] Question of subrogation requiring reference to facts for determination cannot be raised for first time. (Vol 8) 1921 Cal 781 (782).

[6] Question of validity of imposition of personal tax under S. 85, Bengal Municipal Act, cannot be raised for the first time in argument in High Court. (Vol 16) 1929 Cal 452 (453).

[7] A new plea of *lis pendens* cannot be allowed to be raised in the High Court in the second appeal for the first time, especially as the raising of it would entail a remand for further enquiry. (1920) 2 Lah L J 230 (232).

[8] Master and servant sued as principals — Plea of vicarious liability cannot be raised in second appeal as plea is contradictory and is mixed question of law and fact. (Vol 20) 1933 Nag 299 (301) : 30 Nag L R 101.

[9] The question about the liability to interest under the Interest Act cannot be raised in the second appeal for the first time. (Vol 6) 1919 Cal 1077 (1078).

[10] Appeal — Restoration after rejection not known to respondent — Plea can be raised in second appeal. (Vol 9) 1922 Pat 281 (284) : 6 Pat L Jour 625.

38. Plea going to the root of the case. — [1] A plea of law which goes to the root of case can be taken up even for first time in second appeal if it arises from the evidence on record and does not depend on other facts or further enquiry on facts. (Vol 29) 1942 Pat 79 (80) * (Vol 10) 1923 All 343 (344) * (Vol 4) 1917 Nag 213 (213) : 13 Nag L R 98.

[2] Pre-emption — Suit for pre-emption fails if pre-emptor cannot pre-empt all that was sold — This objection can be raised for the first time in second appeal. (Vol 26) 1939 Oudh 233 (237) : 14 Luck 678.

[3] Objection to maintainability of suit can be taken even in second appeal if it does not involve the ascertainment of fresh facts. (Vol 4) 1917 Mad 177 (177) * (Vol 14) 1927 Mad 1035 (1035) : 51 Mad 76 * (Vol 21) 1934 Rang 308 (308). (Maintainability of suit under S. 53, Transfer of Property Act.) * (Vol 14) 1927 Rang 83 (84) : 4 Rang 500.

[But see (Vol 17) 1930 Cal 267 (269).]

[4] Suit for partition — Objection to maintainability on the ground of its being for partial partition cannot be raised for first time in second appeal. (Vol 14) 1927 Mad 528 (530).

[5] Objection as to maintainability of suit for want of notice to quit was not allowed to be raised in second appeal. (1912) 15 Ind Cas 584 (586) (Mad).

39. Plea of jurisdiction. — [1] Objection as to jurisdiction can be raised for first time in second appeal. (Vol 10) 1923 Bom 321 (349) : 47 Bom 843 * (Vol 8) 1921 All 290 (291) : 43 All 18 * (Vol 30) 1943 Bom 427 (429) : I L R (1943) Bom 534 * (1910) 12 Cal L Jour 53 (55) * (1910) 5 I C 158 (160) (Cal). (Appellant though not applying under S. 115, Civil P.C., is not prevented from coming in second appeal on the question of jurisdiction.) * (Vol 10) 1923 Lah 551 (553) * (1928) 1928 Mad V N 601 (601). (A plea that the suit is barred by S. 47 can be raised in second appeal.) * (Vol 2) 1915 Mad 954 (955). (Decision of jurisdiction can be challenged in second appeal.) * (Vol 21) 1934 Oudh 55 (55) : 9 Luck 365 * (Vol 16) 1929 Rang 77 (77) : 7 Rang 370 : 30 Cr L J 1166. (Question of jurisdiction not raised in last appeal — Question can be raised in Letters Patent appeal).

[But see (1935) 18 Nag L Jour 110 (115).]

[2] Plea that lower Appellate Court should not entertain plea of want of jurisdiction in view of S. 21 not raised in lower Court nor in grounds of second appeal — It cannot be raised in second appeal. (Vol 26) 1939 All 163 (164) : I L R (1939) All 167.

[See also (Vol 14) 1927 Nag 164 (165). (On question of jurisdiction discretion rests with High Court whether it is in the interest of justice to interfere.)]

[3] Principles of S. 21 apply even to proceedings other than original suits — Objection as to jurisdiction not taken in lower Appellate Court cannot be taken in second appeal. (Vol 20) 1933 Nag 318 (321, 322) : 29 Nag L R 342.

[4] Objection that first Appellate Court had no pecuniary jurisdiction can be raised at any stage in second appeal — S. 11, Suits Valuation Act, and S. 21, Civil P. C. do not apply — Principle under S. 11, Suits Valuation Act, cannot be extended to case of want of inherent jurisdiction. (Vol 29) 1942 Oudh 481 (482).

40. Plea of limitation, estoppel or res judicata. — [1] The plea of *res judicata* is a question of law and may be raised at any stage of suit. (Vol 5) 1918 Pat 526 (528)

[See also (Vol 10) 1923 Lah 560 (568). (Plea not raised in memorandum was allowed.)]

[2] Though plea of *res judicata* can be entertained for the first time in second appeal, yet such plea cannot

102. No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.
 [1882—S. 586; 1877—S. 586; 1861—S. 27.]

Sections 100 & 101 (contd.)

be allowed to be raised if it involves questions of fact requiring further evidence. (1899) 21 All 446 (448, 449) * (Vol 21) 1934 All 770 (772). (Plea of *res judicata* not based on facts already on record) * (Vol 21) 1934 Mad 551 (552) * (Vol 16) 1929 Mad 775 (776). (Point of *res judicata* not taken in lower Court not necessarily allowable in second appeal.)

[3] Question of limitation is one of law and can be raised in second appeal for the first time. (Vol 9) 1922 Lah 240 (241) * (Vol 15) 1928 All 691 (695). (Even if raised for first time in second appeal it must not be refused where facts necessary to support it are admitted or apparent.) * (Vol 14) 1927 All 177 (179). (Facts not disputed—Question can be raised for the first time in second appeal.) * (Vol 1) 1914 Bom 47 (51) : 38 Bom 227. (Admission or pleadings showing that case is barred—Point of limitation on ground of adverse possession can in such cases be raised in second appeal.) * (Vol 15) 1928 Cal 870 (871). (Plea should be allowed for first time in second appeal but case cannot be remanded to find out facts for showing that claim is barred.) * (Vol 4) 1917 Mad 845 (845). (Objection for failing to plead ground of exemption can be raised for first time in second appeal.) * (Vol 3) 1916 Mad 535 (535). (Can be raised in second appeal if plea rests on pleadings and not on facts.)

[4] Question of limitation dependent upon finding of fact—Question cannot be allowed to be raised in second appeal. (Vol 24) 1937 Nag 184 (185) : I L R (1938) Nag 167 * (Vol 24) 1937 All 696 (699). (Plea not raised in pleadings—No issue framed—Plea also not raised in grounds of appeal—No finding on such question by either Court—Plea of, cannot be allowed for first time in second appeal.) * (Vol 4) 1917 All 359 (362) * (Vol 10) 1928 Bom 254 (255). (Dependent on evidence.) * (Vol 17) 1930 Cal 385 (387) : 57 Cal 114. (Plea depending upon facts, not raised in lower Courts or in memorandum of second appeal cannot be raised only at the time of argument in second appeal.) * (Vol 24) 1937 Nag 314 (316) : I L R (1937) Nag 28 * (Vol 32) 1945 Oudh 65 (70) : 20 Luck 179 * (1929) 10 Pat L T 53 (55) * (Vol 9) 1922 Pat 398 (399) : 1 Pat 23. (Plea of bar by limitation raised without any facts—Bar by adverse possession or under Art. 137 of the Limitation Act cannot be raised in second appeal.) * (1909) 5 Low Bur Rul 82 (83). (Question of limitation by adverse possession.)

[5] Court of appeal cannot take up the question of limitation *suo motu* when it depends on enquiry of facts; the plea must be raised in pleadings or put in issue. (Vol 16) 1929 Lah 432 (432).

[6] Plea of estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal. (Vol 1) 1914 Sind 27 (28) : 8 Sind L R 272 * (Vol 26) 1939 All 194 (196) * (Vol 33) 1946 Lah 134 (141) (F B) * (Vol 27) 1940 Pat 480 (482). (Plea when not raised in plaint or disclosed by evidence.)

41. Plea abandoned or waived is barred.—[1] An appellant ought not to be allowed to take a point in second appeal which was expressly abandoned in the Court below. (Vol 11) 1924 Cal 541 (541) * (1937) 39 Pun L R 312 (312). (The point taken in the grounds of appeal in the lower Appellate Court but not noticed by it in its judgment, cannot be dealt with in second appeal.) * (Vol 10) 1923 Lah 252 (252). (New plea advisedly given up.) * (Vol 18) 1931 Mad 632 (633).

(Pleader not arguing point but merely observing that he does not press it though he does not abandon it.) * (Vol 15) 1928 Mad 900 (901). (Issue of fact.) * (Vol 8) 1921 Mad 243 (245) : 44 Mad 344 * (Vol 18) 1931 Nag 147 (148). (Plea of legal necessity abandoned in lower Appellate Court.) * (Vol 13) 1926 Nag 160 (161) * (Vol 7) 1920 Nag 45 (45) : 16 Nag L R 89 * (Vol 28) 1941 Oudh 203 (205). (Point raised in cross-objections in first Appellate Court—No arguments addressed—Point cannot be raised in second appeal.) * (Vol 24) 1937 Oudh 243 (244) : 13 Luck 167. (Question of *res judicata* raised in trial Court but withdrawn subsequently.) * (Vol 17) 1930 Oudh 268 (269, 270). (Point, though of law, cannot be raised in second appeal.) * (Vol 12) 1925 Oudh 510 (511). (Question of fact.) * (Vol 6) 1919 Oudh 30 (30) * (Vol 18) 1931 Sind 170 (176). 25 Sind L R 493 (Mixed question of law and fact abandoned in first Court cannot be revived in second appeal).

[2] Advocate can concede point of fact without authority from client—Point so conceded in lower Appellate Court cannot be heard in second appeal. (Vol 32) 1945 Mad 256 (256, 257).

[3] Plea raised by party—Court not giving finding—Appellate Court cannot conclude that point was not pressed. (Vol 16) 1929 Lah 81 (82).

[4] Finding of fact not questioned in first appeal cannot be raised in second appeal. (Vol 16) 1929 Rang 213 (214) * (1910) 6 Ind Cas 331 (332) (All) * (Vol 22) 1935 Lah 590 (591) : 17 Lah 84.

[5] Evidence or contention not pressed in lower Courts—High Court will not consider them. (Vol 31) 1944 Oudh 206 (207) * (Vol 12) 1925 Cal 1184 (1184). (Point adumbrated in plaint but no issue raised nor evidence led—Point cannot be raised.) * (Vol 14) 1927 Mad 668 (668, 669) * (Vol 28) 1941 Oudh 198 (203).

[6] Where a point raised in the written statement is not made the subject of an issue and was not also brought to the notice of the Appellate Court in an appeal by the plaintiff, the defendant is entitled to raise it in second appeal. (1913) 18 Ind Cas 367 (368) (Oudh).

42. Remand—See O. 41, Rr. 23 and 25.

43. Ex parte appellate decree is subject to second appeal.—[1] Second appeal is maintainable against an *ex parte* decision, even when other remedies are open. (Vol 12) 1925 Cal 497 (498).

SECTION 102 — SYNOPSIS.

1. Appeal from order of remand or review.
2. Applicability, scope and object.
3. Suit includes execution proceedings.
4. "Suit of the nature cognizable by Courts of Small Causes".
5. Suits for accounts.
6. Suits for contribution.
7. Suits for damages.
8. Suits for declaration.
9. Suits for injunction.
10. Suits for maintenance.
11. Suits for mesne profits.
12. Suits for money.
13. Suits for rent.
14. Suits for specific performance.
15. Suits relating to immovable property.
16. Suits relating to marriage.

1. Appeal from order of remand or review.—

[1] Order of remand in small cause nature suit below

Section 102 (*contd.*)

Rs. 500 is not appealable. (Vol 6) 1919 All 6 (6) : 42 All 200 * (Vol 3) 1916 All 125 (125) * (Vol 3) 1916 Cal 581 (581.)

[2] Small cause decree passed on review—No second appeal lies on the merits—Appeal will lie only from an order granting the review. (Vol 8) 1921 Lah 124 (125).

2. Applicability, scope and object. — [1] No second appeal lies in small cause suit of less than Rs. 500 when suit is tried by Civil Court not being small cause Court. (Vol 11) 1924 All 263 (264) : 46 All 73 * (Vol 22) 1935 All 574 (575) * (Vol 24) 1937 Oudh 244 (245) : 13 Luck 204.

[2] Single Judge of High Court deciding second appeal in suit of small cause nature of value less than Rs. 500 — Decree passed by him is without jurisdiction and is liable to be set aside in Letters Patent appeal. (Vol 6) 1919 All 447 (447).

[3] Suit of valuation of less than Rs. 500 — Suit excluded from cognizance of Small Cause Court under second schedule to Provincial Small Cause Courts Act—Second appeal is not barred. (1945) 1945 Oudh W N (H C) 264 (265).

[4] Object of S. 102 is to take away the right of second appeal where the value of the subject-matter of the original suit does not exceed Rs. 500 in the case of all suits which as regards their subject-matter would be within the jurisdiction of Courts of small causes, but which are outside that jurisdiction by reason of the amount claimed being beyond the pecuniary limit of the small cause jurisdiction. (1900) 23 Mad 547 (554) (F B).

[5] Plaint showing suit not to be of small cause nature — No objection to jurisdiction in trial Court — S. 102 does not apply. (Vol 18) 1931 Oudh 411 (411) * (Vol 18) 1931 Oudh 136 (136, 137).

[6] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905, *see* S. 7 (b).

3. Suit includes execution proceedings. — [1] Section 102 applies to orders in execution under S. 47. (Vol 26) 1939 Sind 360 (360) : I L R (1939) Kar 842 * (Vol 13) 1926 All 345 (345) * (1899) 12 Mad 116 (117) * (Vol 2) 1915 Nag 91 (91) : 11 Nag L R 99 * (Vol 5) 1918 Oudh 269 (269).

[2] Word 'suit' in S. 102 includes not only proceedings till the passing of the decree, but also its execution proceedings. (1912) 16 Cal L Jour 96 (98).

[3] Small Cause Court's decree transferred for execution to regular side — Executing Court deciding question under S. 47 — No second appeal lies from such decision if subject-matter of small cause suit is less than Rs. 500. (Vol 33) 1946 Nag 165 (167, 168, 169) : I L R (1946) Nag 26 * (Vol 14) 1927 All 740 (740) * (1890) 12 All 579 (580) * (Vol 15) 1928 Bom 534 (537) : 53 Bom 46 * (Vol 8) 1921 Cal 242 (243) * (1898) 25 Cal 872 (873) * (Vol 6) 1919 Mad 264 (265) (First appeal lies) * (Vol 4) 1917 Mad 188 (189) * (Vol 5) 1918 Pat 624 (624).

[4] Original suit of the nature cognizable by Court of Small Causes—Subject-matter of suit not exceeding Rs. 500—No second appeal lies in respect of order made in execution proceedings. (1896) 18 All 481 (481) (F B) * (Vol 11) 1924 All 263 (264) : 46 All 73 * (Vol 8) 1921 Bom 229 (230) : 45 Bom 223. (Claim under O 21 R 71 for less than Rs. 500—No second appeal lies). (Vol 7) 1920 Cal 174 (174) * (1912) 16 Cal L Jour 96 (98) * (Vol 12) 1925 Mad 742 (742) * (Vol 11) 1924 Mad 367 (368) * (1911) 2 Mad W N 585 (585) * (Vol 28) 1941 Oudh 101 (102, 103) * (Vol 5) 1918 Oudh 269 (269).

[5] Appeal barred against judgment-debtor is equally barred against his surety. (Vol 26) 1939 Sind 360 (360) : I L R (1939) Kar 842.

[6] Second appeal—Order in execution—Amount of the subject-matter to be considered for purposes of second appeal is that of the suit. (Vol 9) 1922 Lah 290 (291) : 3 Lah 141.

4. "Suit of the nature cognizable by Courts of Small Causes".—[1] Words "any suit of the nature cognizable by Courts of Small Causes" in S. 102 indicate and mean "any suit in which claim is cognizable by Courts of Small Causes as such". (Vol 22) 1935 Rang 386 (386) : 13 Rang 633 (F B).

[2] Small Cause Court nature is determined by nature of relief and amount or value of subject-matter as claimed by plaintiff if it is not fictitious. (Vol 11) 1924 Cal 405 (406) : 51 Cal 62 * (Vol 3) 1916 Bom 106 (106) : 41 Bom 367 * (Vol 13) 1926 Mad 622 (622) * (Vol 26) 1939 Sind 35 (35) : I L R (1939) Kar 134 * [But see (Vol 27) 1940 Mad 507 (508, 509). (Suits for rent of Small Cause nature—Plaintiff's co-sharers added as defendants—Suits involving question of title as shares of co-sharers came up for determination—Suit held ceased to be of small cause nature.)]

[3] If suit is of nature cognizable by Small Cause Court, S. 102 applies irrespective of nature of defence. (Vol 22) 1935 Oudh 413 (414) * (Vol 1) 1914 All 516 (517) * (1901) 25 Bom 625 (629) * (Vol 2) 1915 Nag 124 (125) : 12 Nag L R 47.

[4] Suit of small cause nature — Plaint returned by Small Cause Court under S. 23, Provincial Small Cause Courts Act, as question of title involved — Suit still continues to be small cause suit and no second appeal lies. (Vol 16) 1929 Mad 781 (781) * (1898) 20 All 480 (481) * (1897) 24 Cal 557 (560, 562) * (Vol 16) 1929 Mad 525 (526) * (Vol 13) 1926 Mad 622 (622) * (Vol 15) 1928 Nag 136 (136) * (Vol 24) 1937 Oudh 244 (245) : 13 Luck 204.

[5] Suit of small cause nature does not change its character even if question of title is incidentally decided. (1910) 6 Ind Cas 415 (415) (Cal) * (1931) 1931 All L Jour 967 (968) * (1902) 6 Cal W N 687 (688).

[6] In applying S. 102, the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court. (1919) 50 Ind Cas 629 (630) (Lah) * (1889) 11 All 13 (14) * (1908) 32 Bom 356 (360) * (1912) 15 Cal L Jour 49 (52) * (Vol 15) 1928 Lah 764 (765) * (Vol 5) 1918 Mad 162 (162, 163) * (1912) 22 Mad L Jour 47 (49) * (1912) 13 Ind Cas 493 (494) (Oudh).

[7] In deciding whether a suit is of small cause nature within S. 102 so as to bar a second appeal the fact that the suit was tried by a Court other than a Small Cause Court is immaterial. (Vol 32) 1945 Pat 417 (419) : 24 Pat 307 * (1904) 26 All 358 (360) * (1913) 11 All L Jour 360 (362) * (Vol 28) 1941 Mad 665 (665) * (Vol 9) 1922 Mad 352 (353). (Suit of small cause nature tried on original side — Decree confirmed on appeal — No revision or second appeal lies.) * (Vol 21) 1934 Nag 121 (122) : 30 Nag L R 252 * (Vol 18) 1931 Oudh 49 (49) * (Vol 7) 1920 Oudh 231 (231) : 23 Oudh Cas 117. [See (1909) 33 Bom 664 (667)].

[8] Suit cognizable by Small Cause Court — Mere addition of prayer for declaration does not alter nature of suit. (Vol 5) 1918 Cal 528 (528).

[9] Suit as framed not a small cause — Plaintiff omitting a portion of claim subsequently—Suit does not change its character. (Vol 12) 1925 Bom 440 (441) : 49 Bom 596 * (Vol 3) 1916 Pat 386 (386).

[10] Claim of small cause nature—Interest on sum due on that claim is also of small cause nature. (Vol 31) 1944 Mad 442 (443).

5. Suits for accounts.—[1] A suit for account is not cognizable by Small Cause Court under Art. 31 of the Provincial Small Cause Courts Act. (Vol 2) 1915 Cal 365 (366).

Section 102 (contd.)

[2] Article 31 does not apply to suit by co-sharers for recovery of value of their share of produce realized by other co-sharer — Such suit being of small cause nature no second appeal is competent. (Vol 17) 1930 Lah 613 (613).

[3] A suit upon an agreement between plaintiff and defendant that the latter would pay plaintiff half of what he realized from a tenancy granted to him by Government is cognizable by Small Cause Court and, therefore, no appeal lies under S. 102. (Vol 8) 1921 Lah 173 (173).

[4] Award partitioning market between plaintiff and defendant — Suit by plaintiff to recover certain dues said to have been collected by defendant in his share of market—Article 31 held did not apply and suit was cognizable by Small Cause Court. (1904) 26 All 358 (360).

[5] Suit by widow of a priest for recovery of books and also for a sum of Rs. 60 which the defendant had collected on her behalf is not one for accounts and is of the nature cognizable by a Court of Small Causes. (1905) 27 All 202 (202).

[6] Plaintiff sued for recovery of Rs. 40 advanced for a partnership business which had since ceased to exist and also for Rs. 9 as approximate profits of the money put into the business. *Held*, that no second appeal lay, the suit not being one for the balance of partnership accounts within Art. 29 (c) of the Provincial Small Cause Courts Act. (Vol 6) 1919 Cal 328 (328).

6. Suits for contribution.—[1] No second appeal lies in a suit for contribution by co-judgment-debtor. (Vol 13) 1926 All 456 (456).

[2] Suit for contribution by tort-feasor against joint tort-feasor for less than Rs. 500 is of small cause nature. (Vol 7) 1920 Cal 995 (996).

[3] Suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer is exempted under Art. 41, Small Cause Courts Act from cognizance of Small Cause Courts. (Vol 3) 1916 Cal 954 (955, 956).

[4] Cases falling within the provisions of Ss. 69 and 70 of Indian Contract Act are cognizable by a Small Cause Court. (1888) 15 Cal 652 (656) (FB).

7. Suits for damages. — [1] Suit for recovery of price of trees alleged to have been cut from land of plaintiff landlord and misappropriated by defendants — Case against defendants, although one of wrongful cutting of trees, not necessarily one within purview of Ch. 17, Penal Code—Jurisdiction of Small Cause Court to try suit is not barred — Second appeal from suit is competent. (Vol 26) 1939 Pat 216 (216, 217) * (1930) 1930 All L Jour 1247 (1249) * (Vol 10) 1923 Cal 568 (568) * (Vol 5) 1918 Mad 162 (162) * (Vol 4) 1917 Mad 897 (897, 898) * (Vol 23) 1936 Nag 276 (277) * (Vol 22) 1935 Oudh 413 (414) * (Vol 8) 1921 Oudh 144 (144).

[2] A suit for produce of land forcibly taken is of small cause nature. (Vol 14) 1927 Rang 262 (263) : 5 Rang 388 * (1919) 50 Ind Cas 629 (630) (Lah).

[3] Plaint alleging that defendant without permission used plaintiff's land—No mention of theft or trespass—Suit is of small cause nature. (Vol 27) 1940 Rang 100 (102) : 1940 Rang L R 1.

[4] Suit against mother to recover ornaments valued at less than Rs. 500—Criminal misappropriation alleged against mother—Suit is not cognizable by Small Cause Court — Second appeal lies. (Vol 15) 1928 Lah 887 (887).

[5] Suit to recover money against Government for repairs executed is of small cause nature. (Vol 1) 1914 Mad 578 (578) : 37 Mad 593.

[6] Suit against President, District Board, for damages alleged to be suffered by his illegal order for-

bidding plaintiff to collect tolls — President not being Government officer, suit is triable by Small Cause Court. (Vol 10) 1923 Mad 689 (689) : 46 Mad 808.

[7] Suit for breach of contract of value less than Rs. 500, tried as regular suit, although of nature cognizable by Small Cause Court—No second appeal lies from it. (Vol 23) 1936 Oudh 129 (129) * (Vol 23) 1936 Lah 293 (294).

[8] Contract entitling plaintiff to remain in possession of land for five years—Proprietors obtaining decree for ejectment after expiry of period — Suit by plaintiff for certain amount on ground that he could not be ejected without such payment—Suit held cognizable by Small Cause Court. (Vol 4) 1917 All 340 (341).

[9] Suit for compensation against defendant for doing work without the right to do so is small cause and no second appeal lies. (Vol 10) 1923 Lah 244 (244).

[10] Suit for damages for use and occupation against tenants holding over is small cause. (Vol 12) 1925 Mad 890 (891).

[11] Logs of timber placed in custody of Court — Removal from Court on Court's order by one of the parties — Suit for timber or for their value removed from Court valued less than Rs. 500—Suit is triable as small cause suit and no second appeal lies. (Vol 20) 1933 Mad 636 (637).

[12] Claim for damages by landholder against person not his tenant for unauthorised use of water—Claim is not for rent and is of small cause nature. (Vol 31) 1944 Mad 442 (443).

[13] Suit to recover compensation for loss suffered on account of percolation of drain water is suit of small cause nature. (Vol 20) 1933 Lah 363 (363).

[14] Suit for recovery of offerings to a shrine from their wrongful appropriators is not a small cause, as it falls under Provincial Small Cause Courts Act, Sch. II, Art. 18. (Vol 13) 1926 Lah 228 (228).

[15] Suit for damages for wrongful attachment and negligence is not of small cause nature and hence second appeal lies. (Vol 23) 1936 Nag 257 (257) : I L R (1937) Nag 19.

8. Suits for declaration. — [1] Amount paid for compounding non-compoundable offence — Award for repayment of the amount passed—Suit for enforcement of award — Validity of award challenged — Suit withdrawn — Fresh suit for declaring award void and for recovery of money — Suit not of a small cause nature. (Vol 15) 1928 Rang 173 (174) : 6 Rang 238.

[2] A suit for declaration of ownership of a share in the crop by virtue of purchase is one to recover moveable property or its value and is of a small cause nature. (1913) 11 All L Jour 599 (600).

[3] The mere addition of an unnecessary prayer for declaration does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give the party a right of second appeal which is prohibited by S. 102. (Vol 5) 1918 Cal 528 (528) * (Vol 28) 1941 All 144 (145) : I L R (1941) All 216. (Suit for refund of amount recovered as tax — Prayer for declaration of non-liability — No second appeal lies.) * (Vol 10) 1923 Cal 321 (321). (Suit for declaration of title to fish and for damages being for less than Rs. 500 — No second appeal lies.) * (1912) 23 Mad L Jour 517 (517). (Suit for rent—Incidental prayer for declaration.)

9. Suits for injunction. — [1] A suit is not a suit of a Small Cause Court nature if it includes a plea for a mandatory injunction. (Vol 9) 1922 All 241 (243).

[2] Suit for return of money less than Rs. 500 recovered as tax and injunction to prevent defendant from levying it again — Reliefs independent and necessary — Suit is not of small cause nature. (Vol 20) 1933 Mad 22 (23).

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[3] Suit to recover tax levied under Madras Local Boards Act and for injunction restraining Board from levying it in future is not of small cause nature—Second appeal lies. (Vol 25) 1938 Mad 941 (942).

10. Suits for maintenance.—[1] Suit for arrears of maintenance is not cognizable by Small Cause Court. (Vol 18) 1931 Bom 286 (286).

11. Suits for mesne profits.—[1] Suit for mesne profits is not cognizable by Small Cause Court. (1902) 25 Mad 103 (107) (FB) * (Vol 20) 1933 Lah 509 (510) * (1935) 18 Nag L Jour 76 (79).

[2] Suit for declaration of title and confirmation of possession and also for mesne profits—Second appeal lies against decree disallowing mesne profits as suit being for declaration of title to land is not cognizable by Small Cause Court. (Vol 4) 1917 Cal 562 (563).

[3] Suit for mesne profits in respect of share [of occupancy holding held in common by parties—Such suit is cognizable by Court of Small Causes. (Vol 18) 1931 All 551 (551, 552).

12. Suits for money.—[1] Suit for recovery of money lent—Valuation of suit Rs. 215—Suit is small cause. (Vol 33) 1946 Pat 97 (98).

[2] Suit to recover tax is cognizable by Small Cause Court. (Vol 26) 1939 Sind 85 (35): 1 L R (1939) Kar 134. (Terminal tax.) * (1910) 5 Ind Cas 438 (438) (Mad). (Suit for share of cess paid by landlord.) * (Vol 4) 1917 Pat 672 (673). (Suit to recover *katiari* or a tax for homestead.)

[3] Suit for recovery of money value of *bhaoli* produce of *mahua* trees is suit for money and not suit for rent. (Vol 23) 1936 Pat 102 (102).

[4] Suit to recover sum forcibly taken from plaintiff is of small cause nature. (Vol 7) 1920 All 123 (124).

[5] Suit to recover money payable on contract is of small cause nature. (Vol 17) 1930 All 702 (703, 704). (Suit on simple bond.) * (Vol 10) 1923 All 310 (311): 45 All 359. (A bringing property to sale—B applying for rateable distribution—A allowed to bid on satisfying B's decree—After purchase by A sale set aside at the instance of third party—Suit by A against B to recover sum paid in satisfaction of his decree—Suit held was cognizable by Small Cause Court.) * (1912) 17 Ind Cas 522 (523) (All). (Suit to recover money due on bond.) * (Vol 19) 1932 Cal 716 (719): 59 Cal 1186. (Claim against shareholder for balance due.) * (Vol 7) 1920 Cal 781 (781). (Suit to recover price of coal supplied under agreement.) * (1922) 66 Ind Cas 285 (285, 286) (Lah). (Suit for interest on mortgage bond).

[6] Suit for recovery of share of profits wrongfully appropriated by defendant—Suit is of small cause nature. (Vol 2) 1915 All 396 (396) * (1913) 37 Bom 700 (701).

[7] Suit for recovery of excess amount paid to decree-holder under fraud and cheating—Second appeal is entertainable. (Vol 15) 1928 Cal 776 (777).

[8] Suit under O. 21, R. 93 by purchaser at court-sale to recover purchase money is not a suit of a nature cognizable by Small Cause Court. (1888) 11 Mad 269 (273).

13. Suits for rent.—[1] Suit for recovery of rent which is not house-rent is one cognizable by Small Cause Court. (1900) 23 Mad 547 (557, 559) (F B) * (Vol 22) 1935 Bom 254 (255). (Suit to recover rent including galli-patti and local cess—Amount below Rs. 500—Suit is of small cause nature.) * (Vol 3) 1916 Bom 106 (106): 41 Bom 367 * (Vol 16) 1929 Mad 525 (526) * (Vol 7) 1920 Nag 216 (218). (Suit for rent by tenant of *malik makbuza* fields though not triable is one cognizable by Court of Small Causes.)

[2] Suit for arrears of rent by land-holder against ryot is not cognizable by a Court of Small Causes as jurisdiction of Civil Courts is excluded by Madras

Estates Land Act (1908). (Vol 9) 1922 Mad 119 (120, 123): 44 Mad 697.

[3] Suit for rent of agricultural land is not cognizable by Court of Small Causes—Second Appeal lies even if amount is less than Rs. 500. (Vol 22) 1935 Rang 386 (386, 387): 13 Rang 633 (FB). (Vol 13) 1926 Rang 19: 3 Rang 390, overruled.) * (Vol 30) 1943 Cal 252 (253) * (Vol 2) 1915 Cal 302 (303): 42 Cal 638 * (Vol 9) 1922 Pat 184 (185).

[4] Suit for recovery of rent and recovery of damages for breach of contract—Second appeal not provided for—Bar under S. 153, Bengal Tenancy Act cannot be evaded by amalgamating two claims in one suit for rent. (Vol 3) 1916 Cal 887 (888).

[5] Suit for damages for use and occupation or in alternative claim for Rs. 100 as rent—Held if suit was for rent no second appeal lay under S. 153, Bengal Tenancy Act and if otherwise it was barred by S. 102. (Vol 3) 1916 Cal 907 (908).

[6] Suits held to be for rent: (Vol 20) 1933 Cal 527 (528): 60 Cal 587. (Suit for recovery of excess cess.) * (Vol 14) 1927 Mad 670 (671). (Suit for recovery of *choutarji* dues—Claim is in the nature of a *jodi*.) * (Vol 5) 1918 Mad 557 (558): 41 Mad 370. (Suit for rateable portion of stipulated rent by reason of fraction of demised premises not having been delivered to lessee is not suit of small cause nature.) * (Vol 3) 1916 Nag 21 (21): 12 Nag L R 88. (Suit for recovery of grazing dues.) * (Vol 32) 1945 Pat 417 (419, 421): 24 Pat 307. (Suit by proprietor to recover cess from tenure-holder under Bengal Cess Act.) * (1945) 1945 Pat W N 419 (421, 422). (Suit for cesses is excepted from the cognizance of Small Cause Courts.)

[7] Suits held not to be for rent: (Vol 7) 1920 Cal 733 (734). (Suit to recover money as grazing fee.) * (Vol 15) 1928 Cal 709 (712). (Suit for recovery of cesses and damages.) * (1897) 24 Cal 557 (561, 562). (Suit for a sum of money which the defendant wrongly realised from the tenants of the plaintiff.) * (Vol 31) 1944 Mad 442 (443). (Claim for cess paid by land-holder for person who is not intermediate land-holder within S. 88, proviso, Madras Local Boards Act, is not rent.) * (Vol 21) 1934 Mad 688 (685). (Suit for water cess.) * (Vol 5) 1918 Mad 551 (553). (Apportioned rent claimed below Rs. 500—No second appeal lies.) * (Vol 3) 1916 Mad 1008 (1008). (Suit for enhanced *kattibadi* on default in payment in money rent.)

14. Suits for specific performance.—[1] Suit for specific performance is not cognizable by Small Cause Court. (Vol 19) 1932 Cal 481 (481, 482): 59 Cal 352 (Suit by *patnidar* against *darpatnidar* for recovery of certain account papers on basis of executory contract in *kabuliyat*—Failing such recovery plaintiff claiming compensation—No evidence to show particular papers claimed were in defendant's possession—Suit is not cognizable by Court of Small Causes.) (Vol 11) 1924 Rang 192 (192): 1 Rang 700 (A suit to enforce arbitration award is in essence a suit for specific performance.)

[2] Lease providing that if lessee did not get possession he would be entitled to recover same by suit or to recover money advanced—Possession not delivered—Suit to recover money—Suit is not one for specific performance. (1910) 6 Ind Cas 704 (704) (All).

15. Suits relating to immovable property.—[1] Suit for possession of immovable property is not cognizable by Small Cause Court. (1911) 35 Bom 29 (32).

[2] Suit *bona fide* framed as a mortgage suit with alternative prayer to recover money is still mortgage suit and S. 102 does not apply. (Vol 25) 1938 Cal 336 (337): 1 L R (1938) 2 Cal 81.

[3] Suit in respect of an interest in immovable property is not cognizable by Small Cause Court. (Vol 8) 1921 All 68 (69): 43 All 681. (Suit for a *haq chaharum*.)

103. In any second appeal, the High Court may, if the evidence on the record is sufficient, *Power of High Court to determine any issue of fact necessary for the disposal of the appeal determine issues of fact.* ^a[which has not been determined by the lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.]

[a] *Substituted by the Code of Civil Procedure (Amendment) Act, 1926 (6 [VI] of 1926), Section 2, for "but not determined by the lower Appellate Court".*

APPEALS FROM ORDERS

104. (1) An appeal shall lie from the following orders, and save as otherwise expressly *Orders from which provided in the body of this Code or by any law for the time being in force, appeal lies.* from no other orders:—

a[* * * * *

^b(ff) an order under section 35A ;

(g) an order under section 95 ;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;

(i) any order made under rules from which an appeal is expressly allowed by rules :

^b[Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

Section 102 (contd.)

*(Vol 27) 1940 Bom 12 (12). (Suit to recover sums payable by khatedar to inamdar as superior holder.) * (1911) 9 Ind Cas 1 (1) (Cal). (Suit for declaration that a hut is liable for dues on account of certain decree.) * (Vol 5) 1918 Mad 1 (2) : 41 Mad 374 (FB). (Mirasi right is an interest in the village lands. The *thunduwaram* payable to the mirasidar is not of the nature of "rent" but comes under the general expression "dues" in Art. 13 of the Provincial Small Cause Courts Act.)

[4] Suits held not in respect of an interest in immovable property. (1902) 26 Bom 437 (441). (Suit by a joint khata holder against other joint holders for their share of land revenue paid.) * (Vol 15) 1928 Mad 21 (22). (Suit by shrotriendmar to recover melwaram and swatantrams from his tenant.) * (Vol 2) 1915 Nag 124 (125) : 12 Nag L R 47. (Suit for dues against trespasser.) * (Vol 2) 1915 Nag 106 (107) : 11 Nag L R 100. (Suit by Malguzar to recover value of manure under Wazib-ul-arz.) * (Vol 14) 1927 Rang 90 (91). (Suit for compensation for part of land lost by purchaser from vendor.)

16. Suits relating to marriage. — [1] Suit to recover presents made on promise of marriage — Suit does not lie in Small Cause Court. (1912) 14 Ind Cas 837 (839) (Upp Bur).

Section 103 — Note 1

[1] Lower Court not framing appropriate issue — Evidence on record sufficient for deciding same — Issue may be raised and decided in second appeal. (Vol 6) 1919 P C 29 (31) : 46 Ind App 140 : 47 Cal 107 : 15 Nag L R 97 (P C) * (1918) 11 All L Jour 255 (257) * (Vol 10) 1923 All 134 (134, 135) : 45 All 191 * (Vol 10) 1923 All 71 (73). (Documentary evidence not considered by Lower Court — High Court can give finding itself.) * (Vol 5) 1918 All 428 (428, 429) * (Vol 2) 1915 Cal 284 (286, 287) * (Vol 19) 1932 Mad 545 (552) * (Vol 2) 1915 Mad 774 (775).

[2] Finding of fact not clear and satisfactory — High Court can look into evidence and give a finding. (Vol 21) 1934 All 529 (529) * (Vol 29) 1942 Pat 188 (189) * (Vol 18) 1931 Rang 29 (30) : 8 Rang 425. (Clear finding necessary for dealing with law in case — High Court will go into question of fact.)

[3] Point not raised in plaint or in trial Court but argued before District Judge — No fresh evidence neces-

sary to decide it — It was allowed to be addressed to High Court. (Vol 17) 1930 Lah 1010 (1012) : 11 Lah 393.

[4] Point taken in grounds of appeal to lower appellate Court not considered by it — High Court can determine same. (1909) 5 Mad L Tim 288 (289).

[5] The High Court can under S. 103 draw in a second appeal an inference of fact. (1909) 11 Bom L R 1145 (1149).

[6] Question of fact — High Court has power to determine a question of fact in order to save a remand. (Vol 15) 1928 Pat 318 (321) : 7 Pat 260 * (Vol 18) 1931 Cal 129 (131) * (Vol 16) 1929 Pat 728 (729).

[7] Lower appellate Court's judgment reversed on question of custom or usage on preliminary point — High Court should not examine evidence as to usage, but should remand case. (Vol 5) 1918 Mad 1166 (1167) : 40 Mad 1108.

[8] Case remanded — Fresh finding called for but not given — Second appellate Court can deal with issue as of fact under S. 103. (Vol 7) 1920 P C 67 (68, 69) : 47 Ind App 76 : 43 Mad 567 (P C) * (Vol 17) 1930 Mad 489 (490) * (Vol 26) 1939 Nag 173 (174) : 1 L R (1940) Nag 643 * (Vol 23) 1936 Nag 140 (142) : 1 L R (1936) Nag 188.

[9] According to the amendment of S. 103, in 1926, the High Court can decide, if there is sufficient evidence, a question of fact wrongly decided by the lower appellate Court. (Vol 14) 1927 Cal 1 (10) (F B) * (Vol 17) 1930 Mad 65 (66, 67). (Finding based on such wrong presumption.)

[10] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see Section 7 (b).

SECTION 104 — SYNOPSIS.

1. Scope and applicability.
2. Order under S. 95 — Cl. (g).
3. Order imposing fine, etc. — Cl. (h).
4. Bar of appeal from appellate order — Sub-s. (2).

1. Scope and applicability. — [1] Section 104 applies only to appeals from orders and not to appeals from decrees. (Vol 29) 1942 Lah 95 (99) : 1 L R (1942) Lah 491 (FB).

(2) No appeal shall lie from any order passed in appeal under this section.

[1882—S. 588, para. 2; 1877—S. 588; 1859—Ss. 363 to 365. See O. 16, Rr. 10 and 12; O. 38, R. 1; O. 39, R. 2; O. 43, R. 1.]

[a] Clauses (a) to (f) (both inclusive) of sub-s. (1) were *repealed* by the Arbitration Act, 1940 (10 [X] of 1940), S. 49 and Sch. III. For corresponding provisions in the above Act, see Section 39 thereof. [b] *Inserted* by the Civil Procedure (Amendment) Act, 1922 (9 [IX] of 1922), Section 3. See also foot-note to the text of Section 35A.

105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by *Other orders.* a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

Section 104 (*contd.*)

[2] Order refusing to execute award under Co-operative Societies Act is enforceable as decree and appealable as such. (Vol 13) 1926 Lah 547 (547).

[3] Orders passed by District Judge under Succession Act (e.g., one under S. 292) are appealable. (Vol 16) 1929 Rang 109 (110).

[4] No appeal lies from a conditional or provisional order which does not result in a decree. (Vol 11) 1924 All 376 (377) : 46 All 372.

[5] Order granting mortgagee interest on mortgage money for time during which sale proceeds of mortgage property are lying in Court, is not appealable but is revisable. (Vol 16) 1929 Rang 127 (127).

[6] Section 104 (1) does not apply to award not complete in itself and exposes party to further suit. (Vol 1) 1914 Low Bur 40 (41, 42) : 8 Low Bur 68.

[7] Interlocutory order — No appeal lies from order. (Vol 8) 1921 Lah 265 (266) * (Vol 8) 1921 Oudh 224 (224).

[8] Order under S. 73 is not appealable. (Vol 1) 1914 Mad 437 (437).

[9] Order removing from record names of those who died before institution of the suit is not appealable. (Vol 13) 1926 Lah 513 (513).

[10] An order granting leave to sue a receiver for damages caused by his negligence, laches, etc., is not appealable. (Vol 8) 1921 Bom 427 (428) : 45 Bom 99.

[11] No appeal lies from order passed under S. 151. (Vol 17) 1930 Lah 789 (790).

[12] No appeal lies from order granting amendment unless it is considered as question of review. (Vol 16) 1929 Cal 676 (678) : 57 Cal 549.

[13] Order rejecting decree-holder's petition to withdraw execution case—Appeal does not lie. (Vol 9) 1922 Pat 525(526) : 1 Pat 232*(Vol 13) 1926 Oudh 185(185).

[14] Two applications for sale in execution of different decrees of different decree-holders—Order directing one sale to be prior to the other is not appealable. (Vol 20) 1933 All 10 (11).

[15] Order in execution of decree under Section 9 of Specific Relief Act is not appealable. (Vol 4) 1917 Lah 24 (24) * (Vol 4) 1917 Lah 21 (22).

[16] Section 104 does not restrict S. 109. (Vol 11) 1924 P C 95 (100, 101) : 51 Ind App 72 : 51 Cal 361 : 20 Nag L R 33 (P C).

[17] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905 : see Section 7 (b).

2. Order under S. 95 — Clause (g). —[1] An appeal lies under S. 104 (g) from an order refusing relief under S. 95 of the Civil P. O. as well as from one granting such relief. (Vol 6) 1919 Mad 20 (20)*(Vol 29) 1942 All 261 (262) : I L R (1942) All 360 * (1913) 21 Ind Cas 756 (757) (Mad) * (1911) 11 Ind Cas 217 (918) (Low Bur).

[2] No appeal lies against an order of a Small Cause Court under S. 95. (Vol 6) 1919 Mad 23 (23). (Dissenting from (Vol 2) 1915 Mad 1072 (1072).)

3. Order imposing fine, etc. — Clause (h). — [1] Appeal is allowed from order of arrest or detention in civil prison otherwise than in execution of decree. (Vol 19) 1932 All 524 (524) * (Vol 30) 1943 Pesh 58 (58). (Obstructor directed to be imprisoned—No appeal lies.)

[2] Order in execution, though not appealable under Cl. (h), may be appealable under S. 47. (Vol 2) 1915 Cal 237 (237). (Order by Munsif for surety's arrest in execution of Small Cause Court decree is appealable.)*(Vol 2) 1915 Cal 688 (688). (Surety for release can under Ss. 42, 145 and 47 appeal against his own arrest for failure of condition.) * (Vol 11) 1924 Lah 360 (360). (Order issuing warrant of arrest.) * (Vol 6) 1919 Lah 15 (16) : 1 Lah 77. (Application for judgment-debtor's arrest dismissed—Order is appealable.)

[3] Order imposing penalty under Stamp Act is not an 'order as to a fine' within the meaning of this section and hence is not appealable. (1880) 5 Cal 311 (313, 314).

[4] Decree under S. 9 of Specific Relief Act not being appealable, order in execution of such decree is also not appealable. (Vol 4) 1917 Lah 24 (24).

[5] Order of arrest before judgment is appealable. (Vol 11) 1924 Rang 361 (361) : 2 Rang 362.

4. Bar of appeal from appellate order—Sub-s. (2). —[1] The words in S. 104 (2) cannot be construed to mean an order deciding the appeal on merits. (Vol 28) 1941 All 338 (339).

[2] No second appeal lies from order confirming sale. (Vol 21) 1934 Lah 526 (526).

[3] No second appeal lies from an order on application under O. 21, R. 90. (Vol 8) 1921 Pat 145 (148, 149) : 6 Pat L Jour 319 * (Vol 4) 1917 Cal 443 (444).

[4] Order awarding compensation for improper attachment—No second appeal lies. (1901) 24 Mad 62 (65) * (1911) 9 Ind Cas 484 (484, 486) (All). (Order of appellate Court restoring suit dismissed for want of process fees—Order is not appealable.)

[5] Second appeal does not lie against an order of the Appellate Court under O. 41, R. 10 (2) dismissing an appeal for failure to furnish security. (1910) 8 Ind Cas 436 (437) (Mad).

[6] Case falling both under S. 47 and O. 21—Second appeal lies. (Vol 20) 1933 All 57 (59) : 54 All 1031.

[7] Appeal lies from order of single Judge of High Court passed in appeal from order—Right of appeal conferred by Letters Patent is not taken away by S. 104 (2). (Vol 24) 1937 All 165 (167) : I L R (1937) All 386*(Vol 27) 1940 Bom 216 (218, 224) : I L R (1940) Bom 426*(1909) 11 Bom L R 245 (246) * (Vol 9) 1922 Lah 380 (383) : 3 Lah 188.

[But see (Vol 4) 1917 All 325 (326) : 39 All 191.]

SECTION 105 — SYNOPSIS.

1. Applicability and scope.
2. Compliance with Orders — No bar.
3. "Where a decree is appealed from."
4. "Affecting the decision of the case."
5. Error, defect or irregularity.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

[1882—S. 591; 1877—Ss. 580, 591; 1861—S. 26; 1859—S. 360 last para.]

Objects and Reasons.

"Clause 105. — Though the remarks of the Privy Council in *Moheshur v. The Bengal Government* (7 Moo. Ind. App. 283) are wide enough to embrace an appeal from an order of remand the Committee think that those orders were probably not in their Lordships' contemplation when they condemned the view that a failure to appeal from an interlocutory order should deprive the person aggrieved of his right to object to such order when subsequently appealing from the decree.

And the Committee think there are good reasons on the score of delay and expense for treating an appeal from order of remand as a special case and precluding an appellant from taking, on an appeal from decree, any objection that might have been urged by way of appeal from an order of remand.

The Committee have deleted the word 'such' to remove a difficulty it creates (10 Moo. Ind. App. 340, 413; 12 Moo. Ind. App. 157)." — S. O. R.

Section 105 (contd.)

- 5a. Letters Patent appeals.
6. Orders granting review.
7. Order must be one under the Code.
8. Privy Council appeals.
9. Remand orders.
10. Revision of orders that can be challenged under the section.

1. Applicability and scope.—[1] Section 105 is one of the many rules that come under the heading of *res judicata* — Findings forming basis of appealable order but not appealed from become *res judicata*. (Vol 1) 1914 Nag 58 (59, 60) : 10 Nag L R 28.

[2] Sections 105 and 99 are not mutually destructive. (Vol 14) 1927 Rang 150 (154) : 5 Rang 80.

[3] There is not any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of appellate Court. (1857-59) 7 Moo Ind App 283 (302) (P C) & (1863-66) 10 Moo Ind App 413 (423) (P C) & (1863-66) 10 Moo Ind App 540 (359, 360) (P C).

[4] Interlocutory order can be objected to in appeal against final decree and no separate appeal lies. (Vol 17) 1930 Mad 988 (991) & (Vol 10) 1923 Mad 147 (149) : 46 Mad 47 & (Vol 17) 1930 Pat 266 (269) : 9 Pat 102 & (Vol 30) 1943 Pesh 37 (39). (Interlocutory order not amounting to decree — Appeal against, filed and withdrawn — He is not debarred from challenging same in appeal against final decree.)

[5] In appeal from final order points decided by the preliminary order can be challenged. (Vol 12) 1925 Mad 199 (200) : 48 Mad 267.

[6] The propriety of an order refusing permission to file written statement can be questioned in an appeal from final decree under S. 105 (1). (1944) 1944 All L Jour 17 (18).

[7] Appeal from order — Previous interlocutory order cannot be questioned. (Vol 31) 1944 Pesh 33 (34).

[8] An appealable order can be challenged in an appeal from final decree in the suit. (1896) 18 All 19 (21, 22) (FB) & (Vol 32) 1945 Mad 3 (5).

[9] If a party desires to avail himself of the privilege of an appeal from an interlocutory order of remand he ought to do so before the final disposal of the suit. (1905) 32 Cal 1023 (1029).

[But see (Vol 27) 1940 Nag 104 (106).]

[10] The section preserves to an Appellate Court the right to deal in an appeal from a decree, with an improper unappealable order, passed in the course of a suit. (1909) 2 Ind Cas 677 (680) (All) & (Vol 25) 1938 All 511 (512) : I L R (1938) All 754 & (Vol 12) 1925 All 768 (768) : 47 All 852. (Order impleading a person in appeal.) & (Vol 4) 1917 Mad 404 (405) & (Vol 22)

1935 Rang 245 (246) : 13 Rang 239. (Conditional order granting leave to defend — Condition not fulfilled and suit decreed.—Appeal from decree lies.) & (Vol 1) 1914 Sind 70 (74, 75) : 8 Sind L R 69. (An order allowing an amendment — Objection to an amendment — No appeal lies.)

[11] Where an order under the group of sections relating to representatives has been made excluding a person from the record that person must seek his remedy on appeal against the order and is not entitled to appeal against the decree, so long as the order stands. (1890) 12 All 200 (202).

[12] An order setting aside an *ex parte* decree and restoring the suit to the file is not an order which comes within the purview of this section. (1906) 3 All L Jour 30 (34).

[13] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see section 7 (b).

2. Compliance with orders.—No bar.—[1] Compliance with the directions contained in an interlocutory order does not bar a party from objecting to the order in appeal from the final decree. (Vol 6) 1919 Lah 38 (39) : 1 Lah 54 & (Vol 14) 1927 Cal 733 (735).

[2] Interlocutory order — Appeal dismissed as being an unappealable order — Objections against order can be raised in appeal against decree. (Vol 9) 1922 All 118 (119) : 44 All 534.

3. "Where a decree is appealed from." — [1] The word "decree" in the section means a decree passed by the Court which made the order alleged to be defective, erroneous or irregular. (1909) 32 Mad 318 (319).

[But see (Vol 27) 1940 Mad 756 (757) : I L R (1940) Mad 901.]

[2] Appeal lies from a decree even where the only ground of appeal is the defect, error or irregularity of an order made in the suit. (1890) 14 Bom 232 (235) & (Vol 15) 1928 All 194 (196) & (1881) 7 Cal 148 (149) & (1911) 34 Mad 228 (230, 231).

[But see (1900) 22 All 366 (367).]

[3] The principle of S. 105 is applicable not only to decrees and interlocutory orders but also to orders and interlocutory orders leading to the final decree. (Vol 4) 1917 Mad 404 (405) & (Vol 19) All 392 (393) & (Vol 23) 1936 Mad 936 (937).

[But see (1936) 164 Ind Cas 730 (731) (All).]

4. "Affecting the decision of the case." — [1] "Affecting the decision of the case" means affecting the decision on merits. (Vol 13) 1931 All 294 (297) : 53 All 612 (FB) & (Vol 18) 1931 All 329 (330, 331) & (Vol 12) 1925 All 610 (612) : 48 All 175 (FB) & (Vol 12) 1925 All 426 (427) : 47 All 555 & (Vol 16) 1929 Cal 26 (27) & (Vol 21) 1934 Lah 312 (312). (Order under S. 151 technically wrong — Appellate Court is not bound to interfere in appeal.)

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[2] Validity of order setting aside award can be challenged in appeal under S. 105. (Vol 26) 1939 Sind 241 (245) : I L R (1940) Kar 22 (FB) (Vol 24) 1937 All 582 (584) (Vol 12) 1925 All 566 (567) : 47 All 916 (Vol 16) 1929 Cal 322 (323, 324) : 56 Cal 21 (Vol 16) 1929 Lah 174 (175) (Vol 15) 1928 Lah 753 (754) (Vol 20) 1933 Oudh 563 (564) (Vol 3) 1916 Pat 21 (22) (Vol 26) 1939 Rang 164 (164, 165).

[But see (Vol 20) 1933 Lah 530 (531) (Vol 8) 1921 Lah 145 (146).]

[3] Order extending time under O. 34, R. 3 can be challenged in appeal from final decree. (Vol 1) 1914 Nag 8 (9) : 10 Nag L R 150 (1911) 7 Nag L R 162 (163, 164).

[4] Order refusing amendment of plaint can be questioned in appeal under S. 105. (Vol 1) 1914 Mad 17 (17) (Vol 1) 1914 Sind 70 (72, 73) : 8 Sind L R 69.

[5] Whether a claim is barred by time or not is a decision of the case on the merits. (Vol 30) 1943 Oudh 288 (290).

[6] Order disallowing interrogatories is not appealable—No revision lies — It can be challenged in appeal on final decision. (Vol 7) 1920 Sind 1 (1, 5) : 14 Sind L R 28.

[7] Though the Munsiff's order refusing leave to sue in his Court is not appealable, still the District Judge can consider the question on the principle of S. 105. (Vol 4) 1917 Mad 404 (405).

[8] Dismissal of appeal against some respondents for want of identification of service of notice of appeal — Affidavit sworn in by serving peon but appellant though ordered failing to do so — Transfer of appeal as against other respondents to other Court — Court dismissing entire appeal — Order of dismissal can be raised as ground of appeal in second appeal. (Vol 16) 1929 Pat 609 (610, 611) : 9 Pat 408.

[9] Appeal from order under O. 7, R. 10 — Remand ordered on appeal — Order of remand does not affect decision of case and cannot be questioned in second appeal. (Vol 13) 1926 Mad 900 (902).

[10] Order refusing to record adjustment does not affect decision of case but merely ensures that merits of case should be determined — It cannot be challenged under S. 105. (Vol 23) 1936 Nag 8 (11) : 31 Nag L R 72.

[11] Order allowing substitution or setting aside abatement passed cannot be questioned in appeal from decree. (Vol 20) 1933 Cal 498 (500) (Vol 12) 1925 Cal 766 (768) : 52 Cal 472 (Vol 12) 1925 Cal 473 (474) (Vol 20) 1933 Lah 152 (153) : 14 Lah 361.

[But see (Vol 20) 1933 All 294 (295). (If it affects the decision of the case, it can be questioned in appeal.) (Vol 4) 1917 All 434 (435) (Vol 10) 1923 Lah 230 (232).]

[12] An order under O. 22, R. 5 impleading a person as legal representative cannot be challenged in appeal from final decree. (1908) 27 Bom 162 (187, 188) (SB) (Vol 20) 1933 Cal 498 (500).

[But see (Vol 5) 1918 Mad 1055 (1055). (Order under O. 22, R. 5 bringing two rival claimants on record without deciding claims is not appealable, but can be attacked in appeal against decree under S. 105).]

[13] Refusal to allow withdrawal, with liberty to file fresh suit—Decree—Appeal—Refusal cannot be attacked. (Vol 12) 1925 Cal 711 (713).

[14] An order setting aside an *ex parte* decree cannot be objected to in appeal from the final decree in the suit. (Vol 18) 1931 All 294 (297) : 53 All 612 (FB) (Vol 14) 1927 Bom 455 (455, 456) : 51 Bom 495 (1905) 9 Cal W N 584 (587) (1895) 22 Cal 981 (984) (Vol 10) 1923 Lah 425 (425) (Vol 2) 1915 Lah 353 (353) : 1916 Pun Re No. 40. (Under O. 43, R. 1 (d), an appeal lies against an order refusing to set aside an

ex parte decree.) (Vol 33) 1946 Mad 344 (345) (1916) 34 Ind Cas 713 (713) : 3 Oudh L Jour 231 (Vol 24) 1937 Rang 334 (334, 335, 336) : 1937 Rang L R 207 (FB) ((Vol 14) 1927 Rang 150 : 5 Rang 80, Overruled.)

[15] Order setting aside *ex parte* final decree, but not *ex parte* preliminary decree can be challenged in appeal against decree finally passed. (Vol 11) 1924 Mad 890 (891).

[16] Appeal against final decree—Propriety of order setting aside *ex parte* decree against some only of defendants can be questioned. (Vol 17) 1930 Pat 266 (269) : 9 Pat 102.

[17] Where application by defendant's pleader for adjournment was rejected and suit was decreed *ex parte* proper remedy is by way of appeal from decree under S. 105 (1), in which he could challenge the validity of that order and not by an application under O. 9, R. 13. (Vol 27) 1940 All 305 (306, 308) : I L R (1940) All 192.

5. Error, defect or irregularity.—[1] An error, defect or irregularity within meaning of S. 105 must mean an error, defect or irregularity in procedure or in law and not in matters of fact. (Vol 23) 1936 Nag 8 (11) : 31 Nag L B 72 (1890) 12 All 200 (202) (Vol 16) 1929 Cal 26 (27) (Vol 17) 1930 Pat 266 (269) : 9 Pat 102.

5a. Letters Patent appeals. [1] Letters Patent (Madras) Cl. 15 is not controlled by S. 105(2), Civil P. C. (Vol 16) 1929 Mad 349 (351).

6. Orders, granting review.—[1] Order previous to judgment and decree—Application for review of order—Review rejected—Appeal against judgment and decree—Matters in review raised in appeal—Appellant can do so under S. 105 but attack against review order will be limited to O. 47, R. 7. (Vol 28) 1941 Nag 308 (309, 310) : I L R (1943) Nag 487 (1875-77) 1 All 363 (365) (1908) 31 Mad 49 (50, 51) (1897) 24 Cal 878 (880).

7. Order must be one under the Code.—[1] The word "Order" refers to orders passed under the Code. (1890) 12 All 129 (158) (1895) 17 All 438 (440).

[2] "Save as otherwise expressly provided" includes "provided in Acts other than the Code of Civil Procedure." (Vol 11) 1924 Rang 237 (238) : 2 Rang 117.

8. Privy Council appeals.—[1] Principle of S. 105 (1) applies to Privy Council appeal. (Vol 20) 1933 Bom 251 (252).

[2] Section 105 (2) does not apply to appeals to Privy Council. (Vol 20) 1933 Bom 260 (262) (1911) 33 All 391 (392, 393) (Vol 11) 1924 Mad 701 (702) (Vol 2) 1915 Mad 423 (423) : 38 Mad 509 (Vol 12) 1925 Nag 349 (350) : 22 Nag L R 132.

9. Remand orders.—[1] Orders of remand which are not appealable can be challenged in the appeal from the final decree. (Vol 13) 1926 Mad 900 (900, 901) (Vol 25) 1938 All 37 (38) : I L R (1938) All 79 (Vol 22) 1935 All 553 (554) (Vol 12) 1925 Oudh 527 (528) (Vol 5) 1918 Pat 680 (682) : 2 Pat L Jour 663.

[2] Appealable remand orders are conclusive and cannot be questioned in appeal from the final decree. (Vol 10) 1923 Cal 385 (386) (Vol 15) 1928 Cal 325 (327) : 55 Cal 506.

[3] Appealable remand order not appealed against—The propriety or correctness of the order cannot be questioned in appeal from the final decree. (Vol 4) 1917 All 144 (145) (Vol 8) 1921 All 276 (277) : 43 All 377 (1921) 63 Ind Cas 845 (846) (Cal) (Vol 6) 1919 Cal 65 (65) : 45 Cal 738 (Vol 5) 1918 Cal 182 (182) (Vol 8) 1921 Lah 154 (155) : 2 Lah 252 (Vol 7) 1920 Lah 193 (194) (Vol 12) 1925 Mad 916 (917) (Vol 3) 1916 Mad 127 (128) (Vol 13) 1926 Nag 164 (167) (Vol 12) 1925 Nag 185 (186) (Vol 10) 1923 Pat 45 (47) : 2 Pat 207 (Vol 15) 1928 Rang 297 (298) : 6 Rang 506 (Vol 10) 1923 Rang 29 (30) : 4 Upp Bur Bul 93.

[4] Appealable order of remand not appealed against — The incidental findings and decisions which are a

106. Where an appeal from any order is allowed it shall lie to the Court to which an appeal *What Courts to hear* would lie from the decree in the suit in which such order was made, or *appeals.* where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.
[1882—S. 589; 1877—S. 589.]

GENERAL PROVISIONS RELATING TO APPEALS

107. (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court *Powers of Appellate Court.* shall have power —

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

[1882—S. 582, first part. See O. 41, Rr. 23-25, 27, 28, 33.]

Section 105 (contd.)

material part of the basis of that order cannot be challenged in appeal from final decree. (Vol 12) 1925 Mad 1019 (1019, 1020)* (Vol 10) 1923 Mad 67 (70)* (Vol 12) 1925 Pat 530 (533)* (Vol 10) 1923 Pat 226 (228).

[5] Points decided by order of remand cannot be reconsidered by lower Court. (Vol 8) 1921 Nag 129 (180)* (Vol 5) 1918 Nag 264 (267).

[6] To prevent obvious injustice High Court can refuse to be bound by remand order of Subordinate Court though neither party can question it. (Vol 16) 1929 All 421 (428) : 51 All 780.

[7] Where an order of remand by the Appellate Court on the question of the maintainability of a suit is not appealed against, the Appellate Court cannot subsequently go into the question of the form of suit as it is not open to discussion any longer. (1913) 1913 Pun L R No. 302 Page 1017* (1910) 7 Mad L Tim 93 (94).

[8] Order remanding not appealed against—Ground of remand cannot subsequently be challenged in appeal. (Vol 30) 1943 Mad 706 (708).

[9] *Held* that the ground of objection in the memorandum of appeal that the lower Appellate Court had no jurisdiction to entertain the appeal which had abated and the order for substitution of names was irregular, was untenable in an appeal from order of remand. Proper stage to take such objection was in an appeal from decree itself. (1936) 1936 All L Jour 538 (539).

10. Revision of orders that can be challenged under the section. — [1] Interlocutory order passed by lower Court in appealable case—High Court cannot interfere under S. 115—Order can be made ground of objection under S. 105 in subsequent appeal against decree. (Vol 4) 1917 Low Bur 35 (36)* (Vol 4) 1917 All 321 (321).

Section 106—Note 1

[1] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see S. 7 (b).

[2] Under the different Civil Courts Acts the appellate jurisdiction of the District Judge extends to the decrees in suits of the value of Rs. 5000 and less. Where, therefore the value of the subject-matter of the suit does not exceed Rs. 5000 an appeal from the order passed lies to the District Judge; but if the value of the suit exceeds Rs. 5000 then the appeal lies to the High Court. (1890) 17 Cal 680 (983) (FB). (Order as to

appointment of Receiver—Appeal lies to High Court.)* (1894) 17 Mad 377 (378) (Order in insolvency proceeding—Subject-matter exceeding Rs. 5000—Appeal lies to High Court.)* (1901) 14 C P L R 62 (63). (Order passed by Civil Judge in a suit in which the subject-matter was over Rs. 1000 in value—*Held* appeal lay to the Judicial Commissioner's Court.)

[3] Where the order appealed from is passed by a Court in the exercise of appellate jurisdiction, the appeal lies to the High Court. (1903) 25 All 174 (178) (FB). (Order of Appellate Court returning plaint for presentation to proper Court.)* (1899) 26 Cal 275 (279) (Do.)

SECTION 107—SYNOPSIS.

1. Applicability of section.

1a. Power to remand.—See O. 41, R. 23.

2. Power to take additional evidence.—See O. 41, R. 27.

3. Powers and duties of appellate Court.

4. Addition and substitution of parties.

5. Power to allow amendments.

6. Rejection of memorandum of appeal.

7. Return of plaint or memorandum of appeal for presentation to proper Court.

8. Withdrawal of suit or memorandum of appeal.

1. Applicability of section.—[1] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see S. 7 (b).

[2] This section affects only proceedings under the Code and does not extend the operation of any portion of the Limitation Act. (1886) 12 Cal 590 (593) (F B).

1a. Power to remand.—See O. 41, R. 23.

2. Power to take additional evidence.—See O. 41, R. 27.

3. Powers and duties of appellate Court.—[1] S. 107 does not confer any powers not given by O. 41, as cl. (2) is expressly made subject to any conditions and limitations as may be prescribed. (Vol 5) 1918 Mad 665 (667).

[2] Section 107 does not cut down the Appellate Court's discretionary power under O. 41, R. 33. (Vol 20) 1933 Mad 529 (533.)

[3] Under S. 152 read with S. 107 the Appellate Court is entitled, while the appeal is pending before it, to correct any clerical or arithmetical mistake in the decree of the trial Court apparent on the face of the record. (Vol 15) 1928 All 458 (459).

Procedure in appeals from appellate decrees and orders. **108.** The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals —

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

[1882—Ss. 587, 590; 1877—Ss. 587, 590; 1859—S. 366; Cf. O. 42, R. 1 and O. 43, R. 2.]

Section 107 (contd.)

[4] Question of relevancy of a document, though not raised in trial Court, can be considered by first Appellate Court. (Vol 15) 1928 Cal 512 (512).

[5] Pleas raised but not proved—Inconsistent pleas raised—Best available evidence suppressed—Appellate Court can reverse a finding. (Vol 16) 1929 P C 95 (98, 99) (P C).

[6] Appellate Court can award costs against the estate of the deceased appellant. (1882) 8 Cal 440 (441).

[7] In spite of the words "the Court granting an injunction may order" in the wording of O. 39, R. 2(3), Civil P. C., which were substituted for "in cases of disobedience, injunction might be enforced" the Appellate Court can pass the order which the Court of first instance might have passed. (Vol 4) 1917 Mad 448 (449); 39 Mad 907 (F B).

[8] Appellate Court has power to issue commission for local investigation. (Vol 19) 1932 All 270 (271).

[9] Order 7, R. 11 read with S. 107 (2) would seem to make it clear that the memorandum of appeal improperly stamped should first be returned for correct stamping and not rejected. (1932) 1932 Mad W N 104 (104).

[10] Lower Court exercising discretion where it ought not to have been so exercised—Interference by Court of appeal held justified. (1911) 21 Mad L Jour 1018 (1019).

4. Addition and substitution of parties. — [1] Appellate Court is bound to bring all necessary parties on record. (Vol 3) 1916 Mad 828 (829).

[See also (Vol 28) 1941 Oudh 593 (598). (Decree against debtor and surety — Appeal by surety alone — Decree cannot be set aside against non-appealing debtor.)]

[2] Under the provisions of O. 1, R. 10 (2) read with S. 107 (2), the Appellate Court has power to implead any person in appeal who ought to have been joined or whose presence before the Court may be necessary. (Vol 25) 1938 Mad 329 (331) * (Vol 20) 1933 Mad 806 (810) * (1914) 26 Mad L Jour 86 (89) (P C) * (Vol 12) 1925 Oudh 606 (607). (O. 1, R. 9 read with S. 107 (2) will not permit the non-joinder of any party being condoned by an Appellate Court when such non-joinder makes it impossible to deal equitably and sufficiently with the matter in controversy.) * (Vol 5) 1918 Pat 525 (526); 3 Pat L Jour 409.

[3] Appellate Court has power to transfer respondent to be appellant and pass decree in his favour if just and equitable. (Vol 17) 1930 All 786 (787).

[4] See also O. 1, R. 10 and O. 41, R. 20.

5. Power to allow amendments.—See O. 6, R. 17 and O. 41, R. 3.

6. Rejection of memorandum of appeal. — [1] This section makes the provision relating to the rejection of plaints applicable to the memorandum of appeal. (Vol 29) 1942 Cal 539 (541); I L R (1942) 2 Cal 253 * (Vol 24) 1937 All 280 (281, 282); I L R (1937) All 484.

7. Return of plaint or memorandum of appeal for presentation to proper Court.—[1] Under S. 107 (2) read with O. 7, R. 10, Appellate Court has power to re-

turn memorandum of appeal for presentation to proper Court. (Vol 10) 1923 Nag 310 (311) * (Vol 7) 1920 Lah 120 (120). (No appeal lies against an order returning memorandum of appeal for presentation to proper Court. Revision however is competent.)

[2] Civil revision petition in High Court — Return under O. 7, R. 10 read with Ss. 107 (2) and 141 as appeal to District Court — Not permissible. (Vol 29) 1942 Mad 657 (658).

[3] Appellate Court has power to return plaint for presentation to proper Court. (1903) 25 All 174 (176) (F B) * (Vol 21) 1934 Lah 233 (233). (Order of remand is surplusage.)

8. Withdrawal of suit or memorandum of appeal.—[1] Leave to plaintiff to withdraw from a suit with permission to bring a fresh suit—Court of Appeal can grant. (Vol 8) 1921 Bom 278 (280); 45 Bom 206 * (Vol 14) 1926 Nag 444 (445).

[But see (Vol 6) 1919 Sind 65 (66); 13 Sind L R 72.]

[2] Reading O. 23, R. 1 (2) and S. 107 (2) together, an appellant has the right to withdraw his appeal unconditionally, his only liability being to pay costs. (1931) 1931 All L Jour 232 (233).

[3] If the respondent has obtained any rights under appeal, appeal cannot be withdrawn without leave of Court where the Court has no jurisdiction to allow him to do so, the Court may in a proper case transpose the parties but the Court is not bound to adopt that course in every case where the appellant withdraws. (Vol 25) 1938 Bom 442 (443); I L R (1939) Bom 66.

Section 108 — Note 1

[1] Words "so far as may be" in S. 108 should be taken to mean as far as is consistent with the principles on which second appeals are admitted. (1884) 7 Mad 52 (54). (Adjudication should be confined to matters in which questions of law are involved.)

[2] Order 41, R. 1 applies to second appeals — Any document other than copy of decree and judgment is not required to be presented in second appeal. (1882) 4 Mad 419 (420) (F B).

[3] Rule in S. 98 (2) is applicable not only to first appeals but also to appeals from appellate decrees. (Vol 19) 1932 All 195 (195, 196).

[4] The High Court is not precluded from adding in second appeal persons who had been originally joined in the suit but were not joined in the lower Appellate Court. (1896) 19 Mad 151 (153).

[5] Section 108 must be read in conjunction with S. 107 (2) and O. 22, R. 11. (1907) 34 Cal 1020 (1023) * (1905) 28 Mad 498 (499, 500).

[6] In second appeal High Court has power to order amendment under S. 108 read with S. 107. (Vol 22) 1935 Rang 88 (89).

[7] In second appeal High Court can remand case for finding on an issue. (Vol 4) 1917 Cal 233 (234).

[8] Cross-objections can be entertained in second appeals. (1899) 21 All 297 (300).

[9] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see section 7 (b).

APPEALS TO THE KING IN COUNCIL

109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council —

- (a) from any decree² or final order³ passed on appeal⁴ by a High Court or by any other Court of final appellate jurisdiction;⁵
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit⁶ one for appeal to His Majesty in Council.

[1882—S. 595; 1877—S. 595; See O. 45 and CL 39 of the Letters Patent.]

SECTION 109—SYNOPSIS.

1. Applicability and scope.
 2. "Decree", meaning of.
 3. "Final order", meaning of.
 4. "Order passed on appeal"
 - 4a. Appeals from appellate orders where no second appeal lies.
 5. "Any other Court of final appellate jurisdiction."
6. Certificate of fitness—Clause (c).
7. Original side orders of High Court.

1. Applicability and scope.—[1] S. 109 is subject to the provisions of S. 110. (Vol 29) 1942 Oudh 362 (365).

[2] Clause 39 of the Letters Patent must be read subject to S. 110. (Vol 12) 1925 Mad 243 (243, 244). (Appeal may lie under cl. 39 of Letters Patent though not under S. 109.)

[3] Court should see that conditions precedent are fulfilled. (Vol 19) 1932 Rang 189 (190) : 10 Rang 499.

[4] Sections 109 and 110 do not apply where the decision is not that of a Court. (1906) 33 Cal 219 (254, 255); 33 Ind App 1 (PC). (Political Agent and Governor of Bombay do not exercise jurisdiction as 'Court' in Kathiawar.) * (1905) 32 Cal 1 (4, 5) : 31 Ind App 239 (P C). (Order deposing Ruler or order appointing commission to enquire into charges against Ruler by Governor-General in Council is act of State and not act of Court.)

[5] Sections 109 and 110 do not apply where the decision of the Court is an extra-judicial one. (Vol 9) 1922 Mad 440 (441). (Order suspending vakil from practice.) * (1884) 6 All 163 (164) (F B). (Cancellation of notice wrongly enrolling a pleader.) * (Vol 9) 1922 Pat 603 (604) : 1 Pat 590. (Order refusing to enrol person as legal practitioner.) * (Vol 17) 1930 Rang 150 (150, 151) : 8 Rang 40.

[6] Sections 109 and 110 do not apply where in the nature of the decision itself, no appeal can lie. (Vol 19) 1932 P C 251 (252) (PC). (No appeal will lie from a consent decree passed by the High Court.)

[7] Section 109 does not apply to a case where the right of appeal is barred by the other provisions in the Code. (Vol 13) 1926 Oudh 17 (18). (Decree passed on review by the High Court and not open to any objection under O. 47, R. 7.)

[8] Privy Council cannot be asked at appellant's option to function as concurrent Court of first appeal where the special Act has provided for an appeal in India itself. (Vol 26) 1939 P C 122 (127) : I L R (1939) Kar PC 234 : 14 Luck 252 : 66 Ind App 160 (PC) * (Vol 19) 1932 Oudh 163 (164). (Appeal from decision of single Judge lies to Bench and not to Privy Council under S. 12, Oudh Courts Act.) * (Vol 14) 1927 Rang 88 (89) : 4 Rang 508. (Decree of High Court under S. 91. (3), Rangoon City Municipal Act.)

[9] Appeals from orders under S. 66, Income-tax Act, are not regulated by Ss. 109 and 110. (Vol 28) 1941 Pat 225 (226) : 20 Pat 561 (SB) * (Vol 17) 1930 Rang 274 (276) : 8 Rang 435.

[10] The right of appeal is not confined to the King's subject. (1906) 33 Cal 219 (253) : 33 Ind App 1 (PC).

[11] Petitioner *prima facie* satisfying conditions prescribed by S. 109 — High Court is bound to grant leave—Chance of success immaterial. (Vol 19) 1932 Mad 46 (52).

[12] Leave to appeal to Privy Council by defendant—Considerations that might arise where plaintiff is applicant need not be considered. (Vol 21) 1934 Rang 65 (65) : 12 Rang 164.

[13] Two appeals to Privy Council, one from Division Bench and other from Letters Patent — Both decisions should not be certified. (Vol 18) 1931 P C 104 (106) : 53 Ind App 141 : 58 Cal 1281 (PC).

[14] In the following cases appeal was admitted :—

(a) Originally an award under the Land Acquisition Act of 1894 could not be subject matter of an appeal to the Privy Council—But the Act as amended in 1921 lays down that such award should be treated as a judgment under S. 2 Cl. (2) and S. 2 (9) and therefore an appeal is now competent. (Vol 12) 1925 P C 91 (92) : 6 Lah 69 : 52 Ind App 133 (P C).

(b) Refusal of application under S. 45, Specific Relief Act, to compel reference under S. 51, Income-tax Act—Appeal lies. (Vol 8) 1921 Bom 378 (378).

(c) Order under Presidency Towns Insolvency Act. (Vol 12) 1925 Mad 243 (243, 244) * (1913) 40 Cal 685 (691).

(d) Order on the validity of recording compromise. (Vol 9) 1922 Pat 256 (257) : 6 Pat L Jour 171.

(e) Decree in testamentary matter is appealable to Privy Council. (Vol 13) 1926 Mad 986 (987, 988) : 49 Mad 954 * (Vol 14) 1927 Rang 56 (56) : 5 Rang 119.

[But see (Vol 6) 1919 Low Bur 104 (104) : 10 Low Bur Rul 22. (Order under S. 86 of the Probate and Administration Act in appeal—No appeal lies.)]

[15] In the following cases appeal was not admitted :—

(a) Leave to appeal in *forma pauperis*. (Vol 5) 1918 Pat 303 (303, 304) : 3 Pat L Jour 179 * (Vol 5) 1918 Mad 18 (18) : 42 Mad 32.

(b) Refusal to stay criminal complaint. (Vol 28) 1941 All 211 (212) : I L R (1941) All 364.

(c) Dismissal of appeal against decision in contempt proceedings for not proper prosecution. (Vol 16) 1929 Mad 672 (672).

[16] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see section 7 (b).

2. "Decree", meaning of. — [1] "Decree" will include a preliminary decree. (Vol 9) 1922 P C 237 (238) : 49 Cal 560 : 49 Ind App 108 (P C) * (1891) 15 Bom 155 (158) : 18 Ind App 6 (P C). (Case decided under S. 595 (now S. 109) of the old Code. In the present Code the

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word "Final" has been dropped and only "decree" is retained.) * (Vol 29) 1942 Cal 587 (588).

[2] An act of State is not a decree. (1905) 82 Cal 1 (4, 5) : 31 Ind App 239 (P C).

[3] Letters Patent Bench holding that pleas of want of jurisdiction in executing Court and limitation could not be raised, setting aside sale and remanding case to executing Court for fresh sale—Order held was neither "decree" nor "final order" within S. 109 (a). (Vol 30) 1943 Lah 140 (143, 145, 146) (FB). ((Vol 26) 1939 Lah 177, overruled).

3. "Final order," meaning of. — [1] The words "Final order" in the section are used in contradistinction to the words "interlocutory orders". (Vol 26) 1939 F C 43 (48) : ILR (1940) Lah 400 : ILR (1939) Kar FC 132 : 1939 F C R 159 : 40 Cri L Jour 468 (FC) * (1901) 23 All 220 (226, 227) : 28 Ind App 28 (PC) * (1882) 6 Bom 260 (264, 265).

[See also (1914) 1914 Mad W N 170 (170) (P C). (An interlocutory order can be impeached when an appeal is taken against the final order.)]

[2] Expression "final order" contemplates a final order passed in a suit or a proceeding known to law. (Vol 32) 1945 Pat 149 (150) : 23 Pat 903. (Order of trial Court setting aside decree under S. 151 is neither passed in suit nor in proceeding known to law—Order of High Court passed in appeal setting aside order of trial Court is not therefore final).

[See also (Vol 20) 1933 All 15 (17) : 54 All 941. (Final order need not be one passed in suit—It may be in any other proceeding arising subsequent to suit.)]

[3] The test of finality is whether the order finally disposes of the rights of the parties. The finality must be a finality in relation to the suit. That the order went to the root of the suit is not sufficient. (Vol 20) 1933 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (P C). (15 Bom 155 : 18 Ind App 6 (PC) and 17 All 112 : 22 Ind App 1 (P C) decided under the old Code held inapplicable to cases arising under present section—Cases which followed these two cases must be regarded as no longer good law.) * (Vol 7) 1920 P C 86 (87) : 47 Cal 918 : 47 Ind App 124 : 14 Sind L R 191 (P C). (Order refusing stay under Arbitration Act.) * (Vol 26) 1939 F C 43 (49) : ILR (1940) Lah 400 : ILR (1939) Kar F C 132 : 1939 F C R 159 : 40 Cri L Jour 468 (FC) * (Vol 29) 1942 Cal 537 (539) * (Vol 30) 1943 Lah 140 (145, 146) (F B) * (Vol 29) 1942 Oudh 283 (284). (Order that certain party is entitled to be substituted in place of deceased party in suit is not final order.) * (Vol 33) 1946 Pat 141 (142) : 24 Pat 614. (Restitution order under S. 185, Companies Act).

[4] Order deciding one of cardinal issues in case but leaving suit alive to be tried in ordinary way is not final order. (Vol 26) 1939 Mad 697 (699) * (Vol 6) 1919 Mad 893 (894). (Judgment on merit on one issue and remand on other issues—Judgment is not final.) * (1890) 13 Mad 349 (350). (Order holding adoption proved and remanding case on other issues—Order is not final.)

[5] Order of remand deciding important issue, but leaving suit alive to be tried in ordinary way is not final order. (Vol 20) 1933 P C 58 (60) : 11 Rang 58 : 60 Ind App 76 (PC) * (Vol 32) 1945 All 401 (404, 405) : I L R (1945) All 443 * (Vol 28) 1941 All 333 (335) : I L R (1941) All 573. (Order remanding case for trial in accordance with U P. Encumbered Estates Act.) * (Vol 21) 1934 All 58 (59) : 56 All 277. (Order of remand setting aside order of Revenue Court returning plaint for presentation to Civil Court.) * (Vol 6) 1919 All 34 (34) : 42 All 176. (An order of remand by the High Court holding that there was no fraud in the registration of mortgage.) * (Vol 8) 1916 All 243 (244) : 38 All 150 (F B). (Contract challenged on various grounds one

of them being that it should have been under a particular seal—Order holding that it is not so remanding for trial on merits is not a final order.) * (1909) 31 All 545 (548) * (1901) 23 All 220 (226, 227) : 28 Ind App 28 (P C). (Order setting aside *ex parte* decree and remanding case for disposal.) * (1880) 2 All 65 (67). (District Judge recalling execution application to his own file from that of Sub-Judge and dismissing it—High Court remanding case for disposal by Sub-Judge.) * (1904) 1 All L Jour 26 (28). (High Court remanding case for retrial under O. 41, R. 23 on a matter relating to procedure.) * (1944) 1944 All W R (cc) 239 (289) * (Vol 20) 1933 Bom 260 (262) * (Vol 10) 1923 Bom 39 (40) * (Vol 12) 1925 Cal 574 (574). (Suit dismissed due to plaintiff's want of *locus standi*—Appeal—*Prima facie* case held as made—Case remanded for further hearing—Order is not final.) * (Vol 5) 1918 Cal 878 (878). (Remanding case for trial with the direction that a person should be sued as a residuary legatee.) * (1913) 18 Cal L Jour 124 (125) * (Vol 22) 1935 Lah 458 (459). (Order holding document admissible and remanding case.) * (Vol 20) 1933 Lah 82 (83). (Remand order in insolvency.) * (Vol 18) 1931 Lah 556 (559) * (1936) 38 Pun L R 112 (112). (Remand of execution proceeding for rededuction.) * (Vol 23) 1936 Mad 311 (311) * (Vol 16) 1929 Mad 308 (308). (Trial Court finding temple to be private and dismissing suit—High Court on appeal finding temple to be public and remanding suit—High Court's order is not final adjudication.) * (Vol 2) 1915 Mad 423 (423) : 38 Mad 509. (Remand orders on preliminary points.) * (Vol 12) 1925 Nag 349 (350) : 22 Nag L R 132. (Remand of case for effecting partition on another basis.) * (Vol 5) 1918 Nag 193 (194) * (Vol 26) 1939 Oudh 224 (224) : 14 Luck 675. (Decree on preliminary point—Order reversing the decree and remanding for trial.) * (Vol 23) 1936 Oudh 205 (205). (Remand of suit for determination of issues.) * (Vol 11) 1924 Oudh 81 (82). (Order disposing of subsidiary issue and remanding case.) * (Vol 7) 1920 Oudh 268 (268, 269) : 23 Oudh Cas 324. (Order deciding competency to apply for probate and remanding case for disposal on merits.) * (Vol 14) 1927 Pat 363 (363) : 6 Pat 282. (Order directing that a compromise decree passed under O. 23, R. 3, be set aside and the suit proceeded with, from the stage at which the compromise was filed.) * (Vol 4) 1917 Pat 77 (79). (Decree reversed on preliminary point of *res judicata* and remanded for re-trial.) * (Vol 17) 1930 Sind 254 (254, 255) : 25 Sind L R 293.

[But see (Vol 25) 1938 Rang 333 (334, 335) : 1938 Rang L R 330. (Appellate Court passing order of remand, finally disposing of rights of parties or of some of them leaving subsidiary questions consequent on final determination to be worked out later—Order of remand is final order.)]

[6] Order merely giving direction as to procedure is interlocutory and not final. (Vol 12) 1925 Cal 857 (859). (Compromise not recorded and suit ordered to proceed as usual.) * (Vol 12) 1925 All 263 (264) : 47 All 335. (Direction to lower Court to rehear an application under O. 22 R. 9.) * (1878) 1 Cal L R 354 (358). (Directions to proceed with execution.) * (Vol 6) 1919 Pat 383 (383, 384) : 4 Pat L Jour 461. (Order directing execution.)

[7] Order which does not dispose of suit or proceeding but reserves some question for further determination is not final. (1911) 13 Cal L Jour 90 (101). (Order determining only question of law which affects part of case and leaves other matters to be determined is not final.) * (Vol 1) 1914 Bom 6 (8) : 38 Bom 421. (High Court's order refusing legal representative to be brought on record.) * (Vol 2) 1915 Cal 624 (624). (Reversal of order refusing injunction.) * (Vol 13) 1926 Mad 748 (748). (Order holding the suit not to abate as regards settling of scheme.) * (Vol 11) 1924 Mad 701 (702).

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(Refusal to set aside order restoring suit to the file.) * (Vol 9) 1922 Pat 611 (613). (Order to join other joint decree-holders in execution case — High Court's confirming order).

[8] An order appointing a receiver or refusing to appoint receiver is not final order. (1911) 13 Cal L Jour 507 (508) * (1895) 22 Cal 928 (930, 931) * (Vol 20) 1933 Pat 293 (294, 295) : 12 Pat 723 * (Vol 12) 1925 Pat 173 (174, 175).

[9] Order refusing leave to appeal in *forma pauperis* or granting leave to sue in *forma pauperis* is not final. (Vol 29) 1942 Oudh 422 (423) * (1904) 8 Cal W N 296 (297) (FB). (Granting leave to sue.) * (Vol 12) 1925 Oudh 548 (549) * (Vol 14) 1927 Pat 175 (175, 176) : 6 Pat 67 * (Vol 19) 1932 Rang 192 (192) : 10 Rang 504.

[10] Second appeal rejected and dismissed for want of prosecution — Application for restoration also dismissed — Order of dismissal of application is not final. (Vol 24) 1937 All 566 (567).

[11] Order dismissing appeal as premature is no final order. (Vol 25) 1938 Oudh 107 (110) : 14 Luck 13.

[12] Order granting review is not final order. (Vol 19) 1932 All 818 (818) : 54 All 401 * (Vol 10) 1923 Mad 57 (57).

[13] Appeal to High Court from order rejecting application to set aside *ex parte* decree — Order allowing appeal and setting aside *ex parte* decree is final order. (Vol 20) 1933 All 15 (17) : 54 All 941.

[14] Order allowing appeal under S. 5, Limitation Act, is not final order ; but order refusing to allow would amount to final order. (Vol 13) 1926 Pat 102 (102).

4. "Order passed on appeal." — [1] An order cannot be deemed to have been passed on appeal unless it is an order by a superior Court reversing, modifying, or confirming the order of an inferior Court. (1911) 13 Cal L Jour 681 (682).

[2] Expression "final order passed on appeal" is not equivalent to final order passed in the exercise of final appellate jurisdiction, but implies orders disposing of an appeal at the hearing. (Vol 29) 1942 Oudh 362 (365).

What are not orders passed on appeal. — [3] Order refusing stay of execution under O. 41, R. 5. (1911) 13 Cal L Jour 681 (682).

[4] Order of dismissal of appeal for non-prosecution. (Vol 29) 1942 Oudh 362 (365).

[5] Order refusing to restore appeal dismissed for default though passed in exercise of appellate jurisdiction. (Vol 24) 1937 All 566 (566, 567) * (Vol 20) 1933 All 453 (453) * (Vol 11) 1924 Rang 208 (208).

[6] Dismissal of application to excuse delay in filing application for re-hearing. (Vol 29) 1942 Mad 357 (357).

[7] Order directing final decree to be passed in accordance with the preliminary decree passed by the Privy Council. (Vol 12) 1925 Mad 187 (187) * (Vol 19) 1932 Bom 90 (92) : 55 Bom 785. (Decree passed after taking accounts in accordance with the directions of the Privy Council in its decree.)

[8] An order refusing to extend time for deposit of court-fees in an appeal. (Vol 6) 1919 All 331 (331).

[9] Order rejecting an appeal for not furnishing security for costs under O. 41, R. 10. (1910) 13 Oudh Cas 59 (60).

[But see (Vol 19) 1932 All 312 (314) : 54 All 390.]

[10] Order rejecting memorandum of appeal and disallowing application under S. 5, Limitation Act. (Vol 23) 1936 Oudh 110 (112, 113) : 11 Luck 599 * (1908) 32 Bom 108 (109) * (Vol 29) 1942 Mad 357 (357).

[But see (Vol 8) 1921 Cal 415 (415, 416) * (Vol 4) 1917 Lah 448 (448) * (Vol 13) 1926 Pat 102 (102).]

[11] Order on revisional side is not one "on appeal." (Vol 21) 1934 All 198 (200) * (Vol 13) 1926 All 202 (202) : 48 All 226 * (Vol 30) 1943 Mad 614 (615) : I L R (1944) Mad 372 * (Vol 33) 1946 Oudh 101 (103, 104) : 21 Luck 43 * (Vol 23) 1936 Pat 465 (468) : 15 Pat 659 * (Vol 26) 1939 Fesh 26 (27).

[But see (1911) 13 Cal L Jour 90 (97) * (1911) 13 Cal L Jour 688 (690).]

[12] Order passed by single Judge exercising original jurisdiction is not one passed in appeal. (1872) 9 Bom H C R 566 (566, 568).

[13] Order rejecting application for review. (Vol 1) 1914 Oudh 41 (42) : 16 Oudh Cas 264.

4a. Appeals from appellate orders where no second appeal lies. — [1] Provisions which preclude further appeal from various appellate orders deal only with appeals in British India and do not affect the right to appeal to Privy Council. (1912) 15 Oudh Cas 55 (57) * (Vol 11) 1924 P C 95 (100) : 20 Nag L R 33 : 51 Ind App 72 : 51 Cal 361 (P C).

[2] There is nothing in S. 104 to take away the general right of appealing to the Privy Council under S. 109. (Vol 11) 1924 P C 95 (100) : 20 Nag L R 33 : 51 Ind App 72 : 51 Cal 361 (P C) * (1913) 40 Cal 635 (647, 648) : 40 Ind App 140 (P C). (Appellate order setting aside or refusing to set aside a sale in execution is appealable.)

[3] Order of District Judge under S. 4, Provincial Insolvency Act — Appeal to High Court under S. 75 — Appeal is maintainable to Privy Council. (Vol 21) 1934 P C 81 (82) : 12 Rang 194 : 61 Ind App 158 (P C) * (Vol 31) 1944 Sind 220 (221) : I L R (1944) Kar 216.

5. Any other Court of final appellate jurisdiction. — [1] District Court sitting in appeal under S. 75, Provincial Insolvency Act, is not Court of final appellate jurisdiction — No appeal to Privy Council lies from its decision, whatever may be the value of subject-matter. (Vol 24) 1937 Mad 930 (932, 933).

6. Certificate of fitness — Clause (c). — [1] Under S. 109 (c), Civil P. C., a High Court can, if convinced that a case is a fit one for appeal to the Privy Council grant leave to appeal in any case even upon a question of fact. It is not necessary that the order should be a final one. (Vol 6) 1919 Oudh 7 (8) * (Vol 2) 1915 Cal 624 (624).

[2] Clause (c) applies even to interlocutory orders in appropriate cases. (Vol 27) 1940 All 38 (39, 40) : I L R (1940) All 11. (Order superseding arbitration.) * (Vol 6) 1919 All 31 (32) : 42 All 174. (Appeal under S. 109 against interlocutory orders should be allowed only when it will end litigation.) * (Vol 14) 1927 Cal 481 (487, 488) * (Vol 9) 1922 Cal 130 (132, 134). (Interlocutory order of general importance — Leave can be given) * (Vol 24) 1937 Sind 217 (217).

[3] Litigation must not be made too expensive by granting leave. (Vol 23) 1936 Mad 311 (313) * (1910) 3 Bur L Tim 93 * (1909) 13 Cal W N 1127 (1128).

[4] Power under Cl. (c) should be sparingly used. (Vol 14) 1927 Pat 363 (369) : 6 Pat 282 * (Vol 20) 1933 All 4 (6) : 54 All 459 * (Vol 20) 1933 Oudh 394 (395) * (Vol 11) 1924 Pat 468 (471).

[5] There is no right of appeal if the certificate granted by the High Court is obviously erroneous and does not satisfy the requirements of the statute. (1901) 23 All 227 (232) : 28 Ind App 11 (P C).

[6] The mere existence of a substantial question of law does not give jurisdiction to grant leave to appeal under S. 109 (c). (Vol 32) 1945 Oudh 241 (241) : 20 Luck 259 * (Vol 27) 1940 All 38 (39, 40) : I L R (1940) All 11 * (1913) 15 Bom L R 1021 (1033) * (Vol 18) 1931 Mad 642 (643, 644) * (Vol 30) 1943 Oudh 266 (268).

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[See however (Vol 20) 1933 Lah 690 (692) : 14 Lah 609. (Substantial question of law not of general importance but as between the parties is sufficient.)]

[7] Section 109 (c) contemplates special cases in which the matter in dispute is not measurable in money and the questions involved are of great public or private importance. (Vol 30) 1943 Mad 614 (616) : I L R (1944) Mad 372 (Vol 8) 1921 P C 25 (26) : 48 Ind App 31 : 44 Mad 293 (PC) (Vol 28) 1941 All 211 (212) : I L R (1941) All 364. (A refusal to stay criminal complaint is not a matter of great private importance to an accused in a contempt of court proceedings.) (Vol 22) 1935 All 424 (424) (Vol 21) 1934 All 58 (60) : 56 All 277. (Question whether transaction can be split in two leases is not question of general importance.) (Vol 20) 1933 All 8 (10) : 54 All 431 (Vol 7) 1920 All 161 (162). (Interpretation of Privy Council decision.) (Vol 20) 1933 Bom 260 (262) (Vol 29) 1942 Cal 498 (505) (S B). (Suit for property only.) (Vol 21) 1934 Lah 515 (516). (Clause (c) applies only where it is impossible to define in money value exact character of dispute.) (Vol 14) 1927 Lah 181 (182) : 8 Lah 269. (Leave to appeal to Privy Council in a case under Income-tax Act, S. 66-A (2).) (Vol 10) 1923 Mad 602 (603). (Question of no general interest — Leave granted in other similar appeals is no ground for granting it.) (Vol 3) 1916 Mad 656 (657). (Where value is less, question of law of general interest must be involved.) (Vol 16) 1929 Nag 386 (387). (Question whether *Abidi* year was previous year — Leave not granted.) (Vol 16) 1929 Nag 265 (266). (Question when debt becomes bad debt under Income-tax Act is of great importance to commercial public.) (Vol 32) 1945 Oudh 241 (241) : 20 Luck 259 (Vol 30) 1943 Oudh 266 (268). (Question must be of great public or private importance.) (Vol 29) 1942 Oudh 283 (285). (Where question involved is not of public importance leave can be given in exceptional cases where the disputed matter cannot be valued in money.) (Vol 29) 1942 Oudh 174 (177). (Revision at applicant's request treated as second appeal — Second appeal found not maintainable — Applicant held could not canvass maintainability of revision before Privy Council — Case held did not come within S. 109 (c).) (Vol 27) 1940 Oudh 378 (380) : 15 Luck 716. (Question whether there can be adverse possession of mosque does not come within S. 109 (c).) (Vol 26) 1939 Pat 564 (565). (Trial Court refusing to try issue as preliminary issue before going into merits — Order refusing to interfere in revision does not give rise to point of importance.) (Vol 23) 1936 Pat 465 (468) : 15 Pat 659. (Application under O. 21, R. 100, Civil P. C., in anticipation of delivery of possession — Court deciding it under Rr. 99 and 101 of O. 21, Civil P. C. — Leave refused.) (Vol 21) 1934 Pat 564 (565) (Vol 22) 1935 Rang 113 (115) : 13 Rang 123. (Case involving determination of rights of large body of persons with regard to management of mosque — Question as to construction of trust deed — Leave granted.) (Vol 10) 1923 Rang 71 (73) : 11 Low Bur Rul 335 (Vol 24) 1937 Smd 217 (218). (Question whether certain tribal Chief residing within British territory is Ruling Chief under Ss. 84 and 87, Civil P. C., is not of importance.) (Vol 23) 1936 Sind 68 (69). (Reference by Income-tax Officer as to whether interest paid to partner on capital borrowed from him is allowable as deduction from profits earned and decision of Court on it — Leave refused.)

[8] A question is of public importance if it affects large bodies of persons or communities. (Vol 30) 1943 Oudh 266 (268) (Vol 15) 1928 All 220 (221) : 50 All 640 (Vol 14) 1927 Nag 68 (64). (Question as to the law applicable to inheritance of "lawajama" in Berar was held to be a question of public importance) (Vol 29)

1942 Oudh 362 (366) (Vol 29) 1942 Oudh 283 (284). (Agreement settling dispute between claimants of deceased mahant — Question whether construction put by High Court on agreement is correct or not is not question of public importance) (Vol 28) 1941 Oudh 245 (246, 247) (Vol 26) 1939 Oudh 224 (225) : 14 Luck 675. (Question depending upon interpretation to be put on previous judgment of High Court said to be bar in *res judicata* is not question affecting large body of public) (Vol 8) 1921 Oudh 30 (31) (Vol 15) 1928 Rang 187 (187) : 6 Rang 43 (1913) 7 Sind L R 92 (94).

[9] Point of general importance but settled by Privy Council decision — Certificate should not be granted. (Vol 16) 1929 All 339 (340, 341) (Vol 16) 1929 Mad 780 (781) (Vol 29) 1942 Oudh 174 (177).

[10] Full Bench decision of one High Court differing from that of another High Court — This fact is not sufficient to make case fit for appeal to Privy Council. (Vol 24) 1937 Sind 217 (218) (Vol 15) 1928 Mad 448 (449).

[See also (Vol 23) 1936 Pesh 194 (195) (No inconsistency in rulings of Court — Different High Courts holding divergent views regarding similar matters is no ground for certifying case as fit one for appeal to Privy Council.)]

[11] By private importance is meant private importance to both parties to the litigation and not only to one of them. (Vol 30) 1943 Oudh 266 (268) (Vol 11) 1924 Mad 231 (231, 232) (Vol 10) 1923 Mad 232 (233).

[12] Mere fact that question raised in appeal affects third parties is no ground of fitness. (Vol 16) 1929 Mad 696 (698).

Questions held to be of public importance. —

[13] (a) Contingent reversioner whether can apply to be made party after expiry of period. (Vol 21) 1934 All 198 (201).

(b) Right of procession claimed by Mahomedans against Hindus. (Vol 17) 1930 All 121 (122) : 52 All 329.

(c) Whether fraud of mortgagor in representing to registration officer that some property was within its jurisdiction would vitiate mortgage when mortgagee is innocent. (Vol 6) 1919 All 34 (35) : 42 All 176.

(d) The status of succession certificate-holder. (Vol 3) 1916 All 253 (253) : 38 All 188.

(e) The burden of proof of family necessity for a debt contracted by the manager of joint family and the liability of mortgagor's share alone for such debt. (1913) 18 Ind Cas 305 (305, 306) (All).

(f) Necessity of registering documents with option of repurchase. (Vol 14) 1927 Bom 19 (20) : 50 Bom 759.

(g) Form of ritual in an important public temple. (Vol 26) 1939 Mad 847 (848) : I L R (1939) Mad 967.

(h) Question of jurisdiction of civil Court. (Vol 26) 1939 Mad 95 (95).

(i) Construction of an agreement between two rival temples belonging to two different sections of Hindu community about right of one of them to hold processions in streets of Madras. (Vol 11) 1924 Mad 231 (232).

(j) Whether certain kinds of permanent tenures in Malabar carry with them the incident of forfeiture on alienation. (Vol 10) 1923 Mad 443 (444).

(k) Question whether constitution of the community amounts to a trust or wakf. (Vol 15) 1928 Nag 202 (203).

(l) The question whether in a suit for partition, the value for purposes of appeal to the Privy Council is the value of the entire property or the value of the share claimed. (Vol 22) 1935 Pat 266 (267).

(m) Question whether accession to mortgaged property within the meaning of S. 70, T. P. Act, means accession by mortgagor or his representative or anyone whatsoever. (Vol 23) 1936 Rang 65 (66) : 14 Rang 86.

110. In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or *Value of subject-matter.* value of the subject-matter of the suit in the Court of first instance¹⁶ must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal¹⁷ to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,⁸

and where the decree or final order appealed from affirms¹ the decision of the Court immediately below⁹ the Court passing such decree or final order, the appeal must involve¹⁰ some substantial question of law.¹⁵

[1882—S. 596; 1877—S. 596; See O. 45, Rr. 3, 4 and 5.]

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Questions held not sufficient to justify grant of certificate. — [14] (a) No legal principle involved — Concurrent findings of fact by lower Courts — Leave to appeal should not be granted. (Vol 28) 1941 P C 106 (109) (PC).

(b) Question whether omission to implead one plaintiff is fatal to appeal. (Vol 6) 1919 All 104 (104).

(c) Question as to sufficiency of evidence. (Vol 6) 1919 All 97 (98).

(d) Question whether interpretation of decree given by Court previously operates as *res judicata*. (1910) 8 Ind Cas 485 (485) (All).

(e) Right of party to open windows in loft or gallery in house. (Vol 16) 1929 Bom 341 (343) : 53 Bom 552.

(f) Where the question is merely a matter of practice, such as an order for inspection of document. (1872) 9 Bom H C R 398 (401, 402).

(g) Whether a valid acknowledgment was given for the purposes of Art. 1 of Sch. I, Stamp Act. (Vol 11) 1924 Mad 616 (617).

(h) Question whether decision of Inam Commissioner or surveyor is binding on owners of estates. (Vol 10) 1923 Mad 125 (126).

(i) Decision relating to interpretation of Ss. 14 (4) (a) and 15, U. P. Encumbered Estates Act, and involving question whether in case of decretal debts law of "damdupat" was to be applied by Special Judge to future interest decreed by regular Court. (Vol 32) 1945 Oudh 241 (241, 242) : 20 Luck 259.

(j) Interpretation of Ss. 76 (h) and 77, T. P. Act. (Vol 31) 1944 Oudh 238 (239).

(k) Question of law that appellate Court under O. 44, R. 2, Civil P. C., had no power after directing enquiry into applicant's pauperism by Subordinate Judge to reject his finding. (Vol 29) 1942 Oudh 423 (423).

(l) Order reversing decision of lower Court refusing to set aside dismissal for default. (Vol 1) 1914 Oudh 223 (225).

(m) Decision on construction of a Tenancy Act incidentally affecting rights of holders of tenures. (Vol 8) 1921 Pat 33 (34) : 6 Pat L Jour 125.

(n) Question as to maintainability of suit to set aside decree obtained by perjured evidence. (Vol 7) 1920 Pat 119 (120, 121).

(o) Whether suit to set aside decree obtained by fraud was brought by person who was not party to suit. (1912) 5 Bur L Tim 13.

[15] Decision of a case likely to result in precedent governing numerous cases — It is fit case for appeal to Privy Council. (1913) 15 Bom L R 1021 (1033) (Vol 10) 1923 Cal 451 (453) (Vol 10) 1923 Mad 125 (126) (Vol 30) 1943 Nag 76 (77) : I L R (1943) Nag 580 (Vol 11) 1924 Oudh 81 (83) (Vol 23) 1936 Rang 65 (65, 66) : 14 Rang 86.

[16] No question of general principle involved — Certificate should not be granted unless justified by exceptional circumstances. (Vol 16) 1929 Oudh 243 (244) (1939) 181 Ind Cas 947 (948) (F C) (Leave to appeal

from decision of Federal Court — Special circumstances must be shown—Special circumstances will depend upon facts of each case.)

[17] Two inter-connected appeals — Leave to appeal to Privy Council granted in one—Leave should also be granted in another because the position of the party is likely to be imperilled if no such leave were granted to him. (Vol 33) 1946 All 184 (187, 189) (1910) 5 Ind Cas 583 (583, 584) (All) (Vol 6) 1919 Cal 118 (119, 120).

[18] Orders suspending advocates from practice — Practice of Allahabad High Court is to grant leave to appeal. (Vol 24) 1937 All 167 (168) : 38 Cri L Jour 410 (Vol 21) 1934 All 898 (901) : 56 All 702 (Vol 20) 1933 All 225 (226) : 55 All 246.

[19] Section 109 (c) is not applicable to any matter of criminal jurisdiction. (Vol 18) 1931 Sind 120 (120) (Order directing prosecution for criminal offence is more of criminal nature than of civil.)

[20] Order by High Court against order of District Judge in insolvency proceedings — Appeal to Privy Council—Leave for—Case must fall under S. 109 (a) — Section 109 (c) cannot apply. (Vol 31) 1944 Sind 220 (221, 222) : I L R (1944) Kar 216.

7. Original side orders of High Court.—[1] High Court refusing to issue writ of certiorari to the Board of Revenue against enhancement of rent under Ch. 11, Madras Estates Land Act — High Court's order comes under S. 109 (b) and permission could be granted. (Vol 25) 1938 Mad 722 (722, 723) : I L R (1938) Mad 816.

SECTION 110 — SYNOPSIS

1. Affirmance — Meaning of.
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10. "Involve".
11. Leave to appeal to Privy Council in forma pauperis—See Notes on O. 44, R. 1.
12. Leave to appeal under Cl. 39, Letters Patent — See Notes on Cl. 39, Letters Patent (Cal).
13. Mesne profits, interest and costs after date of suit.
14. Several appeals from single decree.
15. Substantial question of law.
16. Valuation of subject-matter in Court of first instance.
17. Valuation of subject-matter in dispute on appeal.

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1. Affirmance — Meaning of. — [1] The question whether the judgment of the High Court is a judgment of affirmance or not does not depend upon whether the appellant is the plaintiff or the defendant; it depends upon whether the judgment of the Court is one affirming the judgment of the lower Court. It is immaterial whether the effect of the modification is in favour of the appellant or adds to his detriment. (Vol 20) 1933 Pat 262 (262).

[2] The "affirmance of a decision" means the affirmance of the decree and not necessarily of the judgment; judgment means the statement of the grounds on which the decision is based. Appellate decree is a decree of affirmance though based on grounds different from those adopted by the lower Court. (1903) 25 All 109 (114) : 30 Ind App 35 (PC.) * (Vol 20) 1933 Lah 690 (691) : 14 Lah 609 * (Vol 81) 1944 Mad 269 (270, 271) : I L R (1944) Mad 890. (Fresh right given by new Act — Trial Court and High Court differing whether petitioner is entitled to benefits of Act but High Court dismissing appeal.) * (Vol 14) 1927 Oudh 535 (535) * (Vol 12) 1925 Oudh 219 (220) * (Vol 20) 1933 Pat 703 (704) (SB) * (Vol 11) 1924 Pat 463 (470). (Notwithstanding absence of concurrent findings of fact, decree may be affirming.) * (Vol 10) 1923 Rang 55 (56) : 11 Low Bur 410.

[3] Any variation in decree is not enough to take it out of S. 110, last para — "Decree" and "decision" in S. 110 used in connection with the High Court and lower Court respectively do not mean the same thing — Decree of High Court held one of affirmance of lower Court. (Vol 30) 1943 Mad 67 (68).

[4] The words "affirms the decision of the Court immediately below" relate of the subject-matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs. (1907) 10 Oudh Cas 65 (68) * (Vol 30) 1943 All 353 (360) : I L R (1943) All 840. (Variation in matters of costs only is not decree of variance.) * (Vol 9) 1922 Cal 316 (316, 317) * (Vol 29) 1942 Mad 368 (369) * (Vol 21) 1934 Oudh 433 (434) * (Vol 16) 1929 Oudh 43 (44) * (Vol 20) 1933 Pat 703 (704) (S.B.) * (Vol 30) 1943 Pesh 81 (81).

[5] A decree of the High Court dismissing an appeal for default is a decree affirming the decision of the Court below. (Vol 2) 1915 All 827 (827).

[6] Order of dismissal of appeal for non-prosecution affirms decision of Court below. (Vol 29) 1942 Oudh 362 (365) * (1898) 20 All 367 (369) * (Vol 13) 1926 Rang 111 (112) : 3 Rang 656.

[7] A decree of the High Court dismissing an appeal on account of insufficiency of court-fee is one affirming the decree of the first Court. (Vol 6) 1919 Lah 65 (65) : 1 Lah 220.

[8] Order dismissing appeal for appellant's failure to furnish security for costs amounts to affirming decision of Court below. (Vol 19) 1932 All 312 (314) : 54 All 890 (*Obiter*) * (Vol 1) 1914 All 54 (54) : 36 All 325.

[9] High Court's decree reversing lower Court's decision in part and maintaining it with regard to remainder of claim — High Court's decree cannot be said to affirm lower Court's decision — Appeal to His Majesty is competent even on points of concurrence between lower and appellate Court without showing substantial question of law. (Vol 28) 1941 Pat 269 (276) : 20 Pat 459 (S.B.) (Vol 23) 1936 Pat 553 : 15 Pat 637, overruled. * (Vol 35) 1946 All 262 (263, 266) * (Vol 10) 1923 Cal 215 (216). (Decree affirming decree of the Court below with variation is not a decree of affirmance.) * (Vol 6) 1919 Cal 118 (119, 120) * (Vol 3) 1916 Mad 670 (670) * (Vol 16) 1922 Pat 561 (564) : 9 Pat 558. (Part of decree affirmed and part varied — Appeal is not limited to part varied.) * (Vol 30) 1943 Pesh 45 (46).

[10] Decree or order partly maintaining lower Court's decision and partly reversing it — Appeal to His Majesty in Council confined only to part of decree or order which has been affirmed — Decree or order is one of affirmance. (Vol 31) 1944 Lah 458 (460) : I L R (1945) Lah 242 (FB) * (Vol 5) 1918 All 245 (246). (Leave cannot be granted in respect of part affirmed if no question of law is involved.) * (Vol 16) 1929 Bom 359 (360) * (Vol 22) 1935 Cal 146 (146) : 62 Cal 257. (Appellate Court modifying original decree upon single point in appellant's favour — He has no right to appeal on other points.) * (Vol 24) 1937 Lah 761 (764). (Leave cannot be granted to agitate the confirmed portion of the decree.) * (Vol 2) 1915 Lah 113 (114) : 1915 Pun Re No. 22 * (Vol 23) 1936 Mad 881 (883) : I L R (1937) Mad 121. (Appellate Court reversing decree upon single point — Reversal in appellant's favour — He cannot, because of the reversal, have right to appeal on points on which lower Courts have concurred — What is to be regarded is not decision as whole but decision as it affects subject matter in dispute.) * (Vol 16) 1929 Mad 827 (827) * (Vol 13) 1926 Nag 245 (245).

[11] Suit for possession decreed subject to a grant of maintenance of Rs. 800 a year to defendant — On appeal High Court increasing amount to 1200 a year — Leave should be granted even if no substantial question of law is involved. (Vol 12) 1925 P C 60 (60) : 51 Cal 969 : 51 Ind App 319 (P O).

[12] High Court modifying trial Court's decree in appellant's favour — Appellant can challenge High Court's decision by appeal to Privy Council where the amount involved is Rs. 10,000 or upwards. (Vol 28) 1941 All 66 (67, 88) : I L R (1941) All 180 (F B). ((Vol 26) 1939 All 723, overruled.)

[13] High Court varying decree in plaintiff's favour — Decree is not one of affirmance and plaintiff is entitled to appeal as of right even if no substantial question of law is involved. (Vol 25) 1938 Lah 836 (837, 838).

[14] Lower Court's decree affirmed but modified with one variation by the consent of the appellants — Latter appealing to Privy Council must show that substantial question of law is involved. (Vol 8) 1921 Cal 81 (82, 83).

[15] Partition suit — Lower Court granting certain share — High Court on appeal increasing it — No further grievance left in that matter — Substantial question of law must be shown before the points on which both Courts have been in agreement can be disputed. (Vol 14) 1927 Cal 543 (544, 545).

[16] A decree of High Court affirming a decree for redemption passed by a lower Court but fixing a later date for redemption and allowing the interest at bond rate to run from the expiry of the date fixed by lower Court till the date fixed by the High Court, does not make the decision one of reversal. (Vol 15) 1928 Pat 190 (191) * (Vol 14) 1927 Pat 379 (381). (Mortgage decree — Period of grace extended — Order is not of reversal.)

[17] Alteration incidental or unsubstantial — Decree is one of affirmance. (Vol 16) 1929 Pat 561 (564) : 9 Pat 558.

[18] Several decisions in respect of several subject-matters — Decree embodying those decisions should not be regarded as one and entire. (Vol 25) 1938 Mad 631 (633).

[19] Modification of lower Court's decree by High Court of pecuniary nature in appellant's favour — It is variation of lower Court's decree — But appellant cannot make that ground for appeal to Privy Council on grounds unconnected or dissociable from those in which Courts were of one mind. (Vol 19) 1932 Nag 118 (119) : 28 Nag L R 142.

[20] High Court affirming lower Court's decree excepting a slight modification as to rate of interest in favour of applicant — Decree is one of affirmance and

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applicant is not entitled for leave to appeal. (Vol 9) 1922 All 89 (89, 90) : 44 All 200 * (Vol 29) 1942 Oudh 478 (479) : 18 Luck 457.

[21] Suit on mortgage deed — Claim decreed but interest after institution of suit disallowed — Appeal by mortgagor — Cross-appeal against disallowed interest by mortgagee — Decree as to interest modified in favour of mortgagee — Decree is not affirmed. (Vol 16) 1929 Pat 561 (563) : 9 Pat 558.

[22] In the following cases the decree has been held to be one of affirmance: (Vol 26) 1939 All 723 (724). (High Court increasing amount granted by lower Court under Land Acquisition Act.) * (Vol 9) 1922 All 243 (244). (Modification in favour of applicant — Other portions concurrent.) * (Vol 3) 1916 Cal 973 (973) : 43 Cal 90. (Decree of lower appellate Court set aside by single Judge of High Court — Reversal of his judgment by High Court under Cl. 15 of Charter, has effect of affirming decision of lower appellate Court.) * (Vol 31) 1944 Lah 329 (335) : 1 L R (1945) Lah 156 (F B). (Suit under S. 92, Civil P. C. — High Court in second appeal upholding concurrent findings of lower Courts as to nature of trust — Variation of lower Court's decision being merely due to voluntary relinquishment of relief sought for before and granted by lower Court — High Court's decree held one of affirmance and not of variation.) * (Vol 24) 1937 Lah 712 (714) : 1 L R (1937) Lah 268. (Appellate decree modifying lower Court's decree only on single point not disputed in either Court — Point decided completely in favour of applicant) * (Vol 17) 1930 Lah 102 (103) : 10 Lah 688. (Decree based on award not in conformity with award technically as part unenforceable due to lapse of time being omitted — On appeal decree made in conformity with award by modifying decree of trial Court — No substantial alteration — No question of law — Decree is one of affirmance.) * (Vol 16) 1929 Nag 85 (87). (Trifling account adjustments made — Judgment agreeing with findings of the Court below.) * (Vol 31) 1944 Oudh 295 (295) : 20 Luck 256. (Appeal and cross-objections — Appeal dismissed, cross-objections allowed and lower Court's decree modified by High Court.) * (Vol 27) 1940 Oudh 397 (399). (High Court going into evidence regarding possession and concurring with trial Court and rejecting appeal — Order held order of affirmance.) * (Vol 23) 1936 Pat 553 (554, 555) : 15 Pat 637. (Suit for possession — Trial Court holding that plaintiff was entitled to recover possession and defendant's payment of certain sum was forfeited — High Court, on appeal, affirmed judgment as regards main question but reversed it as regards sum.) * (Vol 9) 1922 Pat 555 (556). (Lower Court finding no necessity for whole alienation — High Court finding no necessity only for portion — Decree varied — Decree is one of affirmance.)

[23] In the following cases the decree has been held to be not one of affirmance: (Vol 19) 1932 All 65 (67) : 54 All 146 (S B). (Cross-objection of small value filed in appeal valued at over Rs. 10,000 allowed, but appeal dismissed — Decree drawn up varying decree of Court below does not affirm decree and appellant has right of appeal under S. 110.) * (Vol 8) 1921 All 270 (271) : 43 All 220. (High Court's decree confirming finding as to defendant's liability but slightly altering amount due.) * (Vol 22) 1935 Cal 250 (251). (High Court decree modifying lower Court decree thereby reducing liability of appellant under decree.) * (Vol 24) 1937 Mad 964 (965). (In suit for possession and accounts, trial Court decreeing plaintiff's claim to one fourth share and ordering partial account — High Court dismissing plaintiff's claim with regard to one-fourth share and so not de-

ciding defendants' liability to account — Judgment of High Court held one of reversal on question of accounts.) * (Vol 19) 1932 Mad 46 (48). (Decree for payment of certain amount after taking accounts is one and not series of decrees — High Court's decree not entirely affirming the decision of the Court below — Decree is not one of affirmance.) * (1911) 9 Ind Cas 1040 (1040) (Oudh). (Decree varied only in one particular.) * (Vol 22) 1935 Oudh 489 (490) : 11 Luck 320. (Decision of trial Court relating to question of adoption and also value of movables — On appeal decision relating to adoption against defendant upheld but value regarding movables modified.) * (Vol 15) 1928 Pat 609 (611). (On main question Court affirming decree of trial Court but setting aside finding as to undue influence and on question of deed being illusory.)

2. Applicability, object and scope.—[1] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see section 7 (b).

[2] The object of the section is not to encourage appeals to Privy Council where value of subject-matter is small. (1901) 23 All 227 (231, 232) : 28 Ind App 11 (P C).

[See also (Vol 17) 1930 All 87 (37, 38) : 31 Cri. L. Jour 301. (Object of S. 110 is to offer protection to public.)]

[3] The terms of the section should be strictly construed. No real mischief can arise from not allowing a very wide construction of the section inasmuch as cases not coming within the section, if worthy of being tried by a higher tribunal, can always be dealt with under S. 109 (c). (Vol 12) 1925 P C 159 (160) : 52 Cal 650 : 52 Ind App 207 (P C) * (Vol 19) 1932 Mad 46 (52). (High Court is bound by plain words of S. 110.) * (Vol 25) 1938 Rang 415 (416). (Value of subject-matter not upwards of Rs. 10,000 but shown to be about Rs. 9750—Questions of law involved—Leave under Section 109 (c) should be granted.)

[4] Judgment of reversal—Appealability depends on its being decree or final order and the value being Rs. 10,000 or upwards. (Vol 29) 1942 Cal 537 (537) * (1902) 24 All 174 (177) : 29 Ind App 40 (P C).

[5] The word "and" in the first paragraph of section 110 cannot be read as "or". (1902) 24 All 174 (177) : 29 Ind App 40 (P C).

[6] Loss or detriment suffered by applicant by decree which cannot be estimated in money or by pecuniary standard—S. 110 does not apply. (Vol 22) 1935 Rang 113 (114) : 13 Rang 123.

[7] That large stakes are involved in appeal is not by itself ground for granting leave. (Vol 29) 1942 Mad 368 (369).

[8] Order in the insolvency—Appeal to Privy Council lies if conditions prescribed in that behalf under the Civil P. C. are satisfied. (Vol 21) 1934 Rang 292 (293) : 12 Rand 355.

[9] S. 66A of the Income Tax Act excludes from right of appeal cases which fall within requirements of S. 110. (Vol 16) 1929 Nag 336 (337).

[10] Ss. 5 and 12 of the Limitation Act do not apply to applications under this section. (1906) 28 All 391 (392).

3. Concurrent findings of fact.—[1] Privy Council will not interfere with concurrent judgments of the Courts below on matters of fact unless there has been miscarriage of justice or violation of principles of law or procedure. (1901) 28 Cal 1 (4) : 27 Ind App 166 (P C) * (Vol 18) 1931 P C 68 (69) (P C) * (1901) 25 Bom 332 (336) (P C). (No appeal lies when there are concurrent findings upon questions of fact and when upon such findings no question of law arises.) * (1903) 30 Cal 303

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(808, 809) : 80 Ind App 41 (PC). (The rule is none the less applicable though the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence—Subordinate Judge relying on oral testimony whilst High Court relying on documentary evidence.)*(1891) 18 Cal 28 (30) : 17 Ind App 122 (P C).

[2] Leave to appeal—Concurrent finding, but for different reasons—Leave will not be granted. (Vol 14) 1927 Mad 448 (444).

[3] The principle underlying S. 110 is that when two Courts have concurred on a finding of fact that finding cannot again be attacked. (Vol 19) 1932 Lah 121 (122): 13 Lah 388.

4. Consent decree.—See Note 2 on S. 96.

5. Consolidation of appeals. — See notes on O. 45, R. 4.

6. Cross-appeals.—[1] Two cross appeals filed in High Court separately disposed of—Plaintiff's appeal dismissed—Defendant's appeal allowed—Merely by fact of allowing cross appeal by defendant, decision in plaintiff's appeal which is dismissed does not cease to be one of affirmance. (Vol 22) 1935 All 374 (377) : 57 All 873 (F B)* (Vol 5) 1918 All 245 (246)* (Vol 24) 1937 Lah 916 (917). (That a composite decree is prepared in both appeals does not make any difference)* (Vol 28) 1941 Mad 227 (228). ((Vol 18) 1926 Mad 1024 followed.)* (Vol 25) 1938 Mad 598 (599).

[2] Plaintiff suing trustee for general account—Plaint alleging eight specific charges of malversation—These charges forming subject-matter of trial in lower Court—Lower Court deciding some charges in favour of, while others against, trustee — Trustee appealing and plaintiff filing cross-objections — High Court holding that no liability for general accounts lay and dismissing whole suit—Appeal and cross-objections cannot be treated as independent appeals, for charges of malversation were not independent but particulars of claim for general account and High Court's decree cannot be split up so as to say that one part was affirming while other reversing judgment. (Vol 16) 1929 Mad 429 (431) : 52 Mad 521.

[3] Mortgagee succeeding in his mortgage suit except on question of interest—Both mortgagor and mortgagee appealing to High Court—Mortgagor's appeal dismissed and that of mortgagee accepted—Mortgagor applying for leave under S. 109—Held that as the decree was varied not on his but mortgagee's appeal, leave could not be granted unless a substantial question of law was shown to be involved. (Vol 17) 1930 Lah 554 (555, 556): 11 Lah 465.

[4] Suit on mortgage-deed—Claim decreed but interest after institution of suit disallowed — Appeal by mortgagor — Cross-appeal by mortgagee against disallowance of interest—Decree as to interest modified in favour of mortgagee—Decree is not affirmed. (Vol 16) 1929 Pat 561 (563) : 9 Pat 558.

[5] Where High Court while decreeing plaintiff's claim for royalty gave an adverse decision as to his title to lands, and defendants preferred an appeal to Privy Council on the ground of valuation, plaintiff was allowed to prefer a cross-appeal as there were important questions of law. (1935) 62 Cal 992 (997).

7. Date of valuation. — [1] Material date for determining amount or value of subject-matter in trial Court is date of institution. (Vol 18) 1931 P C 125 (126, 127) (PC) *(Vol 28) 1936 Lah 31 (32) *(Vol 24) 1937 Pesh 61 (62) *(Vol 21) 1934 Rang 65 (65) : 12 Rang 164 *(Vol 10) 1923 Rang 71 (72) : 11 Low Bur Rul 335.

[2] Material date for determination of value of subject-matter in dispute on appeal to Privy Council is value at date of decree and not at institution of suit.

(Vol 4) 1917 Cal 496 (496, 497) : 44 Cal 119 *(Vol 7) 1920 Bom 418 (419) : 44 Bom 104 *(Vol 19) 1932 Lah 526 (527) *(Vol 16) 1929 Nag 75 (76, 77) *(1921) 60 Ind Cas 523 (524) (Pat).

8. "Decree or final order must involve like amount or value."—[1] Two sets of conditions in two paragraphs of S. 110 are alternative and mutually exclusive — Condition in paragraph 2 is independent and self-sufficient and is not dependent on fulfilment of both or either of conditions in paragraph 1 — Right of appeal exists even on fulfilment of condition in paragraph 2 only. (Vol 24) 1937 All 169 170 (171) : I L R (1937) All 405.

[But see (Vol 10) 1923 Rang 71 (72, 73) : 11 Low Bur Rul 335. (Para 2 is alternative to the second restriction in the first para of the section. To read it otherwise is to render the provision as to the value of the subject-matter in the Court of first instance a dead letter.)]

[2] Though value of property actually involved in litigation was less than Rs. 10,000, decision of High Court held affected interest of person in his entire property worth more than Rs. 10,000—Such person aggrieved by High Court decision held entitled to certificate under second clause of Section 110. (Vol 26) 1939 Mad 742 (743) : I L R (1939) Mad 838.

[3] Decree for ejectment after removing structure — Suit valued at Rs. 330—If loss to defendant on account of decree is Rs. 10,000 or upwards, he is entitled to appeal under S. 110 (2). (Vol 32) 1945 Bom 113 (114, 116) : I L R (1945) Bom 268.

[4] Words "some claim or question to or respecting property" in S. 110 (2) mean claim or question to or respecting property additional to or other than actual subject-matter in appeal. (Vol 24) 1937 Bom 326 (329): I L R (1937) Bom 402 *(Vol 20) 1933 All 177 (177) : 54 All 858. (Overruled in (Vol 31) 1944 P C 65 : 71 Ind App 142 : I L R (1944) Bom 745 : I L R (1944) Kar P C 235 (P C) on another point)* (Vol 16) 1929 Nag 75 (77) *(Vol 8) 1921 Low Bur 48 (48) : 11 Low Bur Rul 152. (Para. 2 deals with property outside the subject-matter in dispute).

[5] A suit is not said to involve claim indirectly simply because similar questions may arise in other estates or in connection with other like things in the same province. If the decision of an issue in a particular case makes the decision of the same issue in other case *res judicata* or some such similar connection can be shown then alone the value of other disputed matters may be taken into account. (Vol 16) 1929 Mad 780 (780) *(Vol 5) 1918 Mad 1178 (1179).

[6] Not clear on the record whether judgment will govern other similar deeds like the one in suit—Property covered by the other deeds is not part of the subject-matter. (Vol 10) 1923 Cal 451 (452).

[7] Suit relating to land valued at Rs. 1000 — Other lands having same history and exceeding Rs. 10,000 in value likely to be affected by decision — No right of appeal under para 2. (Vol 2) 1915 All 446 (446).

[8] Execution—Sum in dispute realised in execution Rs. 1,300 — Further applications time-barred — Leave cannot be granted though the sum yet to be realised was Rs. 10,000. (Vol 9) 1922 Pat 611 (613).

[9] Decision on question of impartibility raised as bar to suit for partition is one which affects whole estate notwithstanding that the judgment could take effect as *res judicata* between parties to litigation. (Vol 22) 1935 Pat 266 (267).

[10] Value of subject-matter in dispute in appeal admittedly below Rs. 10,000 — Value more than Rs. 10,000 if another pending appeal by party affected by decree is taken into consideration — Decision in appeal for which leave is sought, not having

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any effect on other appeal either by way of *res judicata* or in any other way—Order passed in appeal cannot be held, directly or indirectly, to involve claim or question to or respecting property involved in other appeal. (Vol 24) 1937 Lah 95 (96).

[11] Claim on legacy — Decision as to, from what source it should be paid—No right of appeal on ground that decision may affect other legatees whose claims may exceed Rs. 10,000. (Vol 5) 1918 Mad 1178 (1178, 1179).

[12] Under S. 110 (2), Civil P. C., the question directly or indirectly involved must be one between the parties to the suit in which the appeal is taken. (1918) 1913 Pun L R No. 340 : 1913 Pun Re No. 90 * (1902) 24 All 236 (238).

[13] Words "must involve directly or indirectly some claim or question to or respecting property of Rs. 10,000 or upwards in value" refer to suits in existence and not to prospective suits. (Vol 20) 1933 All 8 (10) : 54 All 431 * (Vol 9) 1922 Mad 34 (34).

[14] A claim or question which is not essential or relevant for the decision or is too remote or is in *græno futuri* and may never materialize cannot be said to be involved directly or indirectly in the decree or order. (Vol 30) 1943 Oudh 266 (268) * (Vol 16) 1929 Nag 85 (86) (Claim in suit for less than Rs. 10,000 — Findings on questions relating to other property valued at more than Rs. 10,000 recorded but not necessary for decision of suit — Subject matter of suit is not more than 10,000). * (Vol 23) 1936 Oudh 181 (182):12 Luck 27. (No appeal to Privy Council lies in respect of property for which no claim has ever been made). * (Vol 13) 1926 Rang 123 (123). (Words "directly or indirectly" do not cover distinct claim to which irrelevant reference is made in the plaint).

[15] Claims indirectly connected with subject matter of main suit — Adding claims to make up prescribed valuation — Indirect relation must not be too remote — Phrase "directly or indirectly" refers to existing suits — Indirect relation must be decided from actual circumstances — Possible further suits may be considered if *res judicata* affects them. (Vol 23) 1936 Lah 31 (33).

[16] Leave to appeal — Decree for small property — Merely incidental finding as to large property cannot make decree involve indirectly question regarding large property. (Vol 10) 1923 Mad 125 (126, 127, 128).

[17] Case involving nothing beyond the subject-matter of suit — 2nd para of S. 110 does not apply. Both conditions mentioned in para 1 should be satisfied. (Vol 8) 1921 Pat 229 (231) : 6 Pat L Jour 596.

[18] Paragraph 2 means that the suit must, to satisfy the conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and onwards and not that the rights affect properties whose value is Rs. 10,000 and upwards. (Vol 29) 1942 Oudh 174 (176)* (Vol 5) 1918 Mad 632 (633). ("Property" means rights in property inferior to full ownership where such inferior rights alone are subject-matter in dispute.)* (Vol 28) 1941 Oudh 407 (408, 409) : 16 Luck 737.

[See also (Vol 15) 1928 Pat 191 (192) (Dispute between riparian owners as to right to water.)]

[19] The second clause of S. 110 might apply if the matter in dispute is incapable of valuation as in the case of easements. In such a case the value of the matter in suit to the applicant should be considered. (Vol 13) 1926 Rang 138 (139) : 4 Rang 92 (Right to float logs in stream.)

[20] Easement — Value less than Rs. 10,000 — Property affected more than Rs. 10,000 in value — No right of appeal to Privy Council exists. (Vol 8) 1921 Bom 266 (267) * (Vol 16) 1929 Bom 341 (342) : 53

Bom 552. (Value of easement and not of whole property is to be taken.)

[21] Applicant in appeal from order in insolvency must suffer a loss of Rs. 10,000 or upwards — Value of whole property involved is immaterial. (Vol 21) 1934 Rang 292 (294) : 12 Rang 355.

[22] Certain suits for declaration of ownership were tried together and were valued in all above Rs. 10,000. They being dismissed, an appeal was filed to the High Court in respect of one suit in which the claim was above Rs. 5,000. On the appeal being allowed, defendant applied for leave to appeal to Privy Council as a claim or question to property above Rs. 10,000 was involved. Leave was not granted as the value of the defendant's interest was less than Rs. 10,000. (Vol 2) 1915 All 486 (488).

[23] To determine the value prescribed by S. 110 of the Civil P. C. the decree has to be looked at, as it affects the interests of the parties prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000 then the matter in dispute in appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respecting property of the prescribed value. (Vol 6) 1919 Pat 305 (307) : 4 Pat L Jour 415.

[24] Right of way declared over land worth Rs. 1,500 forming part of land worth Rs. 10,000 — Decision does not affect property worth Rs. 10,000. (Vol 15) 1928 Mad 785 (785).

[25] Where subject-matter of dispute is merely nature of tenancy, value of which is only Rs. 4,000, no right of appeal to Privy Council lies although tenancy affects property worth more than Rs. 10,000. (Vol 17) 1930 Bom 509 (511)* (Vol 10) 1923 Lah 286 (287). (Suit for ejectment — Question in dispute was whether defendant was permanent tenant or tenant at will — No claim to buildings erected on the site by defendant — Value of buildings not to be taken into account.)

[26] Suit for declaration that certain property could not be attached and sold in execution of certificate as same belonged to plaintiff — Suit valued at Rs. 7699 for which certificate was issued — Suit decreed by trial Court but dismissed on appeal by High Court — Appeal also valued at Rs. 7699 — Property in respect of which certificate was issued worth more than Rs. 10,000 — Case held fully covered by S. 110 (2). (Vol:28) 1941 Pat 288 (288).

[27] Suit for partition of property worth more than Rs. 10,000 — Decree of High Court declaring plaintiff's share to be of value less than Rs. 10,000 — Leave by Defendant to appeal to Privy Council challenging decree — Case does not come under cl. (2). (Vol 25) 1938 Mad 666 (667) : 1 L R (1938) Mad 923.

[28] Trial Court gave a decree for partition — High Court reversed the decree and dismissed the suit — Value of the property to be partitioned over Rs. 10,000 — Held value of the subject-matter of the suit is the value of the whole of the estate which it sought to partition, and not merely of the particular share which one of the parties may claim — Leave for appeal to Privy Council can be granted. (1906) 3 Cal L Jour 257 (259).

[29] Partition suit — Decree affecting plaintiff's share and also that of some of the defendants whose interests will be finally determined by appeal — Value is of the whole property. (Vol 8) 1921 Pat 502 (504).

[30] Partition suit — Value of share of plaintiff — Subject-matter less than Rs. 10,000 — Decree in favour of plaintiff and defendant brother — Appeal to High Court by other defendants — Decree reversed — Application by both for leave to appeal to Privy Council — Leave held could be granted as decree of High Court involved question respecting property of value of Rs. 10,000 or

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upwards taking into consideration shares of both. (Vol 24) 1937 Bom 181 (182) : I L R (1937) Bom 705.

[31] Execution of decree in suit of value of rupees one lakh — Applicants disputing liability to 4/6ths of item of Rs. 11,709 — Permission cannot be granted. (Vol 2) 1915 Lah 150 (151).

[32] Applicant filing affidavit that decree or order involved claim respecting property exceeding Rs. 10,000 — No counter-affidavit filed — Certificate should be granted. (Vol 13) 1926 Lah 416 (416).

[33] The following are illustrative cases where leave was granted as involving some claim or question respecting property of the value of Rs. 10,000 or upwards: (1913) 35 All 445 (447, 448). (Question as to the validity of an award affecting property exceeding Rs. 10,000 raised.) * (Vol 10) 1923 Bom 176 (176) (Order indirectly involving claim over Rs. 10,000.) * (Vol 10) 1923 Bom 59 (59, 60). (Document dealing with property valued over Rs. 10,000 declared void.) * (1910) 14 Cal W N 651 (652, 653). (Suit by co-sharer zamindar for recovery of his share of rent.) * (Vol 20) 1933 Ondh 397 (398). (Value of subject-matter of suit in trial Court over Rs. 10,000 — But value of subject-matter in dispute in appeal less than Rs. 10,000 but affecting property of greater value — High Court reversing lower Court's decision — *Held* certificate should be granted.)

9. "Immediately below." — [1] Judge sitting singly on *appellate side* of High Court is not Court immediately below the Letters Patent Bench hearing appeal from his decision. (Vol 31) 1944 Lah 458 (461, 462, 463) : I L R (1945) Lah 242 (F B) ((Vol 19) 1932 Lah 121 : 13 Lah 338, overruled.)

[2] Judge sitting singly on *original side* of High Court is Court immediately below the Court hearing appeal from his decision. (Vol 31) 1944 Lah 458 (461, 463) : I L R (1945) Lah 242 (F B) * (Vol 15) 1928 Lah 597 (538).

[3] A reversal by the High Court in a Letters Patent appeal of the judgment of a single Judge of the High Court, setting aside the decree of a lower appellate Court has the effect of affirming the decision of the latter Court, *i. e.*, the Court immediately below within the meaning of S. 110. (Vol 3) 1916 Cal 973 (973) : 43 Cal 90.

10. "Involve." — [1] A question of law is not deemed to be involved in an appeal under S. 110, if it need not be decided for the disposal of appeal or if such question may arise in certain contingencies. The word "involved" in S. 110 implies a considerable degree of necessity. (Vol 3) 1916 Ondh 286 (286, 287) : 19 Ondh Cas 131.

[2] Decision incidental to final conclusion is not directly "involved." (Vol 4) 1917 Lah 381 (382).

[3] In the face of concurrent findings of fact, leave to appeal to the King in Council can only be given if a substantial question of law is "involved." A question of law is not involved if it would arise only if the Privy Council reversed those findings. (1914) 7 Law Bur Rul 103 (105) * (1894) 16 All 274 (275, 276) (P C).

11. Leave to appeal to Privy Council in *forma pauperis* — See Notes on O. 44 R. 1.

12. Leave to appeal under Cl 39, Letters Patent. — See Notes on Clause 39, Letters Patent (Cal).

13. Mesne profits, interest and costs after date of suit — [1] Neither interest nor mesne profits after the date of suit can be taken into account in ascertaining the value of the subject-matter of suit under S. 110. (Vol 17) 1930 P C 44 (44) : 57 Ind App 56 : 53 Mad 167 (P C) * (Vol 7) 1920 All 202 (203) : 42 All 445 * (Vol 16) 1929 Nag 75 (78) * (Vol 28) 1941 Pat

255 (258, 259) : 20 Pat 481 (FB) * (Vol 29) 1942 Pesh 6 (7) * (Vol 20) 1933 Mad 401 (401, 402, 403) : 56 Mad 886. (Difference between plaintiff's and defendant's appeal pointed out.)

In view of the Privy Council decision in (Vol 27) 1930 P C 44 : 57 Ind App 56 : 53 Mad 167 (P C), the following cases holding that interest or mesne profits subsequent to the date of suit can be included for ascertaining the value of the subject-matter under S. 100 are not good law. *Interest* :— (Vol 20) 1933 Nag 22 (23) : 28 Nag L R 345 * (Vol 10) 1923 All 78 (79) : 45 All 133 * (Vol 10) 1923 Mad 135 (136) * (Vol 10) 1923 Nag 239 (240) * (Vol 13) 1926 Rang 45 (46) : 3 Rang 405 * *Mesne profits* :— (Vol 8) 1921 Pat 115 (116, 118) : 6 Pat L Jour 246. * (Vol 16) 1929 Pat 547 (547). * (Vol 5) 1918 Pat 377 (377) : 3 Pat L Jour 377 * (1928) 107 Ind Cas 828 (829) (Pat) * (1910) 14 Cal W N 872 (873, 874).

[2] For the purpose of ascertaining the value of the subject-matter of suit under S. 110, interest after decree cannot be considered. (1902) 24 All 174 (177) : 29 Ind App 40 (P C) * (Vol 5) 1918 Mad 1178 (1179) * (Vol 8) 1921 Pat 229 (230) : 6 Pat L Jour 596 * (Vol 5) 1918 Pat 566 (567, 568) : 3 Pat L Jour 317.

[3] Value of subject-matter in trial Court less than Rs. 10,000—Mesne profits accruing till date of certificate for leave to appeal cannot be added to original value for purpose of obtaining certificate. (Vol 24) 1937 All 169 (170) : I L R (1937) All 405.

[4] Difference between amount claimed and amount decreed less than Rs. 10,000—Costs of proceedings cannot be added to make up deficiency. (Vol 29) 1942 Pesh 6 (7) * (Vol 20) 1933 Nag. 22 (23) : 28 Nag. L R 345. (Costs of original suit cannot be considered — (*Semble*) * (Vol 14) 1927 Pat 328 (329) : 6 Pat 444.

14. Several appeals from single decree. — [1] Suit by reversioners in respect of separate properties against different alienees decreed — Separate appeals by defendants—Single decree in all appeals—Leave to appeal to Privy Council separately—Leave can be granted only in cases in which subject-matter would be over Rs. 10,000. (Vol 6) 1919 Mad 275 (275) : 42 Mad 228 * (Vol 3) 1916 Mad 943 (944).

[But see (Vol 23) 1936 All 832 (833) : I L R (1937) All 105. (Two separate appeals filed in High Court from same suit by different sets of defendants— Appeals disposed of by practically one judgment and on ground common to all defendants — One appeal valued above Rs. 10,000 and other below Rs. 10,000 — High Court can certify that latter case is fit one for appeal to Privy Council—O. 45, R. 4 does not apply.)]

15. Substantial question of law. — [1] Where the decree or final order appealed from is one of affirmation, there must exist a substantial question of law in addition to the requirements as to value mentioned in the first and second paragraphs of the section. (Vol 25) 1938 P C 165 (166) : 65 Ind App 182 : I L R (1938) All 601 : 32 Sind L R 531 (P C) * (1912) 34 All 455 (463) : 39 Ind App 156 (P C) * (1901) 23 All 415 (419) : 28 Ind App 182 (P C) * (1901) 23 All 227 (231) : 28 Ind App 11 (P C) * (Vol 27) 1940 Ondh 397 (399, 400.) (Decree of affirmation— Question of court-fee introduced to obtain leave—Leave not granted.)

[2] In order to entitle the appellant to appeal, there must be not merely a question of law but a *substantial* question of law. (1928) 106 Ind Cas 362 (363) (Pat) * (Vol 16) 1929 Bom 341 (343) : 53 Bom 552.

[3] The point of law for granting leave for appeal to Privy Council must be a question of law and not merely

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a proposition of law. (Vol 13) 1926 Oudh 381 (383) : 29 Oudh Cas 215 : 1 Luck 265 (FB).

[4] Question of law before Privy Council and not that before Court of first instance should be considered. (Vol 29 1942 Oudh 362 (366)* (1912) 23 Mad L Jour 219 (220, 221)

[5] Where a point of law has been virtually decided by the Privy Council, and then there have been recent and long standing definite views of the High Courts a question cannot be said to be substantial. (Vol 30) 1943 Mad 581 (583)* (Vol 16) 1929 All 339 (340, 341)* (Vol 24) 1937 Lah 758 (758, 759)* (Vol 30) 1943 Mad 67 (69)* (Vol 13) 1926 Oudh 381 (383) : 29 Oudh Cas 215 : 1 Luck 265 (FB)* (Vol 2) 1915 Oudh 153 (159)* (Vol 30) 1943 Pesh 81 (81, 82)* (Vol 18) 1931 Rang 283 (284, 285) : 9 Rang 360.

[But see (Vol 16) 1929 Rang 280 (281, 282) : 7 Rang 271. (Whether High Courts in India have rightly decided an important legal point held to be substantial question of law)]

[6] The application of well defined legal principles to a particular set of facts is not a substantial question of law. (Vol 15) 1928 All 61 (62) : 50 All 208* (Vol 18) 1931 Lah 753 (754) : 13 Lah 251* (Vol 5) 1918 Mad 632 (634)* (Vol 25) 1938 Nag 482 (484, 485) : 1 I L R (1940) Nag 29.

[7] The question of law involved must be a substantial one about which there may be a difference of opinion. (Vol 8) 1921 All 214 (214):43 All 513*(Vol 19) 1932 Lah 56 (56)* (Vol 16) 1929 Lah 55 (56):9 Lah 581*(Vol 13) 1926 Nag 215 (216)* (Vol 13) 1926 Nag 5 (6)* (1913) 18 Ind Cas 327 (328) (Oudh)* (Vol 23) 1936 Pesh 200 (202).

[8] Point not directly decided by previous cases but well established upon principles laid down by those cases is not a substantial question of law. (Vol 15) 1928 Pat 581 (582).

[9] Question should be such as is debatable in view of authorities or that authorities may require reconsideration. (Vol 20) 1933 Pat 703 (705, 706) (S B)* (Vol 12) 1925 Oudh 545 (545).

[10] A Full Bench ruling of a High Court specific on the point—View obviously correct—Point is not substantial point of law. (Vol 14) 1927 Oudh 43 (44).

[11] When the question involved was the subject of a decision by a Full Bench of the High Court, it is not correct to say that because the question of law which it is proposed to raise arose out of the provisions of a certain Act and the provisions clearly support the view taken by the High Court that it should be held that no substantial question of law is involved. (Vol 30) 1943 Oudh 262 (263).

[12] Where both the Judges of the High Court affirm the judgment of the Court below on merit though there is a difference of opinion between them on a certain question having only an academic interest no leave to appeal to His Majesty can be granted. (1938) 178 Ind Cas 203 (203, 204) (Pat).

[13] The proposition that, although the point of law may be obviously untenable that point, if the decision in the case turns upon it would be a substantial point of law is not tenable. (Vol 15) 1928 Mad 233 (233).

[14] Words 'substantial question of law' mean substantial question of law as between the parties in the case involved and not merely a question of general importance. (Vol 15) 1928 P O 172 (173) : 55 Ind App 235 : 55 Cal 944 (PC)* (Vol 14) 1927 PC 110 (110): 2 Luck 93: 54 Ind App 126 (PC) (Following cases must be deemed to be overruled by this decision: 11 Cal WN 218: 10 Oudh Cas 318: 34 Ind App 142 : 29 All 708 (PC); (Vol 9) 1922 Oudh 214: 3 Oudh W N 841; (Vol 13) 1926 Oudh 381: 29 Oudh Cas 215: 1 Luck 265 (FB); (Vol 11) 1924 All 559: 46 All 227 and (Vol 7) 1920 All 161)* (Vol 29) 1942 Mad 368 (369).

(Words 'substantial question, must be understood in their being of substance to parties—Important documents held inadmissible and their admissibility affecting result of appeal—Question is substantial one)* (Vol 20) 1933 Mad 221 (222)* (Vol 16) 1929 Nag 85 (87). (Findings on question of law quite immaterial to decision of suit—No point of law for decision of suit itself—No appeal lies)* (Vol 15) 1928 Nag 114 (115)* (Vol 15) 1928 Nag 76 (77): 23 Nag L R 156.

[15] Only question of fact and not of law involved—Fact that creditor's appeal is admitted does not confer upon debtor petitioner right which he does not otherwise possess. (Vol 31) 1944 Mad 269 (271): 1 I L R (1944) Mad 890.

[16] Party transferring his interest in subject-matter of suit to third person—Leave should not be granted unless substantial question of law is involved. (Vol 13) 1926 Rang 111 (112): 3 Rang 656.

The following have been held to be substantial questions of law :

[17] Partition suit—Valuation for purpose of appeal to Privy Council—Question whether valuation of entire property or only of the share claimed by plaintiff should be taken into consideration (Vol 22) 1935 Pat 266 (267).

[18] Whether a document was validly presented for registration. (1913) 18 Ind Cas 126 (126, 127) (All).

[See (Vol 6) 1919 All 34 (35) : 42 All 176. (Question whether fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage).]

[19] Decree transferred for execution—Application for substitution made to second Court—Whether application is according to law is a substantial question of law. (Vol 12) 1925 Oudh 728 (729).

[20] Account settled—Sufficiency of mistake to re-open is substantial question of law. (Vol 14) 1927 Pat 311 (311).

[21] Forfeiture on alienation of *Karamkari* and *Adimayovana tenure*. (Vol 10) 1923 Mad 443 (444).

[22] Question whether law of pre-emption applies. (Vol 15) 1928 Rang 132 (134) : 6 Rang 169.

[23] Interval of a minute between the time when pre-emptor heard of the sale and the time he made the demand—Whether it was immediate demand is substantial question of law. (Vol 15) 1928 Rang 132 (133, 134) : 6 Rang 169.

[24] Important documents held inadmissible and their inadmissibility affecting result of appeal—Question is substantial one. (Vol 29) 1942 Mad 368 (369).

[25] Question relating to the method of arriving at the value of bungalows for land acquisition is such question. (Vol 26) 1939 All 723 (724). (Overruled on another point in (Vol 28) 1941 All 66: 1 I L R (1941) All 180 (F B).)

[26] Parties agreeing to abide by statement of referee—Question as to nature of proceeding whether it is an arbitration or compromise (Vol 20) 1933 All 177 (177) : 54 All 858. (Overruled in (Vol 31) 1944 P C 65 : 1 I L R (1944) Bom 745 : 1 I L R (1944) Kar P C 235 : 71 Ind App 142 (P C). on another point)

[27] Whether prior mortgagee in possession can apply under O 21, R. 89 to set aside sale and whether T. P. Act, S. 72 (d) applies to such sale are substantial questions of law. (Vol 13) 1926 Oudh 17 (17).

[28] Interpretation of Proviso 2 to S. 4 (2), Income-tax Act (Vol 25) 1938 Mad 352 (352) (S B).

[29] Exercise of reasonable discretion under S. 21 (g), Specific Relief Act. (Vol 15) 1928 Nag 292 (293).

[30] The extent to which a mortgage without necessity by a manager of a Hindu family is binding. (1913) 18 Ind Cas 305 (306) (All).

[31] Question as to starting point of limitation. (Vol 30) 1943 Mad 67 (69).

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[32] The applicability of Limitation Act to suits. (Vol 5) 1918 Pat 686 (667).

[33] Whether High Court has power to grant leave to appeal to Privy Council in *forma pauperis* and to dispense with security for costs. (1894) 21 Cal 523 (525).

[34] Interpretation of a document may amount to substantial question of law. (Vol 12) 1925 Oudh 219 (220) * (Vol 20) 1933 All 561 (561). (Yes—Interpretations of document arising between parties.) * (1912) 14 Ind Cas 269 (269) (Ali) (Yes—Question whether document creates sale or mortgage) * (Vol 14) 1927 Mad 443 (444). (Yes—Construction of difficult document.) * (Vol 16) 1929 Pat 561 (565) : 9 Pat 558. (Yes—Question depending on construction) * (Vol 4) 1917 All 93 (93). (No.) * (Vol 1) 1914 All 54 (54) : 36 All 325. (No—Order for security for costs) * (Vol 4) 1917 Lah 381 (382). (No—Decision involving incidentally a question of interpretation of document) * (Vol 25) 1938 Mad 631 (632). (No—Question turning upon construction of inam papers) * (Vol 13) 1926 Nag 245 (245, 246) (No.) * (Vol 9) 1922 Oudh 214 (216). (No.)

The following questions were held to be not substantial questions of law.—

[35] Whether discretion has been properly exercised. (Vol 29) 1942 Oudh 362 (366) * (Vol 9) 1922 Bom 11 (12) * (Vol 8) 1921 Cal 94 (95). (Dismissal of an appeal on the ground of laches and certain irregularities in filing the appeal.) * (Vol 6) 1919 Lah 65 (65). (Refusal to grant time for payment of deficient court-fee.) * (Vol 15) 1928 Lah 560 (561). (Do.) * (1921) 63 Ind Cas 222 (222) (Lah). (Do.) * (Vol 2) 1915 Lah 113 (114, 115) : 1915 Pun Be No. 22. (Discretion to award interest.) * (Vol 29) 1942 Oudh 478 (480) : 18 Luck 457. (Whether interest under S. 27, U. P. Encumbered Estates Act, should be awarded at maximum rate of $4\frac{1}{2}$ per cent.) * (Vol 8) 1921 Oudh 30 (31). (Discretion under S. 90, Evidence Act.)

[36] Question of limitation or of adverse possession on which all the Judges are agreed held not to be a substantial question of law. (Vol 29) 1942 Cal 498 (505) (SB).

[37] Whenever the decision of a certain fact is based to some extent on inferences from other facts it cannot be said that a substantial question of law is involved. (Vol 15) 1928 Nag 76 (78) : 23 Nag L R 156.

[38] Administration suit — Non-joinder of all creditors. (Vol 24) 1937 Lah 761 (763).

[39] Decision that execution of new decree is not barred by S. 48, Civil P. C., even more than twelve years after original decree in view of Ss. 5 and 3, U. P. Agriculturists' Relief Act. (Vol 32) 1945 Oudh 285 (287).

[40] Construction of decree and jurisdiction of Court to pass it held not substantial questions of law. (Vol 30) 1943 All 358 (360) : I L R (1943) All 840.

[41] Question of constructive *res judicata*. (1935) 61 Cal L Jour 69 (74).

[42] Whether family was joint or separate. (Vol 31) 1944 Oudh 295 (295) : 20 Luck 256.

[43] Buddhist Law (Burmese) — Law as to rights of lesser or inferior wife living apart from her husband. (Vol 13) 1926 Rang 111 (112) : 3 Rang 656.

[44] Question that order of sale officer cannot be questioned by Civil Court in execution. (Vol 21) 1934 Oudh 291 (292).

[45] Question whether certain document executed by Hindu widow is binding on the estate. (Vol 15) 1928 All 19 (20).

[46] Question of procedure disallowing new plea in second appeal. (Vol 10) 1923 All 463 (464).

[47] Court relying on presumptions under S. 114, Evidence Act, holding debt as existing and adjudging

debtor as insolvent. (Vol 26) 1939 Cal 35 (37) : I L R (1938) 1 Cal 13.

[48] Whether widow became full proprietor of yeoman tenancy land or whether it was to be considered mere accretion to her husband's estate. (Vol 20) 1933 Lah 1044 (1045).

[49] Object of appeal to challenge act of Executive Government of U. P. in taking estate of applicants under management and superintendence of Court of Wards—Matter in dispute settled by U. P. Court of Wards Act. (Vol 24) 1937 Oudh 132 (133) : 12 Luck 15.

[50] Question whether party has succeeded in proving family custom. (Vol 26) 1939 Oudh 60 (60).

[51] Whether evidence as to custom of adoption is sufficient. (Vol 18) 1926 Nag 215 (215, 216).

[52] Revival after 1871 of claim to Malikhana barred by limitation as being an interest in land before 1871. (Vol 11) 1924 Pat 271 (271).

[53] Legatees attesting the will—Question as to their intention. (Vol 12) 1925 Oudh 541 (541).

[54] Rejection of an application under O. 41 R. 27. (1894) 21 Cal 484 (487).

[55] Misconstruction of portion of evidence. (Vol 3) 1916 Mad 1222 (1223).

[56] Admission of further evidence on a point given up. (Vol 11) 1924 Pat 463 (470).

[57] Whether certain words in Urdu have effect of divorce. (Vol 19) 1932 Oudh 134 (134).

[58] Plaintiff changing allegations — High Court finding them true and decreeing suit — Held there was no substantial question of law. (Vol 22) 1935 Lah 91 (91).

[59] Question whether a suit was not maintainable, because a previous action commenced by the predecessor-in-interest of the plaintiff had abated under O. 22 R. 9. (Vol 11) 1924 All 66 (67) : 45 All 667.

[60] View based on language of section and taken in several cases. (Vol 25) 1938 Mad 631 (632).

[61] Consent decree for money creating charge on immovable property — Execution by appointment of receiver—Appeal from order appointing receiver dismissed with additional direction to receiver—Substantial question of law held not involved. (Vol 18) 1931 Cal 174 (175).

[62] Leave to appeal asked for raising for first time question not raised in trial Court or High Court—Leave cannot be granted. (Vol 27) 1940 Mad 810 (811) * (Vol 7) 1920 All 241 (241).

16. Valuation of subject-matter in Court of first instance. — [1] In order that an appeal may lie under the first paragraph the value of the subject-matter of the suit in the Court of first instance should be ten thousand rupees or upwards. (Vol 29) 1942 Oudh 174 (176) * (Vol 3) 1916 Mad 985 (989) : 39 Mad 843.

[2] Cause of action different against different defendants — Appeal against one — Valuation is to be made in the relief claimed against him. (Vol 10) 1923 Mad 30 (30).

[3] The value of the subject-matter of the suit must be the value at the date of institution of suit and not a future increase or decrease thereof. (Vol 3) 1916 Mad 985 (987) : 39 Mad 843 * (Vol 18) 1931 Cal 417 (419) : 38 Cal 66. (Subject-matter of suit cannot be treated as of different value for purposes of trial or Appellate Court and Privy Council.) * (Vol 6) 1919 Pat 486 (486). (Increase in value during pendency in suit.)

[See also Notes 7 and 13.]

[4] In estimating the value of subject-matter only lands which existed at the date of suit should be considered and not lands which may be formed in the course

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of future years by alluvion. (1910) 5 Ind Cas 645 (645, 646) (Cal).

[5] New machinery brought on property during pendency of suit for specific performance — No mention of it in pleadings, evidence or argument — Its value cannot be taken into account. (Vol 16) 1929 Nag 75 (79).

[6] Land under cultivation subject-matter of valuation — Value of house sites in its vicinity should not be considered. (Vol 15) 1928 Mad 448 (449).

[7] Market value is to be taken and not valuation under Suits Valuation Act. (Vol 11) 1924 Lah 82 (82) : 4 Lah 185 * (Vol 9) 1922 Lah 131 (132) : 2 Lah 297. (Value for jurisdiction is not always value of subject-matter.) * (Vol 5) 1918 Mad 1099 (1100). (Suit for cancellation of sale-deed — Market value of property sold should be taken.)

[8] Multiples prescribed by U. P. Encumbered Estates Act cannot be made basis of calculating values of property. (Vol 26) 1939 Oudh 1 (1).

[9] Suit for redemption and possession — Value of mortgaged property is the value of subject-matter of suit. (Vol 14) 1927 Rang 304 (306) : 5 Rang 499.

[10] In a suit for foreclosure where the mortgagor is not personally made liable, the value of the subject-matter in dispute is the amount claimed, when such amount falls short of the value of the property, while it is the value of the mortgaged property when the amount due under mortgage exceeds the value of the property. (1911) 13 Cal L Jour 505 (506).

[11] Mortgage suit for more than Rs. 10,000 — Property sought to be excluded from mortgage security worth less than Rs. 10,000 — Appeal against order excluding such property — Value for appeal is value of the whole claim. (Vol 14) 1927 Pat 391 (391, 392).

[12] Sale in execution of mortgage-decree for over Rs. 10,000 — Application by puisne mortgagee of certain items worth Rs. 4000 to set aside sale — Value of subject-matter is Rs. 4000. (Vol 6) 1919 Pat 305 (307) : 4 Pat L Jour 415.

[13] Mortgage suit impleading third party claiming paramount title — Leave to appeal by third party — Mortgage amount over Rs. 10,000 — Leave granted on the basis of mortgage amount is invalid — Property claimed by the third party is the subject-matter. (Vol 8) 1916 P C 18 (19, 20) : 38 All 488 : 43 Ind App 187 (P C).

[14] Suit for specific performance of contract to sell property worth over Rs. 10,000 — Subject-matter of suit is property worth over Rs. 10,000. (*Obiter.*) (Vol 19) 1932 Bom 543 (544) : 56 Bom 526.

[15] Suit mainly for specific performance of contract — Relief for possession only ancillary — Possession need not be separately valued. (Vol 16) 1929 Nag 75 (79).

[16] Contract of sale — Consideration or price payable under contract is its value. (Vol 16) 1929 Nag 75 (79).

[17] Partition suit — Value of share claimed and not of whole property is to be considered: (Vol 31) 1944 P C 65 (66) : 71 Ind App 142 : I L R (1944) Bom 745 : I L R (1944) Kar PC 235 (PC) (10 CWN 564 and (Vol 20) 1933 All 177 : 54 All 858 impliedly overruled.) * (Vol 12) 1925 Bom 137 (138) : 49 Bom 149 (Principle applies to partnership suit.) * (Vol 7) 1920 Bom 418 (419) : 44 Bom 104 (Suit for partition.) * (1904) 6 Bom L R 403 (406).

[18] Annuity is to be valued at amount claimed, not property charged. (Vol 10) 1923 P C 102 (102) : 26 Oudh Cas 216 (P C).

[19] Where the proceedings such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties,

the sum of money actually at stake may not represent the true value. The value of the subject-matter of the suit claiming a rent of Rs. 1500 per year is more than Rs. 10,000, (Vol 9) 1922 P C 257 (258) : 45 Mad 475 : 49 Ind App 211 (P C).

[20] Subject-matter in a suit to recover enhanced rent of occupancy holding is not the holding but only the plaintiff's claim to enhanced rent. (Vol 12) 1925 Cal 414 (415).

[21] Ejectment suit by landlord — Subject-matter is capitalised value of the monthly rental. (Vol 10) 1923 Bom 28 (28).

[22] Maintenance decreed to widow — She declared entitled also to occupy portion of certain premises, value of that portion being over Rs. 10,000 — In case there was necessity to sell those premises, she being declared entitled to Rs. 400 per month — On getting offer for premises, widow asked to vacate — Widow refusing contending that there was no necessity — High Court holding that there was necessity — Case fell within both Paras. 1 and 2, S. 110 — High Court's order held final within S. 110. (Vol 19) 1932 Bom 543 (544) : 56 Bom 526.

[23] An applicant for leave to appeal is not bound by the fiscal standards under the Court-fees and Suits Valuation Acts by which he valued his suit but is entitled to show the actual or market value of the claim made. (1878-74) 1 Ind App 317 (320) (P C) * (Vol 20) 1933 All 15 (16) : 54 All 941 * (Vol 24) 1937 Bom 326 (328, 329) : I L R (1937) Bom 402 * (Vol 24) 1937 Cal 292 (296) * (Vol 14) 1927 Cal 225 (226) * (Vol 5) 1918 Mad 1099 (1100).

[24] Valuation under S. 110 is real or market value and where under Court-fees Act or otherwise, plaint or memorandum of appeal is not to be valued according to real or market value, doctrine of approbate and reprobate has no application. (Vol 18) 1931 Cal 417 (419) : 38 Cal 66.

[25] Party taking advantage of other party's valuation cannot object to it. (Vol 14) 1927 Mad 862 (862) * (Vol 19) 1932 Mad 125 (127) : 55 Mad 106.

[26] Under-valuation in lower Courts — Plaintiff cannot be allowed to show real valuation for purposes of leave to appeal to Privy Council. (Vol 10) 1923 Mad 125 (129) * (Vol 26) 1939 All 695 (695, 696) * (Vol 18) 1931 Cal 417 (419) : 38 Cal 66 (Valuation in lower Court effects as estoppel.) * (Vol 17) 1930 Cal 737 (738). (Plaintiff knowingly undervaluing claim.) * (Vol 12) 1925 Mad 1223 (1224).

[But see (Vol 14) 1927 Mad 862 (862).]

[27] A valuation of the property by the plaintiff which is admitted or not objected to by the defendant cannot be questioned by the defendant subsequently for the purpose of securing or opposing an appeal to Privy Council. (Vol 10) 1923 Oudh 93 (96, 97) : 26 Oudh Cas 24 * (Vol 14) 1927 Cal 418 (419). (Case cannot be referred for report under O. 45, R. 5 at defendants' instance.) * (Vol 28) 1941 Pat 269 (271) : 20 Pat 459 (SB).

[28] Where a plaintiff having discretion to value his claim in alternate ways chooses to value his claim in a particular way, he is not entitled to set up subsequently that his valuation given in the plaint is not real, for the purpose of obtaining leave to appeal to Privy Council. (Vol 21) 1934 Cal 809 (810).

[29] Claim for damages valued at Rs. 6000 and for mandatory injunction at Rs. 100 — Contract relations between parties affecting much larger amount — Value of subject-matter of suit exceeded the claim and applicant held could show that value exceeded Rs. 10,000 — Leave held should also be granted under S. 109 (c). (Vol 31) 1944 Sind 190 (192) : I L R (1944) Kar 163.

[30] Plaintiff valuing suit at Rs. 9000 — Defendant's plea that its value is more negatively by Court which found the value was only Rs. 9000 — In view of that

111. Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty Bar of certain appeals. in Council —

(a) from the decree or order of one Judge of a High Court ^a[constituted by His Majesty by Letters Patent], or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies.

[1882—S. 597.]

[a] Substituted by A. O. for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915".

Section 110 (contd.)

finding by Court, it is not open to either party in appeal to go behind that finding. (1931) 133 Ind Cas 415 (416) (All).

[31] Valuation of trial Court neither challenged by appeal nor by cross-objections is binding. (Vol 13) 1926 Rang 138 (139) : 4 Rang 92.

[32] Suit for accounts valued at Rs. 101 instituted in a Court whose pecuniary limit was Rs. 5000—Plaintiff cannot show that value of subject-matter was beyond pecuniary limits i.e. Rs. 5000 for purpose of appealing to Privy Council. (1913) 15 Bom L R 1021 (1027, 1032).

[33] Suit for damages for breach of contract—Counter claim by defendant—Objection as to maintainability overruled in trial Court and not taken in High Court—Appeal allowed and counter-claim dismissed—Appeal to Privy Council by defendant—Plaintiff cannot be allowed to contend that the counter-claim should not be taken into account in determining the appealable value. (Vol 4) 1917 P C 66 (68) (P C).

[34] Value—Suit for declaration of one-anna share—Relief valued at Rs. 3000—Suit dismissed—First appellate Court holding value of suit to be Rs. 24000 under S. 21, Bengal, N. W. P. and Assam Civil Courts Act, and returning memo of appeal as appeal lay to High Court—Appeal allowed by High Court—Defendants applying for leave to appeal to His Majesty in Council—Leave cannot be granted as value of subject-matter is less than Rs. 10,000 whatever the value of suit under S. 21, Bengal, N. W. P. and Assam Civil Courts Act (12 [XII] of 1887). (Vol 3) 1916 Pat 157 (158).

17. Valuation of subject-matter in dispute on appeal.—[1] Subject-matter of suit or appeal is not necessarily identical with subject-matter in dispute between parties. (Vol 20) 1933 All 4 (6, 7) : 54 All 459.

[2] Suit property worth less than Rs. 10,000—Decree for mesne profits of suit property obtained in separate suit—Decretal amount sought to be added to increase value in appeal—Amount held could not be so added not being within cl. (2), S. 110. (Vol 23) 1936 Lah 31 (32).

[3] Valuation of subject-matter and not decree amount due on date of application has to be looked to. (Vol 5) 1918 Mad 1178 (1178). (Interest accruing after decree cannot be taken into account.) * (Vol 7) 1920 All 202 (203): 42 All 445. (Subsequent interest not to be added.) * (Vol 29) 1942 Mad 535 (536, 538): ILR (1942) Mad 618. (Subsequent interest cannot be added.) * (Vol 21) 1934 Rang 65 (66) : 13 Rang 164.

[4] The part decreed by the High Court could not be included for purposes of valuation by plaintiff. (Vol 7) 1920 All 22 (22).

[5] Property sold for less than Rs. 5,000—Pre-emptor depositing price and accepted by sale officer—Order set aside by Sub-Judge and High Court—Appeal in High Court valued at less than Rs. 10,000—Decree held did not involve property worth Rs. 10,000. (Vol 21) 1934 Oudh 291 (292).

[6] Mortgage suit—Appeal by co-sharer in equity of redemption—Value is the entire claim of mortgagee together with interest. (Vol 10) 1923 Cal 387 (388, 389).

[7] Application for leave to appeal to Privy Council from decision of High Court on effect of Proviso 2 to S. 4 (2), Income-tax Act—Assessee as planter carrying on large business in Mysore State—Actual amount of tax involved in appeal Rs. 3500—Still leave held should be granted. (Vol 25) 1938 Mad 352 (353).

[8] Suit to enforce mortgages impleading third party claiming paramount title to a portion of property—Decree for Rs. 38,000—Leave to appeal by third party whose share in hypotheca was below Rs. 10,000—*Held* leave cannot be granted. (Vol 3) 1916 P C 18 (19, 20) : 38 All 488 : 43 Ind App 187 (P C).

[9] Usufructuary mortgage—Suit for redemption and for recovery of surplus profits—Decree for redemption and for Rs. 7000 as surplus profits—Appeal by mortgagee claiming Rs. 2000 due to himself—Appeal does not involve subject-matter worth Rs. 10,000 and hence leave cannot be granted. (Vol 9) 1922 Oudh 214 (215).

[10] Suit to enforce mortgage decree by trial Court—In appeal High Court upholding validity of mortgage but reducing rate of interest thereby reducing decretal amount by less than Rs. 10,000—Question of validity of mortgage held could not be raised for purposes of leave to appeal—Leave held could not be granted as amount reduced not being of the prescribed value. (Vol 26) 1939 All 322 (323) : I L R (1939) All 443.

[11] Where a plaintiff's claim for mesne profits was decreed by the trial Court but dismissed by the High Court on appeal and the plaintiff wished to appeal to the Privy Council, it was held that in calculating the value of the appeal to the Privy Council, the plaintiff was entitled to include mesne profits up to the date of the High Court's decree. (1881) 3 All 633 (635) (F D) * (Vol 5) 1918 Pat 377 (377).

Section 111—Note 1.

[1] Section 111 applies to all Chartered High Courts whether established before or after the Civil P. C. (Vol 29) 1942 Lah 169 (170) : I L R (1942) Lah 592 (F B) * (Vol 4) 1917 Lah 448 (448). (S. 111 applies to a single Judge of a High Court established under the Charter Act, 1861.)

[2] Section 111 prohibits an appeal to the Privy Council from decree of a Single Judge of a High Court and to this extent overrides Cl. 39 of the Letters Patent by virtue of Cl. 44 thereof. (Vol 11) 1924 Mad 399 (399) : 46 Mad 958 * (Vol 18) 1931 Bom 503 (505) (Order of Single Judge in revisional jurisdiction.) * (Vol 15) 1928 Cal 640 (642) : 56 Cal 512 (F B) * (Vol 29) 1942 Lah 169 (170) : I L R (1942) Lah 592 (F B) (No appeal lies to Privy Council either under Civil P. C. or Letters Patent from decree of Single Judge of Lahore High Court. There is no conflict between Cl. 29 of Lahore Letters Patent and S. 111.) * (Vol 23) 1936 Pat 106 (107) (Decision of single

111A. [Appeals to Federal Court]. *Repealed by the Federal Court Act, 1941 (XXI of 1941), S. 2.*

Savings. **112.** (1) Nothing contained in this Code shall be deemed —

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

[1882—S. 616: 1877—S. 616; See O. 45.]

Section 111 (*contd.*)

Judge Leave to appeal to Division Bench refused—Appeal to Privy Council is prohibited.)

[3] Chief Court of Oudh is High Court within meaning of S. 109 (b), though not under S. 111. (Vol 19) 1932 Oudh 163 (163, 164).

[4] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see section 7 (b). As to the meaning of 'decree or order', see section 109.

Section 111A—Note 1.

[1] Section 111A has been omitted by the Federal Court Act, 1941 (21[XXI] of 1941). Act 21 [XXI] of 1941 came into force on 1st September 1942. The omitted S. 111A ran as follows:—

“Where a certificate has been given under S. 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court:

Provided that—

(a) so much of the said sections as delimits the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided;

(b) in determining under clause (c) of S. 109 whether the case is a fit one for appeal, and, under S. 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any Order in Council made thereunder, shall be left out of account.”

The object of repealing S. 111A was to empower the Federal Court itself to make rules for regulating the presentation of appeals lying to that Court. Such Rules have been made; see the Federal Court Rules, 1942.

[2] The following cases were decided under S. 111A before its repeal:

Object of Section 111A is to bring Civil P. C. into line with S. 205, Government of India Act—Provisos to S. 111A make it clear that nothing in the Code shall be read as affecting right given to party to appeal to Federal Court under sub-s. (1) of S. 205 when High Court has passed final judgment, decree or order and has certified that a substantial question of law as to interpretation of Government of India Act is involved. (Vol 27) 1940 Mad 890 (891): I L R (1941) Mad 43* (Vol 29) 1942 Mad 70 (72). (Certificate under S. 205, Government of India Act, given—No further certificate is necessary—Person aggrieved can go to Federal Court provided he deposits fund for printing record and transmitting it to Federal Court.)

Section 112—Note 1.

[1] Privy Council cannot be asked at the appellant's option to function as concurrent Court of first appeal. (Vol 26) 1939 P C 122 (127): I L R (1939) Kar P C 234: 14 Luck 252: 66 Ind App 160 (P C).

[2] Special leave granted—Objection about value being less than Rs. 10,000, or case not otherwise fit cannot be taken. (Vol 30) 1943 P C 142 (144): 70 Ind App 171: I L R (1944) Kar P C 77: I L R (1943) All 727 (P C).

[3] Judicial Committee will not entertain an application for leave to appeal against dismissal of Munsiff for corruption. (1869) 13 Moo Ind App 343 (345) (P C).

[4] When High Court refuses leave to appeal to Privy Council, special leave for appeal by the Privy Council will not be given unless substantial question of law of general importance is involved. (1902) 24 All 174 (177): 29 Ind App 40 (P C).

[5] Special leave will be refused where the refusal of the High Court to grant leave is not shown to be wrong. (1891) 15 Bom 155 (158): 18 Ind App 6 (P C).

[6] Special leave to appeal to the Privy Council was granted to decide the question whether, zillah Judge, under the Indian Registration Act, 1872, could review his own order refusing to register a document. (1873-74) 1 Ind App 72 (74, 75) (P C).

[7] Notwithstanding the proviso to R. 7 of O. 45 Privy Council Rules (1920), R. 9 prevails under S. 112 and the High Court has jurisdiction not only to extend the time for making the deposit and for furnishing the security but also to change the form of the security in a fit case for good cause (Vol 18) 1931 Bom 278 (280). (Appellant minor and property of guardian under attachment—Costs under O. 45, R. 7 (b) agreed to be paid—High Court changed form of security.)*(Vol 29) 1942 Lah 279 (279, 280): I L R (1942) Lah 548. (Privy Council Rules (1920), R. 9 prevails over O. 45, R. 7 and High Court can extend period for deposit beyond six weeks from grant of certificate.)*(Vol 14) 1927 Bom 217 (219): 51 Bom 430 (F B) (Do).

[8] Provisions of Civil P. C. do not apply to Privy Council appeals—Decree passed by Privy Council against respondent in ignorance of death of one of them is not nullity though his legal representative was not brought on record. (Vol 24) 1937 Bom 433 (442).

[9] Special leave to appeal granted on *ex parte* application—Board is not precluded from going into question of competency of appeal on facts being known. (Vol 18) 1931 P C 22 (22): 57 Ind App 279: 10 Pat 86 (P C).

[10] Privy Council does not interfere in concurrent findings of fact in the Courts below. (Vol 12) 1925 P C 174 (174) (P C)* (Vol 12) 1925 P C 122 (123) (P C).

[11] Certificate for leave to appeal granted—Subsequent compromise—High Court cannot pass decree in terms of compromise. (Vol 20) 1933 Bom 244 (244): 57 Bom 369.

PART VIII.

REFERENCE, REVIEW AND REVISION

113. Subject to such conditions and limitations as may be prescribed, any Court may state a *Reference to High Court*. case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

[1882—S. 617; 1877—S. 617; 1861—S. 28; See O. 46.]

Review. **114.** Subject as aforesaid, any person considering himself aggrieved —

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

[1882—S. 623; 1877—S. 623; 1859—S. 376. See O. 47.]

115. The High Court may call for the record¹⁵ of any case which has been decided⁴ by any *Revision*. Court subordinate²⁸ to such High Court and in which no appeal lies thereto,¹² and if such Subordinate Court appears—

- (a) to have exercised a jurisdiction not vested in it by law,⁹ or
 - (b) to have failed to exercise a jurisdiction so vested,¹⁰ or
 - (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
- the High Court may make such order in the case as it thinks fit.¹⁶

[1882—S. 622; 1877—S. 622; 1861—S. 35. See also S. 224 of the Government of India Act of 1935.]

Section 112 (*contd.*)

[12] Proceedings for contempt of Court — Appeal to Privy Council does not lie. (Vol 22) 1935 All 811 (813): 57 All 910.

[13] Refusal of High Court to punish party for contempt of Court — Provisions of S. 109 do not apply as jurisdiction of a criminal nature was only exercised. (Vol 28) 1941 All 211 (212) : I L R (1941) All 364.

[14] Committal for finding of contempt for breach of injunction is not criminal in its nature—Leave to appeal under S. 109 granted to party inhibited by injunction is quite valid. (Vol 25) 1938 P C 295 (298) : 17 Pat 770 : I L R (1939) Kar P C 42 (P C).

[15] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see S. 7 (b).

Section 113 — Note 1.

[1] "Subject to such conditions and limitations" — See Order 46.

Section 114 — Note 1.

[1] As to the procedure, see Order 47.

SECTION 115 — SYNOPSIS.

1. Appeal treated as an application.
2. Applicability and scope.
3. Application in revision treated as appeal.
4. "Case which has been decided."
5. Decision as to court-fee.
6. Error of law or fact.
7. Error of procedure.
8. Exercise of jurisdiction illegally or with material irregularity.
9. "Exercised a jurisdiction not vested in it by law."
10. "Failed to exercise a jurisdiction so vested."
11. Interlocutory orders.
12. "In which no appeal lies thereto."
13. Jurisdiction.
14. Laches in making the application.

15. "May call for the record."

16. "May make such order in the case as it thinks fit."

17. Nature of order made in revision against a decree.

18. Orders in claim cases.

19. Orders setting aside or refusing to set aside sales.

20. Orders under Section 73.

21. Orders under Sections 152 and 153.

22. Orders under Order 33.

23. Orders under Order 45.

24. Other remedy open.

25. Review and appeal.

26. Revision in cases of discretionary and final orders.

27. Revisional powers under other Acts.

28. Subordinate Court.

29. Wrong decision of lower appellate Court as to the jurisdiction of the trial Court.

1. Appeal treated as an application. — [1]

Where no appeal lies the Court may treat an appeal as a petition for revision, where the conditions of S. 115 are satisfied. (Vol 29) 1942 All 85 (87) : I L R (1941) All 807 & (Vol 29) 1942 Lah 275 (277) : I L R (1943) Lah 17 (F B) & (Vol 28) 1941 Cal 53 (59) : I L R (1940) 2 Cal 334 & (Vol 28) 1941 Mad 73 (73) & (Vol 28) 1941 Pat 43 (44) : 19 Pat 935 & (Vol 27) 1940 All 387 (388) : I L R (1940) All 499 & (Vol 27) 1940 Bom 239 (240) : I L R (1940) Bom 353 & (Vol 27) 1940 Oudh 367 (368) : 16 Luck 65 & (Vol 27) 1940 Oudh 421 (422) : 15 Luck 730 & (Vol 12) 1925 Sind 253 (254) : 18 Sind L R 130 & (Vol 31) 1944 Pat 54 (56) : 23 Pat 61 (F B) & (Vol 39) 1946 Cal 63 (64) & (Vol 31) 1944 Bom 239 (242) : I L R (1944) Bom 405 & (Vol 20) 1933 Cal 496 (497) & (Vol 20) 1933 Pesh 46 (46) & (1904) 26 All 358 (361) & (1911) 38 Cal 421 (424) & (Vol 3) 1916 Mad 376 (378) : 39 Mad 593. (Even if presented out of time.) & (Vol 13) 1926 Rang 205 (206) : 4 Rang 221 & (Vol 22) 1935 Mad 842 (847) : 58 Mad 972 (F B) & (Vol 25) 1938 Nag 122 (126) : I L R (1938) Nag 106 (F B).

Section 115 (*contd.*)

[2] Appeal cannot be converted into revision long after the expiry of limitation for a revision. (Vol 13) 1926 Nag 65 (65).

[3] No second appeal lies for setting aside a sale which has been confirmed — Nor can such appeal be treated as revision though lower Court wrongly holds that time for confirmation cannot be extended without consent of parties. (Vol 23) 1936 Oudh 172 (172).

[4] It would not be proper to utilize the power of the Court in revision in order to entertain an appeal when an appeal is expressly prohibited by Civil Procedure Code or where the appeal has long been barred by limitation. (Vol 22) 1935 Pat 177 (178).

[5] Section 115 is only intended to relate to questions of jurisdiction and not to questions of law or construction of document or a wrong decision by a Judge. These are not matters affecting jurisdiction and cannot constitute sufficient grounds for treating an appeal as an application in revision, when an appeal is expressly prohibited by law. Section 115 is intended only to supplement the Code in relation to matters on which the Code is silent, and not provide the parties with a right of second appeal. (Vol 26) 1939 Sind 360 (360) : I L R (1939) Kar 342 (344).

2. Applicability and scope.—[1] The provisions of this section do not apply to Courts constituted under the Provincial Small Cause Courts Act, 1887, or under the Berar Small Cause Courts Law, 1905; see section 7 (b).

[1a] Before the revisional powers can be exercised, all the conditions mentioned in the section must be satisfied. (Vol 29) 1942 Oudh 395 (397) : 18 Luck 186. (Distinction between appellate jurisdiction and revisional jurisdiction pointed out—Revisional jurisdiction can only be exercised in the three cases enumerated.) * (Vol 29) 1942 Pat 312 (313). (No question of jurisdiction involved—No revision.)

[2] The maintainability of a revision application is not a matter to be judged by the merits of such application. (1942) I L R (1942) Kar 160 (162).

[3] The High Court cannot interfere on the ground of expediency. (Vol 29) 1942 Oudh 432 (433) * (1912) 34 All 393 (395) * (Vol 18) 1931 Cal 604 (606) : 59 Cal 68 * (Vol 6) 1919 All 328 (329) * (Vol 25) 1938 Lah 434 (435). (This principle is all the more applicable in cases of revision from an order making an award a rule of Court.)

[4] The fact that a case is a very hard one does not permit the High Court to interfere where it has no power so to do. (Vol 27) 1940 Pat 87 (88) : 18 Pat 210.

[5] No revision lies merely because no other remedy is open. (Vol 27) 1940 Pat 102 (106) : 19 Pat 321 (SB).

[6] Requirements of S. 115 not fulfilled — High Court cannot interfere merely on ground that hardship would be caused to applicant and that he would have no other remedy. (Vol 23) 1936 Oudh 22 (24) : 11 Luck 529 (FB).

[7] In doubtful cases, Court should err on side of entertaining revision rather than refusing to do so. (Vol 22) 1935 All 353 (358) : 57 All 459.

[8] Mere question whether Court's order is wise or unwise cannot be gone into in revision. (Vol 28) 1941 Mad 285 (286).

[9] Powers of High Court to interfere under S. 115 are very limited. (Vol 25) 1938 Pat 106 (107).

[10] The powers under this section should be used with a view to subvert and not to defeat the ends of justice. (Vol 22) 1935 Mad 89 (89, 90).

[11] Where substantial justice has been rendered by the lower Court, the High Court will not interfere in revision though the reasons for the order under revision

are not correct. (Vol 20) 1933 All 154 (155) * (Vol 24) 1937 Mad 644 (645). (Trial Court having no jurisdiction to try suit — High Court is not bound to interfere in revision if decree of trial Court is correct.) * (Vol 22) 1935 Lah 190 (191) * (Vol 22) 1935 Mad 574 (575).

[12] Findings of fact cannot be attacked in revision. (Vol 30) 1943 Nag 155 (156) : I L R (1943) Nag 456 * (Vol 30) 1943 Oudh 192 (196) * (Vol 30) 1943 Oudh 300 (302) * (Vol 29) 1942 Mad 502 (503) * (Vol 29) 1942 Nag 47 (48) : I L R (1942) Nag 625 * (Vol 29) 1942 Pesh 81 (82) * (Vol 21) 1934 Cal 104 (104, 105) * (Vol 20) 1933 Pat 575 (576) : 12 Pat 482 (F B) * (Vol 21) 1934 Rang. 306 (307) * (1883) 7 Bom 341 (372) (F B) * (Vol 6) 1919 Cal 312 (314) (S B) * (Vol 23) 1936 Lah 725 (727) * (Vol 24) 1937 Bom 25 (26) : I L R (1937) Bom 186 * (Vol 24) 1937 All 691 (692) * (Vol 22) 1935 Mad 246 (247) * (Vol 23) 1936 Nag 140 (143) : I L R (1936) Nag 188.

[But see (Vol 30) 1943 Bom 42 (43). (Courts exercising revisional powers can differ from the lower Court on questions of fact.)]

[13] The revisional Court can look into evidence for seeing whether the lower Court has assumed or failed to exercise jurisdiction or has acted with material irregularity. (Vol 2) 1915 Cal 49 (53) * (Vol 6) 1919 All 295 (296) : 41 All 602 * (Vol 7) 1920 All 359 (359) * (1907) 1907 Pun Re No. 12, p. 59 (60) * (1896) 1896 Pun Re No. 54, p. 154 (158) * (1896) 1 Cal W N 67 (70) * (Vol 3) 1916 Nag 123 (126) : 13 Nag L R 203 * (1887) 9 All 398 (404, 409).

[14] A party cannot be allowed to obtain in revision what he will not be able to obtain in appeal. (Vol 14) 1927 Mad 859 (860) * (Vol 16) 1929 Mad 259 (260) * (Vol 14) 1927 Bom 599 (600) * (Vol 5) 1918 All 176 (177).

[15] A point not raised in the lower Court cannot be raised in revision. (Vol 29) 1942 All 45 (46) : I L R (1941) All 793 * (Vol 29) 1942 Mad 449 (450) * (Vol 29) 1942 Mad 733 (733) * (Vol 29) 1942 Nag 47 (49) : I L R (1942) Nag 625 * (Vol 28) 1941 All 355 (357) * (Vol 27) 1940 Nag 302 (303) : I L R (1942) Nag 139 * (Vol 26) 1939 Rang 413 (416) * (Vol 11) 1924 Pat 785 (785) * (Vol 21) 1934 Pesh 50 (51) * (Vol 9) 1922 Bom 149 (150) : 46 Bom 56 * (Vol 12) 1925 Pat 461 (461) * (Vol 8) 1921 Sind 159 (164, 165, 166) : 16 Sind L R 207 (F B) * (Vol 24) 1937 Cal 201 (203) * (Vol 32) 1945 Lah 260 (261) * (Vol 30) 1943 Lah 295 (298) * (Vol 26) 1939 Sind 125 (126) : I L R (1939) Kar 422 * (Vol 31) 1944 Lah 280 (282) * (Vol 26) 1939 Lah 260 (261) * (Vol 26) 1939 Bom 296 (299).

[See also (Vol 13) 1926 P C 18 (20) : 53 Ind App 64 : 49 Mad 249 (P C). (Litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponent at a great disadvantage.)]

[See however (Vol 15) 1928 Mad 528 (531) : 51 Mad 672 * (Vol 14) 1927 Rang 134 (134).]

[16] Revisional Court is not bound to but may allow a point of jurisdiction. (Vol 24) 1937 Mad 644 (645) * (Vol 22) 1935 Mad 699 (700) * (Vol 23) 1936 Pat 428 (429). (New point as to jurisdiction—Case under S. 25, Small Cause Courts Act.) * (Vol 29) 1942 Oudh 289 (289) : 17 Luck 725 * (Vol 27) 1940 Sind 178 (180) : I L R (1940) Kar 327.

[See (Vol 23) 1936 Pesh 97 (100). (A question of jurisdiction can be raised even on revision.)]

[17] The section is not exhaustive and the jurisdiction in the matter of issuing *writs of certiorari* is not taken away by this section. (Vol 6) 1919 P C 31 (35) : 46 Ind App 176 : 48 Mad 146 (P C).

[18] For powers of the Bombay High Court under Bombay Regulations, see the following cases : (Vol 2)

Section 115 (*contd.*)

1915 Bom 269 (270, 271) : 40 Bom 86 (94) * (Vol 15)
1928 Bom 5 (7, 8) : 52 Bom 87*(Vol 21) 1934 Bom 299
(800) : 58 Bom 597*(Vol 28) 1941 Bom 271 (272).

[19] High Court may dismiss a revision petition for default of appearance. (Vol 32) 1945 Mad 103 (104).

[20] Party not filing a revision is not entitled to challenge the decree of lower Court. (Vol 32) 1945 All 47 (48) : I L R (1945) All 15.

3. Application in revision treated as appeal.—

[1] Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an appeal, if it is filed within the time prescribed for filing the appeal. (1898) 25 Cal 757 (778) (FB)* (Vol 19) 1932 Bom 77 (78)* (Vol 2) 1915 Cal 268 (271)* (1884) 7 Mad 555 (556) * (Vol 6) 1919 Mad 358 (358) * (Vol 12) 1925 Pat 16 (17) : 3 Pat 344 * (Vol 4) 1917 Upp Bur 9 (10) : 2 Upp Bur Rul 106*(Vol 14) 1927 All 120 (120) : 49 All 178.

[2] Court may treat the petition as appeal provided the proper court-fee is paid. (Vol 30) 1943 Cal 177 (179) * (1900) 23 Mad 101 (104).

[3] Conversion of revision application into appeal after expiry of period for appeal.—Court may excuse delay under S. 5, Limitation Act. (Vol 5) 1918 Lah 67 (68) : 1917 Pun Re No. 95*(Vol 7) 1920 Lah 450 (451) * (Vol 9) 1922 Lah 233 (234) : 2 Lah 1.

[4] *Ex parte* order treating revision as second appeal.—Respondent is entitled to show that no second appeal lay. (1894) 1894 Pun Re No. 80, page 274 (275).

[5] An application for revision to the High Court cannot be returned for presentation as an appeal to another Court. (Vol 29) 1942 Mad 657 (658).

4. "Case which has been decided." — [1] The word 'case' has a wider meaning than the words 'suit' or 'appeal'. (Vol 8) 1921 All 1 (2) : 43 All 564 (FB) * (Vol 2) 1915 Bom 269 (271) : 40 Bom 86*(Vol 23) 1936 Sind 203 (205) * (Vol 33) 1946 Nag 5 (7, 8) : I L R (1945) Nag 684.

[2] The word 'case,' is nowhere defined ; but the word should be understood in its broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning. (1885) 7 All 661 (665) (FB).

[3] The word "case" cannot be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must include an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. (Vol 4) 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (P C).

[4] Scheme framed for management of a public temple giving Devasthan Committee of the taluka power to audit accounts of the managing committee of the temple. On the report of the Devasthan Committee pointing out irregularities in the management the District Judge passed orders interfering in the management and threatening action in case of disobedience — *Held*, that the proceeding was a 'case'. (Vol 26) 1939 Bom 279 (283).

[5] Proceedings of a District Judge under the Charitable and Religious Trusts Act (14 [XIV] of 1920) are open to revision under this section. (Vol 16) 1929 All 581 (583, 584) : 51 All 957.

[6] Where the whole case was over and the only thing that remained to be done was the preparation of the decree, it was held to be a 'case decided'. (Vol 2) 1915 All 171 (171).

[7] Where the decision of the Court is in favour of the party concerned an application by him against a *finding* is not competent. (Vol 23) 1936 Pesh 97 (99).

[8] Dismissal of a suit on the ground that the Court has no jurisdiction amounts to a 'case decided'

within the meaning of this section. (Vol 30) 1943 Oudh 307 (307)

[9] Order dismissing application under S. 19, Madras Agriculturists' Relief Act, consequent to withdrawal of the same is case decided. (Vol 30) 1943 Mad 617 (626).

5. Decision as to court-fee.—[1] An order demanding additional court-fee is revisable. (Vol 29) 1942 Mad 585 (585) * (Vol 29) 1942 Pat 60 (62) : 20 Pat 780 * (Vol 29) 1942 Sind 76 (77) : I L R (1942) Kar 61 * (Vol 28) 1941 All 298 (300) : I L R (1941) All 558 * (Vol 25) 1938 Pat 22 (25) : 16 Pat 766 (FB) * (Vol 25) 1938 Nag 122 (126) : I L R (1938) Nag 106 (FB) * (Vol 22) 1935 Cal 279 (280) : 62 Cal 417 * (Vol 31) 1944 Mad 315 (317) : I L R (1944) Mad 626 (FB). ((Vol 26) 1939 Mad 380, overruled.) * (Vol 32) 1945 Bom 336 (337) : I L R (1945) Bom 729.

[See also (Vol 23) 1936 Pesh 140 (141).]

[But see (Vol 29) 1942 Pesh 23 (24) * (Vol 26) 1939 Mad 380 (382)]

[2] A decision holding that the court-fee paid is sufficient cannot be revised. (Vol 25) 1938 Pat 22 (25) : 16 Pat 766 (FB)* (Vol 23) 1936 Pat 85 (86) : 15 Pat 340 * (Vol 25) 1938 Nag 122 (126) : I L R (1938) Nag 106 (FB) * (Vol 30) 1943 Nag 315 (317) : I L R (1943) Nag 802.

[3] The Judicial Commissioner's Court should not hear a revision application against an order in an appeal from a decree, on which the proper court-fee, arising from the decree of the trial Court has not been paid by the applicant. (Vol 29) 1942 Sind 76 (77) : I L R (1942) Kar 61.

[4] Decision by Appellate Court under S. 7 (v) (c), Court-fees Act, holding land to be overvalued and determining annual income—No revision lies. (Vol 27) 1940 Mad 821 (821).

[5] Where the decision on a question of court-fee also bears upon the valuation of the suit for purposes of jurisdiction, and the suit may have to be filed in a higher Court if the court-fee question should be decided in a different way, the High Court is justified in interfering in revision, although the point has been decided in plaintiff's favour. (Vol 23) 1936 Mad 411 (411).

6. Error of law or fact.—[1] If a particular jurisdiction originates in some special law or enactment, the High Court can always interfere in the sense that it can construe the law and in accordance with that construction compel the lower Court to exercise such jurisdiction or to refrain from exercising such jurisdiction if not warranted by law or the enactment in question. (Vol 22) 1935 Pat 385 (388) : 14 Pat 488.

[2] The decision on a question of law can be interfered with if in fact a question of jurisdiction does arise. (Vol 24) 1937 Pat 647 (651) : 16 Pat 729.

[3] Where matter of jurisdiction arises High Court can interfere in a question of law or fact. (Vol 24) 1937 Pat 651 (652).

[4] High Court will interfere where the jurisdiction is derived from statute and matter is one of construction of statute. (Vol 25) 1938 Pat 22 (24) : 16 Pat 766 (FB).

[5] Where the Court has jurisdiction over a case, the fact that the conclusion or decision arrived at is erroneous in law or fact is not a ground for revision. (Vol 21) 1934 All 620 (622) : 57 All 17 (FB). (Decision on a question of court-fee.) * (1885) 7 All 661 (664) (FB) * (Vol 32) 1945 Bom 386 (389) * (Vol 31) 1944 Lah 473 (475) * (Vol 32) 1 45 Nag 183 (184) : I L R (1945) Nag 457 * (Vol 32) 1945 Nag 244 (246) : I L R (1945) Nag 587 * (Vol 33) 1946 Nag 165 (169) : I L R (1946) Nag 26 * (Vol 32) 1945 Oudh 79 (81) * (Vol 32) 1945 Pesh 14 (15) * (Vol 33) 1946 Pesh 7 (8) * (Vol 13) 1926 Cal 773 (775) : 53 Cal 679 * (Vol 18) 1931 Mad 88 (90) : 54 Mad 627 * (Vol 11) 1924 Cal 493 (495) * (Vol 26) 1939 Pat 480 (481). (But if the order is absolutely unjustifi-

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able and perverse, High Court can interfere.) ✕(Vol 23) 1936 Pat 119 (121).

[6] The section applies to jurisdiction alone, the irregular exercise, or the non-exercise of it, or the illegal assumption of it. The section is not directed against *conclusions* of law or fact in which the question of jurisdiction is not involved. (Vol 4) 1917 P C 71 (74) : 40 Mad 793 : 41 Ind App 261 (PC).

[7] An erroneous decision on a question of limitation or of *res judicata* is not a ground for revision. (1884) 11 Cal 6 (8) : 11 Ind App 237 (PC) ✕(1894) 17 Mad 410 (415, 416) (FB). (Admitted appeals after they had become time barred.)

[8] An erroneous decision may be interfered with if the Court has failed to consider all necessary matters. (1906) 1906 Pun Re No 118, page 453 (456) ✕(1906) 1906 Pun Re No 121, page 462 (462) ✕(Vol 17) 1930 All 477 (478).

[9] Decision wrong — Nature of claims misapprehended — Decision may be interfered in revision. (1913) 1913 Pun L R No. 135, page 472 (474).

[10] Erroneous decision — Court not applying its mind to the question at all — Revision is maintainable. (Vol 20) 1933 Pat 132 (134) ✕(Vol 25) 1933 Rang 87 (87) ✕(Vol 3) 1916 Cal 907 (908) ✕(Vol 13) 1926 Cal 444 (445) ✕(Vol 11) 1924 Lah 603 (604) ✕(1918) 9 Nag L R 35 (38) ✕(Vol 14) 1927 Mad 436 (437) ✕(Vol 11) 1924 Pat 36 (36) ✕(Vol 5) 1918 Low Bur 140 (142) : 9 Low Bur Rul 71 ✕(Vol 16) 1929 Rang 304 (306).

[See however (Vol 4) 1917 Mad 667 (667) ✕(Vol 5) 1918 Mad 1173 (1173). (Where plea of limitation was not pressed.) ✕(Vol 12) 1925 Oudh 34 (34). (Revision lies on a question of limitation.)]

[11] An erroneous conclusion as to the admissibility of evidence is no ground for revision. (Vol 1) 1914 Cal 826 (827) ✕(Vol 5) 1918 Pat 607 (608) ✕(Vol 10) 1923 Cal 322 (322) ✕(Vol 16) 1929 Pat 633 (634) ✕(Vol 14) 1927 Bom 664 (665).

[12] Erroneous construction of a deed is no ground for revision. (Vol 29) 1942 Mad 413 (415) ✕(Vol 21) 1934 All 530 (530, 531) ✕(Vol 21) 1934 Lah 67 (67) : 15 Lah 305 ✕(Vol 5) 1918 Cal 925 (927) : 45 Cal 519 ✕(Vol 12) 1925 Pat 818 (819) ✕(Vol 10) 1923 All 269 (269) ✕(Vol 15) 1928 Lah 284 (285) ✕(Vol 26) 1939 Sind 360 (360) : I L R (1939) Kar 342 (342) ✕(Vol 22) 1935 Mad 160 (161) ✕(Vol 22) 1935 Lah 971 (971) ✕(Vol 24) 1937 Oudh 193 (194) : 13 Luck 81. (Wrong construction of scheme framed under S. 92).

[But see (Vol 14) 1927 Lah 44 (45). (Misconstruction of pleadings is ground for revision.) ✕(Vol 23) 1936 Lah 801 (802). (Where a document cannot possibly bear the construction that has been placed by the lower Court on it, and its interpretation is clearly wrong the High Court has jurisdiction to revise its decree.)]

[13] Misconstruction of a section is no ground for revision. (1903) 30 Cal 397 (400) (S B) ✕(Vol 5) 1918 Cal 896 (897) ✕(Vol 23) 1936 All 449 (450) ✕(Vol 24) 1937 Mad 36 (37) : I L R (1937) Mad 189 ✕(Vol 16) 1929 Mad 257 (257) ✕(Vol 12) 1925 Oudh 373 (374) ✕(Vol 11) 1924 Rang 212 (213) ✕(Vol 10) 1923 Pat 90 (91).

[14] Erroneous appreciation of evidence — No ground for revision. (Vol 30) 1943 Pesh 54 (56) ✕(Vol 6) 1919 Mad 796 (797) ✕(Vol 17) 1930 Mad 225 (226) ✕(Vol 9) 1922 Lah 290 (293) : 3 Lah 79 ✕(1910) 6 Nag L R 49 (50) ✕(1899) 21 All 181 (183).

[15] An erroneous decision as to what constitutes a material irregularity in setting aside an execution sale is no ground for revision. (Vol 19) 1932 All 140 (140) ✕(Vol 16) 1929 Oudh 26 (29) : 4 Luck 98 ✕(1894) 21 Cal 799 (806) ✕(1913) 18 Ind Cas 715 (717, 718) (Cal).

[16] Where a particular question of law has been decided in one way by a High Court or by the Privy Council the failure of a subordinate Court to follow such precedent is an illegal or irregular exercise of jurisdiction, with which the High Court will interfere. (Vol 20) 1933 Mad 94 (95) ✕(Vol 24) 1937 Rang 197 (198).

Also see Note 12.

7. Error of procedure. — [1] An error of procedure in the exercise of jurisdiction is an irregular exercise of jurisdiction and, if the irregularity is material, may be interfered with in revision. (Vol 3) 1916 Mad 1164 (1164). (Order without giving opportunity to the other side to put forth its case.) ✕(Vol 22) 1935 Bom 216 (218). (Remand in disregard of method of procedure enjoined by Code.) ✕(Vol 1) 1914 Cal 388 (390, 391) : 41 Cal 323 (338).

[But see (Vol 7) 1920 Pat 567 (568) : 4 Pat L Jour 642. (Error of procedure held not to be within the section.)]

[2] An error of procedure resulting in a failure of justice is a material irregularity. (Vol 7) 1920 Pat 82 (84).

[3] Case not raised by the parties — No evidence directed to it — Court disposing it — Revision lies. (Vol 11) 1924 Pat 341 (342).

[4] Suit entertained without permission under O. 1, R. 8 — Revision lies. (Vol 14) 1927 Rang 134 (134).

8. Exercise of jurisdiction illegally or with material irregularity. — [1] "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, *act* illegally or with material irregularity. It appears that they had perfect jurisdiction to *decide* the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not *exercise* their jurisdiction illegally or with material irregularity." There is a conflict of decisions as to the interpretation of cl. (c) and the above observations of the Privy Council relating thereto. (1885) 11 Cal 6 (8) : 11 Ind App 237 (PC).

[2] It is only when a Court *decides a case perversely* that it can be said to act illegally or with material irregularity in the exercise of its jurisdiction and that other errors on questions of law or procedure are outside this clause (Vol 2) 1915 Mad 1223 (1233) : 39 Mad 195 (FB) ✕(1894) 17 Mad 410 (414, 415) (FB).

[3] Clause (c) has been purposely and advisedly left in indefinite language in order to empower the High Court to interfere with *gross and palpable* errors of subordinate Courts, and to prevent *manifest injustice* in non-appellable cases. (Vol 22) 1935 Cal 102 (106) ✕(1896) 1 Cal W N 617 (625, 626) ✕(Vol 18) 1931 Cal 27 (28) : 58 Cal 111.

[4] Though a Court may have jurisdiction to make an order, if the effect of the order is finally to shut out a trial when it ought never to have been so shut out, then such an error must be regarded as a material irregularity although it may not be palpable or gross. An erroneous order of an Appellate Court demanding additional court-fee is an order affected with material irregularity although the error may not be palpable or gross. (Vol 25) 1938 Nag 122 (126) : I L R (1938) Nag 197 (FB) (Overruling (Vol 20) 1933 Nag 107 : 29 Nag L R 125 (FB))

[5] Where the law has prescribed the *manner* in which a Court shall exercise its jurisdiction and the Court *acts* in disregard of those provisions, it acts illegally or irregularly in the exercise of jurisdiction. (1885) 7 All 345 (347) ✕(Vol 20) 1933 All 295 (297) : 55 All 216 ✕(Vol 19) 1932 Bom 584 (587) : 56 Bom 535 ✕(Vol 20) 1933 Oudh 540 (542) : 9 Luck 225 ✕(Vol 20)

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1938 Oudh 547 (548) : 9 Luck 219*(Vol 14) 1927 Rang 134 (134) * (Vol 25) 1938 Nag 107 (109) : I L R (1938) Nag 436 (Irregularity must be analogous to one in procedure and must be of the Court whose order is being revised.)

[6] Where the Court exercises its jurisdiction in the manner prescribed but arrives at a *conclusion or decision* which is erroneous in law or fact, it does not *act* illegally or with material irregularity but *decides* erroneously in the proper exercise of jurisdiction. (Vol 30) 1943 Oudh 192 (196) * (Vol 28) 1941 Rang 244 (246) * (Vol 27) 1940 Nag 386 (390) : I L R (1940) Nag 659 * (Vol 27) 1940 Rang 75 (77)*(1886) 8 All 519(521, 534)*(Vol 21) 1934 All 4 (6) : 55 All 825 *(Vol 24) 1937 Pat 639 (640) *(Vol 26) 1939 Pat 564 (565) *(Vol 26) 1939 Oudh 129 (131) : 14 Luck 442 * (Vol 23) 1936 All 449 (450)*(Vol 25) 1928 Lah 857 (358)*(Vol 26) 1939 Lah 162 (163) * (Vol 23) 1936 Nag 157 (159) : I L R (1936) Nag 73*(Vol 24) 1937 Oudh 108 (111) * (Vol 26) 1939 Mad 733 (733, 734)*(Vol 23) 1936 Sind 205 (206).

[7] There is nothing in the language of the section, to limit the meaning of the words in Cl. (c) to *perverse decisions* only. (1904) 2 Low Bur Rul 333 (339, 340).

[8] Where the Court is *perverse*, i. e., where it wilfully or consciously disregards the provisions of law, it is certainly acting illegally in exercise of its jurisdiction. (1883) 7 Bom 341(358, 359)(FB)*(1903) 25 All 509(524) (FB)*(Vol 8) 1921 Upp Bur 27 (29) : 4 Upp Bur Rul 16 *(Vol 2) 1915 Mad 1122 (1123)*(Vol 26) 1939 Pat 430 (431)*(Vol 22) 1935 Bom 222 (225) : 59 Bom 430 * (Vol 23) 1936 Mad 526 (527).

[9] Every illegality can be a ground for revision; but in case of an irregularity it must be one which affects the decision upon the merits. (1886) 18 Cal 225 (230) * (Vol 6) 1919 Low Bur 151 (153) : 9 Low Bur Rul 263 * (1938) 177 Ind Cas 138 (140) (Pat).

[10] Whether an act is illegal or merely irregular depends upon the *importance* of the provision of law disregarded. (1902) 25 Mad 61 (98) : 28 Ind App 257 (P O).

[11] Where the law *expressly prohibits* a thing to be done, a disregard of such a provision has been held to amount to an illegality. (Vol 7) 1920 Cal 305 (308) : 46 Cal 962 * (Vol 19) 1932 All 337 (339) : 54 All 490 * (1886) 8 All 111 (115) (FB)*(Vol 17) 1930 Rang 129 (129) : 7 Rang 766.

[12] There is a material irregularity if the Court arrives at a conclusion without any evidence to support it. (Vol 12) 1925 Mad 877 (878) * (Vol 19) 1932 Pat 9 (11) : 11 Pat 161 * (Vol 12) 1925 Mad 494 (495) * (Vol 13) 1926 Lah 566 (566) * (Vol 18) 1931 All 452 (452)*(Vol 12) 1925 Lah 278 (278)*(1906) 10 Cal W N 14 (16)*(Vol 10) 1923 Mad 503 (504).

[But see (1887) 9 All 398 (409) (Illegality).]

[13] Where the lower Court decides a case without considering the materials placed before it or in disregard of the evidence, revision is maintainable (Vol 29) 1942 Sind 57 (59) : ILR (1941) Kar 587 * (Vol 28) 1941 Rang 244 (246) *(Vol 27) 1940 Lah 180 (181)*(Vol 27) 1940 Sind 30 (32) : I L R (1939) Kar 669 * (Vol 21) 1934 Bom 343 (347) : 58 Bom 623*(Vol 21) 1934 Rang 214 (215)*(Vol 11) 1924 Nag 44 (45) : 19 Nag L R 165 *(Vol 6) 1919 Pat 481 (482) * (1909) 10 Cal L Jour 33 (36)*(Vol 12) 1925 Cal 254 (255)*(1911) 10 Mad L Tim 163 (164) * (Vol 25) 1938 Mad 634 (637) : I L R (1938) Mad 983*(Vol 25) 1938 Nag 216 (217) : I L R (1940) Nag 526*(Vol 26) 1939 Pesh 9 (13) * (Vol 22) 1935 All 705 (706).

[14] Revision lies where the Court gives a decision on evidence not legally taken. (Vol 1) 1914 Cal 575 (577) *(1877) 8 Ind App 259 (286) (P O) * (Vol 3) 1916

Mad 347 (548) * (Vol 23) 1936 Pesh 72 (74)*(Vol 33) 1946 Nag 5 (8) : ILR (1945) Nag 634.

[But see (Vol 13) 1926 Pat 29 (30). (One piece of inadmissible evidence but finding arrived at on the rest of the evidence.)]

[15] Where the Court gives a decision on evidence without considering the question of its admissibility, revision would lie. (Vol 13) 1926 All 161 (162)*(1894) 18 Bom 369 (372)*(1912) 15 Cal L Jour 114 (118, 119) *(1897) 1897 Pun Re No. 68, p. 311 (315).

[16] Where it arrives at a conclusion in opposition to the finding expressed in the body of the judgment, a revision will lie. (Vol 16) 1929 Mad 841 (841)*(Vol 22) 1935 All 280 (281).

[17] Revision lies where the Court decides a case without giving reasons for its judgment. (Vol 3) 1916 All 65 (66) *(1890) 1890 Pun Re No. 72, p. 197 (199)*(Vol 14) 1927 Lah 798 (799)*(Vol 25) 1938 All 31 (32) : ILR (1938) All 48 *(Vol 33) 1946 Cal 304 (305)*(Vol 31) 1944 Oudh 157 (159).

[But see (Vol 22) 1935 Mad 103 (106). (Failure to state reasons for order is no ground for revision.)]

[18] Revision lies where the Court disregards and does not apply its mind to, or misapplies the provisions of any law. For illustrations see the following cases : (Vol 29) 1942 Nag 78 (79) : I L R (1942) Nag 675. (Decree set aside under O. 9, R. 13 without considering whether there was jurisdiction to do so or not.) * (Vol 29) 1942 Sind 57 (59) : I L R (1941) Kar 587. (Judge enunciating principle that suit must be stayed if difficult point of law arises—S. 115 applies.) *(Vol 23) 1941 Oudh 433 (435) : 16 Luck 778. (Genuineness of document presumed contrary to Evidence Act, S. 90.)*(Vol 26) 1939 All 668 (669, 670) * (Injunction granted under S. 151, but against the spirit of the section.)*(Vol 19) 1932 Cal 448 (450) : 59 Cal 829. (Adding a party under O. 1, R. 10 when the Court had no power to act under that rule held to be an irregularity.) *(Vol 20) 1933 Lah 260 (261). (Failure to consider extension of time under S. 5, Limitation Act.)*(Vol 32) 1945 Mad 278 (279) *(Vol 32) 1945 All 348 (349) : ILR (1945) All 604*(Vol 31) 1944 Nag 295 (298):ILR (1944) Nag 806*(Vol 31) 1944 Lah 398 (399) * (Vol 6) 1919 Low Bur 151 (153) : 9 Low Bur Rul 263 *(Vol 3) 1916 Bom 55 (56) : 41 Bom 402. (When lower Court discharged surety under O. 38, R. 1 on death of defendant.)*(Vol 12) 1925 Rang 300 (300) : 3 Rang 211. (Applying O. 25, R. 1 to a suit not for payment of money.) *(1904) 2 Low Bur Rul 333 (340)*(Vol 12) 1925 Rang 37 (38). (A failure to consider the effect of a previous Full Bench decision.) * (Vol 8) 1921 Sind 159 (162) : 16 Sind L R 207 (FB). (Rule of estoppel.)*(Vol 21) 1934 Mad 399 (400) : 57 Mad 705. (Failure to distinguish between an application by a plaintiff to be examined on commission and an application by a defendant.) * (Vol 22) 1935 Nag 209 (211) : 31 Nag L R 413. (Application by idols to sue in *forma pauperis* rejected on ground that they are not "persons."—Decision amounts to conscious violation of specific rules of Civil Procedure Code—Revision lies.) * (Vol 25) 1938 Mad 634 (637) : ILR (1938) Mad 988. (Where the lower Court has acted without any clear conception of the law on the subject or has failed to apply the law to the facts of the case, it acts illegally, and in any case with material irregularity justifying interference by the High Court in revision.)*(Vol 23) 1936 Oudh 185 (188) : 12 Luck 52. (Order made in violation of provisions of O. 45, R. 15 is quite irregular.) * (Vol 26) 1939 Sind 137 (141) : ILR (1939) Kar 330. (Allowing a question to be argued which cuts at the very root of the plaintiff's case but which is not raised in the pleadings.)*(Vol 22) 1935 All 34 (35) : 57 All 482. (Judgment-debtors jointly and severally liable for decree — Application for

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reference to arbitration by decree-holder and only some of them—Order of reference by Court is illegal—Revision is competent) * (Vol 24) 1937 All 598 (604) : I L R (1937) All 805 (FB). (Application under S. 30, U. P. Agriculturists' Relief Act—Failure of Court to apply its mind to material provisions of law.) * (Vol 25) 1938 All 153 (156) : I L R (1938) All 305. (Lower Court wrongly interpreting section of a statute and refusing to grant relief—High Court should interfere.) (Vol 22) 1935 Pesh 186 (189). (Court dismissed an application for restoration of a suit dismissed in default under the impression that Art. 163, Limitation Act, applies to the case which does not in fact so apply.) * (Vol 25) 1938 Pesh 49 (50). (Court ignoring fundamental principles of law.)

[19] Where a subordinate Court fails to follow a decision of the High Court to which it is subordinate a revision lies. (Vol 28) 1941 Rang 22 (23). (Failure to grasp the essentials of a reported ruling of the High Court is also ground for revision.) * (Vol 26) 1939 Rang 433 (434) : 1939 Rang L R 587 * (Vol 20) 1933 Mad 94 (95) * (Vol 19) 1932 Pat 346 (347) : 11 Pat 616.

[20] A revision would lie where the Court follows a decision without noticing that it does not apply to the case. (Vol 28) 1941 Pesh 76 (78).

[21] The High Court will interfere in revision where the evidence has been misinterpreted. (Vol 30) 1943 Pesh 17 (18) * (Vol 26) 1939 Rang 413 (414, 416) * (Vol 16) 1929 Mad 204 (205) * (Vol 20) 1933 Pesh 67 (69) * (1910) 1910 Pun W R No. 97, p. 262 (264) * (Vol 6) 1919 Lah 91 (92).

[22] The High Court will interfere in revision where there has been misapprehension of facts. (1912) 15 Cal L Jour 114 (118, 119). (Inferring estoppel without any finding or issue.) * (1897) 1897 Pun Re No. 60, p. 261 (265) (FB) * (Vol 18) 1926 All 604 (605) (Appellate Court treating findings as being the opposite of what they really are) * (Vol 17) 1930 Bom 129 (131) : 54 Bom 105. (Judge inferring misconduct from facts which cannot be taken into consideration) * (Vol 9) 1922 Nag 104 (105, 106) : 19 Nag L R 181. (Court assuming that the contract made on behalf of minor, was made by minor himself.) * (Vol 14) 1927 Mad 227 (228) * (Vol 22) 1935 P C 185 (186) : 62 Ind App 257 : 57 All 678 (P C). (Trial Judge misapprehending nature of application to be added as party to suit and dealing with it summarily, acts with material irregularity.)

[23] Decision in the absence of a party affected thereby—Revision lies. (Vol 13) 1926 P C 142 (144) : 54 Cal 338 : 53 Ind App 271 (P C) * (Vol 16) 1929 All 761 (761).

[24] Decision without hearing party—Revision lies. (1907) 34 Cal 929 (933) * (Vol 20) 1933 All 196 (196) * (Vol 9) 1922 Bom 207 (209) : 47 Bom 11 * (Vol 10) 1923 Pat 102 (102) * (Vol 17) 1930 Lah 177 (178).

[25] Decision against a party who had no opportunity of being heard—Revision lies. (Vol 20) 1933 All 751 (751). (Dismissal of claim on the ground of delay without giving opportunity to claimants to explain delay.) * (Vol 20) 1933 Lah 421 (421) * (1886) 8 All 111 (115) (FB) * (Vol 20) 1933 Lah 538 (539). (Court refusing to summon proper witness.) * (Vol 16) 1929 Mad 49 (49) * (Vol 10) 1923 Pat 180 (183) * (Vol 6) 1919 Mad 14 (15) * (Vol 12) 1925 Nag 236 (238) * (Vol 24) 1937 Oudh 268 (269) : 13 Luck 111.

[See however (Vol 8) 1921 Bom 219 (219) : 45 Bom 360. (Failure to give notice where none is required to be given is not a ground of revision.)]

[26] Decision against a party not given opportunity to obey orders—Revision is maintainable. (Vol 2) 1915 All 133 (134). (Dismissing appeal for failure to furnish security.) * (Vol 13) 1926 Cal 1017 (1018). (Dismissing

execution petition for failure to pay process.) * (Vol 13) 1926 Lah 571 (571). (For failure to amend plaint and pay costs of adjournment.) * (1911) 9 Ind Cas 132 (133) (Cal) * (Vol 7) 1920 Pat 82 (84) * (Vol 3) 1916 Mad 1161 (1164) * (1912) 34 All 348 (350) * (Vol 32) 1945 Mad 107 (108). (Refusal to adjourn a case for few minutes to enable pleader to be present.) * (1935) 158 Ind Cas 250 (250) (Pesh) * (Vol 23) 1936 Lah 560 (561). (Dismissal of suit without informing parties of date fixed.) * (Vol 22) 1935 Oudh 119 (120) : 10 Luck 476.

[27] Revision would lie from a decision taking a mistaken view of the question at issue. (Vol 28) 1941 Mad 510 (512) : I L R (1941) Mad 559 * (1939) 41 Pun L R 909 (910) * (1888) 12 Bom 617 (620) * (1905) 29 Bom 213 (219) * (Vol 19) 1932 Nag 177 (179) : 28 Nag L R 221 * (Vol 20) 1933 Nag 188 (188) : 29 Nag L R 164 * (Vol 7) 1920 Cal 459 (460) * (1927) 99 Ind Cas 946 (947) (Cal) * (1893) 1893 Pun Re No. 89, p. 355 (357). (Suit based on adoption of plaintiff, decided on defendant's title.)

[28] Where the Court decides an issue which does not properly arise, revision will lie. (Vol 16) 1929 Lah 294 (295) * (Vol 17) 1930 Lah 80 (80) * (Vol 16) 1929 Nag 347 (348) * (Vol 8) 1921 Sind 159 (165) : 16 Sind L R 207 (FB) * (Vol 18) 1926 Mad 947 (948) * (Vol 18) 1931 Mad 334 (336) * (Vol 15) 1928 Lah 299 (301) * (Vol 22) 1935 Pesh 174 (175).

[29] Omission to decide issues properly arising in the case may be a ground for revision. (1912) 13 Ind Cas 657 (658) (Cal). (Per Stephen, J., *contra.*) * (Vol 12) 1925 Mad 884 (885) * (1912) 16 Cal WN 424 (425) * (1913) 1913 Pun L R No. 140, p. 484 (484) * (Vol 7) 1920 Mad 843 (846) * (Vol 15) 1928 Mad 815 (816) : 51 Mad 860 * (Vol 23) 1936 Pesh 97 (100) * (Vol 26) 1939 Pat 216 (217) * (Vol 22) 1935 Lah 964 (965) * (Vol 26) 1939 Pat 74 (75) * (Vol 33) 1946 Pat 316 (330) : 25 Pat 58.

[30] Where the lower Court wrongly places the onus of proof, the High Court may interfere in revision. (Vol 28) 1941 Rang 244 (246) * (Vol 25) 1938 All 520 (521) * (Vol 22) 1935 Cal 710 (711) * (Vol 22) 1935 Mad 784 (784) * (Vol 18) 1931 Rang 136 (137) : 9 Rang 71 * (Vol 26) 1939 Lah 562 (562) * (Vol 26) 1939 Mad 644 (645) * (Vol 10) 1923 Mad 607, followed.)

[But see (1926) 92 Ind Cas 46 (46) (Oudh) * (Vol 6) 1919 Cal 266 (269) * (1934) 151 Ind Cas 548 (548) (Lah) * (Vol 11) 1924 Lah 425 : 5 Lah 288, followed.] * (Vol 26) 1939 Mad 733 (734).]

[31] Revision would lie where the Court declines to examine the evidence offered in support of a case. (1921) 64 Ind Cas 85 (86) (Cal) * (1883) 13 Bom 642 (649) * (Vol 20) 1933 Pat 278 (279) * (Vol 14) 1927 Lah 239 (239) * (Vol 16) 1929 Lah 878 (879) * (1885) 7 All 345 (352) * (Vol 5) 1918 Pat 100 (102, 103) : 4 Pat L Jour 20 * (Vol 10) 1923 Pat 590 (591).

[32] Where the Court refuses to go into the merits, revision will lie. (1912) 15 Oudh Cas 78 (80) * (1897) 1897 Pun Re No. 34, p. 157 (159) * (1888) 1888 All W N 126 (126).

[33] Revision lies from an order for execution of a decree which is inexecutable. (1899) 20 All 311 (314).

[34] Order for execution contrary to directions contained in a decree—Revision lies. (1912) 16 Cal L Jour 557 (558) * (Vol 17) 1930 Lah 103 (104).

[35] Court ordering notice in garnishee proceedings to a firm to pay a debt really due by the individuals of the firm—Revision lies. (1911) 21 Mad L Jour 525 (525).

[36] Attachment in execution of a personal decree of property held as a trustee—Revision lies. (1901) 28 Cal 574 (583).

[37] Decision in appeal on a case not raised in the first Court—Revision lies. (Vol 28) 1941 Rang 244 (246) * (1909) 33 Bom 35 (38) * (Vol 14) 1927 Lah 73 (74) * (Vol 1) 1914 Lah 39 (41) : 1913 Pun Re No. 34 *

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(Vol 12) 1925 Mad 357 (357) ✕ (Vol 13) 1926 Rang 214 (215) : 4 Rang 202.

[38] Appellate Court remanding a case after framing issues not arising in it — Revision lies. (Vol 15) 1928 Mad 984 (985) ✕ (Vol 16) 1929 Mad 205 (207).

[39] Remand by Appellate Court after practically deciding the whole case — Revision lies. (Vol 10) 1923 Mad 113 (113).

[40] Incompetent order of remand — Revision lies. (Vol 27) 1940 Nag 349 (353) : ILR (1940) Nag 538 ✕ (Vol 27) 1940 Oudh 367 (368, 369) : 16 Luck 65 ✕ (Vol 14) 1927 Cal 850 (852) : 55 Cal 219 ✕ (Vol 14) 1927 Cal 401 (402) ✕ (Vol 15) 1928 Mad 991 (994) ✕ (Vol 15) 1928 Mad 984 (985).

[41] Remand without setting aside decree in appeal — Revision lies. (Vol 11) 1924 Rang 177 (178) : 1 Rang 656.

[42] Refusal to record a compromise in a proceeding under O. 21, R. 90 — Revision lies. (Vol 16) 1929 Lah 886 (887).

[43] Compromise incomplete — Order on compromise can be revised. (1898) 1898 Pun Re No. 50, page 164 (167).

[44] Order confirming an execution sale under O. 21, R. 92 without disposing of an application to set aside the sale under O. 21, R. 90 — Revision lies. (Vol 29) 1942 Cal 480 (481).

[45] Revision lies from an order appointing a person as a *guardian ad litem* of another, without his consent. (1909) 4 Ind Cas 1108 (1108) (Mad).

[46] Appointment of a guardian to a person of unsound mind without considering the question of unsoundness of his mind — Order may be revised. (Vol 9) 1922 Cal 86 (86).

[47] Decree on compromise by the guardian *ad litem* without enquiring whether it was for the benefit of the minor — Revision lies. (1899) 1899 Pun Re No. 105, page 368 (373) ✕ (Vol 22) 1935 Oudh 287 (289) : 11 Luck 30.

[48] Court allowing reference to arbitration by the guardian without passing an order under O. 32, R. 7 — High Court will interfere. (Vol 29) 1942 All 85 (89) : I L R (1941) All 807 ✕ (Vol 27) 1940 Sind 178 (180) : I L R (1940) Kar 327 ✕ (1895) 1895 Pun Re No. 37, page 153 (155).

[49] Court proceeding with a suit stayed under S. 10 — Revision lies. (Vol 16) 1929 All 957 (959).

[50] High Court will interfere in revision where the Court refuses to issue a sale certificate to the auction-purchaser. (Vol 4) 1917 Pat 697 (697) : 1 Pat L Jour 446.

[51] Omission to draw up a decree in pursuance of a judgment — Revision allowed. (Vol 30) 1943 Nag 204 (209) : ILR (1943) Nag 241 (FB) ✕ (1912) 37 Bom 60 (63).

[52] Where the Income-tax Commissioner refuses to make a reference to the High Court under S. 66, Cl. 2, Income-tax Act, High Court will interfere in revision. (Vol 11) 1924 Lah 662 (663).

[53] High Court will interfere in revision where the Court omits to determine who the real legal representatives are. (Vol 6) 1915 Mad 510 (511) : 42 Mad 76 (79).

[54] Refusal to issue a certificate for refund of court-fee where the case was remanded under O. 41, R. 23 — High Court will interfere in revision. (Vol 5) 1918 Bom 157 (158) : 42 Bom 363.

[55] High Court will interfere in revision where the Court passes a decree on a contract *prima facie* void in law. (1912) 15 Ind Cas 35 (36) (All) ✕ (Vol 2) 1915 Mad 635 (636) : 37 Mad 385 ✕ (Vol 11) 1924 Mad 159 (160) ✕ (Vol 11) 1924 Nag 101 (103) : 21 Nag L R 6.

[56] Where the Court grants reliefs not prayed for without reference to any provision of law, High Court may interfere in revision. (Vol 11) 1924 Mad 911 (911).

✕ (Vol 13) 1926 Pat 519 (520) ✕ (Vol 11) 1924 Oudh 11 (14) ✕ (Vol 22) 1935 Pesh 157 (157).

[57] A plea that the Court refused to exercise jurisdiction cannot be raised along with the plea that the Court acted with material irregularity in the exercise of jurisdiction. (Vol 13) 1926 Cal 773 (775) : 53 Cal 679.

[58] An objection to an application for revision that the lower Court had jurisdiction to hear and decide the matter and that it did not exercise its jurisdiction illegally or with material irregularity is not a *preliminary* objection inasmuch as such objection cannot be decided without going into the merits of the application for revision. (Vol 22) 1935 All 310 (314) : 57 All 810.

9. "Exercised a jurisdiction not vested in it by law." — [1] Where a Court has no authority to decide a cause but it decides the cause under an erroneous construction of the law or of a misapprehension of facts it exercises a jurisdiction not vested in it by law. (Vol 30) 1943 Bom 42 (43) ✕ (Vol 29) 1942 Pat 234 (235) ✕ (Vol 31) 1944 Bom 203 (204). (Section 15, Municipal Boroughs Act.) ✕ (Vol 33) 1946 Bom 64 (64). (Section 15, Municipal Boroughs Act.) ✕ (Vol 32) 1945 Mad 26 (27) ✕ (Vol 12) 1925 Mad 1201 (1204) : 48 Mad 676. (Wrong interpretation of a rule.) ✕ (Vol 13) 1926 Cal 1030 (1031) ✕ (Vol 13) 1926 Bom 266 (269) : 50 Bom 215 ✕ (Vol 10) 1923 Mad 192 (196) : 46 Mad 536 ✕ (Vol 7) 1920 Cal 305 (308) : 46 Cal 962 ✕ (Vol 22) 1935 Pat 385 (388) : 14 Pat 488 ✕ (Vol 25) 1938 Nag 169 (173) ✕ (Vol 22) 1935 Pesh 174 (175).

[2] Court cannot be said to have acted without jurisdiction if it is subsequently found by a higher Court that the findings of fact which were essential for the exercise of such jurisdiction were incorrect or erroneous. (Vol 25) 1938 Mad 603 (604).

[3] Facts ousting jurisdiction must be patent on the face of the record. (Vol 20) 1933 Sind 229 (230) : 27 Sind L R 261.

[4] Appeal against non-appealable order entertained — Revision lies. (Vol 28) 1941 Mad 867 (868) ✕ (Vol 28) 1941 Pat 616 (617) ✕ (Vol 10) 1923 Bom 214 (215) ✕ (Vol 19) 1932 Lah 416 (416) : 13 Lah 798 ✕ (Vol 32) 1945 Cal 156 (156, 157) : I L R (1944) 1 Cal 619 ✕ (Vol 19) 1932 Mad 714 (716) ✕ (Vol 23) 1936 Lah 83 (84). [But see (Vol 28) 1941 Cal 441 (441).]

[5] Suit or appeal entertained — No jurisdiction — Revision lies. (Vol 30) 1943 Mad 284 (285) ✕ (Vol 7) 1920 All 175 (176). (Civil Court entertaining a suit cognizable by a Revenue Court.) ✕ (Vol 21) 1934 Lah 540 (541) ✕ (Vol 20) 1933 Rang 185 (186) : 11 Rang 337 (FB) ✕ (Vol 31) 1944 All 247 (248) : I L R (1944) All 514 ✕ (Vol 31) 1944 Mad 539 (540) ✕ (1899) 23 Bom 321 (324). (Special Judge entertaining an appeal on a finding that a person was not an agriculturist under the Dekkhan Agriculturists' Relief Act.) ✕ (Vol 13) 1926 All 55 (56, 57) : 48 All 27 ✕ (Vol 13) 1926 Cal 1236 (1237) ✕ (Vol 12) 1925 Pat 525 (526) : 4 Pat 718 ✕ (1909) 33 Mad 323 (326) (FB) ✕ (Vol 15) 1928 Pat 451 (451).

[But see (Vol 11) 1924 Nag 17 (18) : 19 Nag L R 179. (Small Cause Court — Trial of small cause suit as a regular suit without objection.) ✕ (Vol 14) 1927 Nag 164 (165).]

[6] See the following cases where Court passing order was not authorized to pass it and hence High Court interfered. (Vol 29) 1942 Oudh 135 (137) : 17 Luck 391. (Trustees appointed under scheme not providing for removal of trustee — Proper procedure for removal of trustee is by suit properly instituted under S. 92 and not by mere application — Removal on application is without jurisdiction — Revision lies.) ✕ (Vol 28) 1941 Cal 156 (158) : I L R (1940) 2 Cal 277. (Restoring under S. 151 execution application dismissed as time-barred — Aggrieved judgment-debtor's remedy is by application

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under S. 115.) * (1941) 22 Pat L Tim 965 (967). (Execution petition dismissed for default — Court has no jurisdiction to restore application — Remedy of decree-holder is to file fresh application.) * (Vol 27) 1940 Oudh 405 (409) : 16 Luck 79. (Court remitting an award for reconsideration under Sch. II, Para. 14 (c) when it had no authority to do so.) * (1903) 25 All 509 (525) (F B) * (Vol 21) 1934 Pat 284 (287). (Order of remand under inherent power held in this case to be an illegal assumption of jurisdiction.) * (Vol 20) 1933 Rang 110 (111). (Re-opening *ex parte* decree on a time-barred application amounts to exercise of jurisdiction not vested by law.) * (Vol 4) 1917 All 78 (79) : 39 All 723. (Court finding that valuation in plaint was fictitious but instead of rejecting plaint fixing its own valuation.) * (Vol 26) 1939 Pat 513 (519). (Order contrary to the provisions of Bihar Tenancy Act.)

[7] Where the High Court *passes a decree* on certain terms and remits the case to the lower Court for disposal under the decree, the lower Court has no power to *dismiss the suit* itself; if it does so, it is an exercise of jurisdiction not vested in it by law. (Vol 11) 1924 P C 198 (200) : 4 Pat 61 : 51 Ind App 321 (PO).

[8] Court impounding documents which it had no jurisdiction to impound — Revision lies. (Vol 30) 1943 Nag 97 (98) : I L R (1943) Nag 520.

[9] Court amending decree contrary to provisions of S. 8, U. P. Debt Redemption Act — Revision lies. (Vol 30) 1943 Oudh 241 (243) : 18 Luck 668.

[10] Order under S. 148 without jurisdiction — Revision lies. (Vol 28) 1941 Mad 706 (706).

[11] Court has no jurisdiction to direct a party to amend his plaint — If it does so revision lies. (Vol 28) 1941 Pat 44 (44).

[12] Court allowing withdrawal of suit on ground not contemplated by O. 23, R. 1 (2) — Revision lies. (Vol 27) 1940 Bom 121 (126) : I L R (1940) Bom 299 (FB).

[13] One Court issuing injunction to another Court to stay confirmation of a sale — Latter Court refusing to comply with it — It acts without jurisdiction — Revision lies. (Vol 19) 1932 Lah 515 (516).

[14] Decree directing dismissal of suit on non-payment of court-fee within time — No power to extend time and receive court-fee long afterwards. (Vol 10) 1923 Cal 612 (614).

[15] Allowing claim after confirmation of sale — Revision lies. (1906) 33 Cal 487 (496).

[16] Extension of time granted for payment after time fixed had expired — Revision lies unless order is in interests of justice. (Vol 3) 1916 Mad 882 (882) : 39 Mad 882.

[17] Revenue Court transferring rent decrees, passed by it to another district for execution — Revision lies. (1882) 9 Cal 295 (297, 299) : 9 Ind App 174 (P C).

[18] Judge setting aside order passed by his predecessor and thus usurping appellate jurisdiction which he does not possess — High Court can set aside order in revision. (Vol 26) 1939 Sind 137 (142) : I L R (1939) Kar 330.

[19] Where the lower Court itself has to determine whether it has jurisdiction or not to try the case, and it exercises its discretion wrongly and proceeds to try the case the High Court has power to interfere in revision. (Vol 24) 1937 Nag 334 (335) : I L R (1939) Nag 641.

[20] Where the lower Court threatens to invade vested rights of the subject by assuming jurisdiction which it does not possess and it is about to resort to the use of the machinery at its disposal, the High Court as a superior Court will show a strong leaning against construing the powers under S. 115 so as to oust or restrict its jurisdiction. (Vol 26) 1939 Bom 279 (282, 283).

[21] Appellate Court reversing finding of fact arrived

at in another suit — Revision lies. (Vol 23) 1936 Pesh 176 (178).

[22] As to the powers of the High Court to interfere with a decision given by Small Cause Court in a presidency town *see* the following cases : (Vol 3) 1916 Mad 871 (872) * (1911) 10 Ind Cas 551 (551) (Mad).

10. "Failed to exercise a jurisdiction so vested." — [1] Order staying suit on receipt of intimation from Debt Conciliation Board — Court erroneously assuming that it cannot go into the question of the jurisdiction of the Board fails to exercise jurisdiction vested in it by law. (Vol 30) 1943 Lah 65 (78) : I L R (1943) Lah 257 (FB).

[2] Commissioner under Workmen's Compensation Act, not considering question of status under Act fails to exercise jurisdiction. (Vol 29) 1942 Pat 33 (34) : 21 Pat 173.

[3] Court proceeding on wrong view of the law as regards the scope and object of O. 21, R. 88 fails to exercise jurisdiction. (Vol 27) 1940 Nag 337 (340) : I L R (1941) Nag 150.

[4] Order staying a pauper suit under S. 10 on the erroneous view of law that it should be deemed to be filed when the plaint was registered and not on date of application to sue in forma pauperis amounts to a refusal to exercise jurisdiction. (Vol 27) 1940 Oudh 441 (442) : 16 Luck 184.

[5] (Patna Amendment) Proviso (i) — Judgment-debtor applicant asked to deposit cash security — Court not judicially considering judgment-debtor's application for permission to give landed security fails to exercise jurisdiction. (Vol 25) 1938 Pat 240 (242) : 17 Pat 107.

[6] Refusal to exercise jurisdiction by erroneous order staying suit. (Vol 18) 1931 All 332 (332).

[7] Refusal to exercise — Appellate Court concurring — Revision lies against orders of both Courts. (Vol 12) 1925 All 267 (270) : 47 All 140.

[8] Refusal to allow amendment — Revision lies. (Vol 20) 1933 All 374 (376) : 55 All 256.

[9] Refusal to act under O. 1, R. 10 on the ground that it has no jurisdiction — Revision lies. (Vol 21) 1934 All 25 (27).

[10] District Judge declining to exercise jurisdiction in reference by Collector under Land Acquisition Act, S. 18 — Revision lies. (Vol 21) 1934 All 260 (264) : 56 All 656 (FB).

[11] Refusal to release property from attachment on a wrong construction of S. 64 and O. 21, R. 2, Civil P. C. — Revision lies. (Vol 10) 1923 Mad 230 (232).

[12] Court having jurisdiction to decide application for refund of court-fee not doing so — Revision is competent. (Vol 22) 1935 All 455 (456).

[13] Judgment-debtor alleging that execution was taken out in bad faith — Court refusing to give him opportunity of proving it and refusing to grant compensatory costs — Failure to exercise jurisdiction. (1936) 162 Ind Cas 860 (860) (Nag).

[14] Court declining to entertain application due to misapprehension of true effect of statutory rules of Civil Procedure Code — Revision lies. (Vol 26) 1939 Mad 196 (199).

[15] Attachment of judgment-debtor's share in tarwad property — Pending attachment registration of tarwad as impartible — Court's order declining to proceed with execution on wrong view of law — Order is liable to revision. (Vol 25) 1938 Mad 555 (556).

[16] Application to revoke submission on ground of want of jurisdiction of arbitrator — Refusal of Court to decide question of jurisdiction — Revision lies. (Vol 24) 1937 Mad 405 (406).

[17] Objection to sale refused to be entertained by Court owing to erroneous belief that it was not enter-

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tainable in view of O. 21, R. 90, proviso—Error of law affects jurisdiction of Court—Revision is competent. (Vol 26) 1939 Lah 222 (222).

[18] Refusing, under an erroneous construction of the section to entertain and decide application which the statute directs the Court to decide—Revision lies. (Vol 23) 1936 Cal 275 (276) : 63 Cal 49.

[19] Refusal to allow amendment on the assumption that it has no power to amend—Revision lies. (Vol 22) 1935 Pat 86 (88).

[20] Court dismissing objection by judgment-debtor and refusing to apply the provisions of the Punjab Relief of Indebtedness Act—Revision lies. (Vol 23) 1936 Lah 574 (574).

[21] Court refusing to entertain defence—Revision lies. (Vol 24) 1937 Nag 267 (267) : ILR (1937) Nag 159.

[22] Misapprehension of S. 63, Civil P. C.—Refusal to exercise jurisdiction vested by law—Interference is proper though another remedy open. (Vol 23) 1936 Mad 91 (93) : 59 Mad 303.

[23] Stay of whole suit under S. 7, U. P. Encumbered Estates Act—Plaint disclosing two sets of causes of action—Failure to order separate trial—Revision lies. (Vol 25) 1938 All 86 (88) : ILR (1938) All 153.

[24] Where the Court rightly assumes jurisdiction but decides against the rights of a party under an error of law, there is no failure to exercise jurisdiction but only an erroneous conclusion arrived at in the exercise of it. (Vol 6) 1919 Pat 501 (502) : 4 Pat L Jour 340 * (Vol 22) 1935 Pat 201 (202).

[25] But an order refusing permission to a minor-defendant on attaining majority to file an additional written statement is not one with which the High Court will interfere in revision, because there is no refusal to exercise a jurisdiction vested in the lower Court which it was bound to exercise. (Vol 22) 1935 Mad 117 (117).

[26] The Court fails to exercise jurisdiction vested in it by law where it refuses to entertain or it rejects a plaint, application, or memorandum of appeal on the erroneous view that it has no power to entertain or deal with it. (Vol 30) 1943 Nag 204 (205) : ILR (1943) Nag 241 (FB). (Refusing to entertain appeal from finding which amounts to decree.) (Vol 30) 1943 Lah 295 (296) * (Vol 29) 1942 Cal 230 (232) : 1 L R (1941) 2 Cal 866 * (Vol 29) 1942 Pat 237 (238) * (Vol 27) 1940 Mad 808 (809) * (Vol 26) 1939 Cal 669 (672) : ILR (1939) 2 Cal 401 * (Vol 25) 1938 Mad 555 (556) * (Vol 21) 1934 Lah 176 (176) * (Vol 19) 1932 Nag 70 (71) : 28 Nag L R 54 * (Vol 21) 1934 Oudh 352 (354) : 8 Luck 734 * (Vol 18) 1931 All 756 (757) : 53 All 959 * (1890) 1890 Pun Re No. 75, page 219 (223) (FB) * (Vol 13) 1926 All 346 (346, 350) : 48 All 432 * (Vol 16) 1929 Bom 467 (467) : 38 Bom 773 * (Vol 7) 1920 Pat 519 (520) * (Vol 18) 1931 Rang 332 (333).

[27] The erroneous rejection of an application under O. 21 R. 89, or R. 90 on the ground that the applicant had no *locus standi* to apply, is a failure to exercise jurisdiction. (Vol 28) 1941 Mad 653 (653, 654) * (Vol 24) 1937 Cal 7 (8) * (Vol 6) 1919 Pat 501 (502) : 4 Pat L Jour 340. (If decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it comes within the purview of the section.) * (Vol 10) 1923 Pat 490 (491) : 2 Pat 715 * (Vol 6) 1919 Pat 465 (466) * (Vol 8) 1921 Mad 157 (163) : 44 Mad 554 (FB). (Overruling (Vol 1) 1914 Mad 46 : 38 Mad 775—Doubtful if (Vol 4) 1917 Mad 76 is good law.) * (1895) 22 Cal 767 (783) (FB) * (Vol 13) 1926 Nag 10 (14, 15) : 21 Nag L R 102.

[But see (Vol 28) 1936 Pat 119 (121).]

[28] The refusal of an application under O. 21 R. 89, on the ground that the applicant had no *locus standi* to apply is only an error in the exercise of jurisdiction

and not a failure to exercise jurisdiction. (1906) 28 All 84 (87, 88) * (Vol 10) 1928 All 892 (898) : 45 All 425 (FB).

[29] An erroneous decision as to the *locus standi* of a person to apply to set aside a sale does not affect the jurisdiction of the Court. (1941) 1941 Oudh W N 835 (836) * (Vol 24) 1937 Oudh 108 (110, 111).

[30] The Court fails to exercise jurisdiction vested in it by law where it fails to decide one way or the other any question submitted to it for decision. (Vol 14) 1927 Lah 808 (809) * (Vol 21) 1934 Pesh 83 (33). (Omission to give finding on necessary issue is failure to exercise jurisdiction.) * (Vol 22) 1935 Mad 150 (151). (Refusal to exercise Court's jurisdiction in deciding the preliminary point raised as to whether judgment-debtors were estopped from questioning the correctness of a proclamation order.) * (Vol 22) 1935 Pat 454 (455). (Where the lower Court did not consider the only question that it had to consider in the case, it must be deemed to have not exercised its jurisdiction.)

[31] Merely writing on the application "the petition will be recorded" is failure to exercise jurisdiction. (Vol 15) 1928 Mad 215 (215) : 51 Mad 244.

[32] See the following cases of revision where the Court refused to pass an order on the ground that it had no power to do so: (1913) 18 Ind Cas 298 (298) (Cal). (Court finding possession in plaintiff, dismissing a suit under S. 9, Specific Relief Act, after an inquiry into title.) * (Vol 13) 1926 Cal 184 (186). (Refusal to order partition at instance of defendant.) * (Vol 21) 1934 Lah 537 (538). (Failure to exercise discretion in extending time for payment of additional court-fee on the ground that it had no power to so extend.) * (Vol 20) 1933 Pat 302 (303). (Refusal to grant an application under O. 1, R. 8 while the necessary allegations were made.) * (1885) 8 Mad 192 (195) * (1910) 12 Bom L R 762 (765). (Refusal to consider correctness of the decision of the lower Court under Dekkhan Agriculturists' Relief Act, on the ground that the decision is not a decree.) * (1911) 4 Cal L Jour 50 (54) * (Vol 16) 1929 Lah 694 (695). (Staying execution proceedings by wrongly applying S. 10, Civil P. C.) * (Vol 19) 1932 Nag 70 (71) : 28 Nag L R 54. (Refusal to make a reference under O. 46, Rule 7.)

[33] A refusal to confirm an execution sale when the conditions for setting aside the same are not present is a failure to exercise jurisdiction. (1893) 20 Cal 8 (11) : 19 Ind App 154 (PC) * (Vol 20) 1933 Lah 99 (100) : 13 Lah 761 * (Vol 19) 1932 All 403 (404).

[34] A refusal to annul an execution sale when the proceedings were found to have been carried on against a deceased judgment-debtor, is a failure to exercise jurisdiction vested in it. (Vol 2) 1915 Cal 268 (271).

[35] There is a failure to exercise jurisdiction where the Court fails, or refuses, to consider a case on the merits as it was bound to do. (Vol 15) 1928 Lah 414 (416). (Refusing to consider application to set aside a sale on merits on the ground that auction-purchaser was not made a party to it.) * (1913) 40 Cal 518 (522). (Omission to hear appeal on the merits.) * (Vol 20) 1933 Rang 38 (39). (Objections to award filed in time—Refusal of Court to consider.) * (Vol 12) 1925 Cal 357 (359) * (1887) 9 All 436 (492) * (Vol 7) 1920 Pat 536 (538). (Omission to consider plea.) * (1907) 10 Oudh Cas 3 (10). (Omission to consider part of defence owing to an erroneous view of law.) * (Vol 4) 1917 All 214 (215) : 39 All 297. (Court refusing to "try the issues.") * (Vol 14) 1927 All 386 (387). (Failure to exercise discretion under S. 5, Limitation Act.) * (Vol 22) 1935 Mad 547 (551) : 58 Mad 936. (Jurisdiction—Failure to exercise—Misconstruction of order of Court—Refusal to consider merits—Revision lies.)

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[36] Where the Court misunderstands its own duties or its powers and declines jurisdiction, there is failure to exercise jurisdiction. (Vol 27) 1940 Oudh 381 (382) : 15 Luck 712. (Where the Court orders an application for recording an adjustment of decree under O. 21, R. 2, to be filed on the ground that no inquiry is contemplated by that rule, it declines to exercise jurisdiction vested in it by law.) * (1921) 63 Ind Cas 858 (858) (All). (Misreading issue in the case.) * (Vol 15) 1928 Rang 67 (68) : 5 Rang 803. (Failing to grasp the fundamental point in the case.) * (Vol 12) 1925 Rang 188 (189). (Court holding that it had no inherent power to allow substitution of right copy of decree in appeal.) * (Vol 15) 1928 Lah 811 (812, 813) * (Vol 20) 1933 Oudh 225 (226). (Declining to proceed with execution is declining to exercise jurisdiction.) * (Vol 21) 1934 Pat 425 (425). (Refusal to allow an application under O. 1, R. 10 on the ground that it is opposed by plaintiff.) * (Vol 32) 1945 All 388 (388) : ILR (1945) All 637 * (Vol 31) 1944 Sind 162 (163) : ILR (1944) Kar 46 * (Vol 33) 1946 Pat 316 (325) : 25 Pat 58 * (Vol 32) 1945 Pat 132 (133).

11. Interlocutory orders.—[1] There is a conflict of views as to whether an interlocutory application is a "case" and an interlocutory order "a case decided."

(a) It has been held by the Allahabad High Court that an interlocutory order is not "a case decided." (Vol 28) 1941 All 50 (51) : I L R (1941) All 132 * (Vol 8) 1921 All 1 (4, 5) : 43 All 504 (F B) * (Vol 21) 1934 All 620 (622) : 57 All 17 (F B).

(b) The decisions of the Bombay High Court are conflicting.

The following decisions hold that an interlocutory order is not a "case decided." (Vol 19) 1932 Bom 81 (83) * (Vol 19) 1932 Bom 232 (233).

The following decisions hold that an interlocutory order is a "case decided." (Vol 28) 1941 Bom 361 (363) : I L R (1941) Bom 658 * (Vol 22) 1935 Bom 222 (225) : 59 Bom 430. (7 Bom 341, followed.) * (Vol 24) 1937 Bom 167 (168) : I L R (1937) Bom 623.

(c) The Sind view is that an interlocutory order is not "a case decided." (Vol 17) 1930 Sind 265 (269) : 24 Sind L R 277 (F B) * (Vol 20) 1933 Sind 82 (83, 84) : 26 Sind L R 491.

[But see (Vol 33) 1946 Sind 36 (37) : I L R (1945) Kar 347.]

(d) According to the Oudh view, an interlocutory order is not a "case decided." (Vol 30) 1943 Oudh 147 (148) * (Vol 20) 1933 Oudh 345 (345) * (1909) 12 Oudh Cas 405 (413) * (Vol 32) 1945 Oudh 255 (258) : 20 Luck 454 * (Vol 31) 1944 Oudh 116 (117).

[But see (Vol 4) 1917 Oudh 389 (390) * (Vol 32) 1945 Oudh 289 (293, 294) : 20 Luck 488.]

(e) According to the Peshawar view, an interlocutory order is not a "case decided." (Vol 30) 1943 Pesh 8 (9) * (Vol 20) 1933 Pesh 48 (49).

[But see (Vol 31) 1944 Pesh 1 (2).]

(f) The following Full Bench decision of the Lahore High Court has laid down that the word "case" is wide enough to include interlocutory applications. This decision overrules the previous Lahore decisions to the contrary. (Vol 30) 1943 Lah 65 (79) : I L R (1943) Lah 257 (F B). (Case-law fully discussed with illustrations—Overruling (Vol 11) 1924 Lah 425 : 5 Lah 288 (F B).)

(g) The general trend of the Courts at Calcutta, Madras, Nagpur, Patna and Rangoon is that the High Court can interfere in revision with interlocutory orders. (Vol 27) 1940 Cal 92 (92) : I L R (1939) 2 Cal 378 * (1887) 14 Cal 768 (780) * (Vol 16) 1929 Cal 159 (159) * (Vol 29) 1942 Mad 247 (249) : I L R (1942) Mad 455 * (Vol 29) 1942 Mad 362 (363) : I L R (1942) Mad 647 * (Vol 16) 1929 Mad 121 (124) * (Vol 18) 1931 Mad 1 (2, 5) * (Vol 30) 1943 Nag 97 (98) : I L R (1943) Nag

520 * (Vol 28) 1941 Nag 289 (290) : I L R (1942) Nag 478 * (Vol 18) 1931 Nag 17 (19) : 27 Nag L R 251 * (Vol 5) 1918 Pat 100 (103) : 4 Pat L Jour 20 * (Vol 24) 1937 Pat 550 (552) : 16 Pat 600 (S B) * (Vol 11) 1924 Pat 176 (179) * (Vol 11) 1924 Rang 2 (3) : 1 Rang 231 * (Vol 22) 1935 Rang 466 (466) : 13 Rang 595 * (Vol 22) 1935 Rang 225 (226) * (Vol 21) 1934 Pat 550 (551) * (Vol 18) 1926 Cal 1149 (1150) : 53 Cal 767. (Per Cumming J.) * (Vol 15) 1928 Cal 114 (114) : 54 Cal 1038 * (Vol 10) 1923 Mad 43 (43) * (Vol 12) 1925 Mad 985 (986) * (1928) 110 Ind Cas 78 (78) (Nag) * (Vol 16) 1929 Rang 270 (271) * (1935) 18 Nag L Jour 132 (134) * (Vol 22) 1935 Rang 158 (158).

[But see (Vol 28) 1941 Nag 263 (263) : I L R (1942) Nag 414.]

[2] Proceedings before a suit is commenced, or after a suit has ended and proceedings for which the Legislature has provided an independent remedy or a different procedure, are not interlocutory proceedings and will therefore be open to interference in revision. (Vol 27) 1940 Sind 190 (190) : I L R (1940) Kar 34. (Order awarding arbitrator's fees is a "case decided.") * (1904) 12 Oudh Cas 405 (413) * (Vol 13) 1926 Lah 642 (613) * (Vol 21) 1934 All 620 (622, 623) : 57 All 17 (F B). (Test as to whether a proceeding is a case or not laid down.)

[3] Order returning plaint under S. 23, Provincial Small Cause Courts Act, terminates the proceedings in that Court and is therefore a "case decided." (Vol 20) 1933 All 106 (107) : 51 All 1048.

[4] Decision dismissing applications under O. 41, R. 6 (2) is "case decided." (Vol 21) 1934 Bom 252 (253) : 58 Bom 485.

[5] Proceedings for a temporary injunction are a 'case' as they do not directly affect the decision of the suit one way or other. (Vol 20) 1933 Lah 1046 (1047).

[6] Order directing the defendant to deposit money under S. 10, Charitable and Religious Trusts Act is a "case decided." (Vol 11) 1924 Lah 408 (409).

[7] Application for transfer is a "case." (Vol 12) 1925 Lah 189 (189).

[8] In a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim is "case decided." (Vol 17) 1930 All 701 (702) : 52 All 951.

[9] Original Court having no jurisdiction sending suit to District Judge who transfers the same — There is a case decided — Proceedings terminate when original Court decided that it had no jurisdiction. (Vol 17) 1930 Lah 195 (197).

[10] Order refusing stay under S. 19, Arbitration Act is "case decided." (Vol 18) 1931 Lah 644 (647) : 13 Lah 59.

[11] Suits for injunction to restrain opposite party from proceeding to arbitration under arbitration clause — Order staying suit and asking parties to proceed with arbitration terminates the case so far as the Court is concerned and is therefore a "case." (Vol 18) 1931 Lah 66 (67).

[12] Order deciding finally one point in a suit terminates case and is therefore a "case." (Vol 12) 1925 Oudh 604 (604).

[13] Order regarding security for stay of further proceedings on appeal from preliminary decree—*Held*, to be a "case." (Vol 18) 1931 Lah 503 (503).

[14] An application made under S. 19, Arbitration Act, is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115 of the Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration; therefore an application in revision will lie and is not excluded by S. 115. (Vol 23) 1936 Sind 205 (205).

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[15] Application for refund of court-fee—Decision of, after suit has terminated is “case decided.” (Vol 22) 1935 All 455 (456).

[16] Order holding that a suit is triable under Sikh Gurdwaras Act (8 [VIII] of 1925) is revisable. (Vol 14) 1927 Lah 394 (394) : 8 Lah 362.

[17] Where in the course of execution of a decree, an outsider to the suit and to the execution proceedings, makes an independent application for stay of execution, the proceedings which begin with such an application for stay by a person not a party to the suit and not originally a party to the execution proceedings and which terminate with an order of refusal have the character of a “case” complete in itself; and an order passed on such an application, refusing to stay the execution is a “case decided” within the meaning of S. 115, Civil P. C., and is subject to revision by the High Court. (Vol 24) 1937 All 658 (659).

[18] Order on an application for leave to sue as pauper is a “case decided.” (Vol 29) 1942 Pesh 29 (29) * (Vol 14) 1927 Lah 56 (56) * (Vol 21) 1934 Lah 231 (231) * (Vol 24) 1937 Oudh 481 (481) : 13 Luck 560.

[19] An application to set aside an *ex parte* decree is a “case.” (Vol 12) 1925 All 610 (611) : 48 All 175 (F B) * (Vol 18) 1931 All 294 (301) : 53 All 612 (F B) * (Vol 13) 1926 Lah 344 (344) * (Vol 13) 1926 Lah 379 (380) : 7 Lah 161 * (Vol 8) 1921 Oudh 141 (142) : 24 Oudh Cas 282 * (Vol 10) 1923 Oudh 177 (180) : 26 Oudh Cas 10. (Order of remand setting aside an *ex parte* decree and directing a re-hearing of the same.) * (Vol 25) 1938 Sind 76 (78) : 32 Sind L R 703.

[20] An order on an application to set aside a decree dismissed for default is “a case decided.” (Vol 28) 1941 Oudh 367 (368) * (Vol 16) 1929 All 599 (599) : 51 All 908 * (Vol 20) 1933 All 41 (41) * (Vol 20) 1933 Lah 169 (171). (Order is not of an interlocutory nature.) * (1928) 107 Ind Cas 395 (396) (Lah) * (Vol 23) 1936 Lah 618 (619). (Orders relating to an application for restoration of proceedings dismissed in default constitute a “case” within the meaning of S. 115.)

[21] An application raising the question whether a certain person should or should not act as the next friend of a minor, was held to be a “case.” (Vol 16) 1929 Lah 257 (259). (Case finally decided *qua* that particular proceeding.)

[22] An application for stay under S. 10 of the Code is not a “case.” (1939) 41 Pun L R 883 (883). (No revision against order refusing stay.) * (Vol 26) 1939 Sind 291 (292) * (Vol 16) 1929 All 957 (959) * (Vol 21) 1934 All 520 (521). (Decision by lower Court on an issue that the trial of the suit was not barred under S. 10, C. P. Code, is not a case decided.) * (Vol 23) 1936 Lah 569 (569). (Order refusing to stay proceedings under S. 10.) * (1939) 41 Pun L R 55 (55).

[But see (Vol 20) 1933 Lah 34 (34) * (Vol 20) 1933 Lah 50 (51) * (1921) 61 Ind Cas 380 (381) (Lah) * (Vol 27) 1940 Oudh 441 (442) : 16 Luck 184 * (Vol 15) 1928 Oudh 355 (358) : 3 Luck 650 (F B) * (Vol 27) 1940 Oudh 342 (343) : 15 Luck 641. (Civil Court proceeding with trial of suit in spite of its finding that its jurisdiction to proceed with it is temporarily ousted by U. P. Encumbered Estates Act—Revision lies.)]

[23] (a) According to the Allahabad High Court an application under O. I. R. 10 is a “case.” (Vol 15) 1928 All 97 (97) : 50 All 276 * (1912) 14 Ind Cas 263 (264) (All).

[But see (Vol 21) 1934 All 25 (27).]

(b) According to the Oudh Court an application under O. I. R. 10 is not a “case.” (Vol 30) 1943 Oudh 315 (315, 316) * (Vol 29) 1942 Oudh 338 (339) : 13 Luck 56 * (1910) 13 Oudh Cas 109 (112).

[But see (Vol 26) 1939 Oudh 102 (103) : 14 Luck 447.]

[24] Plaintiff dying during the pendency of a suit — Two parties, each claiming to be his legal representative applying to be brought on the record — Order of the Court deciding in favour of one party amounts to a “case decided.” (Vol 22) 1935 Lah 934 (934).

[25] Suit against several persons on the basis of a promissory note executed by them—Court ordered that the suit could not proceed against one of them as promissory note was signed by him at place beyond jurisdiction of the Court—It was held that there was a “case decided.” (Vol 24) 1937 Lah 800 (801).

[26] An order by Court holding the suit of a plaintiff time barred in respect of certain reliefs claimed by him is a “case decided” to that extent. (Vol 25) 1938 Lah 507 (508).

[27] Order dismissing suit as against one of the defendants is not an interlocutory order and order by successor of Judge setting aside such order is also not an interlocutory order. (Vol 26) 1939 Sind 137 (140) : I L R (1939) Kar 350.

[28] The proceeding started by the filing of an application under S. 7 (1) (a), U. P. Encumbered Estates Act, (25 [XXV] of 1934), is “case.” (Vol 27) 1940 All 887 (888) : I L R (1940) All 499.

[29] An order allowing or refusing an amendment of the plaint, is of an interlocutory nature and not open to revision. (Vol 23) 1936 All 686 (688, 689) : I L R (1937) All 17 (F B) * (Vol 21) 1934 All 785 (785) * (Vol 28) 1941 Oudh 87 (88) * (Vol 28) 1941 Oudh 623 (624).

[See however (Vol 27) 1940 All 448 (449) : I L R (1940) All 564. (Application that certain additions by way of explanatory notes be made after description of certain defendants in the plaint is not an application for amendment of a pleading—Rejection of application constitutes the decision of a case and revision lies —(Vol 23) 1936 All 686 : I L R (1937) All 17 (F B) explained.)]

[30] An order refusing to file an award and directing the suit to proceed is interlocutory. (1936) 58 All 946 (947) * (Vol 25) 1938 All 557 (559, 560) : I L R (1938) All 805 (F B). (Vol 18) 1931 All 721 and (Vol 8) 1921 All 743 : 51 All 1010, overruled.) * (Vol 30) 1943 Pesh 8 (9). (Order holding that there was no valid reference to arbitration and directing suit to be tried regularly — No revision.)

[31] An order setting aside an award in a pending suit and directing the suit to proceed in the ordinary way is interlocutory in its nature. (1939) 183 Ind Cas 837 (838) (Oudh).

[32] Order setting aside final decree in terms of award and restoring case—No revision. (Vol 27) 1940 Oudh 405 (406) : 16 Luck 79.

[33] An order of the Appellate Court holding that there is a valid reference to arbitration and directing the lower Court to deal with the case under the Arbitration Act is not of an interlocutory nature. (Vol 30) 1943 Pesh 8 (9).

[34] Judge deciding that particular issue should be referred to arbitration—That is a case decided. (Vol 29) 1942 Sind 7 (7).

[35] An order impounding a document and forwarding it to the Collector for necessary action under the Stamp Act is “a case decided.” (Vol 29) 1942 Lah 265 (266).

[36] In the undermentioned cases High Courts interfered with interlocutory orders in the exercise of their powers of superintendence under S. 107 of the Government of India Act, 1915 (corresponding to S. 15 of the Charter Act, 1861). (Vol 9) 1922 Pat 598 (599) * (1909) 10 Cal L Jour 407 (413, 414) * (Vol 12) 1925 Cal 1118 (1199) * (1912) 16 Cal L Jour 375 (378) * (Vol 7)

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1920 Cal 204 (205) * (Vol 3) 1916 Mad 903 (906) * (Vol 11) 1924 Pat 673 (675) : 3 Pat 930 * (Vol 22) 1935 Cal 102 (107) * (Vol 21) 1934 Pat 641 (642) : 14 Pat 220 * (Vol 23) 1936 Mad 187 (187) : 59 Mad 356 (F B).

[37] In the undermentioned cases the Bombay High Court acted under Regulation II of 1827, S. 5, and interfered with interlocutory orders. (1886) 10 Bom 610 (616) (F B) * (Vol 2) 1915 Bom 269 (270, 271) : 40 Bom 86 * (Vol 18) 1931 Bom 234 (235).

[37a] Improper rejection of evidence can be questioned in appeal from decision—No revision. (Vol 26) 1939 Rang 448 (448) : 1939 Rang L R 591.

[37b] Assuming that interlocutory orders are reversible, the High Court will not interfere except where the non-interference will cause a denial of justice or irreparable harm. (Vol 25) 1938 Nag 358 (359) : 1 L R (1940) Nag 280 * (Vol 23) 1936 Pat 85 (86) : 15 Pat 340 * (Vol 26) 1939 Pat 157 (158) * (Vol 22) 1935 Cal 102 (106).

[38] The following are some of the circumstances in which the High Courts have interfered under S. 115 with interlocutory orders:

(a) Where the effect of the order was to cause a multiplicity of litigation or to prolong the trial. (Vol 23) 1941 Mad 84 (85). (Where a decision relates to the question of the jurisdiction of the Court to entertain the suit and it relates to a matter which, if decided wrongly, would result in an elaborate trial which would otherwise be unnecessary, the High Court will interfere in revision.) * (Vol 5) 1918 Cal 909 (909). (Neither S. 115, Civil P. C., nor S. 107, Government of India Act, 1915, prevents the interference of the High Court in the matter of addition or substitution of parties.) * (1894) 21 Cal 539 (541). (Refusal to allow a party interested in a probate case to appear and oppose the grant of probate.) * (Vol 5) 1918 Mad 1137 (1139). (Erroneously adding parties.) * (Vol 10) 1923 Mad 144 (147) : 47 Mad 47. (Failure to add receiver as party to suit or execution proceedings.) * (Vol 13) 1926 Mad 185 (186). (Addition of party causing multifariousness.) * (Vol 17) 1930 Pat 592 (592). (Order refusing to add purchaser of holding in a rent suit is improper.) * (Vol 16) 1929 Mad 403 (403). (Trial Court refusing to make person party defendant—Likelihood of there being conflicting findings if that person not made defendant.) * (Vol 5) 1918 Mad 1071 (1071). (Refusing to implead son of hereditary trustee in a scheme suit.) * (Vol 9) 1922 Mad 174 (175) : 46 Mad 186. (Order erroneously holding that suit was not bad for multifariousness.) * (Vol 9) 1922 Mad 436 (436). (Joinder of claims as administrator and as partner—Order directing plaintiff to elect.) * (1911) 7 Nag L R 130 (133) * (Vol 2) 1915 Cal 87 (91). (Order directing trial of case piecemeal.) * (Vol 8) 1921 Pat 323 (323). (Do.) * (Vol 12) 1925 Cal 204 (206). (Trial of the suit was sought to be complicated by dragging in issues which were outside its scope and wholly irrelevant and unnecessary, and the trial of which would inevitably prolong the litigation.) * (Vol 11) 1924 Pat 761 (764). (Issue of commission tending to unnecessary prolonging the litigation.) * (Vol 7) 1920 Pat 131 (137) : 5 Pat L Jour 550. (Refusal of a right to cross-examine witness.) * (Vol 18) 1931 Mad 542 (549). (Amendment of plaintiff by including barred claim—Non-interference would only multiply proceedings.) * (Vol 18) 1931 Mad 1 (2, 5). (Order of remand allowing an amendment of barred claim.) * (Vol 23) 1936 Lah 619 (621). (Improper refusal to add party.)

[But see (Vol 17) 1930 Nag 51 (51). (Court refused to interfere though refusal to add parties would lead to multiplicity of proceedings.)]

(b) Where there is a patent irregularity in procedure.

(Vol 3) 1916 Mad 903 (906). (Allowing inconsistent or alternative claim to be made after all the evidence is closed.) * (Vol 9) 1922 Mad 49 (49, 50). (The legal representative of a deceased plaintiff allowed to set up a claim not open to original plaintiff.) * (Vol 17) 1930 Mad 322 (325). (Order allowing amendment of plaintiff—Same not justified in law.)

(c) Where the effect of the order is to cause unnecessary delay or expense. (Vol 12) 1925 Mad 535 (536). (Refusal of amendment.) * (Vol 21) 1934 Cal 508 (505) * (Vol 13) 1926 Mad 1124 (1125). (Refusal to allow just prayer for amendment.) * (Vol 14) 1927 Mad 212 (213). (Refusal to amend a suit for partition into a claim for a fresh partition.) * (Vol 12) 1925 Mad 707 (707). (If an election petition is not maintainable at all an order holding the same to be maintainable will be set aside.) * (Vol 17) 1930 Mad 216 (217). (Decision upon preliminary issue relating to jurisdiction is open to revision.) * (Vol 12) 1925 Mad 820 (821). (Suit not maintainable at all—High Court can interfere and thus prevent further waste of time and money.) * (Vol 6) 1919 Nag 150 (152) : 15 Nag L R 21. (Order going to the root of the case and allowing the continuance of a litigation which the lower Court had no jurisdiction to allow to continue.) * (Vol 18) 1931 Nag 17 (20) : 27 Nag L R 251. (Erroneous decision that a suit which was time-barred was not so barred.) * (Vol 23) 1936 Pat 250 (252).

[See (Vol 12) 1925 Mad 188 (189). (Refusal to amend plaintiff for setting aside sale for fraud into one that plaintiff was a minor at the time.)]

(d) Where the order passed is perverse or such that unless set aside irreparable harm is likely to be caused to one of the litigants. (Vol 9) 1922 Mad 321 (324). (Where the lower Court posted a case for final hearing on preliminary issue of law, settled long before the High Court's refusal to interfere.) * (1910) 12 Cal L Jour 519 (524) * (Vol 14) 1927 Mad 188 (189). (Grant of injunction without a *prima facie* case.) * (1908) 18 Mad L Jour 303 (303). (Grant of injunction to party out of possession.) * (Vol 15) 1928 Nag 222 (222) * (Vol 11) 1924 Pat 176 (179). (Will not interfere unless for avoiding irreparable loss.) * (Vol 18) 1931 Rang 193 (194). (Order impounding a document.) * (1913) 17 Cal W N 318 (319). (Where Court required applicant to whom injunction was granted to furnish security—Held it was passed to prevent a failure of justice, so no revision.) * (Vol 12) 1925 Cal 1118 (1119). (Order refusing to examine a witness on commission amounting to a denial of justice.) * (1908) 31 Mad 60 (61). (Order issuing commission as being beyond the scope of S. 386.) * (Vol 11) 1924 Cal 971 (974). (Issue of commission is a question of jurisdiction and not one of mere discretion—Grounds alleged for issue of commission should be carefully examined.) * (Vol 11) 1924 Mad 846 (846) : 47 Mad 934. (Court not properly understanding provisions of O. 11, R. 14.) * (Vol 7) 1920 All 191 (192). * (Vol 13) 1926 Mad 166 (166). (Refusing injunction on Judge's own private opinion.) * (Vol 9) 1922 Cal 42 (44). (Wrong refusal to grant commission and examine witnesses.) * (Vol 11) 1924 Mad 541 (541). (Refusal to allow defendant to examine himself on commission when plaintiff was so examined.) * (Vol 8) 1921 Nag 9 (10). (Order directing plaintiffs to elect as to which of them is to remain on record when both can remain.) * (Vol 19) 1932 Pat 9 (11) : 11 Pat 161. (Court fixing arbitrary valuation and returning plaintiff.)

(e) Where the effect of the order is to make the trial take an illegal course. (Vol 10) 1923 Mad 321 (322) : 46 Mad 574. (Refusal to issue commission.) * (Vol 1) 1914 Bom 42 (45) : 38 Bom 331 * (Vol 20) 1933 All 523 (525) : 55 All 719. (Decision that defendant is not

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entitled to take part in the case amounts to a "case decided".)

(8) The order works manifest injustice. (Vol 5) 1918 Mad 1137 (1139).

[39] An interlocutory order which is appealable as an order under S. 104 or O. 43, R. 1 is not open to revision under this section. (Vol 12) 1925 Cal 510 (511) * (1902) 1902 Pun Re No. 31, page 118 (119).

12. "In which no appeal lies thereto."—

[1] Revision lies only where no appeal lies to the High Court. (Vol 30) 1943 Oudh 241 (242)* (Vol 28) 1941 All 55 (56)* (Vol 28) 1941 Oudh 598 (599) : 17 Luck 17* (Vol 27) 1940 Pat 7 (9) : 18 Pat 777* (Vol 31) 1944 Cal 309 (310)* (Vol 20) 1933 Lah 327 (327)* (Vol 23) 1936 Cal 267 (268)* (Vol 25) 1938 Pat 447 (149)* (Vol 25) 1938 All 456 (458) : I L R (1938) All 702 (FB). (The mere fact that a right of appeal is denied to a litigant is no ground for holding that he is debarred from invoking the revisional jurisdiction of the High Court.)

* [See (1895) 90 Bom 480 (482) (FB).]

[2] The mere fact that a decree is unappealable is no ground for holding that it cannot be challenged by an application in revision. (Vol 24) 1937 All 65 (75) : I L R (1937) All 317.

[3] "Appeal" includes both first and second appeals (Vol 30) 1943 Cal 177 (178)* (Vol 18) 1931 All 294 (296) : 53 All 612 (FB)* (Vol 17) 1930 All 604 (605)* (Vol 15) 1928 Mad 794 (795)* (Vol 11) 1924 Lah 487 (487)* (1897) 20 Mad 155 (156)* (1890) 3 C P L R 177 (178)* (Vol 16) 1929 Cal 226 (227)* (Vol 23) 1936 Lah 963 (965).

[But see (Vol 20) 1933 Rang 64 (67) : 11 Rang 134.]

[4] Where a first appeal or second appeal lies to the High Court, the High Court has no jurisdiction to interfere in revision. (Vol 28) 1941 Cal 264 (265). (Order appealable as decree under S. 47—No revision.)* (Vol 28) 1941 Cal 518 (520). (Decision as to court-fee.)* (Vol 17) 1930 All 604 (605)* (1893) 6 C P L R 17 (18)* (Vol 11) 1924 Oudh 16 (16)* (Vol 4) 1917 Mad 659 (660)* (Vol 1) 1914 Mad 143 (143). (Order of District Court—Appeal lay to High Court—No revision lies.)* (Vol 2) 1915 All 171 (171)* (Vol 12) 1925 Oudh 70 (71)* (Vol 22) 1935 Pat 121 (121).

[5] Orders and decisions amounting to decrees and which are open to a second appeal to the High Court cannot be revised under this section. (Vol 27) 1940 Cal 257 (259, 260) : I L R (1940) 1 Cal 393. (Order under S. 47, in execution proceedings vacating a stay order.)* (1886) 8 All 109 (111) (FB). (Order dismissing a suit for failure to furnish security for costs in a decree and so appealable.)* (Vol 20) 1933 Bom 185 (186). (Decision under S. 47—Remedy of appeal open.)* (Vol 4) 1917 Mad 285 (286). (Order declaring a suit to have abated being a decree is appealable.)* (Vol 1) 1914 Lah 153 (154) : 1914 Pun Re No. 80 * (Vol 16) 1929 Pat 141 (144) : 8 Pat 717.

[6] The mere fact that an appeal to a Court, other than the High Court, lies or is preferred from a decision, is no bar to the exercise of the power under S. 115. (Vol 30) 1943 Oudh 241 (242)* (Vol 25) 1938 All 6 (6) : I L R (1938) All 22* (Vol 23) 1936 Cal 786 (787).

[7] In this case High Court interfered with an order of a Munsif granting review even after an appeal against the order was disposed of. (Vol 21) 1934 All 250 (251).

[8] Order rejecting plaint by Sub-Judge—High Court can interfere though appeal lies to District Judge. (Vol 22) 1935 Pat 86 (88).

13. Jurisdiction. — [1] The word 'jurisdiction' has been used in its broad legal sense as meaning the power of administering justice subject to the limitations

imposed by law. (1885) 7 All 345 (350)* (Vol 1) 1914 Cal 388 (390, 391) : 41 Cal 323.

[2] "Jurisdiction" means jurisdiction of the Court and not the competence of the party to sue. (Vol 23) 1936 Lah 783 (784).

[3] The section applies to jurisdiction alone, the irregular exercise or non-exercise of it or the *illegal assumption* of it. The section is not directed against the *conclusions* of law or fact in which the question of jurisdiction is not involved. (Vol 4) 1917 P C 71 (74) : 40 Mad 793 : 44 Ind App 261 (PC) * (Vol 30) 1943 Bom 42 (43) : I L R (1943) Bom 33. (Distinction between appellate and revisional jurisdiction pointed out.)

[4] Jurisdiction of arbitrators to proceed with arbitration challenged on ground of its subject-matter being subject of pending suit—Question of jurisdiction is involved. (Vol 29) 1942 Sind 41 (41, 42) : I L R (1941) Kar 570.

[5] Judge failing to distinguish conditions in England and India—Instead of considering particular case considered another decision—No question of jurisdiction arises. (Vol 29) 1942 Sind 57 (58) : I L R (1941) Kar 587.

14. Laches in making the application.—[1] There is no limitation for revision applications. (Vol 29) 1942 Pat 251 (254) : 21 Pat 197. (Usual practice of the Court is not to entertain applications presented beyond 90 days.)* (Vol 20) 1933 Pesh 51 (52).

[2] No special period is prescribed for an application for revision and therefore if any article is applicable it is Art. 181, Limitation Act which prescribes a three years' period from the time when the right to apply accrues. (Vol 29) 1942 Oudh 340 (341).

[3] According to the practice in the Rangoon High Court, revision application may be filed at any time within 90 days of the order. (Vol 27) 1940 Rang 91 (93) : 1940 Rang L R 237.

[4] The period of 90 days provided by the Rules of the Sind Court in case of a revision application is subject to the High Court's discretion. (Vol 23) 1936 Sind 172 (173) : 30 Sind L R 271.

[5] High Court will not interfere where there has been unexplained delay or laches. (Vol 29) 1942 Pat 251 (254) : 21 Pat 197 * (Vol 25) 1938 All 98 (100) : I L R (1938) All 148 * (Vol 22) 1935 Lah 120 (121) * (Vol 1) 1914 Mad 299 (299) * (1883) 7 Bom 341 (372) (FB) * (Vol 1) 1914 Lah 249 (250) : 1914 Pun Re No. 25.

[6] Ordinarily if an application is filed beyond the period of limitation prescribed for an appeal it ought to be considered to have been unduly delayed. (Vol 29) 1942 Oudh 392 (393).

[7] Interference in revision being discretionary the practice of Oudh Chief Court is to demand an explanation in case the application is made more than ninety days after the passing of the order. (Vol 23) 1936 Oudh 185 (187) : 12 Luck 62.

[8] Delay—No fault of applicant—Delay excused and revision allowed. (1884) 6 All 125 (126) * (Vol 15) 1928 Mad 528 (530) : 51 Mad 672.

[9] If the applicant was not a party to any of the orders which he seeks to revise and they were all passed behind his back and without notice to him, the delay on the part of the applicant should be condoned. (Vol 23) 1936 Oudh 185 (187) : 12 Luck 52.

[10] Delay excused in view of special circumstances. (Vol 29) 1942 Mad 757 (758) * (Vol 2) 1915 Cal 290 (291) * (Vol 9) 1922 Mad 63 (64) * (1869) 11 Suth W R 56 (57).

[See also (Vol 17) 1930 Oudh 496 (496).]

[11] The petitioner failed in his attempt to set aside an *ex parte* decree and filed a suit to vacate the same for want of jurisdiction but the Court held that the

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relief could not be granted—A revision was preferred—Circumstances held sufficient to explain delay. (Vol 16) 1929 Oudh 383 (383).

15. "May call for the record." — [1] The High Court will not take a technical view and use its discretionary powers of revision to interfere with every improper or irregular order. (Vol 29) 1942 Cal 230 (232) : I L R (1941) 2 Cal 366. (Petitioner himself party to arbitration and on its going against him, trying to back out—High Court would not interfere in his favour.) * (1941) 1941 Oudh W N 835 (838) * (Vol 31) 1944 Pat 147 (157) : 22 Pat 755 * (Vol 27) 1940 Sind 178 (180) : I L R (1940) Kar 327 * (Vol 33) 1946 Pat 165 (167) * (Vol 18) 1931 Cal 607 (613) : 59 Cal 275 * (Vol 19) 1932 Oudh 156 (158) : 7 Luck 642. (High Court will not therefore interfere where the order is just.) * (Vol 20) 1933 All 118 (120) * (Vol 20) 1933 Oudh 327 (327) * (1892) 14 All 226 (232) (F B) * (Vol 18) 1926 Lah 637 (637) * (Vol 12) 1925 Bom 341 (342) : 49 Bom 535 * (Vol 4) 1917 Mad 726 (726) * (Vol 32) 1945 All 284 (285) : I L R (1945) All 680 * (Vol 31) 1944 Lah 397 (397, 398).

[2] Order granting permission to the plaintiff to sue *in forma pauperis* — Power of attorney granted by the plaintiff to the Mukhtar who filed the application technically defective — No interference. (1940) 42 Pun L R 227 (228).

[3] The High Court will interfere in revision with improper or irregular orders only where grave injustice or hardship would result from a failure to do so. (Vol 30) 1943 Lah 65 (70, 71) : I L R (1943) Lah 257 (F B) * (Vol 18) 1931 Rang 136 (137, 138) : 9 Rang 71 * (Vol 20) 1933 Mad 5 (6) * (Vol 22) 1935 Lah 190 (191).

[See (1895) 22 Cal 729 (734) : 22 Ind App 90 (P C).]

[4] Court summarily rejecting prayer for trying preliminary issue on point of law — No opinion expressed as to whether question of law would be sufficient to dispose of case — High Court would interfere in revision as non-interference might give rise to gravest hardship. (Vol 23) 1936 Pat 250 (252).

[5] If interference is found necessary the High Court may call for the record and pass the necessary orders even where no application has been made by the party. (Vol 20) 1933 Lah 327 (327) * (Vol 19) 1932 Mad 714 (716) * (Vol 20) 1933 Sind 200 (202) : 28 Sind L R 167 * (1901) 28 Cal 680 (684) * (1906) 33 Cal 757 (769, 770) (F B) * (Vol 15) 1928 Mad 528 (529) : 51 Mad 672 * (Vol 11) 1924 Nag 154 (155) * (Vol 30) 1943 Nag 333 (334) : I L R (1944) Nag 444 * (1909) 12 Oudh Cas 78 (80) * (Vol 9) 1922 Pat 525 (526) : 1 Pat 232 * (Vol 1) 1914 Bom 123 (124) : 38 Bom 638. (On a reference by a District Judge.) * (Vol 23) 1936 Pat 591 (593) : 15 Pat 738 * (Vol 23) 1936 Sind 1 (1) * (Vol 25) 1938 All 456 (458) : I L R (1938) All 702 (F B) * (Vol 25) 1938 Pesh 81 (82).

[But see (1881) 7 Cal L Rep 191 (192).]

[6] The practice of Bombay High Court is not to exercise its powers of interference, under Regulation II of 1827, unless a party applies. (1894) 1894 Bom P J 52 (52) * (1896) 21 Bom 806 (807).

[7] The mere fact that a non-party has also joined in revision application is no bar to the High Court disposing of the application. (1903) 27 Bom 140 (143) * (1901) 28 Cal 574 (579).

[8] Where an application by one of the decree-holders for stay of execution proceedings against the judgment-debtor, is not granted and that decree-holder does not choose to agitate it further, the judgment-debtor has no *locus standi* to prefer a revision. (1938) 177 Ind Cas 138 (139) (Pat).

[9] Order passed against trustee of provident fund violating the terms on which he held trust property—

He can move against the order in revision. (Vol 30) 1943 Nag 333 (334) : I L R (1944) Nag 444.

16. "May make such order in the case as it thinks fit." — [1] Where the High Court has jurisdiction to revise, there is no limitation as to the mode of disposal. (Vol 28) 1941 All 215 (216).

[2] A case may be finally disposed of in revision by the High Court. (Vol 19) 1932 Mad 714 (716) * (Vol 9) 1922 Pat 359 (360) : 4 Pat L Jour 195 * (Vol 22) 1935 Pesh 21 (22) * (Vol 25) 1938 Oudh 107 (108) : 14 Luck 13 * (1881) 3 All 203 (205, 206) (F B) * (Vol 18) 1931 Lah 748 (749) * (1903) 27 Bom 563 (574).

[3] The High Court may pass any order in revision satisfying justice of the case. (Vol 29) 1942 Mad 296 (297). (Contention of petitioner upheld by lower Court but rejected by High Court—Petitioner should be given opportunity to establish subsidiary contention which he would have raised in lower Court had it rejected his contention.) * (Vol 4) 1917 Mad 223 (224). (May expunge seditious, blasphemous, or irrelevantly scandalous or indecent remarks in the judgment.) * (Vol 2) 1915 Oudh 171 (172). (When pre-emption money deposited on last day was not sent to bank in time due to mistake of Court, order refusing to deliver property was set aside.) * (Vol 23) 1936 Lah 903 (910). (Time fixed by lower appellate Court already expired and appeal dismissed for want of payment of court-fees—High Court, even then can extend time in revision.)

[3a] When High Court as a Court of revision, under its inherent powers to remand, remands a case for further evidence on an issue and findings, retaining seisin of the case, it has no power to scrutinize or review the evidence. All it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial. (Vol 23) 1936 Nag 140 (143) : I L R (1936) Nag 188.

[4] High Court will not interfere in revision with a finding of fact, where justice is done. (Vol 30) 1943 Pesh 54 (56) * (Vol 29) 1942 Pat 293 (295) * (Vol 19) 1932 Oudh 156 (158) : 7 Luck 642 * (1904) 28 Bom 458 (460) * (Vol 16) 1929 Cal 78 (80) : 55 Cal 1084 * (1902) 1902 Pun Re No. 36 page 135 (139) (F B) * (Vol 16) 1929 Lah 777 (777). (Surety claiming discharge in revision on ground of dismissal of suit against principal—Revision not competent.) * (Vol 3) 1916 Mad 882 (882) : 30 Mad 882 * (Vol 16) 1929 Mad 790 (791) * (Vol 11) 1924 Nag 293 (294) * (Vol 12) 1925 Pat 36 (37) : 3 Pat 778 * (Vol 13) 1926 Pat 218 (222) : 5 Pat 36 (F B) * (Vol 16) 1929 Rang 193 (200) * (1913) 7 Sind L R 186 (187) * (Vol 1) 1914 Sind 61 (62) : 8 Sind L R 327 * (Vol 28) 1941 Nag 261 (263). (The 'justice' referred to in the above rule, however, relates to a right to which a party has a legal claim and not purely moral claim — If plaintiff's suit is barred by time, the above rule does not apply.) * (Vol 19) 1932 Mad 157 (158) * (Vol 7) 1920 All 112 (115) : 42 All 626 * (Vol 12) 1925 All 51 (52).

[5] Interference tampering with justice—High Court will not interfere. (Vol 17) 1930 Lah 417 (418) * (Vol 20) 1933 All 154 (155) * (Vol 12) 1925 All 264 (266) * (1898) 28 Bom 458 (460) * (Vol 18) 1931 Cal 425 (427) * (1905) 1905 Pun L R No. 109, page 423 (424). (*Ex parte* decree set aside in 30 days after date of order.) * (Vol 30) 1943 Sind 233 (235) : I L R (1943) Kar 342 * (Vol 1) 1914 Mad 159 (160) * (Vol 15) 1928 Mad 559 (560) * (Vol 12) 1925 Pat 153 (154).

[6] The High Court under S. 115, Civil P. C., ought not obviously to interfere in revision so as to restore an order which itself is without jurisdiction, or founded on irregularity in the exercise of jurisdiction, although the order under revision is one without jurisdiction. (Vol 25) 1938 Pat 447 (449).

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[7] High Court will not interfere in revision where such interference will lead to contradictory orders. (Vol 27) 1940 Pat 670 (671).

[8] Where a particular order creates an anomalous position the High Court will interfere in revision. (Vol 14) 1927 Lah 435 (439) : 8 Lah 617 * (Vol 20) 1933 Bom 245 (250) * (Vol 29) 1942 Pat 293 (295) * (Vol 12) 1925 All 202 (202) * (Vol 19) 1932 Bom 210 (213).

[9] A Small Cause Judge returned a plaint which had been returned by the Munsif to be presented before the former — The Munsif adhered to his previous order — High Court passed an order so as to enable the plaintiff to have his action tried. (Vol 9) 1922 Pat 368 (369) * (Vol 21) 1934 Nag 257 (258).

[10] A party creating a particular position cannot seek to set it aside in revision. (1886) 9 Mad 451 (452) * (1904) 28 Bom 264 (274, 275).

17. Nature of order made in revision against a decree. — [1] An order passed in revision from a decree is a decree. (Vol 21) 1934 All 134 (135) : 56 All 608.

[2] An order *dismissing* a petition for revision is not a decree. (Vol 22) 1935 Pesh 91 (92).

18. Orders in claim cases. — [1] Orders under O. 21, Rr. 60, 61 and 62 — No revision as a rule because appeals lie from the orders. (Vol 25) 1938 Rang 319 (320) * (Vol 23) 1936 Rang 306 (306) : 14 Rang 516 * (Vol 23) 1936 Sind 2 (3) : 30 Sind L R 288 * (Vol 20) 1933 Lah 317 (318) : 14 Lah 51 * (Vol 17) 1930 Pat 394 (395) * (Vol 16) 1929 Nag 66 (67) * (Vol 13) 1926 Cal 1149 (1151) : 53 Cal 767 * (Vol 10) 1923 Oudh 208 (208) * (Vol 6) 1919 Cal 857 (858) * (Vol 5) 1918 Mad 914 (915) * (Vol 4) 1917 All 177 (178) * (1907) 1 Sind L R 226 (226, 227) * (1904) 28 Bom 458 (460) * (1888) 10 All 119 (122) * (1885) 8 Mad 484 (493) (FB).

[2] High Court has jurisdiction to interfere in exceptional cases. (Vol 18) 1926 Nag 257 (259). (But the mere fact that if applicant files a suit the onus will be on him is no ground for interference in revision.) * (Vol 20) 1933 Pat 158 (159). (Where order is passed without consideration of evidence, High Court will interfere.) * (Vol 10) 1923 Mad 663 (664) * (Vol 23) 1936 Rang 306 (306) : 14 Rang 516. (High Court will interfere where Court passing the order has failed to exercise jurisdiction vested in it.)

[3] The Court will interfere in the following cases:—

(a) Question of possession not decided. (Vol 16) 1929 Pat 751 (752) * (Vol 16) 1929 Cal 225 (226) * (Vol 15) 1928 Mad 124 (125) * (Vol 14) 1927 Nag 286 (288) * (Vol 10) 1923 Rang 195 (196) : 1 Rang 276 * (1887) 14 Cal 617 (620).

(b) Disposal of petition made on the ground of *title*. (Vol 2) 1915 Cal 116 (117) * (Vol 20) 1933 Rang 259 (260) * (Vol 12) 1925 Mad 588 (588) * (Vol 18) 1931 Lah 666 (666) * (Vol 26) 1939 All 117 (120).

(c) Claim allowed after execution sale. (1906) 33 Cal 487 (496) * (1912) 16 Cal W N 1029 (1031) * (Vol 16) 1929 Pat 746 (747).

(d) Claim allowed against mortgaged property brought to sale. (1905) 27 All 700 (701) * (1913) 18 Ind Cas 215 (216) (Cal) * (Vol 5) 1918 Lah 368 (368) : 1918 Pun Re No. 58.

(e) Refusal to entertain a claim on the mistaken view that the decree was a mortgage decree. (Vol 21) 1934 Lah 176 (176).

(f) Improper refusal to investigate a claim. (Vol 24) 1937 Oudh 268 (269) : 13 Luck 111. (Objection summarily dismissed on supposed ground of unnecessary delay.) * (1875) 24 Suth W R 422 (423). (Refusing to receive evidence.) * (1872) 17 Suth W R 74 (74) * (1879) 4 Cal L Rep 74 (76) * (Vol 16) 1929 Rang 152 (153) : 7 Rang 132.

(g) Extraneous questions considered in determining possession. (1900) 1 Low Bur Rul 180 (182) * (Vol 14) 1927 Pat 316 (318) * (1891) 18 Cal 290 (296).

[4] Revision lies from an order of the executing Court refusing to entertain objections under O. 21, R. 58. (Vol 23) 1936 Pesh 185 (186).

19. Orders setting aside or refusing to set aside sales. — [1] Judgment-debtor depositing amount mentioned in the sale proclamation together with the 5 per cent. of the purchase-money in time — Order of refusal to set aside sale held irregular exercise of jurisdiction. (Vol 10) 1923 All 315 (317) * (Vol 6) 1919 Pat 465 (466) * (Vol 17) 1930 Oudh 9 (10) * (Vol 16) 1929 Nag 10 (11).

[2] When the deposit falls short, due to a mistake of the Court, and is subsequently made good, the Court acts with material irregularity in refusing to set aside the sale. (Vol 17) 1930 Cal 249 (250).

[But see (Vol 7) 1920 Cal 392 (392).]

[3] Revision does not lie from an order dismissing an application under O. 21, R. 89 on the ground that an application under R. 90 was previously dismissed. (1898) 1898 All W N 148 (149).

[4] Parties agreeing that on default in payment of the decretal amount by a certain date the sale should be confirmed — Sale confirmed — Order one under O. 21, R. 89 — Appeal lay and even if appeal did not lie, revision lay. (Vol 24) 1937 Pat 113 (116) : 16 Pat 202 (FB).

[5] Execution sale — Decree-holder consenting to accept decretal amount from judgment-debtor — Court setting aside sale — Equities held were in favour of judgment-debtor and High Court should not interfere in revision. (Vol 23) 1936 Oudh 55 (56) : 11 Luck 418.

[6] An order rejecting an auction-purchaser's application for confirmation of the sale is not an appealable matter nor can it be revised. (Vol 25) 1938 Mad 307 (312).

[6a] Summary order rejecting an application to set aside a sale — Revision lies. (Vol 12) 1925 Nag 289 (291).

[6b] Sale set aside without giving the petitioner opportunity to substantiate his allegations — Revision lies. (Vol 16) 1929 All 793 (793) : 51 All 1023.

[6c] Sale set aside without considering evidence — Revision lies. (Vol 12) 1925 Cal 515 (516) * (Vol 8) 1921 Cal 251 (252) : 48 Cal 119.

[7] Sale set aside misapplying the law of limitation — Revision lies. (Vol 13) 1926 All 305 (306) : 48 All 286 * (Vol 15) 1928 All 354 (354) * (1913) 17 Cal W N 667 (668).

[8] Auction-purchaser not impleaded — Revision lies. (Vol 16) 1929 All 593 (595) : 51 All 910 * (Vol 15) 1928 Cal 189 (190).

[9] Decree-holder not impleaded — Revision lies. (1893) 15 All 407 (409).

[10] Sale set aside — No substantial injury — Revision lies. (Vol 12) 1925 Sind 253 (254) : 18 Sind L R 130 * (Vol 11) 1924 Pat 785 (786) * (1901) 24 Mad 311 (315) * (1886) 9 Mad 145 (146) * (Vol 24) 1937 Pat 357 (358).

[11] Sale not set aside as Court decided on erroneous ground that substantial injury was not caused by certain irregularity — No revision. (Vol 22) 1935 Oudh 154 (156).

[12] An incumbrance was not mentioned in a sale proclamation — Price fetched was inadequate — No notice was issued under O. 21, R. 66, and nevertheless the sale was confirmed — *Held* a fit case for revision. (Vol 16) 1929 Pat 588 (589) * (Vol 16) 1929 Cal 736 (737).

[13] It is a failure to exercise jurisdiction to refuse to confirm a sale in the absence of a petition either under R. 89 or R. 90 of O. 21. (1893) 20 Cal 8 (11) : 19 Ind App 154 (P C) * (Vol 14) 1927 Lah 71 (72) * (Vol 20) 1933 Lah 99 (100) : 13 Lah 761.

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[14] A sale confirmed while application to set it aside pending—Order will be interfered with in revision. (Vol 20) 1933 All 137 (138).

[15] When petition put in under O. 9 to set aside an *ex parte* order setting aside the execution sale, the High Court, in revision, will not convert it into one of review. (Vol 13) 1926 Cal 735 (736).

[16] Revision lies from an order refusing to set aside sale on the ground of fraud of the auction-purchaser in colluding with the execution creditor and purchasing property at a depreciated value. (1878) 2 Mad 264 (269).

[17] Order 21, Rule 90 (Patna Amendment), proviso (i)—Application for permission to give landed property as security instead of deposit—Court not applying mind to it and refusing—Dismissal of application to set aside sale for failure to make deposit—Appeal—Order refusing to accept security—Revision is maintainable. (Vol 25) 1938 Pat 240 (242); 17 Pat 107.

[18] Where an application for restoration of an application under O. 21, R. 90, not limited to O. 9, is dismissed on the ground that it is not entertainable, without being considered on merits, there is a failure to exercise jurisdiction. (Vol 18) 1931 All 594 (595).

[19] Where the trial Court wrongly entertains a time-barred application under O. 21, R. 90 and sets aside the sale but the decision is reversed on appeal which is incompetent under S. 173, Bengal Tenancy Act, the High Court will not interfere in revision. (Vol 18) 1931 Cal 425 (426).

20. Orders under Section 73.—[1] The High Court will not generally interfere with a wrong order of rateable distribution. (Vol 27) 1940 Nag 302 (303); I L R (1942) Nag 139; (Vol 31) 1944 Nag 295 (298); I L R (1944) Nag 806; (Vol 23) 1936 Oudh 132 (133); 12 Luck 19; (Vol 23) 1936 Oudh 185 (187); 12 Luck 52; (Vol 23) 1936 Pesh 52 (53); (Vol 22) 1935 Mad 399 (400); (Vol 20) 1933 Sind 229 (231); 27 Sind L R 261; (Vol 20) 1933 Sind 329 (330); 27 Sind L R 190; (Vol 19) 1932 Lah 96 (97); (Vol 14) 1927 Mad 1030 (1030); (Vol 2) 1915 Mad 547 (548); (1912) 1912 Pun L R No 176, p. 563 (565).

[2] High Court will interfere in revision where there has been a defiance of S. 73. (Vol 27) 1940 Oudh 237 (239); 15 Luck 332; (Vol 12) 1925 Oudh 287 (287); (Vol 19) 1932 All 411 (413); 54 All 516; (Vol 20) 1933 Lah 48 (49); 14 Lah 243; (Vol 20) 1933 Pesh 52 (53); (Vol 3) 1916 Cal 371 (372); (Vol 19) 1922 Cal 19 (21); (1909) 32 Mad 334 (335). (Refused because there was other property of the judgment-debtor available.) (Vol 8) 1921 Mad 481 (482); (Vol 13) 1926 Nag 380 (381); (Vol 11) 1924 Pat 434 (435); (Vol 19) 1931 Pat 405 (408); 11 Pat 250; (Vol 27) 1940 Nag 302 (303); I L R (1942) Nag 139.

[But see (Vol 8) 1921 Pat 401 (402); 5 Pat L Jour 415.]

21. Orders under Sections 152 and 153.—[1] An order passed under S. 152 is a 'case' and open to revision under this section. (1885) 7 All 875 (876) (FB); (1907) 31 Bom 447 (449); (1901) 28 Cal 177 (179); (1905) 9 Cal W N 605 (608); (1888) 1888 Pun Re No. 101, p. 266 (269); (Vol 28) 1941 Oudh 66 (66); 16 Luck 252; (Vol 21) 1934 All 100 (101); (Vol 14) 1927 Lah 68 (68); (Vol 26) 1939 Bom 389 (390); (Vol 24) 1937 Oudh 246 (247); 13 Luck 186. (Order refusing to amend decree—High Court, even if precluded from interfering in revision, can interfere under S. 151.) (Vol 23) 1936 Oudh 81 (82); (Vol 25) 1938 Lah 4 (5).

[See however (Vol 14) 1927 Cal 114 (116). (Order amending decree not open to revision as appeal lies on amended decree.)]

[But see (1901) 24 Mad 646 (650). (Doubted in (Vol 27) 1940 Mad 538 (539).]

[2] If a Court refuses to amend a decree in conformity with the judgment it amounts to a refusal to exercise jurisdiction. (1886) 8 All 519 (532); (Vol 5) 1918 All 208 (209); (Vol 11) 1924 Lah 621 (622); (Vol 16) 1929 Lah 664 (664); (Vol 18) 1931 Oudh 422 (424); (Vol 2) 1915 All 1 (1). (But not when the refusal arose from a mistake of law or fact.)

[3] Court varying or amending a decree in conformity with the judgment—Revision lies. (1893) 15 All 121 (122); (Vol 21) 1934 All 100 (101); (Vol 1) 1914 Cal 387 (387); (1928) 108 Ind Cas 737 (738) (Lah.).

[See (Vol 17) 1930 Lah 589 (591).]

[4] A refusal to correct clerical or arithmetical errors amounts to a failure to exercise jurisdiction. (Vol 2) 1915 All 188 (189); 37 All 313; (1900) 27 Cal 5 (7); (Vol 12) 1925 Cal 420 (421); (Vol 16) 1929 Lah 400 (401); (Vol 17) 1930 Mad 421 (421); (Vol 1) 1914 Mad 143 (143); (Vol 12) 1925 Oudh 373 (373); (Vol 11) 1924 Rang 104 (105); (Vol 22) 1935 Oudh 461 (462); 11 Luck 413; (Vol 23) 1936 Pesh 196 (197); (Vol 24) 1937 Lah 894 (894); (Vol 25) 1938 All 466 (467) (FB). (In the peculiar circumstances of this case, the High Court considered it inexpedient to interfere with the order of the lower Court refusing to amend the decree.) (Vol 2) 1915 Lah 218 (214).

[5] On an application for revision against an order refusing to amend a decree, the High Court cannot direct amendment unless one of the reasons specified in the Code as justifying amendment is established. (1913) 17 Ind Cas 418 (419); 1913 Pun Re No. 47.

[6] The appellate Court alone can amend a decree, after it has been affirmed or varied in appeal. The original Court cannot grant an amendment in such a case. (1910) 32 All 295 (300); 37 Ind App 70 (P O).

22. Orders under Order 33.—[1] There is divergence of opinions on the question whether applications in *forma pauperis* are open to revision:

I. Allahabad view—

(a) Such applications are not "case decided." (1882) 1882 All W N 39 (39); (1885) 7 All 661 (664) (FB).

(b) If the application is rejected there is a "case decided" but if it is *allowed* there is no "case decided." (1910) 32 All 623 (624); (Vol 29) 1942 All 319 (319); I L R (1942) All 859; (Vol 29) 1942 All 347 (349); (Vol 18) 1931 All 659 (660).

(c) Even orders rejecting the applications cannot be revised. (Vol 9) 1922 All 1 (1); 44 All 248; (Vol 13) 1926 All 446 (446); 48 All 493; (Vol 9) 1922 All 208 (208).

(d) If a Court enters upon the question of title of the pauper for maintaining the suit revision lies. (Vol 10) 1923 All 577 (578); 45 All 548; (Vol 12) 1925 All 275 (276).

(e) Where the plaintiff is out of Court and the matter is at an end, revision lies. (Vol 17) 1930 All 758 (760); 52 All 927; (Vol 20) 1933 All 295 (296); 53 All 216.

(f) See also the following cases: (Vol 4) 1917 All 355 (355). (Where the lower Court acted within its jurisdiction in refusing an application for leave to sue in *forma pauperis*, the revision was held not to lie.) (Vol 4) 1917 All 186 (186). (*Held* that the lower Court had discretion to grant the application or not, and that it was not possible to say that the Court acted illegally and with material irregularity in granting the application.)

II. Lahore view—

(g) An order granting or refusing an application for leave to sue as pauper is a "case decided." (Vol 28) 1941 Lah 128 (131); I L R (1941) Lah 697. ((1912) Pun Re No. 87, overruled.) (Vol 13) 1926 Lah 642 (643).

III. Nagpur and Sind view—

(h) Revision lies only where the application is rejected. (Vol 28) 1941 Nag 330 (333, 334); I L R (1942) Nag

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459 * (Vol 11) 1924 Nag 44 (45) : 19 Nag L R 165* (Vol 20) 1933 Sind 82 (83) : 26 Sind L R 491* (Vol 14) 1927 Nag 340 (341) * (Vol 22) 1935 Nag 209 (211) : 31 Nag L R 413.

[But see (Vol 25) 1938 Nag 210 (211) : I L R (1940) Nag 463. (Order allowing person to sue as pauper is revisable when the conditions of S. 115 are satisfied.)]

IV. *Oudh view*—

(i) The application is a "case" and revision lies. (Vol 29) 1942 Oudh 169 (171) : 17 Luck 462 * (Vol 29) 1942 Oudh 239 (240) : 17 Luck 605* (Vol 25) 1938 Oudh 146 (149) : 14 Luck 116.

V. *Madras, Patna and Rangoon view*—

(j) There is no distinction between applications allowed and those rejected. (Vol 13) 1926 Mad 958 (958)* (Vol 25) 1938 Pat 209 (209) * (Vol 18) 1931 Rang 318 (318, 319)* (Vol 18) 1931 Rang 129 (131) : 9 Rang 86* (Vol 18) 1931 Rang 131 (134) : 9 Rang 92.

[2] Where there is no error of jurisdiction the High Court will not interfere in revision. (Vol 29) 1942 Nag 47 (48) : I L R (1942) Nag 625 * (Vol 27) 1940 Oudh 353 (354) * (1898) 20 All 299 (302) * (Vol 12) 1925 Cal 990 (991)* (Vol 17) 1930 All 831 (832) * (Vol 16) 1929 Lah 821 (822)* (Vol 6) 1919 Pat 58 (59)* (Vol 11) 1924 Pat 667 (669)* (Vol 26) 1939 Pat 95 (96).

[3] Irregularity in exercise of jurisdiction by lower Court—Revision lies. (Vol 14) 1927 Cal 464 (464)* (Vol 21) 1934 All 424 (425) : 56 All 895.

[4] Sufficiency of the evidence as to pauperism not properly considered—Revision lies. (Vol 29) 1942 All 319 (320) : I L R (1942) All 859 * (Vol 28) 1941 Pat 638 (640) * (Vol 27) 1940 Oudh 148 (152) : 15 Luck 365 (F B) * (Vol 27) 1940 Pat 263 (263)* (Vol 2) 1915 Mad 652 (653)* (Vol 14) 1927 Rang 283 (284)* (Vol 16) 1929 Lah 746 (748) * (Vol 13) 1926 Mad 958 (958) * (Vol 1) 1914 Cal 721 (722)* (Vol 18) 1931 Rang 318 (319).

[5] Court going into the merits of the case and dismissing the application after finding that the claim is not maintainable—Revision lies. (1910) 6 Ind Cas 703 (703) (All) * (1903) 8 Cal W N 70 (73)* (Vol 19) 1932 Bom 584 (588) : 56 Bom 585 * (1903) 13 Mad L Jour 292 (295) (F B). (That the evidence showed no cause of action.)* (Vol 1) 1914 Mad 256 (258).

[6] Obvious error of law—High Court will interfere. (Vol 28) 1936 Mad 89 (84) * (Vol 12) 1925 Rang 381 (382). (Overlooking the provisions of Limitation Act.)* (Vol 15) 1928 Pat 28 (29)* (Vol 15) 1928 Lah 271 (271) * (Vol 6) 1919 All 213 (214) * (Vol 17) 1930 Rang 324 (325)* (1893) 16 Mad 454 (455)* (Vol 25) 1938 Rang 453 (454)* (Vol 23) 1936 Pat 591 (593) : 15 Pat 738.

[7] Court acts without jurisdiction if the Court goes beyond the plaint to ascertain whether it discloses cause of action. (Vol 28) 1941 Mad 398 (399) * (Vol 11) 1924 Mad 80 (80) * (Vol 19) 1932 Bom 584 (588) : 56 Bom 585* (Vol 14) 1927 Mad 441 (442) * (Vol 12) 1925 Pat 30 (30) : 3 Pat 275 * (1913) 18 Ind Cas 491 (491) (Lah) * (Vol 20) 1933 Pat 284 (285)

[8] An order rejecting the application for failure to furnish security for costs is improper and will be set right in revision. (Vol 15) 1928 Lah 960 (960)* (Vol 9) 1922 Lah 87 (88) : 8 Lah 30.

[9] Revision lies from an order disallowing a pauper, whose application is rejected, to pay the necessary court-fee. (Vol 5) 1918 All 194 (194) : 40 All 38 * (Vol 11) 1924 Nag 105 (108) * (1880) 5 Cal 807 (810) : 6 Cal L Rep 223 (227).

23. Orders under Order 45.—[1] This section is applicable to an order granting or refusing a certificate under O. 45. (Vol 24) 1937 Mad 930 (936).

24. Other remedy open. — [1] The High Court will not generally interfere in revision where another remedy is open. (Vol 29) 1942 Pat 251 (258):

21 Pat 197 * (Vol 18) 1931 All 333 (335, 336) : 53 All 466 * (Vol 19) 1932 Bom 511 (518) * (Vol 16) 1929 Nag 66 (67) * (Vol 10) 1923 Bom 395 (395). (Review.)* (Vol 32) 1945 Pat 296 (297) * (Vol 22) 1935 Lah 934 (934) * (Vol 22) 1935 Pat 385 (388, 390) : 14 Pat 488.

[2] Matter still under investigation and not finally decided by lower Court — Revision undesirable. (1940) 187 Ind Cas 838 (839) (Pat).

[3] Dismissal of appeal for non-appearance — Since remedy is by way of application for restoration revision does not lie. (Vol 20) 1933 Pat 625 (625).

[4] Applicant must satisfy the Court that he has no other remedy open to him to set right what he alleges to have been done illegally, irregularly or without jurisdiction by a Subordinate Court. (Vol 23) 1936 Rang 12 (14).

[5] Principle that revision should not be allowed when other remedy is open should be applied before admission of revision application. (Vol 28) 1941 Mad 262 (265).

[6] Where an appeal lies against a decision, High Court will not generally interfere in revision. (Vol 23) 1941 Mad 817 (819) : I L R (1942) Mad 60. (Application for final decree in suit for sale on mortgage dismissed — Dismissal being appealable no revision lies.)* (Vol 28) 1941 Pat 385 (387) : 20 Pat 417 * (Vol 3) 1918 Nag 51 (51) * (Vol 20) 1933 Rang 64 (67) : 11 Rang 134 * (Vol 15) 1928 Mad 124 (124) * (1913) 6 Sind L R 106 (107) * (Vol 31) 1944 Pat 54 (55) : 23 Pat 61 * (Vol 33) 1946 All 89 (90, 96) (F B) * (Vol 22) 1935 Pat 186 (188). (Order deciding the amount of court-fees payable by plaintiff)* (Vol 24) 1937 All 691 (693, 694). (Order refusing to set aside *ex parte* decree — No revision.)

[7] Where an interlocutory order can be questioned in an appeal against the final decree in the suit under S. 105 the High Court will not ordinarily interfere in revision. (1940) 187 Ind Cas 838 (839) (Pat). (Final decree not passed—Matter in revision could be raised in the appeal from the final decree—No revision.)* (Vol 26) 1939 Rang 448 (448) : 1939 Rang L R 591* (Vol 12) 1925 Nag 62 (63) * (1883) 7 Bom 341 (372) (F B) * (Vol 20) 1933 Rang 263 (264) * (Vol 19) 1932 Bom 81 (83)* (1889) 11 All 383 (385)* (Vol 22) 1935 Pat 90 (91).

[8] Where the aggrieved party could bring a *separate suit* the High Court will not, as a rule, interfere in revision. (Vol 29) 1942 Cal 230 (232) : I L R (1941) 2 Cal 366* (Vol 29) 1942 Oudh 387 (387, 388)* (Vol 29) 1942 Pat 251 (258) : 21 Pat 197* (1885) 7 All 407 (410) * (1909) 11 Bom L R 754 (757, 758) * (Vol 7) 1920 Bom 67 (67) : 44 Bom 595* (1877) 3 Cal 243 (248) * (Vol 11) 1924 Lah 471 (473) * (Vol 16) 1929 Lah 777 (777) * (Vol 11) 1924 Mad 119 (123) : 47 Mad 250* (Vol 12) 1925 Nag 31 (31)* (Vol 11) 1924 Pat 134 (135) * (Vol 16) 1929 Nag 317 (318).

[9] The following orders can be challenged by separate suits and hence will not be generally interfered with in revision :—

(a) Order under O. 21, R. 58. (1942) I L R (1942) Kar 160 (161, 162)* (Vol 21) 1934 Rang 212 (213).

(b) Order under O. 21, Rr. 98, 99 and 101. (Vol 25) 1938 Cal 577 (578). (But High Court has power to interfere in revision.)* (Vol 20) 1933 All 959 (960)* (Vol 20) 1933 Pat 604 (605)* (Vol 17) 1930 Cal 348 (348)* (1911) 1911 Pun L R No. 129 p. 479 (483) * (Vol 2) 1915 Mad 744 (744)* (Vol 23) 1936 Mad 940 (940).

[But see (1884) 6 All 172 (173).]

(c) Decision under S. 9 of the Specific Relief Act. (1908) 30 All 331 (333). * (Vol 19) 1932 Oudh 39 (40). * (1911) 33 All 647 (649)* (Vol 21) 1934 All 541 (542) * (1888) 12 Bom 221 (225) * (Vol 3) 1916 Cal 621 (622) * (Vol 1) 1914 Mad 882 (884)* (Vol 18) 1926 Mad 18 (18) (Vol 18) 1926 Nag 290 (291) : 22 Nag L R 30* (1910) 4

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Sind L R 80 (82) * (Vol 24) 1937 Oudh 183 (184) : 13 Luck 18.

[10-11] Even where another remedy is open the High Court will interfere in revision when there are special circumstances. For illustrations see the following cases : (Vol 27) 1940 Mad 538 (538, 539). (Order amending decree under S. 152, passed without jurisdiction—Order set aside in revision.) * (Vol 27) 1940 Oudh 237 (239, 240) : 15 Luck 332. (Order under S. 73—High Court entertained revision but dismissed it on merits.) * (Vol 16) 1929 Nag 356 (357) * (Vol 21) 1934 Bom 343 (347) : 58 Bom 628. (Order passed illegally and with material irregularity.) * (Vol 21) 1934 Lah 110 (119). (Where the lower court had committed obvious mistakes.) * (Vol 20) 1933 Pat 158 (159). (Order on a claim petition without considering evidence is a fit case for revision.) * (Vol 20) 1933 Pesh 52 (52). (Order under S. 73 of the Code.) * (Vol 20) 1933 Rang 64 (68) : 11 Rang 134 * (Vol 18) 1931 Cal 385 (386) : 58 Cal 55. (Where the onus of proof was misapplied leading to an erroneous conclusion interference was made.) * (1910) 15 Oudh Cas 341 (344). (The date of hearing on which the suit was dismissed was fixed by chief ministerial officer in the Judge's absence.) * (Vol 14) 1927 Cal 578 (578) * (Vol 1) 1914 All 234 (235). (When the Court summarily rejected the application under O. 21, R. 100 the High Court will interfere.) * (1906) 28 All 72 (74) * (1883) 7 Bom 341 (372) (FB) * (Vol 13) 1926 Lah 612 (612). (When after close of arguments behind the back of the opposite side, Court allowed defendants to examine witnesses.) * (Vol 14) 1927 Lah 911 (912). (Where all defendants except one were served out but the plaintiff defaulted in process-fee, regarding a particular defendant, and the suit was dismissed as against all.) * (Vol 12) 1925 Nag 17 (18). (Where a lessee of the property deposited the decree amount under O. 21, R. 89 but did not disclose his interest.) * (Vol 14) 1927 Mad 799 (799). (But it would require very strong grounds to induce the Court to interfere.) * (Vol 13) 1926 Mad 179 (181). (When a petition under S. 73 was dismissed on the ground that the petitioner's application in execution did not end successfully.) * (Vol 17) 1930 Bom 375 (378) : 54 Bom 479. * (When District Judge entertained an appeal against an order made by the Sub-Judge under O. 21, R. 98.) * (Vol 32) 1945 Lah 298 (308) * (Vol 33) 1946 Oudh 88 (90) : 21 Luck 167 * (Vol 31) 1944 Oudh 260 (261) : 20 Luck 38 * (Vol 33) 1946 Mad 90 (92) : I L R (1946) Mad 640. (Abuse of powers by executing Court.) * (Vol 33) 1946 Mad 176 (178) * (Vol 5) 1918 Cal 252 (252). (Where a suit for possession under the Specific Relief Act was dismissed for want of title.) * (1910) 8 Ind Cas 613 (614) (Lov Bur). (Court in a petition under O. 21, R. 101, 102 adjudicating a question of title.) * (Vol 18) 1931 All 663 (663) : 53 All 532. (Decree entirely without jurisdiction.) * (Vol 28) 1936 Mad 91 (98) : 59 Mad 308. (Misapprehension of Section of Code—Refusal to exercise jurisdiction.) * (Vol 24) 1937 Nag 30 (31) : I L R (1937) Nag 82. (Where the order of lower Court is obviously wrong.) * (Vol 22) 1935 Rang 395 (396). (Plaintiff attaching property which defendant alleged to be wakf property—Court holding wakf illusory—Attachment order continued—Revision is competent though there is remedy by suit.) * (Vol 22) 1935 Cal 279 (280) : 62 Cal 417. (Order demanding additional court-fee.)

[12] The High Courts have interfered in the following cases :—

(a) Where it is not clear whether another remedy is available to the applicant. (Vol 10) 1923 Mad 663 (664) * (Vol 8) 1924 Nag-9 10 * (Vol 8) 1921 Nag 17 (18) * (Vol 33) 1946 Mad 176 (178).

(b) Where the other remedy is barred. (Vol 11) 1921 Nag 298 (299).

(c) Where non interference will lead to multiplicity of proceedings and unnecessary expense and delay. (Vol 29) 1942 Mad 614 (616) : I L R (1942) Mad 376 * (Vol 28) 1941 Mad 262 (265) * (1909) 32 Mad 334 (336) * (Vol 19) 1932 Lah 176 (177) * (Vol 20) 1933 Rang 259 (260) * (Vol 15) 1928 Rang 83 (84) : 5 Rang 742 * (Vol 5) 1918 All 405 (405) : 40 All 216 * (Vol 14) 1927 Cal 156 (157) : 53 Cal 913 * (Vol 6) 1919 Pat 425 (430) : 4 Pat L Jour 94 (FB) * (Vol 26) 1939 Lah 52 (53).

(d) Where the other remedy is inconvenient and enormously expensive. (Vol 29) 1942 Mad 614 (616) : I L R (1942) Mad 376 * (Vol 28) 1941 Nag 289 (290) : I L R (1942) Nag 478 * (Vol 26) 1939 Cal 719 (719) * (Vol 12) 1925 All 610 (612) : 48 All 175 (FB).

(e) Where grave injustice or a defeat of the provisions of law is likely to result from non-interference. (Vol 18) 1931 All 632 (634) : 34 All 183 (FB) * (Vol 20) 1933 Bom 313 (314) * (1883) 7 Bom 341 (357, 372) (FB) * (Vol 9) 1922 Lah 63 (64) * (Vol 26) 1939 Sind 137 (141) : ILR (1939) Kar 330.

[13] The powers of High Court under S. 115 should, however, be liberally utilised where the applicant has no other remedy, though even in such cases the High Court may, in its discretion, refuse to interfere. Where the case does not fall under the terms of this section no revision will lie even though no other remedy may be open. See also Note 2. (Vol 8) 1921 Sind 80 (80) : 15 Sind L R 135 * (Vol 11) 1924 Sind 49 (51).

[14] The High Court can refuse to interfere in revision even where no other remedy is available to the applicant. (Vol 29) 1942 Oudh 179 (180) * (1909) 13 Cal W N 793 (797) * (Vol 6) 1919 Lah 203 (204) : 1919 Pun Re No. 169 * (Vol 1) 1914 Lah 179 (179).

[15] Where the case does not fall under this section, no revision will lie even where no other remedy is open. (Vol 27) 1940 Pat 102 (106) : 19 Pat 321 (SB).

25. Review and appeal. — [1] By Clause 15 of the present Letters Patent no appeal lies from an order made in the exercise of revisional jurisdiction or of the powers of superintendence under S. 107, Government of India Act, 1915, by a High Court. (Vol 8) 1921 Cal 217 (219) * (Vol 18) 1931 Pat 292 (293) : 10 Pat 428 * (Vol 15) 1928 Mad 169 (170) : 51 Mad 165 * (Vol 22) 1935 All 889 (891) * (Vol 32) 1945 Mad 103 (104).

[2] There can be no appeal or review or re-hearing of an application for revision dismissed for default. (1901) 1901 Pun Re No. 54, p. 172 (174) (FB) * (1881) 1881 Pun Re No. 75, p. 169 (170).

[3] Application for revision dismissed for default—A second application for revision may be preferred. (Vol 15) 1928 Lah 550 (551) * (1901) 1901 Pun Re No. 54, p. 172 (175) (FB) * (Vol 24) 1937 Lah 685 (686).

[4] An application for review may be treated as one for revision. (1901) 1901 Pun Re No. 54, p. 172 (175) (FB).

26. Revision in cases of discretionary and final orders. — [1] Where the lower Court passes an order in the exercise of its discretion, the High Court will not interfere with it in revision. (Vol 30) 1943 Oudh 147 (148) * (Vol 29) 1942 Bom 82 (84) : I L R (1941) Bom 629 * (Vol 29) 1942 Mad 604 (606) : I L R (1942) Mad 868 * (Vol 29) 1942 Pat 35 (37) * (Vol 28) 1941 Pat 408 (409) * (Vol 26) 1939 All 646 (648) * (Vol 24) 1937 Oudh 268 (269) : 13 Luck 111 * (Vol 20) 1933 All 86 (90) * (Vol 20) 1933 Cal 786 (787) * (1895) 19 Bom 116 (119) (FB) * (Vol 32) 1945 Pat 184 (184) : 23 Pat 927 * (Vol 15) 1928 Cal 421 (423) : 55 Cal 748 * (Vol 13) 1926 Mad 591 (592) * (Vol 1) 1914 Nag 60 (62) : 10 Nag L R 139 * (Vol 1) 1914 Sind 105 (107) : 8 Sind L R 275 * (Vol 22) 1935 Pesh 182 (185) * (Vol 25) 1938 Mad 347 (348) : I L R (1938) Mad 667

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(F B) * (Vol 24) 1937 Pat 38 (39) * (Vol 26) 1939 Lah 170 (171).

[2] Reasons for order not stated — High Court was not satisfied whether discretion was exercised judicially—Revision allowed. (Vol 29) 1942 Pat 451 (452).

[3] An improper or wrong exercise of discretion is no ground for interference. (Vol 10) 1923 Mad 690 (692) * (Vol 13) 1926 Cal 1112 (1113) * (1867) 7 Suth W R 519 (520) (F B) * (Vol 5) 1918 All 418 (419) : 40 All 612 * (1928) 111 Ind Cas 141 (142) (Nag) * (1893) 16 Mad 424 (428) * (Vol 14) 1927 Rang 811 (813) : 5 Rang 615 * (Vol 25) 1938 Lah 548 (550) : I L R (1938) Lah 289.

[4] Perverse exercise of discretion prejudicing a party — Revision lies. (Vol 29) 1942 Pat 451 (452) * (Vol 3) 1916 Pat 75 (76) : 1 Pat L Jour 465 * (Vol 20) 1933 All 957 (958) * (Vol 12) 1925 Cal 293 (294) * (Vol 18) 1921 Cal 268 (269) * (Vol 1) 1914 Mad 203 (203) * (Vol 10) 1923 Lah 506 (508) * (Vol 24) 1937 Oudh 282 (283) : 13 Luck 171 * (Vol 22) 1935 Mad 230 (232) * (Vol 23) 1936 Pat 250 (252) * (Vol 22) 1935 All 705 (706) * (Vol 22) 1935 Cal 336 (337) : 62 Cal 61 * (Vol 21) 1934 Mad 84 (85) : 57 Mad 542. (Excess fee paid by mistake of party—Certificate should be granted even in revision.)

[5] Judge's order as to whether a ballot paper is valid or not held final and cannot be interfered with in revision. (Vol 16) 1929 Mad 793 (793).

[6] Revisional power not distinctly barred by any specific provision — Revision is maintainable. (Vol 16) 1929 All 581 (584) : 51 All 957 * (Vol 32) 1945 Bom 60 (63) : I L R (1944) Bom 553 * (Vol 19) 1932 Oudh 39 (40). (Decree under S. 9, Specific Relief Act, may be revised.) * (Vol 19) 1932 Oudh 210 (213) : 7 Luck 601 (F B). (Revision lies against order of Court under Mussalman Waqf Act of 1923.)

[7] Order of District Judge as to validity of election — Rule providing that the order shall be final — Revisional powers will not be exercised unless the order is made without jurisdiction. (Vol 20) 1933 Rang 2 (3) : 10 Rang 517 (S B).

[8] The provision about the finality of the decision of the appellate Court contained in S. 5 (2), U. P. Agriculturists' Relief Act, cannot warrant the inference that the Legislature meant in any way to control or limit the revisional jurisdiction conferred on the High Court by S. 115, Civil P. C. (Vol 25) 1938 All 456 (459) : I L R (1938) All 702 (F B).

27. Revisional powers under other Acts. — [1] See the following provisions :—

- (1) Guardians and Wards Act, 1890, Section 47.
- (2) Punjab Courts Act (VI of 1918), Section 44.
- (3) Provincial Small Cause Courts Act, Section 25.
- (4) Provincial Insolvency Act (V of 1920), Section 75.

28. Subordinate Court. — [1] A person acting in an administrative capacity is not a "Court". (1892) 1882 All W N 143 (143). (An order refusing to discharge a surety.) * (1911) 13 Bom L R 118 (122) * (Vol 11) 1924 Lah 55 (57, 58) : 4 Lah 1. (Order of District Magistrate under Part II of the Lunacy Act with respect to reception, care and treatment of the lunatic.) * (1910) 8 Ind Cas 1160 (1160) : 1910 Pun Re No. 104. (Order under S. 92, Civil P. C., granting permission to sue.) * (Vol 9) 1922 Mad 337 (339). (Order punishing a village Munsif for misconduct under S. 7, Madras Hereditary Village Officers' Act.) * (Vol 7) 1920 Sind 70 (71) : 13 Sind L R 212. (Proceedings under S. 36 of the Legal Practitioners' Act.) * (Vol 19) 1932 Nag 50 (51) : 28 Nag L R 4. (Do.—But Court can interfere under general powers of superintendence).

[2] The Judge issuing or refusing to issue a notice under S. 167, Bengal Tenancy Act, at the instance of an

applicant is not acting merely in a ministerial capacity. He acts as a Court. (Vol 27) 1940 Cal 450 (451).

[3] All the orders of Courts under the Succession Act, the Probate and Administration Act, etc., relating to the administration of the assets of deceased persons are in a sense administrative but they are at the same time judicial orders. So also an order passed by a Court under S. 73, Civil P. C., though an administrative order is a judicial order and revision under S. 115 lies. (Vol 27) 1940 Oudh 237 (238) : 15 Luck 332.

[4] A Judge nominated to hear certain appeals by the Governor in his executive capacity is not a Court. (Vol 30) 1943 Cal 247 (249, 250) : ILR (1943) 2 Cal 272.

[5-6] Where special jurisdiction is conferred on an existing Court, it will attract all the incidents of its ordinary jurisdiction. (Vol 31) 1944 Cal 401 (405).

[7] "Court" does not include person acting as *persona designata*. (Vol 13) 1926 Bom 344 (345) : 50 Bom 357. (A District Judge acting under S. 22, Bombay District Municipal Act, III of 1901) * (Vol 20) 1933 All 764 (766, 772) : 55 All 1008. (District Judge acting under U. P. District Boards Act.) * (Vol 20) 1933 Rang 41 (41) : 11 Rang 1. (District Judge acting under the Mandalay Election Rules.) * (1897) 21 Bom 279 (281). (District Judge acting under S. 23, Bombay District Municipal Act (Amendment Act), II of 1884.) * (Vol 10) 1923 Bom 421 (423). (Chief Judge acting under the powers given to him by S. 33, Bombay City Municipal Act.) * (Vol 17) 1930 Bom 231 (231) : 54 Bom 224. (Chief Judge, Small Cause Court, Bombay, acting under S. 219, Bombay City Municipal Act, III of 1888.) * (Vol 14) 1927 Mad 93 (95) : 50 Mad 121 (F B). (Chief Judge of the Presidency Small Cause Court of Madras acting under R. 2 of the Rules framed under the Madras City Municipal Act.) * (Vol 13) 1926 Rang 25 (31) : 3 Rang 560 (F B). (Chief Judge, Rangoon, Small Cause Court, performing the functions assigned to him by S. 14, Rangoon Municipal Act.) * (Vol 4) 1917 Bom 31 (32) : 42 Bom 119. (District Judge acting under S. 4 of Act XII of 1850.) * (Vol 22) 1935 Nag 5 (7, 8) : 31 Nag L R 1 * (Vol 26) 1939 Rang 143 (144).

[See however (Vol 28) 1941 Pat 65 (68) : 20 Pat 373 (F B). (*Persona designata* may be a Court — Commissioner appointed under Workmen's Compensation Act, is a Court)]

[But see (Vol 20) 1933 Rang 2 (3) : 10 Rang 517 (S B). (District Judge's decision as to validity of election under Burma Rural Self-Government Act—District Judge is subordinate to High Court.) * (Vol 18) 1931 Bom 582 (586, 587) : 55 Bom 544. (District Court exercising judicial functions under S. 198, Bombay City Municipalities Act of 1925, according to the procedure laid down in the Land Acquisition Act, is a subordinate Court.)]

(a) District Judge acting under S. 40A, Bengal Agricultural Debtors Act, does not act as *persona designata*, but as Court. (Vol 30) 1943 Cal 250 (251) : I L R (1942) 2 Cal 478.

(b) District Judge or Additional District Judge, exercising his powers under S. 40A, Bengal Agricultural Debtors Act, acts as a Court and not as a *persona designata*. (Vol 30) 1943 Cal 470 (473) : I L R (1943) 2 Cal 462.

(c) The Chief Judge of Bombay Small Cause Court acting under S. 217, City of Bombay Municipal Act as a *persona designata*. (Vol 26) 1939 Bom 471 (472).

(d) Sub-Judge passing order in capacity of Election Commissioner — No revision lies. (Vol 19) 1932 Mad 560 (560).

(e) Judge acting under S. 19, Bombay Local Boards Act, acts as *persona designata*. (Vol 21) 1934 Sind 110 (111).

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(f) Chief Judge of the Rangoon Small Cause Court, when exercising the powers vested in him by S. 18, Rangoon Rent Act (1920), acts as *persona designata*. (Vol 14) 1927 Rang 1 (3) : 4 Rang 304 (F B) (Overruling (Vol 10) 1923 Rang 94 : 11 Low Bur Rul 387 (F B); also (Vol 12) 1925 Rang 367.)

(g) District Judge trying an election dispute is a *persona designata*. (Vol 16) 1929 Rang 352 (354).

(h) Judge of Civil Court acting as Commissioner under Workmen's Compensation Act is not a subordinate Court but *persona designata*. (Vol 24) 1937 Sind 6 (6) : 30 Sind L R 351.

(i) Tribunals constituted by and for purposes of new Act are special — Small Cause Judge passing orders under Ss. 16 and 17 of Karachi City Municipal Act (1938) does not act as Court but as *persona designata*. (Vol 26) 1939 Sind 165 (167) : I L R (1939) Kar 131. (City of Karachi Municipal Act, 1938, Ss. 16, 17.)

(j) District Judge acting under S. 22, Bombay District Municipal Act, acts as *persona designata*. (Vol 25) 1938 Sind 153 (157) : I L R (1939) Kar 121.

[8] Where a Judge or presiding officer of a Court, as distinguished from the Court itself, is performing any function as vested in him, such a Judge may be considered as a *persona designata*, and cannot be regarded as a Civil "Court subordinate" to the High Court, within the meaning of S. 115, Civil P. C. In considering whether the Judge acts as a Court or as a *persona designata*, the important point to be investigated is what is the source of his authority — The nature of the proceedings and the action taken therein may also be relevant and may be considered. (Vol 26) 1939 Bom 279 (281).

[9] Subordinate Judge holding an enquiry in an election petition under the Madras District Municipalities Act, 1920, or a District Judge trying the validity of an election under the Madras Local Boards Act, 1902, is not a *persona designata*. (Vol 10) 1923 Mad 192 (194, 195) : 46 Mad 536 (Vol 11) 1924 Mad 561 (562) : 47 Mad 869 (F B).

[But see (Vol 19) 1932 Mad 560 (560).]

[10] Where it is provided that a matter is to be decided by a certain Court, the presiding officer of such Court will act as a Court but where a certain "Judge" is to decide a matter, the entire provisions of the statute will have to be looked into for the purpose of determining whether the judicial officer acts as a Court or as a *persona designata*. (Vol 30) 1943 Cal 247 (248).

[11] The mere fact that a person exercises judicial functions is not sufficient to constitute him a "Court." (1907) 30 Mad 326 (327) (Vol 11) 1924 Mad 442 (445) : 47 Mad 357 (F B) (Vol 17) 1930 Nag 271 (271) : 26 Nag L R 309.

[12] A District Registrar is not a "Court." (1907) 30 Mad 326 (327) (Vol 15) 1928 Mad 475 (475) : 51 Mad 245.

[13] The Rent Controller of Rangoon is not a "Court." (Vol 13) 1926 Rang 33 (41, 43) : 3 Rang 410 (F B).

[14] A District Judge exercising powers as Rent Controller under the Bengal House Rent Control Order, 1942, is not a Court. (Vol 30) 1943 Cal 247 (250).

[But see (Vol 13) 1926 Cal 708 (709). (Assumed.)]

[15] A Collector dealing with an application under S. 18 of the Land Acquisition Act, 1894, is not a "Court." (Vol 19) 1932 All 568 (569) : 54 All 1085 (SB) (Vol 10) 1923 Bom 290 (292) : 47 Bom 699 (Vol 27) 1940 Lah 299 (302) : I L R (1941) Lah 100. ((Vol 3) 1916 Lah 37 : 1916 Pun Re No. 67, overruled.) (Vol 11) 1924 Mad 442 (445) : 47 Mad 357 (F B). (Overruling (Vol 6) 1919 Mad 583 : 42 Mad 231.) (Vol 27) 1940 Pat 102 (106) : 19 Pat 321 (S B). (A case under Proviso 2 to S. 49

which like S. 18 gives the Collector no alternative but to refer the question to the Court — Overruling (Vol 4) 1917 Pat 176 : 2 Pat L Jour 204.) (Vol 21) 1934 Rang 118 (118, 120) : 12 Rang 275. (Collector refusing to make a reference is not a Court.) (Vol 17) 1930 Nag 271 (271) : 26 Nag L R 309 (Vol 24) 1937 Nag 12 (12) : I L R (1938) Nag 149 (Vol 21) 1934 All 260 (263) : 56 All 656 (F B) (Vol 32) 1945 Nag 146 (148) : I L R (1945) Nag 399 (Vol 25) 1938 Cal 250 (252). (Land Acquisition Collector assuming that he is a Court while dealing with applications under S. 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has therefore no jurisdiction to interfere with his order under that section in revision under S. 115, Civil P. C.) (Vol 24) 1937 Cal 705 (709) : I L R (1938) 1 Cal 400.

[16] A Collector dealing with an application under S. 18, Land Acquisition Act is a "Court." (1908) 12 Cal W N 241 (245). (Collector is Court.) (1913) 16 Oudh Cas 374 (377) (Vol 19) 1932 Oudh 180 (181) : 7 Luck 578.

[17] A Collector acting under S. 49, Proviso of the Land Acquisition Act or Calcutta Improvement Trust Tribunal acting under S. 32 of the Act is a "Court." (1912) 16 Cal L Jour 165 (168) (Vol 19) 1932 Cal 660 (661).

[18] A Collector acting under S. 11 of the Land Acquisition Act is not a "Court." (1905) 32 Cal 605 (629) : 32 Ind App 93 (P C) (1910) 38 Cal 230 (241).

[19] The Collector acting under the powers given by S. 69 and Sch. III of this Code is not a "Court." (Vol 20) 1933 Bom 369 (370).

[20] A Revenue Officer when making a settlement of rent under Chapter II of the Madras Estates Land Act is not a Civil Court. Consequently, the Board of Revenue when directing the revision of his proceedings under S. 172 of that Act is also not a Civil Court. (Vol 19) 1932 Mad 612 (639, 640) : 55 Mad 883 (FB).

[21] A Revenue Officer acting under S. 26G of the Bengal Tenancy Act is not a Court. (Vol 27) 1940 Cal 111 (112) : I L R (1940) 1 Cal 329 (1940) 44 Cal W N 426 (426).

[22] Debt Settlement Board is not a "Court." (Vol 30) 1943 Cal 470 (473) : I L R (1943) 2 Cal 462.

[23] Lower Court impounding document under Stamp Act—S. 115 does not enable the High Court to call in question the action either of the Collector or the Chief Controlling Revenue Authority. (Vol 30) 1943 Nag 97 (98) : I L R (1943) Nag 520.

[24] Deputy Collector acting under S. 3 (5), Madras Estates Land Act, is not subordinate to High Court. (Vol 29) 1942 Mad 742 (743).

[25] Order of Collector under S. 20A, Madras Estates Land Act—No revision. (Vol 26) 1939 Mad 901 (901).

[26] A District Magistrate when normally functioning as a Court exercises jurisdiction in criminal matters and not in civil matters—When therefore some new function is imposed upon him by some special Act, although he acts as a Court and not as an individual, that Court is not subject to the civil jurisdiction of the High Court within the contemplation of S. 115. (Vol 24) 1937 Cal 720 (725) : I L R (1938) 1 Cal 146.

[27] An order by the Deputy Collector acting under the Madras Estates Land Act under O. 21, R. 101, Civil P. C., is one revisable by the High Court, and not by the District Collector under S. 205 of the Madras Estates Land Act, and therefore an application to the District Collector for revision is incompetent. (Vol 22) 1935 Mad 309 (310).

[28] It is open to the High Court to interfere in revision with an order of the Sub-Collector refusing to set aside a rent sale under S. 131 of the Madras Estates Land Act or with an order of the Collector under S. 205

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of the Act on revision against it. (Vol 24) 1937 Mad 293 (294).

[29] A Court is *subordinate* to the High Court only when it is subject to its *appellate jurisdiction* though in any particular case, an appeal may not lie to the High Court. (Vol 29) 1942 Pat 1 (10, 20) : 21 Pat 1 (FB). (Per Full Bench; Manohar Lal, J., dissenting; (Vol 27) 1940 Pat 249 and 5 Cut L Tim 64 overruled.) * (Vol 29) 1942 Pat 33 (34) : 21 Pat 173. (The Commissioner appointed under the Workmen's Compensation Act being subject to the appellate jurisdiction of the High Court is a Court subordinate to High Court.) * (Vol 27) 1940 Cal 111 (112) : I L R (1940) 1 Cal 329. (Revenue officer acting under S. 26G of the Bengal Tenancy Act — Assuming him to be a Court he is not a subordinate Court as he is not subject to the appellate jurisdiction of the High Court.) * (Vol 10) 1923 Bom 290 (291) : 47 Bom 699 (701) * (Vol 19) 1932 All 651 (652) : 54 All 891. (The Court of the District Magistrate while deciding an appeal under S. 318 of the U. P. Municipalities Act is not subordinate to the High Court.) * (Vol 21) 1934 All 260 (263) : 56 All 656 (FB). (Court acting under the Land Acquisition Act is subordinate to the High Court.) * (Vol 13) 1926 Rang 33 (41) : 3 Rang 410 (FB) * (Vol 25) 1938 Cal 671 (673) : I L R (1938) 2 Cal 162. (Section 115 applies to suits and proceedings in the Presidency Small Cause Court.) * (Vol 23) 1936 Oudh 132 (133) : 12 Luck 19.

[See (Vol 19) 1932 All 568 (570) : 54 All 1085 (SB). (Collector acting under S. 18 of the Land Acquisition Act is not subordinate to the High Court.) * (Vol 26) 1939 Oudh 177 (177). (A Court of Revenue is not subordinate to the High Court—Order of Assistant Collector in execution proceedings under the Oudh Rent Act is not revisable by High Court.)]

[30] A single Judge of the High Court is not a Court subordinate to the High Court. (1893) 17 Bom 514 (519) * (Vol 3) 1916 Cal 973 (973) : 43 Cal 90 (94) * (Vol 32) 1945 Oudh 54 (55) * (Vol 2) 1915 Cal 695 (695) * (Vol 14) 1927 Oudh 59 (59) : 2 Luck 1 * (Vol 22) 1935 Oudh 72 (75).

[See (Vol 27) 1940 F C 4 (5) : I L R (1939) Kar F C 191 : 1940 F C R 12 (FC). (High Court's decision in previous case cannot be revised.)]

[31] The High Court of Kumaun is not a Court subordinate to the High Court of Allahabad. (Vol 10) 1923 All 291 (291, 292) : 45 All 383.

[32] The following Courts are subordinate to the Bombay High Court :

(a) His Britanic Majesty's Courts in Zanzibar. (1911) 36 Bom 105 (108) * (1896) 20 Bom 480 (484) (FB). (Jardine, J., dissenting.)

(b) Court of the Resident at Aden. (1910) 34 Bom 267 (275) * (Vol 20) 1933 Bom 194 (195) * (Vol 16) 1929 Bom 190 (191).

(c) District or Deputy Collector acting under the Bombay Mamlatdars' Courts Act. (1912) 37 Bom 114 (116) * (Vol 2) 1915 Bom 17 (18) : 39 Bom 552 * (Vol 25) 1938 Bom 159 (160) : I L R (1938) Bom 259.

[33] The Madras Village Courts, and the Agent to the Governor of Madras at Vizagapatam acting under the Agency Rules are Courts subordinate to the High Court of Madras. (Vol 14) 1927 Mad 786 (787). (Village Courts.) * (Vol 4) 1917 Mad 726 (726). (But under S. 107, Government of India Act, 1915.) * (1911) 12 Ind Cas 78 (74) (Mad). (Agent.)

[See however (1893) 16 Mad 229 (229).]

[34] Civil Courts purporting to act under the Religious Endowments Act, 1863, are subordinate to the

High Court. (Vol 4) 1917 P C 71 (74) : 40 Mad 793 (801) : 44 Ind App 261 (PC) * (Vol 2) 1915 Mad 827 (829, 830) : 38 Mad 594.

[35] Courts acting on a reference under S. 55 of the Bengal Land Registration Act, 1876, is a Court subordinate to the High Court. (1908) 35 Cal 120 (131) * (1908) 35 Cal 571 (573).

[36] Presidency Small Cause Court is a subordinate Court. (1908) 31 Mad 490 (491) * (Vol 3) 1916 Mad 387 (389) * (1893-1900) 1893-1900 Low Bur Rul 61.

[37] Deputy Commissioner acting under the Punjab Court of Wards Act, 1903, is a subordinate Court. (1910) 4 Ind Cas 949 (951) : 1910 Pun Re No. 6.

[38] The Sub-divisional Officer acting under S. 2 of the Santhal Parganas Act, 1855, is a subordinate Court. (1914) 23 Ind Cas 876 (877) (Cal). (Assumed.)

[39] Section 115 covers orders passed by subordinate Court acting judicially under powers conferred on it by special Act—Order of appellate Court accepting Deputy Commissioner's revision petition under S. 21A, Punjab Alienation of Land Act, is open to revision under S. 115, Civil P. C. (Vol 29) 1942 Lah 228 (231) : I L R (1943) Lah 1 (FB) (Vol 24) 1937 Lah 637, overruled.)

[40] Orissa Tenancy Act (as amended in 1933), S. 204. Collector acting under S. 204 (2), (3), (4) and (5) is subordinate to High Court. (Vol 29) 1942 Pat 1 (20) : 21 Pat 1 (FB).

[41] Sessions Judge acting under S. 111 of the Bombay Municipal Boroughs Act in revision from a decision of the Magistrate under S. 110 of that Act, is a Court subordinate to the High Court. (Vol 25) 1938 Bom 301 (302) * (Vol 26) 1939 Bom 477 (478) : I L R (1939) Bom 571.

[42-43] Agency District Munsif's Court of Rayagada is a Civil Court—High Court can exercise powers of superintendence under S. 107, Government of India Act of 1915. (Vol 23) 1936 Mad 187 (187) : 59 Mad 356 (FB).

[44] Section 36 of the Legal Practitioners Act confers a special jurisdiction on a subordinate Court; and an order passed by a District Judge under S. 36 declaring a person a tout is an order which the High Court has power to revise under S. 115, Civil P. C., being a case decided by Court subordinate to the High Court. (Vol 25) 1938 Mad 634 (637) : I L R (1938) Mad 988.

[45] A Commissioner appointed under the Workmen's Compensation Act and adjudicating a claim made under the Act is a "Court subordinate to the High Court" within the meaning of S. 115 (Vol 25) 1938 Lah 855 (855).

[46] The Court exercising jurisdiction under S. 5 of the U. P. Agriculturists' Relief Act is a Civil Court, and as such subordinate to the High Court. (Vol 25) 1938 All 456 (458) : I L R (1938) All 702 (FB).

[47] Oudh Rent Act — Assistant Collector of the second class is not a Court subordinate to the Chief Court within the meaning of S. 115. (Vol 24) 1937 Oudh 143 (143) : 11 Luck 481.

[48] Collector executing decree for under-proprietary rent is not subordinate to High Court and latter Court cannot act in revision. (Vol 26) 1939 Oudh 177 (178).

[49] The mere fact that a Court has *exclusive* jurisdiction over a matter under a certain Act does not affect the revisional jurisdiction of the High Court unless such revisional jurisdiction has otherwise been expressly or impliedly ousted. (Vol 30) 1943 Cal 470 (473). (Orders of District Judge under S. 40A of Bengal Agricultural Debtors Act are revisable by High Court.) * (Vol 29) 1942 Oudh 21 (22). (High Court cannot revise orders passed under U. P. Encumbered Estates Act 25 [XXV] of 1934.) * (Vol 29) 1942 Oudh 291 (297) : 18

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

Part to apply only to certain High Courts.

[1882 — S. 631.]

[a] *Substituted* by A. O. for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915".

Application of Code to High Courts.

[1882 — S. 632; 1877 — S. 632; See Ss. 120, 129 and O. 49, R. 3.]

116. This Part applies only to High Courts which are, or may hereafter be, "[constituted by His Majesty by Letters Patent.]

117. Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

Section 115 (*contd.*)

Luck 1 (F B). (A revision under S. 46, Encumbered Estates Act or S. 115, Civil P. C., does not lie against a decision of the lower Appellate Court.) * (Vol 29) 1942 Oudh 458 (459) (F B). (Case under U. P. Agriculturists' Relief Act.) * (Vol 28) 1941 Oudh 497 (497) : 16 Luck 775. (By a specific provision in the U. P. Tenancy Act, S. 115, Civil P. C., has been excluded from applying to cases under that Act.) * (Vol 28) 1941 Oudh 566 (567). (Section 115, Civil P. C., does not apply to orders passed under U. P. Encumbered Estates Act by virtue of S. 47 of that Act.) * (Vol 22) 1935 All 310 (315, 316) : 57 All 810. (Local Government conferring power on District Court under proviso to S. 3, Companies Act — That Court has exclusive original jurisdiction—But this does not oust revisional jurisdiction of High Court — District Court acting under Companies Act is subordinate to High Court.)

[50] An appellate officer appointed by the Provincial Government under S. 40, Bengal Agricultural Debtors Act, 1936, is not a Court *subordinate* to the High Court. (Vol 25) 1938 Cal 688 (688) * (Vol 25) 1938 Cal 448 (448).

[51] Under the Rent Acts of the various Provinces, the right of revision to the High Court has been either expressly or impliedly excluded. (Vol 13) 1926 All 398 (399) (F B). (Practically overruling (Vol 13) 1926 All 118 : 48 All 104 under the Agra Tenancy Act.) * (Vol 19) 1932 All 273 (277) : 54 All 573 (F B) * (Vol 16) 1929 Oudh 389 (390) : 4 Luck 539 (F B) ((Vol 15) 1928 Oudh 214 : 3 Luck 150, approved; (Vol 10) 1923 Oudh 18 and 14 Oudh Cas 38 must be taken to be overruled.) * (Vol 1) 1914 Cal 890 (892). (Revenue Officer under the Chota Nagpur Tenancy Act.) * (Vol 4) 1917 Pat 61 (62) : 3 Pat L Jour 143. (Chota Nagpur Tenancy Act.) * (Vol 11) 1924 Mad 119 (121) : 47 Mad 250. (Order of the Board of Revenue under Estates Land Act.) * (Vol 15) 1928 Mad 1032 (1037, 1038) (F B). (High Court cannot revise orders of the Board of Revenue — Overruling (Vol 13) 1926 Mad 480 : 49 Mad 499 and (Vol 6) 1919 Mad 672 : 42 Mad 310.) * (Vol 22) 1935 Pat 417 (418). (Chota Nagpur Tenancy Act [6 [VI] of 1908], S. 218—Rent suit for Rs. 100 or less—No revision lies — Deputy Commissioner's order is final.) * (Vol 13) 1926 Bom 308 (309). (Collector acting under Bombay Act, 3 [III] of 1874.) * (Vol 4) 1917 Mad 576 (577). (Board of Revenue, Madras.) * (Vol 4) 1917 All 59 (60) : 39 All 91. (Collector ordering prosecution acting as a Revenue Court.) * (1936) 63 Cal 136 (137). (Section 13, Bengal Municipal Act.)

[But see (1896) 23 Cal 723 (728) (F B). (Special Judge acting under S. 108, cl. (2), Bengal Tenancy Act, in regard to settlement of rent by Revenue Officer — Overruling 16 Cal 596.)]

[52] When the local Rent Acts have not excluded right of revision S. 115 would apply. (1913) 40 Cal 518 (522). (Under the Chota Nagpur Tenancy Act.) * (Vol 22) 1935 Mad 367 (367). (Collector acting in exercise of revisionary powers under Madras Estates Land Act — Order by—Revision lies.) * (Vol 25) 1938 All 635 (636).

(Decree or order under S. 9, Specific Relief Act — Revision lies.) * (Vol 21) 1934 Cal 666 (667). (The provision in S. 93, Bengal Village Self-Government Act, does not affect the revisional powers of the High Court.) * (Vol 23) 1936 Lah 695 (696) : 17 Lah 768. (The provisions of S. 115, Civil P. C., are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act, is revisable.) * (Vol 25) 1938 Lah 753 (753) : 1 L R (1939) Lah 196. (There is nothing in S. 192, Succession Act, which takes away the right of revision by the High Court.)

[53] Order of a Commissioner or the District Court. The Payment of Wages Act is not open to revision. (Vol 32) 1945 Nag 244 (245, 246) : 1 L R (1945) Nag 587 * (Vol 33) 1946 All 276 (277).

[54] Commissioner's order under S. 476B, Criminal P. C., is not revisable. (Vol 31) 1944 Oudh 23 (25) : 19 Luck 245.

29. Wrong decision of lower Appellate Court as to the jurisdiction of the trial Court.—[1] Order of trial Court as to its own jurisdiction—Appeal.

(a) Appellate order is revisable. (Vol 17) 1930 All 713 (717, 720, 721) : 53 All 75 (F B) * (1886) 8 All 111 (113) (F B) * (Vol 26) 1939 Bom 485 (485, 486) : 1 L R (1939) Bom 472 * (Vol 15) 1928 Bom 548 (549) * (1905) 32 Cal 146 (153). (1 Cal W N 626 dissented from.) * (Vol 7) 1920 Cal 977 (977) * (Vol 2) 1915 Mad 1223 (1229, 1235) : 39 Mad 195 (F B) * (Vol 9) 1922 Pat 525 (526) : 1 Pat 232 * (Vol 28) 1941 Nag 278 (279, 281, 282) : 1 L R (1941) Nag 543. ((Vol 24) 1937 Nag 39 : 1 L R (1937) Nag 97 held correctly decided.) * (Vol 16) 1929 Lah 605 (606) * (Vol 17) 1930 Lah 611 (612) * (Vol 30) 1943 Oudh 307 (307) * (Vol 16) 1929 Oudh 91 (92) : 4 Luck 347 * (Vol 30) 1943 All 300 (301) : 1 L R (1943) All 681.

(b) Appellate order cannot be revised. (Vol 21) 1934 Lah 536 (537) * (Vol 11) 1924 Lah 349 (350) * (Vol 29) 1942 Oudh 370 (371) * (Vol 17) 1930 Oudh 2 (3) : 4 Luck 667 * (Vol 31) 1944 Oudh 260 (262) : 20 Luck 38.

(c) Order of trial Court can be revised. (Vol 28) 1941 Nag 278 (279, 281, 282) : 1 L R (1941) Nag 543. (High Court can act *suo motu* and revise the order of the first Court although it is moved by a motion to revise the order of the appellate Court.) * (Vol 13) 1926 All 58 (61) : 48 All 168. (Vol 21) 1934 Lah 108 (108) * (Vol 19) 1932 Nag 70 (71) : 28 Nag L R 54 * (1874) 11 Bom H O R 194 (195) * (Vol 20) 1933 Lah 210 (211) * (Vol 29) 1942 Mad 741 (741, 742). (Lower appellate Court wrongly entertaining appeal and dismissing it on merits—High Court in second appeal can only set aside incompetent appellate order—Interference with trial Court's order can be only in revision.) * (Vol 12) 1925 Oudh 163 (163).

Section 117—Note 1

[1] Code is generally applicable to High Court in the exercise of its ordinary original jurisdiction except where it is specifically excluded or unless the High Court itself has made rules superseding any particular provisions of the Code. (Vol 15) 1928 Mad 385 (386).

[2] Section 117 applies the provisions of Civil Procedure Code to Chartered High Courts in the exercise of

118. Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

[1882 — S. 634.]

119. Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its Charter authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

[1882 — S. 635; 1877 — S. 635; See Letters Patent, (Cal.), Clauses 9 and 10.]

Provisions not applicable to High Court in original civil jurisdiction. **120.** (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely sections 16, 17 and 20.

* * * * *

[1882 — S. 638; 1877 — S. 638. As to rules, see O. 49, R. 3.]

[a] Sub-section (2) was repealed by the Presidency Towns Insolvency Act, 1909 (3 [III] of 1909), S. 127 and Sch. III.

PART X.

RULES.

Effect of rules in First Schedule. **121.** The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

Power of certain High Courts to make rules. **122.** High Courts ^a[constituted by His Majesty by Letters Patent] ^b[and the Chief ^c[Court of Oudh and Sind]] ^d[* * *] may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

[1882, cf. S. 652, first para.]

[a] Substituted by A. O. for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915." [b] Inserted by the Oudh Courts (Supplementary) Act, 1925 (32 [XXXII] of 1925), S. 2 and Schedule. [c] Substituted for "Court of Oudh" by the Sind Courts (Supplementary) Act, 1926 (84 [XXXIV] of 1926), S. 2 and Schedule. (15-4-1940). [d] The words "and the Chief Court of Lower Burma," were repealed by the Repealing and Amending Act, 1923 (11 [XI] of 1923), S. 3 and Sch. II. The words "Chief Court of Lower Burma" had been previously substituted for "Chief Courts of the Punjab and Lower Burma" by the Repealing and Amending Act, 1919 (18 [XVIII] of 1919), S. 2 and Sch. I.

Section 117 (contd.)

their appellate civil jurisdiction including their jurisdiction in Letters Patent appeals. (Vol 18) 1931 All 244 (247) : 53 All 535 (F B).

[3] As empowered under Cl. 44, Letters Patent (Madras), the Governor-General in Council has, by S. 117, Civil P.C., incorporated into the Letters Patent the provisions relating to review. (Vol 4) 1917 Mad 670 (670) : 40 Mad 651.

[4] In Vice-Admiralty cases, the effect of appearance the mode of objecting to the jurisdiction, the mode of questioning the validity in law of a pleading, are all governed by a settled practice under Civil Procedure Code. The Privy Council Rules issued under 2 & 3 Will. IV, C 51, have no operation except in suits *in rem* in which no appearance has been entered and other matters to which Civil Procedure Code cannot be applied. (1890) 17 Cal 387 (341). (17 Cal 66 referred.)

Section 119—Note 1

[1] The words "power of the High Court to make rules concerning advocates, vakils and attorneys" under S. 119 are not limited to High Court's power under Cls. 9 and 10

of the Letters Patent to make rules for admission of advocates, vakils and attorneys and to their professional conduct but include also the power of the High Court under the Government of India Act to make rules regulating the practice of the Court. (Vol 15) 1928 Mad 472 (473).

[2] The Rule empowering legal practitioners to appoint other legal practitioners to hold their briefs and appear in their place framed by the Allahabad High Court is within powers conferred by S. 635 (S. 119 of present Code). (1887) 9 All 613 (616, 617) (F B).

Section 120—Note 1

[1] The applicability of S. 20 to High Court in the exercise of its original jurisdiction has been expressly excluded by S. 120. (Vol 10) 1923 Mad 272 (274).

[2] Section 15 does not apply to High Courts though not excepted by S. 120. (Vol 22) 1935 Rang 517 (520).

Section 122 — Note 1

[1] Section 122 is wider than S. 26, Queen's Remembrancer's Act (22 and 23 Vict., C. 21). (Vol 29) 1942 Lah 201 (203); I L R (1943) Lah 569.

Constitution of Rule Committees in certain Provinces.

123. (1) A Committee, to be called the Rule Committee, shall be constituted at ^a[the town which is the usual place of sitting of each of the High Courts and ^b[Chief Courts] ^c[* * *] referred to in section 122.]

(2) Each such Committee shall consist of the following persons, namely :—

- (a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or ^d[* * *] a Divisional Judge for three years,
- (b) a barrister practising in that Court,
- (c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,
- (d) a Judge of a Civil Court subordinate to the High Court, and
- (e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf ^e[by the Provincial Government].

[a] *Substituted* by the Amending Act, 1916 (13 [XIII] of 1916), S. 2 and Schedule, for "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon". [b] The words "Chief Courts" were *substituted* for "of the Chief Court" by the Sindh Courts (Supplementary) Act 1926 (34 [XXXIV] of 1926). This Act came into force on 15-4-1940, (see Sind Government Gazette Notification (Home Department Political) No. 1499 H-39 dated 28th March 1940). [c] The words "and of the Chief Court" were *repealed* by Act 11 [XI] of 1923. Words "of the Chief Court" had been previously *substituted* for "Chief Courts" by Act 18 [XVIII] of 1919. [d] Brackets and words "(in Burma)" were *substituted* for "(in the Punjab or Burma)" by Act (18 [XVIII] of 1919), S. 2 and Sch. I, and were subsequently *repealed* by Act (11 [XI] of 1923), S. 3 and Sch. II. [e] *Substituted* by A. O. for "by the Governor-General in Council or by the Local Government, as the case may be".

124. Every Rule Committee shall make a report to the High Court established at the town *Committee to report at which it is constituted on any proposal to annul, alter or add to the rules to High Court.* in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Section 122 (contd.)

[2] The rules made by the High Court under S. 652 (S. 122 of the present Code) have the force of law and if they are ignored by the Courts, the High Court can interfere in revision. (1909) 6 All L Jour 45 (48).

[3] Under S. 122 the High Court can only regulate the procedure of the subordinate Courts, and cannot take away their jurisdiction. (Vol 18) 1931 All 756 (757): 53 All 959.

[4] Rules made under S. 122 should not be inconsistent with the provisions of the Letters Patent. (Vol 17) 1930 All 558 (559, 560).

[5] A rule though it may amend, alter or add to the rules in the first schedule should not be inconsistent with the provisions in the body of the Code. (Vol 29) 1942 Lah 201 (202) : I L R (1943) Lah 569 (Vol 12) 1925 Oudh 492 (492) : 28 Oudh Cas 169. (Rule made by High Court under S. 122 in conflict with the section of Civil P. C. is void.)

[6] If a new rule added by the High Court under S. 122 to the rules in the first schedule is to some extent in conflict with the previous existing rule, the new rule must by implication be deemed to have annulled or altered that rule. The new rule if not consistent with the

old rule must prevail. (Vol 18) 1931 All 567 (567, 568) : 54 All 263 (F B).

[7] Unless a rule framed under S. 122 expressly says to the contrary it applies to original as well as appellate side. Technically, R. 72A added to O. 21 by the Bombay High Court would in terms apply to original side as well as appellate side of the High Court. (Vol 15) 1928 Bom 123 (126) : 52 Bom 459.

[8] Under S. 122 the Chief Court framed a new rule in place of R. 2 of O. 34 which allowed interest at court rate and not at mortgage rate as stipulated. The new rule was held to be *ultra vires* as it limited the substantive right of the mortgagee to the stipulated rate. (1911) 12 Ind Cas 18 (20) (Low Bur).

[9] The rules made under S. 122 cannot vary the period of limitation prescribed by the Limitation Act for any proceeding. (Vol 17) 1930 Rang 228 (234): 8 Rang 380 (F B) (Vol 8) 1921 All 23 (25): 43 All 660. (Part I, Chap. III, Rule 2 of the Rules of Court made by the Allahabad High Court requiring that a memorandum of second appeal must be accompanied by a copy of the judgment of the Court of first instance framed under S. 122, is *intra vires*.) (Vol 5) 1918 All 389 (390): 40 All 1 (FB). (Rule requiring copy of trial Court's judgment to

125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as ^a[the Provincial Government] may determine :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

[a] *Substituted* by A. O. for the words "in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government", which had been *substituted* for "the Governor-General in Council" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

^a[**126.** Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the Province in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any Province, to the previous approval of the Governor-General.]

[a] *Substituted* by A. O. for the original section.

127. Rules so made and ^a[approved] shall be published in the ^b[Official Gazette * * *], and shall have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

[a] *Substituted* by the Repealing and Amending Act, 1917 (24 [XXIV] of 1917), S. 2 and Sch. I for "sanctioned". [b] *Substituted* by A. O., Para. 4 (1), for "Gazette of India or in the Local Official Gazette, as the case may be." As under Para. 4 (1) the words "Official Gazette" have to be *substituted* for "Gazette of India" and also for "Local Official Gazette," the substitution will strictly read "Official Gazette or in the Official Gazette, as the case may be." But the last words are *omitted* as being redundant.

128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by subsection (1), such rules may provide for all or any of the following matters, namely :—

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;
- (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale;
- (c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;

Section 122 (contd.)

be filed along with memo of second appeal will not entitle appellant to exclude time requisite for obtaining copy of such judgment.)²(Vol 10) 1923 Lah 96 (96).

[10] Limitation Act, S. 5, made applicable by rule under S. 122 to application under O. 9, R. 9—Rule is *intra vires* and retrospective. (Vol 16) 1929 Bom 262 (262):53 Bom 453.

[11] A rule extending S. 5, Limitation Act, to applications under O. 9, R. 13 is not *ultra vires*. (Vol 12) 1925 Mad 14(17):47 Mad 824(FB)²(Vol 4)1917 Mad 957(957).

[12] Since the amendment by the Government of India (Adaptation of Indian Laws) Order, 1937, S. 122 clearly applies to all High Courts constituted by His Majesty by Letters Patent. Before the amendment it was held by the Patna High Court in the following case that S. 122 applied to it as it was a High Court within the meaning of Government of India Act, 1915 having been established in British India by Letters Patent. (Vol 8) 1921 Pat 509 (510).

[But see (Vol 8) 1921 Pat 83 (84, 85) : 5 Pat L Jour 719.]

Section 125 — Note 1

[1] Rule requiring filing of duly filed process papers is not *ultra vires*. (Vol 8) 1921 Pat 428 (429).

[2] Proviso — Patna High Court has adopted Rules

of Calcutta High Court — Rule adopting latter Rules was published in Patna High Court and this is enough. (Vol 8) 1921 Pat 428 (429).

Section 128 — Note 1

[1] Rule framed by the High Court in conflict with section of Civil Procedure Code would be *ultra vires*. (Vol 12) 1925 Oudh 492 (492): 28 Oudh Cas 169. (Rule 172 (a) of the Oudh Civil Digest is not *ultra vires*.)

[2] Section 128 relates only to rules to be made under the Code by the High Courts with advice of Rule Committee constituted under S. 123 — It does not affect the validity of the rules framed under the previous Code. (Vol 16) 1929 Mad 641 (650) : 52 Mad 563 (FB). (Per *Thiruvankatachariar J.* in the Order of Reference.)

[3] Matter of procedure — 'A matter of procedure' means the mode of proceeding by which a legal right is enforced, as distinguished from law which gives or defines right. (Vol 24) 1937 Rang 419 (421): 1937 Rang L R 268 (F B).

[4] Defendant claiming indemnity over against third party — Power to add party is discretionary — Power is widely exercised. (Vol 6) 1919 Cal 189 (189) : 46 Cal 48.

[5] Suit on negotiable instrument under O. 37 is within Civil P. C., S. 128 (2) (f) and Art. 5, Limitation Act, applies. (Vol 14) 1927 Sind 90 (92) : 21 Sind L R 257.

- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;
- (f) summary procedure —
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
 - on a contract express or implied; or
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or
 - on a trust; or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;
- (g) procedure by way of originating summons;
- (h) consolidation of suits, appeals and other proceedings;
- (i) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

129. Notwithstanding anything in this Code, any High Court ^a[constituted by His Majesty by Letters Patent] may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

[1882—S. 652, Para. 3.]

[a] *Substituted* by A.O. for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915".

^a**130.** A High Court not constituted by His Majesty by Letters Patent may, with the previous approval of the Provincial Government, make with respect to any matter other than procedure any rule which a High Court so constituted might under section 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.]

[a] *Substituted* by A. O. for the original section.

131. Rules made in accordance with section 129 or section 130 shall be published in the *Official Gazette* * * * and shall from the date of publication or from such other date as may be specified have the force of law.

[1882—S. 652, Para. 4.]

[a] *Substituted* by A. O. for "Gazette of India or in the local official Gazette, as the case may be." See also foot-note [b] to the text of Section 127.

Section 129 — Note 1

[1] The object of this section is to provide elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation. (Vol 17) 1930 Cal 685 (686) : 57 Cal 676.

[2] There is nothing in the Code to say that the rules of the High Court on the original side must not be inconsistent with the Code. But they must not be inconsistent with the Letters Patent establishing the Court. (Vol 17) 1930 Cal 685 (686); 57 Cal 676. ((Vol 8) 1921 Cal 169 : 48 Cal 69 holding that O. 21, R. 89 applied to the High Court on the original side, though it was inconsistent and incompatible with the High Court rules on the original side, doubted but followed.) * (1913) 37 Bom 572 (574). (Where a rule framed under this section is in-

consistent with O. 41, R. 10, the former prevails over the latter.) * (1907) 34 Cal 619 (624).

[3] Execution — Order of payment made by Bombay High Court in favour of solicitor — Order made under R. 874 of Rules made under S. 129, Civil P. C. — Such order can be executed as a decree. (Vol 23) 1936 Lah 369 (370).

[4] Section 129 refers to Letters Patent of 1865. (Vol 11) 1924 Cal 1025 (1027) : 51 Cal 905.

Section 131 — Note 1

[1] Under S. 131, rules made by the High Court have the force of law from the date of publication or from such other date as may be specified. (Vol 15) 1928 All 708 (708) : 50 All 865.

PART XI.

MISCELLANEOUS.

Exemption of certain women from personal appearance.

132. (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

[1882—S. 640; 1877—S. 640; 1859—S. 21; See O. 26, R. 1.]

133. (1) The ^a[Provincial Government] may, by ^bnotification in the ^c[Official Gazette], exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the ^a[Provincial Government] and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

[1882—S. 641; 1877—Ss. 641, 93; 1859—Ss. 22 and 23; See O. 26, R. 1.]

[a] Substituted by A. O. for "Local Government." [b] For such notification, see the Local Rules and Orders.

[c] Substituted by A. O. for "Local Official Gazette".

Arrest other than in execution of decree.

134. The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Exemption from arrest under civil process.

135. (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

Section 132 — Note 1

[1] Right of *parda* ladies is absolute. (Vol 15) 1928 Cal 814 (815) * (Vol 12) 1925 Mad 905 (906) * (Vol 22) 1935 Sind 205 (206) : 29 Sind L R 298.

[2] "Personal appearance" in S. 132 mean "personal attendance"—Woman found to be *pardanashin* lady observing strict *parda* should not be compelled to attend Court but should be examined on commission. (Vol 29) 1942 Cal 143 (144) : 1 L R (1941) 2 Cal 155* (Vol 20) 1933 All 551(553) : 55 All 666. (Even under O. 5, R. 3 and O. 10, R. 4, *pardanashin* ladies cannot be compelled to attend Court personally.)* (Vol 22) 1935 Sind 205 (206) : 29 Sind L R 298.

[But see (Vol 16) 1929 Cal 528 (528) : 56 Cal 865. (Exemption is not from attendance in Court but from appearance in Court — "Appearance" means that she shall not be compelled to come forth into view or become visible to the public gaze.)]

[3] Woman conveyed to court building completely veiled in *burkha* and examined in private room cannot be said to make personal appearance in Court. (Vol 33) 1946 Bom 340 (342).

[4] Section 132 applies not merely to witness but also to the examination of parties to a suit or proceeding before a Court. (1911) 11 Ind Cas 668 (668) (Mad).

[5] A Court is entitled to reject an application for issue of witness summons to ladies who according to custom and manners of the country ought not to be compelled to appear in public. (1910) 8 Ind Cas 418 (421) (Oudh).

[6] Custom set up must not be of varying or uncertain character — Custom of Parsi widows not to leave the house during mourning held uncertain and varying. (1890) 14 Bom 584 (586).

[7] Unmarried girl of 12 of humble rank belonging to class of Hindu *pardanashin* females, held entitled to privilege under this section — Fact that her elder

married sisters were willing to appear in Court to give evidence, held did not affect the younger one's privilege. (1875) 24 Suth W R 375 (375).

[8] Held that S. 132 covered case of an old Hindu lady belonging to a high family but not observing *purda*. (Vol 5) 1918 Cal 111 (112) : 45 Cal 492.

[9] The privilege under this section cannot be refused on the ground that the *pardanashin* lady had appeared in public before. (1899) 26 Cal 650 (652)* (Vol 5) 1918 Cal 743 (744) : 45 Cal 697. (*Pardanashin* lady appearing in Court to institute criminal complaint does not cease to be exempt from personal appearance in Civil Court.)

[10] *Pardanashin* lady while being examined on commission tutored by somebody — Court may exclude evidence but cannot insist on personal attendance of the lady. (Vol 20) 1933 All 551 (554) : 55 All 666.

[11] *Pardanashin* lady is not entitled to decline to be examined at any place other than that of her choice. (Vol 8) 1921 Cal 229 (231) : 48 Cal 448.

[12] Commission can be issued only on the grounds contained in the Code — Order granting commission on insufficient grounds is revisable. (Vol 14) 1927 Mad 524 (525).

[13] See also Notes on O. 26, R. 1.

Section 133 — Note 1.

[1] Commission to examine witness — Provisions as to witnesses must be impartially enforced. (Vol 4) 1917 Bom 155 (157) : 42 Bom 136.

SECTION 135—SYNOPSIS.

1. Applicability and scope.
2. Going to, attending and returning from tribunal.
3. Arrest of person while in custody.
4. Tribunal, meaning of.
5. Parties.
6. Civil process.
7. Remedies for illegal arrest.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

[1882—S. 642; 1877—S. 642.]

Section 135 (contd.)

1. Applicability and scope.—[1] The immunity from arrest is not for the benefit of the individual but for the furtherance of public interest and better administration of justice. (Vol 16) 1929 Oudh 426 (426); 5 Luck 302 (F B) (1875) 14 Beng L R (App) 13 (14).

[2] The privilege rests on a principle that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice. (1869) 4 Mad H C R 145 (146).

[3] In order to obtain exemption from arrest for a party, it must be shown, firstly, that the party's attendance before Court was *bona fide* in relation to the matter pending before it; secondly that the said Court had jurisdiction over the matter pending before it or the party believed in good faith that it had jurisdiction; and thirdly, that he should be exempt from arrest during such period as is reasonably required in going to the tribunal from his ordinary place of residence, in attending that tribunal, and in returning from it to the ordinary place of residence. (Vol 18) 1931 Bom 175 (178): 55 Bom 612.

[See also (1875) 14 Beng L R (App) 13 (14).]

[4] Arrest under writ from a Small Cause Court—Though this section does not apply, English law, which is approximately the same in this respect, followed. (1880) 5 Cal 106 (110).

[See also (1869) 4 Mad H C R 145 (146).]

[5] No case pending.—Section cannot be invoked. (Vol 17) 1930 Lah 736 (736).

2. Going to, attending and returning from tribunal.—[1] A defendant who appears in Court to defend his suit is exempt from arrest under S. 135. (Vol 7) 1920 Mad 355 (356): 43 Mad 272.

[2] Exemption can be claimed during such period as is reasonably required in going to the tribunal from his ordinary place of residence, in attending that tribunal, and in returning from it to the place from whence he came. (Vol 18) 1931 Bom 175 (178): 55 Bom 612 (Vol 11) 1924 All 676 (677): 46 All 663 (A few yards out of the way is immaterial deviation.) (Vol 22) 1935 Nag 216 (216) (Vol 22) 1935 Pat 6 (8): 14 Pat 242. (Person having temporary lodgings—Protection extends only from his temporary lodging to Court.)

[3] No party or witness can claim to return by any route he likes. (Vol 18) 1931 Bom 175 (178): 55 Bom 612.

[4] No hard and fast rule can be laid down as to the duration or extent of the privilege. It is a question of fact to be determined in each case. (Vol 18) 1931 Bom 175 (178): 55 Bom 612.

[5] Place of residence may be within or outside the jurisdiction of the Court before which the matter is pending. (Vol 18) 1931 Bom 175 (178): 55 Bom 612.

[6] The exemption is forfeited if there is an unnecessary or excessive deviation in going to or in returning from Court. (Vol 18) 1931 Bom 175 (178): 55 Bom 612 (Vol 20) 1933 Cal 11 (12): 34 Cri L Jour 173. (Arrest after one hour of closing of Court at place not on way to person's residence—No explanation as to

how the hour was spent—Held not exempted.) (1880) 5 Cal 106 (111). (Going by a longer but quicker and less crowded road is no deviation.) (Vol 3) 1916 Lah 318 (319): 17 Cri L Jour 525. (While returning from Court judgment-debtor stopping to get petition written—He is not deprived of protection.)

[7] Some latitude must be allowed in case where person is not re-ident in the city where the cause is to be heard.) (1856) 5 H L C 671 (672): 10 E R 1064 (1910) 32 All 3 (7). (Where certain persons came to Benares from Bombay to attend a case and after the case was finished took a ticket to Allahabad and they were arrested in the train. Held they could not be said to be returning from a tribunal.) (1882) 4 Mad 317 (318). (H, a native of Patna coming to Madras to be present at trial of suit in which he was plaintiff—On day of hearing, suit adjourned for seven weeks—H staying in Madras for adjourned hearing—Held he was entitled to privilege while so staying in Madras.) (1809) 11 East 439 (440): 103 E R 1073.

[8] Decree-holder applying for execution by arrest of judgment-debtor—Judgment-debtor bolting away, but on assurance of Court that he would be exempt from arrest while appearing on fixed date before Receiver for giving accounts, he coming home and then arrested two days before date fixed for appearing—S. 135 (2) held did not apply.) (Vol 25) 1938 All 356 (357, 358).

3. Arrest of person while in custody.—[1] A judgment-debtor present in Court at the time of execution of a second decree can be arrested in execution of the second decree though he was already arrested in execution of a first decree. (Vol 11) 1924 Mad 900 (901).

4. Tribunal, meaning of.—[1] Word "tribunal" in S. 135 (2) is used to cover tribunal both of British India as well as of Native State. (Vol 22) 1935 Nag 216 (216).

[2] Income-tax officer is a "tribunal". (Vol 20) 1933. Lah 214 (215).

[3] A defendant in suit in the High Court while attending before an arbitrator appointed by the High Court is exempt from arrest. (1880) 5 Cal L Rep 170 (171).

5. Parties.—[1] Person coming to appear as accused in criminal case is exempt from arrest—Money paid to secure release should be refunded. (Vol 16) 1929 Oudh 426 (426): 5 Luck 302 (F B).

6. Civil process.—[1] This section does not preclude the arrest of a person under a process issued by a Criminal Court. (Vol 16) 1929 Lah 785 (785): 30 Cri L Jour 788.

[2] It is not open to the Court either under Presidency Towns Insolvency Act or under Civil P. C. to issue a warrant of arrest against a bankrupt who is in attendance in Court as witness. (Vol 2) 1915 Mad 282 (286, 287).

7. Remedies for illegal arrest.—[1] Person claiming exemption from arrest even if arrested can get himself released but such arrest would not entitle him to claim damages for tort. To claim damages it is essential that the arrest is procured maliciously and

Exemption of members of legislative bodies from arrest and detention under civil process.

^a[135A. (1) No person shall be liable to arrest or detention in prison under civil process —

^b[(a) if he is a member of a unicameral Legislature or of either Chamber of a bicameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber;]

(b) if he is a member of any committee of such ^c[Legislature or Chamber], during the continuance of any meeting of such committee;

^b[(c) if he is a member of either Chamber of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the Chambers of that Legislature;]

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1), shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).]

[a] *Inserted by the Legislative Members Exemption Act, 1925 (23 [XXIII] of 1925), S. 3. [b] Substituted by A. O. for the original clause. [c] Substituted, *ibid* for "Chamber or Council".*

136. (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, ^a[* * *] the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras ^b[or Bombay], as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

[1882 — S. 648 ; 1877 — S. 648.]

[a] The words "or of the Chief Court of Lower Burma," were repealed by A. O. [b] *Substituted by A. O. for "Bombay or Rangoon."*

Section 135 (*contd.*)

without reasonable and probable cause. (Vol 17) 1930 Rang 131 (132) : 7 Rang 598.

[2] A person who causes the arrest and the officer arresting a person exempted under this section are guilty of an offence under S. 342, Penal Code. (Vol 9) 1916 Lah 318 (319) : 17 Cri L Jour 525.

[But see (Vol 22) 1935 Cal 551 (551).]

[3] See (1910) 20 Mad L Jour 136 (137). (A person arrested in contravention of this section, can apply for his release to the Court which ordered his arrest.)

Section 136—Note 1

[1] Provisions of the section must be strictly observed. (Vol 24) 1937 Pat 603 (605) : 39 Cri L Jour 2.

[2] Under S. 136 (1), orders passed under O. 39, R. 2 (1) may be enforced outside the local limits of the

jurisdiction of the Court making such orders. (Vol 19) 1931 Cal 279 (280) : 57 Cal 1280.

[3] It is doubtful whether a Judge on the original side has a right to direct a District Judge within appellate jurisdiction of High Court to execute a warrant of arrest for contempt—Application to that effect refused—Proper course is to ask the original side Judge to ask for express injunction. (Vol 15) 1928 Cal 462 (463) : 55 Cal 777.

[4] Writ issued by High Court to Sheriff for arrest of person and directing him to transfer it to District Judge for execution — Arrest by District Judge is not *ultra vires* or without jurisdiction. (Vol 21) 1934 Cal 818 (820) : 61 Cal 971.

[5] Order by High Court in its appellate jurisdiction — Person against whom the order is passed residing

137. (1) The language which, on the commencement of this Code, is the language of any *Language of sub-* Court subordinate to a High Court shall continue to be the language of such *ordinate Courts.* subordinate Court until the ^a[Provincial Government] otherwise directs.

(2) The ^a[Provincial Government] may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

[1882—S. 645 and also compare Ss. 49, 200 and 201 of that Code.]

[a] *Substituted* by A. O. for "Local Government".

138. (1) The ^a[High Court] may, by notification in the ^b[Official Gazette], direct with respect *Power of High Court to* to any Judge specified in the notification, or falling under a descrip- *require evidence to be re-* tion set forth therein, that evidence in cases in which an appeal *corded in English.* is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

[1882 — S. 185A.]

[a] *Substituted* by the Decentralisation Act, 1914 (4 [IV] of 1914), S. 2 and Schedule, Pt. I, for "Local Government". [b] *Substituted* by A. O. for "local official Gazette".

Oath on affidavit by whom to be administered.

139. In the case of any affidavit under this Code —

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the ^a[Provincial Government] has generally or specially empowered in this behalf,

may administer the oath to the deponent.

[1882 — S. 197; 1877 — S. 197; See O. 19.]

[a] *Substituted* by A. O. for "Local Government".

Objects and Reasons.

"Clause 139. — The Committee have inserted the words 'or other person' after the word 'officer' in sub-clause (b) in order to give the High Court power to relieve the officers of the Courts of the work of admin-

nistering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required." — S. O. R.

140. (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, *Assessors in causes* whether it be exercising its original or its appellate jurisdiction, may, if it thinks *of salvage, etc.* fit, and shall upon request of either party to such cause, summon to its assist-

Section 136 (contd.)

within appellate jurisdiction — High Court can proceed under this section and transfer warrant of arrest to a proper District Judge. (Vol 13) 1928 Mad 574 (575).

[6] Application to attach property before judgment — Property to be attached lying outside Court's jurisdiction — Court must send its order of attachment to District Judge of place where property is situated — Attachment made by any other Court is invalid. (Vol 28) 1941 All 212 (214).

[7] District Judge — Shan States have no District Judge — Issue of order of attachment before judgment — Order sent to Court of Assistant Superintendent at Kalaw — Such Court not being District Court order is wrong. (Vol 24) 1937 Rang 367 (369); 1937 Rang L R 249.

[8] Where an officer proceeding from Burma to England on leave resided for a few days in Madras on his way, it was held that that was enough to give jurisdiction to the Court to arrest him under this section. (1885) 8 Mad 205 (206).

[9] Court can order attachment before judgment of property outside the local limits of its jurisdiction and is also competent to remove such attachment. (Vol 18) 1931 Rang 279 (280); 9 Rang 561.

Section 138—Note 1

[1] As to the method of recording evidence, see O. 18, Rr. 5 and 7.

Section 139—Note 1

[1] An affidavit sworn before an Honorary Magistrate who was then in the Bar room is inadmissible under S. 139. (1910) 5 Ind Cas 537 (538) (Cal).

[2] Patna High Court General Rules and Circular Orders (Civil) — Sherishtadar of Munsif's Court has authority to receive and attest affidavit in appeal in District Court if empowered to do so by District Judge — If Sherishtadar acts under R. 13 *ex officio*, his jurisdiction is limited to matters subject to jurisdiction of Munsif's Court — Issue of process of District Court through Munsif's Court is subject to jurisdiction of Munsif. (Vol 20) 1933 Pat 713 (714); 35 Cri L Jour 459.

ance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessor shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

[1882—S. 645A.]

Miscellaneous 141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[1882—S. 647, para. 1; 1877—S. 647; 1861—S. 38; See S. 388, Indian Succession Act.]

SECTION 141—SYNOPSIS.

1. Proceedings to which section applies.
2. Restitution proceedings.
3. "Procedure provided in this Code."
4. "In regard to suits."
5. "As far as it can be made applicable."
6. "Court of civil jurisdiction."

1. Proceedings to which section applies. — [1] Words "all proceedings in any Court of civil jurisdiction" include all proceedings relating to original matters in the nature of suits. (Vol 30) 1943 Cal 19 (20); 1 L R (1942) 2 Cal 194 & (1887) 9 All 36 (41) & (Vol 8) 1921 Bom 463 (463). (Such as proceedings in probate, guardianship and so forth but does not include proceedings in execution.) & (Vol 28) 1941 Rang 201 (202); 1941 Rang L R 246. (Original matters mean matters which originate in themselves and not those which spring up from a suit.)

[See also (Vol 26) 1939 Lah 308 (308, 309). (Minor party to award involved in proceedings pending in other Court—Subject-matter of proceedings not covered by award—S. 141 or O. 32, R. 7 held did not apply—Award held valid without permission of such other Court.)

[2] In the following cases the section has been applied to proceedings in the suit itself. (Vol 28) 1941 All 101 (104); ILR (1941) All 193 (FB). (Section 141 is not restricted to original proceedings but applies to all proceedings in civil Court.) & (1894) 21 Cal 479 (482, 483). (Sale by Receiver — Procedure prescribed by Code in a suit held applicable.) & (Vol 18) 1931 Mad 795 (796, 797). (By force of S. 141, O. 17 and O. 9 apply to application for final decree under O. 34, R. 5.) & (Vol 12) 1925 Mad 145 (146); 47 Mad 800. (Order 18, Rule 1 applies to enquiry before Commissioner.) & (Vol 17) 1930 Nag 188 (189); 26 Nag L R 154. (Application for personal decree in mortgage—O. 9, R. 9 applies.) & (Vol 17) 1930 Rang 257 (258, 259); 8 Rang 316. (Application for personal decree against mortgagor is not an application in execution but an application for a decree.)

[3] Section 141 does not apply to execution proceedings. (Vol 20) 1933 All 783 (784); 55 All 891 (FB). (Order 9 cannot be made applicable to such proceedings with the aid of S. 141.) & (Vol 28) 1936 All 378 (380); 58 All 797. (Objection under O. 21, R. 58 cannot be held to be an original matter.) & (Vol 24) 1937 Bom 111 (112); 1 L R (1937) Bom 144. (Reference to arbitration.) & (Vol 18) 1926 Cal 773 (777); 53 Cal 679 & (Vol 12) 1925 Cal 812 (818); 52 Cal 559 & (Vol 12) 1925 Cal 510 (510). (Dissenting from (Vol 3) 1916 Cal 613; (Vol 3) 1916 Cal 221 and (Vol 6) 1919 Cal 50; 45 Cal 950.) & (Vol 26) 1939 Lah 223 (223). (Court however has inherent power under S. 151 to restore application in execution dismissed for default.) & (Vol 17) 1930 Lah 961 (968) & (Vol 13) 1926 Lah 109 (109) & (Vol 26) 1939 Mad 576 (579). (Provisions of O. 26, R. 4.) & (Vol 16) 1929 Mad 757 (761, 762); 52 Mad 899 (FB). (Proceedings under O. 21, R. 97.) & (Vol 10) 1923 Nag 18 (19). (Order 9, R. 9 does not apply to execution proceedings.) & (Vol 9) 1922 Nag 267 (269); 18 Nag L R 152 & (Vol 11) 1924 Pat 346 (347). (Application to set aside sale under

O. 21, R. 90.) & (Vol 10) 1923 Pat 239 (241); 2 Pat 372. (O. 9, R. 4.) & (Vol 18) 1931 Sind 97 (98); 25 Sind L R 475 (FB) & (Vol 8) 1921 Sind 55 (56); 17 Sind L R 105 & (Vol 1) 1914 Sind 61 (62); 8 Sind L R 327.

[4] It has been held in the following case that O. 9, R. 9 applies to application under O. 21, R. 100 as it is not execution proceeding. (Vol 10) 1923 Pat 239 (241); 2 Pat 372.

[5] The following case holds that O. 9, R. 9 applies to an order dismissing for default an application under O. 21, R. 90. (Vol 7) 1920 Oudh 177 (178); 23 Oudh Cas 549. (Following (Vol 3) 1916 Cal 613 which is dissented from in later cases.)

[6] Order 9 applies to applications under O. 9 itself by virtue of S. 141. (Vol 13) 1926 Mad 325 (326).

[But see (Vol 14) 1927 Cal 534 (535, 536); 54 Cal 405.]

[7] When an application to have a suit, decided *ex parte*, restored to file has been dismissed for default, an application to set aside that dismissal lies under O. 9, R. 9 read with S. 141. (Vol 10) 1923 Oudh 146 (146).

[8] Suit dismissed in default—Application for restoration also dismissed for default—Application for restoration of application is maintainable. (Vol 7) 1920 Lah 304 (304); 1 Lah 339 & (Vol 12) 1925 All 773 (774); 47 All 878 & (Vol 14) 1927 Lah 71 (71) & (1911) 7 Nag L R 32 (32, 33).

[9] Where an application under O. 9, R. 4 is itself dismissed for default, a fresh application to restore such application is maintainable. (Vol 6) 1919 Lah 155 (156).

[10] The following have been held to be the original matters contemplated by the section:

(a) Proceedings under Guardians and Wards Act, 1890. (Vol 20) 1933 Nag 62 (64); 28 Nag L R 332 & (Vol 21) 1934 Mad 496 (498). (Order 39, R. 10 applies to a petition for depositing money under the Guardians and Wards Act.)

(b) Proceedings for the grant of probate or letters of administration. (Vol 23) 1936 Lah 863 (864) & (1894) 18 Bom 237 (238). (Application to obtain probate in *forma pauperis*.) & (Vol 30) 1943 Cal 19 (20); 1 L R (1942) 2 Cal 194. (Application for letters of administration.) & (Vol 23) 1936 Lah 712 (713) & (Vol 25) 1938 Mad 486 (488) & (Vol 2) 1915 Mad 811 (812); 38 Mad 199.

(c) Proceedings under the Companies Act. (Vol 7) 1920 Lah 51 (53); 1 Lah 187. (*Ex parte* orders—O. 9, R. 13 applies.) & (Vol 23) 1936 All 826 (829); 58 All 742 (F B). (Proceedings under S. 187.) & (1887) 9 All 180 (182) (SB). (Section 24, Civil P. C., applies to cases of winding up of companies.) & (Vol 15) 1923 Lah 376 (377) & (Vol 24) 1937 Oudh 62 (63). (Power to review.)

(d) Proceeding to compel registration. (1877) 2 Cal 131 (139); 3 Ind App 221 (P C).

(e) Reference to Court under the Land Acquisition Act. (1886) 16 Cal 31 (32).

(f) Proceedings under Lunacy Act, (1912). (Vol 5) 1918 Cal 353 (355).

(g) Proceeding for the appointment of a common manager under the provisions of Bengal Tenancy Act. (Vol 3) 1916 Cal 427 (427); 43 Cal 986.

Orders and notices to be in writing.

[1882—S. 94.]

142. All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

Section 141 (contd.)

(h) Application to a District Judge for sanction to lease *wakf* properties. (Vol 11) 1924 Cal 327 (328).

(i) Proceedings under S. 78, Madras Hindu Religious Endowments Act. (Vol 22) 1935 Mad 612 (614) : 59 Mad 36.

(j) Application to sue in *forma pauperis*. (Vol 20) 1933 Mad 5 (6) & (Vol 1) 1914 Mad 256 (258) & (Vol 16) 1929 Sind 136 (136).

(k) Issue referred by Revenue Court to Civil Court under S. 271, Agra Tenancy Act, 1926. (Vol 21) 1934 All 86 (86) : 56 All 390.

(l) Application to file an award under the Arbitration Act of 1899. (Vol 27) 1940 Lah 164 (165).

2. Restitution proceedings. — [1] Section 141 does not apply to proceedings under S. 144 which are not original proceedings. (Vol 29) 1942 All 85 (88) : I L R (1941) All 807 & (Vol 5) 1918 Pat 396 (397, 398) : 3 Pat L Jour 367. (Order 2, R. 2 does not apply to restitution proceedings.)

[But see (Vol 9) 1922 All 223 (225, 226) : 44 All 407 & (Vol 17) 1930 Lah 981 (968).]

[2] Section 141 does not make S. 144 applicable to execution proceedings. (Vol 2) 1915 Cal 530 (531).

3. "Procedure provided in this Code". — [1] Section is limited to matters of procedure — It cannot be availed of where substantive rights are involved. (Vol 29) 1942 Nag 8 (11) : I L R (1941) Nag 588 & (Vol 28) 1941 All 101 (105) : I L R (1941) All 193 (F B) & (Vol 15) 1928 Rang 137 (138) : 6 Rang 563.

[2] The section relates to procedure only and does not confer a right of appeal which is a substantive right. (1913) 9 Nag L R 33 (34) & (Vol 11) 1924 All 632 (633) : 46 All 538 & (1928) 32 Cal W N 693 (696). (Section does not give a right of appeal against an order returning a memorandum of appeal for presentation to proper appellate Court.) & (Vol 9) 1922 Cal 572 (572, 573). (Application to set aside dismissal of suit, dismissed — Second application also dismissed — No appeal lies from latter.) & (Vol 19) 1932 Nag 101 (102) : 28 Nag L R 83. (Application to restore application for restoration of suit dismissed — No appeal lies — (Vol 10) 1923 Nag 293 : 19 Nag L R 119, overruled.) & (Vol 10) 1923 Pat 180 (183). (Execution proceedings — Dismissal for default — No appeal lies.) & (Vol 30) 1943 Sind 223 (223, 224) : I L R (1943) Kar 213. (Order of District Court under S. 74, Trusts Act — No appeal lies.)

[But see (1882) 4 Mad 295 (296). (Appeal lies from an order of District Judge made under S. 5 of the Religious Endowments Act.) & (Vol 24) 1937 Oudh 344 (347) : 13 Luck 246. (Application under O. 9, R. 9 for restoration of suit dismissed for default — Application to restore such application rejected — Order on such application is appealable.)

[3] Section does not empower Judge to apply provisions of review to the judicial proceedings. (Vol 6) 1919 Mad 244 (246) & (1912) 1912 Pun L R No. 174, p. 561 (562) : 1912 Pun Re No. 116. (Section 114 does not apply to proceedings under Guardians and Wards Act.)

[4] The section does not confer on a Court the power to make a reference under O. 46, R. 1 in a case not coming under that rule. (1913) 36 Mad 16 (17) & (Vol 12) 1925 Cal 391 (392). (Enquiry before Rent Controller is not a suit.)

[5] Rule in S. 86 relating to protection of Ruling Chief is not a rule of procedure. (Vol 27) 1940 Cal 244 (246) : I L R (1940) 1 Cal 344.

[6] Sections 10 and 11, Civil P. C., are concerned with law of procedure. Mere use of the word 'suit' in

S. 10 does not restrict its applicability to suits alone. Sections can be extended to civil miscellaneous proceedings by virtue of S. 141. (Vol 9) 1922 Sind 6 (8) : 16 Sind L R 79.

[7] Order 39, R. 1 is a rule of procedure and can be applied to "proceedings" within S. 141. (1909) 3 Sind L R 128 (129, 130).

4. "In regard to suits." — [1] "Suit" includes appeal. (Vol 15) 1928 Lah 488 (488).

[2] Procedure prescribed by S. 98 is extended to miscellaneous proceedings of the nature of appeals by S. 141. (1879) 3 Bom 204 (206) (S B).

5. "As far as it can be made applicable." — [1] Section 141 does not apply to a matter where a clear procedure is laid down. (Vol 17) 1930 Mad 105 (107) & (Vol 11) 1924 All 376 (378) : 46 All 372. (Section 141 does not apply to Succession Certificate Act except so far as Ss. 19 and 26 make it applicable.)

[2] Section does not make the whole of the procedure in regard to suits applicable to other proceedings but only as far as it can be made applicable. (Vol 7) 1920 Cal 743 (745). (Probate proceedings — Every rule in O. 32 is not made applicable.) & (Vol 14) 1927 Sind 187 (189) : 22 Sind L R 206.

[3] Section does not apply to proceedings under S. 105, Bengal Tenancy Act, as the Act provides special procedure by S. 107 of that Act. (Vol 11) 1924 Pat 104 (106) : 3 Pat 67.

[4] The Civil P. C. does not apply to proceedings under the Mamlatdar Courts Act, which provides summary procedure. (1912) 6 Sind L R 67 (70).

[5] *Per Napier J.* — Neither S. 141 nor R. 94, Civil Rules of Practice, applies to order under S. 10, Religious Endowments Act. (Vol 3) 1916 Mad 268 (271, 272).

[6] Section 141 does not require that O. 2, R. 2 and S. 11, Expl. 4 should be applied to proceedings under S. 144. (Vol 22) 1935 All 195 (197).

[7] Surety bond by guardian and surety under Guardians and Wards Act — Proper course is to assign the bond and to enable assignee to sue on the bond and by issuing execution on the strength of S. 141, Civil P. C. (Vol 14) 1927 Sind 262 (262).

[8] Revisional jurisdiction is peculiar to High Court and there can be no question of returning a revision petition for presentation as an appeal or as a revision petition to any other Court in the Province. (Vol 29) 1942 Mad 657 (658).

6. "Court of civil jurisdiction." — [1] Section is applicable only to proceedings of Court exercising civil jurisdiction. (Vol 3) 1916 Pat 115 (117) : 18 Cri L Jour 132 : 1 Pat L Jour 576.

[See also (1890) 12 All 129 (157) (F B). (Decision under S. 5, Court-fees Act — Taxing officer is not a Court — Section 141 (S. 647 old) does not apply.)]

[2] Court holding inquiry under Legal Practitioners Act is Court of civil jurisdiction. (Vol 6) 1919 Cal 474 (475).

[But see (Vol 3) 1916 Pat 115 (116, 117) : 18 Cri L Jour 132 : 1 Pat L Jour 576.]

[3] This section does not make applicable the provisions of Civil Procedure Code to proceedings under S. 195, Criminal P. C., which are of a criminal rather than of a civil nature. (1907) 30 Mad 311 (314).

Section 142 — Note 1

[1] Practice in mofussil Courts not to formally draw up interlocutory orders (e. g., granting an injunction) condemned. (Vol 31) 1944 Bom 24 (24).

Postage. 143. Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Provided that the ^a[Provincial Government] ^b[***] may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

[1882 — S. 95; 1877 — S. 95.]

[a] Substituted by A. O. for "Local Government". [b] The words "with the previous sanction of the Governor-General in Council", were repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I, Pt. I.

144. (1) Where and in so far as a decree is varied or reversed,⁹ the Court of first instance⁸ shall, on the application of any party entitled²² to any benefit by way of restitution or otherwise, cause such restitution to be made¹⁷ as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders¹³, including orders for the refund of costs and for the payment of interest¹⁴, damages, compensation and mesne profits¹⁵, which are properly consequential on such variation or reversal.

(2) No suit⁷ shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

[1882—S. 588.]

Objects and Reasons.

"Clause 144.—Sub-clause (2) has been added on the suggestion of the High Court. We agree that restitution

which may be obtained by application under this clause should not be made the subject of a separate suit."—S. C. R.

SECTION 144 — SYNOPSIS.

1. Against whom restitution can be granted.
2. Restitution against auction-purchaser.
3. Surety.
4. Third persons.
5. Appeal.
6. Applicability, scope and object.
7. Bar of suit.
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10. Effect of reversal of main decree on dependent decrees.
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12. Modes of variation or reversal.
13. Extent of power to grant restitution.
14. Interest.
15. Mesne profits.
16. Possession obtained otherwise than in execution.
17. "Shall cause restitution to be made."
18. Inherent power to grant restitution.
19. Nature of proceedings and limitation.
20. Court-fee.
21. Splitting up claim of restitution.
22. Who may apply for restitution.
23. Auction-purchaser.
24. Party not in possession.

1. Against whom restitution can be granted.—[1] Word "parties" includes their representatives — Assignee and attaching creditor of party are representatives and are liable to restitution. (Vol 27) 1940 Pesh 44 (46, 47) * (Vol 19) 1932 Lah 527 (528, 529) * (Vol 29) 1942 Mad 472 (473); I L R (1942) Mad 949. (Person attaching decree is representative of original decree-holder.) * (Vol 17) 1930 Mad 787 (788, 789) : 53 Mad 796. (Do.)

[2] Party bound to restore possession — Legal representatives of that party are equally bound. (Vol 5) 1918 Mad 678 (674).

[3] The judgment-debtor is entitled to restitution

from the assignee of the decree who has realised the decretal amount in execution even though the assignee was not brought on the record in appeal. (Vol 8) 1916 Mad 745 (746) : 38 Mad 36. (23 Mad 203, followed, 24 All 288, dissented.)

[4] Word "party" is not confined to original parties to suit but applies to persons subsequently becoming concerned — Assignee from decree-holder realizing amount due under decree — Right to restitution arises against both original decree-holder and his transferee. (Vol 28) 1941 Mad 315 (315, 316) : I L R (1941) Mad 498.

[5] Winning party is entitled to be restored to property free from all encumbrances — Restitution can be claimed not only against party but also against persons deriving title from him. (Vol 22) 1935 All 65 (66).

[6] Order for restitution cannot be granted against person receiving no benefit in favour of one losing nothing. (Vol 19) 1932 Rang 148 (150) : 10 Rang 480.

[7] Decree-holder purchaser in rent decree settling land with another lessee—On reversal of decree application for restitution made only against decree-holder, lessee not made party — No objection raised — Restitution with mesne profits held could be ordered against decree-holder. (Vol 7) 1920 Cal 550 (551, 552).

[8] Allowances ordered by Court to be paid to parties out of suit property must be deemed to have been paid on condition of their being refunded by party ultimately proving unsuccessful. (Vol 27) 1940 Mad 850 (863, 864).

[9] A co-plaintiff in whose favour a decree is not passed is not a decree-holder and restitution cannot be ordered against him. (Vol 4) 1917 All 117 (118).

[10] A suing B for possession — Receiver appointed — Profits pending suit deposited in Court—A claiming those profits — Trial Court refusing A's claim — A appealing — C, obtaining decree during pendency of A's appeal, attaching profits lying in Court in B's name — A's title established on appeal— A's claim for restitution against C is valid. (Vol 24) 1937 Mad 95 (96).

[11] Suit by A against B dismissed with costs—B assigning his decree for costs to C — D in execution of his decree against B attaching decree for costs—C and D dividing costs and taking each half and half—Decree in favour of B reversed—C and D though liable to restitu-

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tion held not liable for interest. (Vol 27) 1940 Pesh 44 (47).

[12] Suit for ejectment—Suit decreed and possession obtained in execution — Decree finally reversed — Property leased in meantime to third person—Application under S. 144 — Possession can be recovered from lessee and mesne profits from ejector only. (Vol 16) 1929 Cal 590 (591).

[13] Decree in a suit for possession passed in favour of plaintiff against A and his usufructuary mortgagees—Decree reversed on appeal—A getting possession under reversing decree—Mortgagees claimed restitution against A—Remedy held misconceived. (Vol 23) 1936 Mad 634 (635).

2. Restitution against auction-purchaser. —

[1] Restitution cannot be demanded under S. 144 as against a *bona fide* purchaser at a court sale, who was not a party to the decree, on the ground that the decree was reversed by the appellate Court subsequent to the sale and that the appeal was pending to the knowledge of the purchaser. (Vol 4) 1917 Mad 250 (253) * (Vol 3) 1916 All 159 (160) : 38 All 240 * (Vol 12) 1925 Lah 176 (177) * (1913) 16 Oudh Cas 225 (230, 231) * (Vol 30) 1943 Pat 325 (326, 327) : 22 Pat 315. (Rule of restitution is to be relaxed in favour of stranger purchaser.) * (Vol 11) 1924 Sind 101 (103, 104) : 17 Sind L R 73. (Purchaser not *bona fide*—Restitution can be granted.)

[2] Purchaser party to suit but getting no benefit under decree—Decree reversed on appeal — Sale should be set aside. (Vol 13) 1926 Mad 78 (80, 81) : 48 Mad 767.

[3] The purchaser in court auction in execution of a decree is bound to restore possession to the judgment-debtor on the reversal of the decree in appeal. During the pendency of the appeal the purchaser is a representative of the plaintiffs for the purpose of transference of possession from the plaintiffs to the judgment-debtor. (Vol 5) 1918 Cal 229 (230).

[4] Auction sale—Deposit of price by purchaser and subsequent discharge of incumbrance — Sale set aside — Judgment-debtor must refund deposit before claiming restoration of possession, but not money paid for incumbrance. (Vol 9) 1922 P C 269 (271) : 49 Ind App 351 : 2 Pat 10 (P C).

[5] Application to set aside sale under O. 21, R. 90, dismissed — Still application under S. 144 can be entertained. (Vol 18) 1931 All 655 (656).

[6] Decree-holder purchasing property sold in execution of his *ex parte* decree — *Ex parte* decree subsequently set aside—Sale stands cancelled and restitution can be claimed against the decree-holder auction-purchaser but not in case of stranger auction-purchaser or transferee from decree-holder. (Vol 12) 1925 Cal 1074 (1076).

3. Surety.—[1] Section applies only to the parties or the representatives of the original parties and not to sureties. (Vol 6) 1919 P C 55 (58) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (P C) * (Vol 19) 1932 Bom 326 (327). (Decree fixing compensation to be paid on acquisition of land set aside by High Court — But amount paid during interval to nominee of decree-holder on his executing bond binding himself to repay it — No reference to interest made in bond — Government held not entitled to interest — Ss. 144, 145 and 146 held not to apply.) * (Vol 27) 1940 Mad 850 (852). (But they can be made parties to proceedings—Surety's liability can only be determined under S. 145.) * (Vol 25) 1938 Nag 101 (102) : I L R (1938) Nag 354.

[2] P's suit for possession of estate in hands of Court of Wards decreed—During pendency of appeal to High Court P put in possession on furnishing security to the extent of certain sum—Security bond executed by S for

liability of plaintiff decree-holder by creating charge on certain properties and in the event of deficiency making him personally liable — Surety not bound to any individual—Decree reversed by High Court and P's suit dismissed — Application under Ss. 145 and 151 claiming mesne profits against P by enforcement of bond against S—S. 145 is not applicable—*Held* remedy was by way of application under S. 144 to trial Court for assessment of mesne profits and under its inherent powers to enforce the security by making the surety as a proper party. (Vol 30) 1943 P C 189 (191, 192): I L R (1944) Kar P C 16 (P C).

4. Third persons. — [1] Section does not allow restitution to be made against a third party. (Vol 11) 1924 All 273 (273) * (Vol 19) 1932 Cal 29 (33) : 58 Cal 1070 * (Vol 24) 1937 Lah 169 (170) * (1913) 16 Oudh Cas 225 (230, 231).

[2] M obtained possession of certain property in execution of his decree against L — Decree set aside in appeal — L applying for possession of property and K resisting his claim—Proceeding should be treated under O. 21, R. 97, and not under S. 144. (Vol 17) 1930 All 415 (416).

5. Appeal. — [1] The determination of a question under S. 144 is a decree within the meaning of S. 2 (2) and as such is subject to appeal. (Vol 28) 1941 Nag 318 (318) : I L R (1941) Nag 662 * (Vol 12) 1925 Cal 102 (103). (There is no distinction between a decree in suit and a decree in a proceeding under S. 144.) * (Vol 1) 1914 Mad 328 (329) : 38 Mad 1120. (Order for restitution is equal to decree.) * (1912) 1912 Mad W N 513 (513) * (Vol 19) 1932 Pat 317 (319) : 11 Pat 553. (Order passed on footing that case is governed by S. 144 is appealable.)

[See also (1898) 8 Mad L Jour 276 (277). (Case under old Code.)]

[2] Where the decree for restoration is resisted by a third person and the decree-holder applies under O. 21, R. 97, the mere fact that the application under O. 21, R. 97 is dismissed and is unappealable does not make the order of dismissal the less a refusal of the restitution under S. 144 and as such it is appealable. (Vol 21) 1934 Pat 109 (109) : 13 Pat 108.

[3] An order dismissing an application for restitution under S. 144 is not appealable as it is not a decree. (Vol 1) 1914 Lah 9 (11) : 1914 Pun Re No. 10.

[4] A rejection of a prayer for restitution under S. 144 on the ground of limitation amounts to determination of a question under S. 144 and the order dismissing the application is a decree and therefore appealable. (Vol 23) 1936 Cal 812 (812).

[5] Application under S. 144 — Objection as to limitation overruled by District Judge — Order held to be not decree within S. 2 (2) and hence not appealable. (Vol 1) 1914 Lah 415 (416) : 1913 Pun Re No. 110.

[6] Application for restitution of property — Subsequent application for ascertainment of mesne profits — Order that latter application is not barred by limitation — No appeal lies from such order. (Vol 20) 1933 Pat 498 (499).

[7] Possession obtained in decree against wrong representative — Rightful representative who was never in possession recovered possession — Person ousted applied and obtained *status quo* — This order is not appealable. (Vol 1) 1914 Lah 398 (399).

[8] Application for mesne profits — Claim to set off not put in trial Court cannot be raised in appeal (Per *Stodart J.*). (Vol 27) 1940 Mad 850 (868).-

[9] Order passed that party entitled to mesne profits — Another order determining amount — Second order appealed against when appeal against first order time-barred — First order being appealable could not be

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attacked in appeal against second order. (Vol 17) 1930 Lah 24 (26).

[10] Application on original side of High Court for restitution in execution proceedings—Application made long after suit had been determined and right of parties fully settled by final judgment—It is not application made in suit—Order passed on it is not judgment and is not appealable. (Vol 25) 1938 Rang 446 (446, 447).

[11] Order of restitution under S. 151 is not decree and is not appealable (Vol 4) 1917 Pat 495 (497); 2 Pat L Jour 361; (Vol 24) 1937 Cal 152 (156); ILR (1937) 1 Cal 637. (Appeal may lie if order under S. 151 comes in substance under S. 47 or S. 144.) (Vol 30) 1943 Nag 172 (174); I L R (1943) Nag 699. (Supratdar returning property to successful objector on orders of Court—Application by him against decree-holder for costs of custody and transport—Order on, is appealable under S. 144 read with S. 151.) (Vol 26) 1939 Oudh 273 (275); (Vol 25) 1938 Pat 447 (448, 449). (Third party claimant establishing title to property sold in execution—Order of Court directing decree-holder to restore purchase-money to auction-purchaser comes not under S. 144 but under S. 151 and is therefore not appealable.)

[But see (Vol 18) 1931 Cal 779 (781). (Order of restitution made under S. 151 is appealable.) (Vol 14) 1927 Cal 285 (286).]

6. Applicability, scope and object.—[1] The doctrine of restitution is based on the principle that the Court will not permit an injustice to be done by reason of an erroneous order made by it when that erroneous order has been reversed and the Court will restore the parties to the position which they would otherwise have occupied. (Vol 16) 1929 Nag 138 (138); (Vol 25) 1938 Cal 554 (557); (Vol 4) 1917 Cal 188 (192).

[2] Object of S. 144 is to put right what was originally an error of the Court. (Vol 28) 1941 Mad 315 (315); I L R (1941) Mad 498; (Vol 7) 1920 Cal 919 (920).

[3] Object of S. 144 is to provide speedy and simple remedy for any party who has suffered by reason of erroneous decree made by a Court of first instance and it does not apply to a case where Court has to decide questions of conflicting rights under different decrees which may be very complicated. (Vol 16) 1929 Cal 814 (815); 57 Cal 226; (1912) 16 Cal L Jour 135 (136, 137, 138). (Section 144 should be construed liberally.)

[4] "Restitution" implies restoration to a party of what has been lost to him in execution of a decree or directly in consequence of that decree. (Vol 14) 1927 Lah 625 (626); 8 Lah 356; (Vol 18) 1931 Mad 81 (82).

[5] Section 144 gives no right which a successful party did not otherwise possess—It only regulates the exercise of his right of having the state of things, as it stood before the erroneous decree was passed, restored. (1898) 8 Mad L Jour 276 (277); (Vol 15) 1928 All 293 (294); 50 All 767. (Section 144 merely lays down a procedure.) (1912) 16 Cal L Jour 83 (84). (Section gives a more convenient procedure instead of conferring new substantive rights.)

[6] Provisions of S. 144 are not exhaustive. (Vol 16) 1929 Lah 657 (658).

[7] Section 144 is not confined to restitution only but covers case of party who is entitled to any benefit by way of restitution or otherwise and empowers Court to do justice between parties. (Vol 16) 1929 Lah 657 (658).

[8] The words 'or otherwise' are inserted to provide for cases where it is not possible to make restitution in the sense of restoring the very property which was lost to the petitioner, and when the Court proceeds to do the next best thing that it could do in the petitioner's behalf in the circumstances. (Vol 18) 1931 Mad 81 (83).

[9] Right of party to have and duty of Court to give restitution do not rest on provisions of S. 144—Fiction of implied direction by final Court of appeal reversing decree cannot be introduced—Restitution though dependent upon final result of suit is in a sense independent of proceedings in suit—Order for restitution is in effect new decree and has to be enforced by execution. (Vol 27) 1940 Cal 260 (263); I L R (1940) 1 Cal 486.

[10] Section 144 is not made applicable to execution proceedings, by S. 141. (Vol 2) 1915 Cal 530 (531).

[11] Order 2, R. 2 does not govern restitution application (Vol 4) 1917 Mad 185 (186); 40 Mad 780.

See also Note 21.

[12] Restitution proceedings—Schedule II, does not apply. (Vol 29) 1942 All 85 (88); I L R (1941) All 807.

[13] Execution proceedings pending prior to application for insolvency—No notice under S. 52, Provincial Insolvency Act, to executing Court by Receiver—Attached property sold—Decree-holder obtaining payment—No refund possible—Proper course is application under S. 52, Provincial Insolvency Act and not under Civil P. C., S. 144. (Vol 17) 1930 Lah 39 (40).

[14] Order under S. 145, Criminal P. C. lasts only until party in whose favour it is made is lawfully evicted—It does not bar restitution under Civil P. C. S. 144. (Vol 19) 1932 Cal 29 (31); 58 Cal 1070.

[15] Section 144 of the new Civil Procedure Code does not apply to decrees passed before the Code came into force. (Vol 3) 1916 Mad 1204 (1205).

[16] Dismissal of Mahant's claim petition under S. 5, Punjab Sikh Gurdwara's Act—No declaration that property belongs to Gurdwara—Jurisdiction of executing Court under S. 144 is not taken away. (Vol 20) 1933 Lah 798 (801).

[17] Succession certificate obtained by A on death of holder of Post Office cash certificates—Declaratory suit by B that A had no right to them and temporary injunction passed preventing A from cashing certificates—Dismissal of suit—Appeal filed and injunction applied for—Certificates cashed by A before notice of appeal was served—Appeal by B allowed—Application by B for restitution of money comes under S. 144 though it was not a case of actual restitution. (Vol 20) 1933 Pesh 76 (78).

7. Bar of suit.—[1] The right of restitution arising on account of the reversal of a decree on appeal can be enforced only in execution and not by a separate suit. (1912) 22 Mad L Jour 146 (148); (Vol 9) 1922 All 71 (72); 44 All 283; (1907) 29 All 343 (350). (Case under old Code.) (Vol 18) 1931 Mad 713 (714).

[2] *Ex parte* decree set aside by Court passing it—Section 144 does not apply—Suit for restitution is maintainable. (Vol 3) 1916 Pat 299 (300); 1 Pat L Jour 43.

[3] Ejectment in execution of decree—Decree reversed—Restitution partially allowed—Suit to enforce complete restitution is not maintainable. (Vol 6) 1919 All 212 (213).

[4] A obtaining decree against judgment-debtor and attaching certain properties belonging to him—At auction sale A purchasing interest of judgment-debtor and paying price in Court—Amount rateably distributed among other creditors—Suit by judgment-debtor for declaration against A that sale was void dismissed but decreed in appeal—Application by A for restitution against creditors who had obtained rateable distribution held came neither under S. 144 nor S. 151—Suit held proper remedy. (Vol 32) 1945 Mad 108 (111); I L R (1945) Mad 482.

[5] Suit for damages for wrongful civil suit is not barred by section. (Vol 9) 1922 All 465 (466); 44 All 687.

[6] Suit for assertion of certain rights—Plaintiffs taking advantage of injunction granted and unlawfully taking possession of defendant's property—Proper

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remedy of defendant is not by way of restitution but by way of suit. (Vol 24) 1987 Mad 815 (816).

[7] Sale set aside under O. 21, R. 90—Property restored under inherent powers—Decree not varied or reversed — Suit for recovery of mesne profits is maintainable. (Vol 18) 1931 Cal 517 (517) : 58 Cal 465.

[8] Waste by mortgagee — Question is to be determined at the time of preparation of decree — Separate suit for the same does not lie. (Vol 12) 1925 Oudh 654 (656).

[9] Plaintiff's application under S. 144 claiming to be restored to possession and to be paid mesne profits after the defendant's suit for damages and cancellation of the lease was decreed by the Appellate Court granting only the damages—Plaintiff giving up his claim of possession in course of the proceedings — The claim for mesne profits also rejected—He, therefore, filed a fresh suit for mesne profits for period subsequent to expiry of lease on dispossession by the defendant (lessor)—*Held*, the suit was not maintainable. (Vol 14) 1927 Nag 373 (374).

[10] Restitution application refused as time barred—Suit for same relief is barred. (Vol 18) 1931 Cal 14 (15).

[11] Suit for restitution—Court can treat it as proceeding under S. 47 and can order restitution. (Vol 9) 1922 Nag 198 (199) * (Vol 3) 1916 Pat 299 (300) : 1 Pat L Jour 43.

8. Court of first instance. — [1] Decree varied or reversed — Right to restitution arises automatically and is claimable before trial Court — Trial Court and not Appellate Court should assess mesne profits. (Vol 30) 1943 P C 189 (190) : I L R (1944) Kar P C 16 (P C).

[2] The expression "Court of first instance" as used in S. 144, Civil P. C., is used in contradistinction to the expression "Court of appeal" and means the Court which passed the decree or if that Court has ceased to exist, the Court to which the proceedings are transferred in substitution for the Court which passed the decree. (Vol 24) 1937 All 515 (520) : I L R (1937) All 670.

[3] Decree by lower Court reversed by High Court—Court passing decree abolished and new Court established—Latter Court can order restitution. (Vol 8) 1921 Mad 103 (104).

[4] "Court of first instance" must be interpreted on principles laid down in S. 37 (b), Civil P. C. (Vol 13) 1926 Mad 813 (814).

[5] Ejectment decree of Revenue Court reversed by District Judge and confirmed by High Court—Revenue Court is the Court of first instance. (Vol 9) 1922 All 71 (72) : 44 All 283.

[6] Only the Court which executes the decree has jurisdiction to restore property to the judgment-debtor. (Vol 15) 1928 Pat 502 (504).

[7] The Court to which a decree has been transferred for execution can exercise the same powers under S. 144 of the Code as the Court of first instance. (1913) 7 Sind L R 19 (20, 21).

[8] Application for restitution by person who is successful in appeal to Privy Council—Applicant should only approach Court of first instance and need not apply to High Court under O. 45, R. 15—O. 45, R. 15, applies only to applications for execution. (Vol 24) 1937 All 515 (523, 524) : I L R (1937) All 670.

[9] Sum of money in deposit in District Court in execution of decree — Plaintiff claimed it, and on being asked brought suit in Sub-divisional Court for declaration that he was entitled to it—Suit decreed in favour of another who withdrew it from District Court — On remand by Appellate Court suit decreed in favour of plaintiff—Plaintiff applying to District Court in execution proceedings for refund of that money — He is entitled to the refund—"Court of first instance" is Court

which does the act which turns out to be wrong. (Vol 18) 1931 Rang 21 (23).

[10] Decree passed by Court A—Purchase of judgment-debtor's property by decree-holder in execution at A—Sale set aside—Decree transferred to Court at B — Appeal against order setting aside sale allowed—Meanwhile decree executed in Court at B — Application by judgment-debtor for restitution in Court B — Proper Court to grant restitution was the Court at A and not B. (Vol 25) 1938 Cal 554 (556, 557).

9. Decree must have been varied or reversed.—

[1] Section 144 applies only when a decree has been varied or reversed. Where the original decree stands good against a party no restitution can be claimed by him. (Vol 10) 1923 P C 167 (169); 46 Mad 895; 50 Ind App 301 (PC) * (Vol 28) 1941 PC 128 (129); 21 Pat 243; I L R (1941) Kar P C 150 (P C) * (Vol 11) 1924 All 64 (65). (Section 144 applies only when decree is set aside in appeal or otherwise.) * (Vol 17) 1930 Cal 89 (91); 56 Cal 550. * (1912) 16 Ind Cas 945 (946, 947) (Cal). (Decree of trial Court revived by order of Judicial Committee.) * (Vol 24) 1937 Nag 151 (152) : I L R (1937) Nag 153 * (Vol 10) 1923 Oudh 16 (17). (Order directing execution under mistake reversed — Decree not affected — Section 144 does not apply).

[2] A declaratory decree that a person is a mutwalli is incapable of execution and a mutwalli who is entitled to get property under a declaratory decree could not have his remedy under S. 144, Civil P. C. (Vol 23) 1936 Lah 48 (49).

[3] It is not every variation of a decree by an Appellate Court that would entitle a judgment-debtor whose property has been sold in execution of the original decree to put forth a claim for restitution on the basis that the sale is invalid. The extent of variation must be considered in considering how the restitution should be made. (Vol 32) 1945 Mad 133 (134, 135).

[4] Section 144 applies only where a decree is varied or reversed and not where an order which is not a decree is varied or reversed. (Vol 27) 1940 Lah 59 (60, 61). (Order confirming sale is not decree.) * (Vol 22) 1935 All 126 (127) * (Vol 26) 1939 Lah 508 (508). (Sale set aside after confirmation — Application by judgment-debtor for mesne profits—Section 144 is inapplicable.) * (Vol 25) 1938 Lah 456 (456). (Order passed on appeal setting aside sale of judgment-debtor's property is a decree and S. 144 is wide enough to cover such order.) * (Vol 22) 1935 Mad 783 (783). (Variation of order in appeal under S. 75, Provincial Insolvency Act is not variation of decree within S. 144.) * (Vol 20) 1933 Mad 888 (888). (Decree against dead person is nullity — If money is paid under such decree Court should allow restitution under its inherent powers, S. 144 not being applicable.) * (Vol 9) 1922 Mad 99 (99, 100). (Order for rateable distribution is not a decree.) * (Vol 6) 1919 Mad 581 (581); 41 Mad 467. (Order refusing to set aside execution sale reversed in appeal—No restitution under S. 144 can be claimed.) * (Vol 4) 1917 Pat 495 (496) : 2 Pat L Jour 361. (Order setting aside execution sale is not decree.)

[5] The word "decree" in S. 144 includes "order." (Vol 11) 1924 Nag 258 (261) : 20 Nag L R 93 * (Vol 25) 1938 Lah 833 (833) * (Vol 30) 1943 Mad 248 (250) : I L R (1943) Mad 411. (Claim order reversed in suit under O. 21, R. 63—Application under S. 144 for costs paid to successful party in claim under O. 21, R. 58 was assumed to be maintainable.)

[6] Decree for Rs. 3626 made charge on cotton bales of judgment-debtor in possession of decree-holder—Value of bales not stated — In execution decree-holder giving credit to judgment-debtor by presenting application that Rs. 143 were realized by sale of bales—Judgment-debtor

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objecting to price—Issue framed and price of bales found to be Rs. 5512 — Meanwhile decree-holder recovering from judgment-debtor about Rs. 3151 — Judgment-debtor applying to executing Court for restitution of overpayments to decree-holder—Restitution held could be granted by liberally applying S. 144. (Vol 19) 1932 Bom 96 (96, 97).

[7] Injunction by trial Court restraining defendant from interfering with plaintiff's possession — Defendant not restrained from bringing suit for possession — Injunction dissolved by Privy Council—Defendant held not entitled to claim restitution under S. 144 or S. 151. (Vol 32) 1945 PC 5 (7, 8); I LR (1945) Kar P C 43 (P C).

10. Effect of reversal of main decree on dependent decrees. — [1] In general upon the reversal of judgment, order or decree, all connected and dependent judgments or orders fall with it, specially judgments subsequently entered and dependent thereon: but not a distinct and independent judgment or proceeding though it is a part of the same litigation. (Vol 4) 1917 Cal 188 (192).

[2] Mortgagee obtaining preliminary decree for foreclosure of mortgaged property—Mortgagee subsequently applying for amendment of plaint and preliminary decree on ground that mortgaged property having changed its form by reason of settlement proceedings, specification of property should be altered accordingly — Application allowed and preliminary decree amended — Judgment-debtor filing revision against the order and getting order of amendment set aside — Mortgagee in the meanwhile obtaining final decree and taking possession of property as specified in amendment — Application by judgment-debtor for restitution held maintainable. (Vol 25) 1938 All 364 (366): I L R (1938) All 494.

[3] Mortgage suit — Preliminary decree — Defendants appealing — Final decree obtained and put into execution — Appellate Court varying preliminary decree — Defendant's application under S. 144 held competent. (Vol 18) 1931 All 655 (656).

[4] When a preliminary decree for partition is set aside on appeal, the final decree which may have been passed pending the appeal from the preliminary decree becomes ineffective. A party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree. (Vol 5) 1918 Cal 457 (457, 458).

11. Ex parte decrees. — [1] Where an ex parte decree is set aside, the judgment-debtor is entitled to restoration of property which has passed out of his hands in execution of that ex parte decree. (Vol 7) 1920 Bom 12 (12): 44 Bom 702 * (Vol 6) 1919 Bom 175 (176): 43 Bom 235 * (Vol 24) 1937 Mad 150 (151). (In such cases there is no variation or reversal of the decree within S. 144 but restitution can be ordered under S. 151.)

[2] A sale held under an ex parte decree must be set aside when the decree itself is set aside. If a subsequent decree is passed against the defendant, original sale is not revived since there is no revival of the original decree. (1910) 14 Cal W N 182 (182, 183).

[3] Ex parte decree on mortgage — Mortgagee purchasing mortgaged property and put in possession — Decree set aside — On retrial decree passed in favour of mortgagee with reservation to apply profits taken by mortgagee under S. 144 — Mortgagee again purchasing property in execution — Mortgagee cannot challenge maintainability of application under S. 144. (Vol 18) 1931 Cal 42 (43).

12. Modes of variation or reversal. — [1] Section 144 contains no restriction as to the manner in

which a decree should be varied or reversed and none can be read into it except that it be in accordance with law. (Vol 6) 1919 Sind 79 (79): 13 Sind L R 153 * (Vol 6) 1919 Bom 1 (10): 43 Bom 433 and 492 (F B). (Reversal in second appeal.) * (Vol 13) 1926 Lah 488 (488): 7 Lah 232. (Decree reversed by Privy Council.) * (Vol 22) 1935 Mad 476 (477). (Restitution can be applied for even where a decree is reversed by a compromise decree of the Appellate Court.) * (Vol 9) 1922 Mad 70 (71). (Abatement set aside—Restitution can be had of the costs paid as per first Court's order of abatement).

[2] Section 144 contemplates variation or reversal of decree by superior Court in appeal, revision or review—Section does not apply where decree is varied or affected by decision of a Court in another suit. (Vol 24) 1937 All 232 (234) * (Vol 10) 1923 All 394 (395, 396): 45 All 369 * (Vol 24) 1937 Bom 173 (174, 175) * (Vol 18) 1931 Cal 42 (43, 44) * (Vol 18) 1931 Cal 14 (15) * (Vol 16) 1929 Cal 814 (814): 57 Cal 226 * (Vol 31) 1944 Lah 165 (167). (Decree reversed by separate suit—Section 144 does not apply.) * (Vol 26) 1939 Oudh 273 (274).

[3] Section 144 applies even when variation or reversal is the result of a decree in a separate suit. (Vol 27) 1940 Mad 725 (726, 727, 728, 730) * (Vol 32) 1945 Mad 860 (860). (Decree varied under Madras Agriculturists' Relief Act.) * (Vol 4) 1917 Mad 293 (293, 294): 40 Mad 299 * (1933) 1933 Mad W N 641 (642). (Compromise decree in separate suit.) * (Vol 31) 1944 Sind 233 (236): I L R (1944) Kar 284. (Decree in fact set aside in another suit — Section 144 applies.)

[4] Claim under O. 21, R. 58 dismissed with costs—Costs recovered—Suit under O. 21 R. 63 subsequently successful—Order in claim proceedings is not automatically set aside—Executing Court cannot refund costs under S. 144 or S. 151. (Vol 30) 1943 Bom 129 (132): I L R (1943) Bom 171.

[5] Section 144 cannot apply where decree is varied or reversed by private compromise entered into by parties whether out of Court or in course of execution proceedings. (Vol 20) 1933 All 743 (744).

13. Extent of power to grant restitution. — [1] The restitution to be made is that which will, so far as may be, place the parties in the position which they would have occupied but for such decree or any part thereof as has been varied or reversed. The true criterion is to consider what would be the position had the Appellate Court's decree been passed by the Court of first instance. (Vol 33) 1946 Mad 258 (260). (If sale held in execution of trial Court's decree is one which would have been held even if the trial Court had decreed only the amount eventually found due in appeal there is no legal or equitable reason for setting aside sale or ordering restitution.) * (Vol 27) 1940 Mad 850 (871, 872) * (Vol 4) 1917 Pat 55 (57, 58). (Section 144 authorises restoration of parties only to their respective positions at the time of the wrong order and not to later positions taken up by them of their own accord, as a consequence of the wrong order.)

[2] Right to restoration includes restoration of property, refund of money paid and also full compensation including costs, damages, and mesne profits. (Vol 21) 1934 All 626 (631) (F B).

[3] Restitution should clear the account between parties and leave no claim on one side or the other. (Vol 18) 1931 Oudh 12 (12).

[4] Relief by way of restitution cannot be obtained unless prejudice results from erroneous original decree. (Vol 19) 1932 Cal 303 (307): 59 Cal 647 * (Vol 9) 1922 Mad 96, 96, 97).

[5] In a proceeding in restitution under S. 144 the parties must be placed in the position they were previously in, irrespective of any rights accruing to any of

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the parties during the period of the litigation. (Vol 4) 1917 Mad 814 (315).

[6] Suit for specific performance of contract of sale decreed—Execution delayed for four years owing to objections of other party—Application under S. 144 claiming compensation for loss of profits of property for four years—Claim held not properly consequential and not maintainable by application under S. 144. (Vol 26) 1939 All 66 (69): I L R (1939) All 103.

[7] Decree for specific performance—Property delivered not under specific direction of Court but on account of the decree—Decree set aside in appeal—All property moveable or immoveable obtained because of the decree should be directed to be returned. (Vol 30) 1943 All 202 (203, 204): I L R (1943) All 312.

[8] Sale of property not covered by proclamation set aside—Judgment-debtor can claim restitution only on payment to auction-purchaser of purchase money. (Vol 4) 1917 Pat 55 (57, 58).

[9] Person coming to appear as accused in criminal case is exempt from arrest—Money paid to secure release should be refunded. (Vol 16) 1929 Oudh 426 (426): 5 Luck 302 (F B).

[10] Person in possession of property by virtue of execution of decree settling lands on permanent lease and receiving premium—Decree set aside—Rent which can be realized on yearly tenancy should be calculated and not rent fixed for assessing compensation or damages or mesne profits. (Vol 22) 1935 Cal 206 (208): 62 Cal 217.

[11] Wrongful attachment of judgment-debtor's properties—Objection dismissed—Judgment-debtor privately selling the properties and depositing money in Court to set aside auction sale—Loss caused by private sale cannot be claimed in restitution by judgment-debtor. (Vol 14) 1927 Mad 353 (354).

[12] Pre-emption decree—Pre-emption money increased in appeal—Decree-holder's failure to deposit enhanced amount—He can withdraw original deposit. (Vol 12) 1925 Lah 177 (178).

[13] Ultimate decree-holder can claim compensation only for loss caused by execution of lower Court's decree against him and not for any loss caused prior to such execution. (Vol 8) 1921 Lah 234 (234, 235).

[14] Execution stayed pending hearing of appeal by judgment-debtor upon giving security for mesne profits—Appeal eventually dismissed—Decree-holder is entitled to recover mesne profits in execution proceedings—Court has inherent power to order restitution—Decree-holder is entitled to be restored to position he would have occupied but for stay of execution. (Vol 7) 1920 Lah 499 (499).

[15] Suit for pre-emption dismissed—Vendee recovering costs from pre-emptor's deposit—On appeal suit decreed—Deposit is to be treated as intact and only balance should be paid. (Vol 5) 1918 Lah 313 (313).

[16] Restitution proceedings started by judgment-debtor—Failure of surety of decree-holder to pay back certain amount—Final decree passed in favour of decree-holder—He must give credit to judgment-debtor for amount unrecovered from surety. (Vol 21) 1934 Lah 911 (913).

[17] Possession obtained by pre-emptor on deposit of amount—Suit by vendees for possession on ground that deposit was not in time and dispossession of pre-emptor ordered by trial Court—Pre-emptor succeeding in appeal is entitled to be restored to possession under S. 144. (Vol 20) 1933 Lah 791 (792).

[18] Suit for possession decreed and mesne profits assessed by trial Court—Amount of Rs. 61,000 deposited by judgment-debtor in Court as sufficient to meet position and soon after taken out by decree-holder—On appeal, High Court increasing amount of mesne

profits but Privy Council eventually reducing it to Rs. 75,000—Application by judgment-debtor for restitution, namely payment back to him of Rs. 61,000—S. 144 held did not apply as amount due from judgment-debtor was larger than sum which he had paid in—Amount of Rs. 61,000 taken into account in adjusting decree—No injustice held was done to judgment-debtor. (Vol 29) 1942 P C 30 (31): 69 Ind App 10: I L R (1942) Kar P C 14 (P C).

[19] Decree-holder auction-purchaser—Sale cannot stand if decree reversed or modified and judgment-debtor pays amount finally decreed. (Vol 16) 1929 Rang 157 (157, 158): 7 Rang 107.

[20] Sale in execution of time-barred decree—Deposit by judgment-debtor under O. 21, R. 89 pending objection about decree being barred by limitation—Objection ultimately decided in favour of judgment-debtor—Restitution is permissible under S. 144. (Vol 30) 1943 All 267 (269, 270): I L R (1943) All 510. (Vol 29) 1942 All 14, reversed.)

[21] Execution application—Court rejecting objection of judgment-debtor that decree is barred by limitation and ordering payment of fund belonging to judgment-debtor to decree-holder—Decision on point of limitation reversed on appeal—Judgment-debtor is entitled to restitution. (Vol 4) 1917 Cal 188 (191, 192).

[22] Execution sale—After sale decretal amount substantially reduced in second appeal—Judgment-debtor found not in position to avoid sale by paying in full even reduced decretal amount before date of sale or within thirty days thereafter—Sale proceeds less than reduced decretal amount—S. 144 does not apply—Sale cannot be set aside. (Vol 28) 1941 Pat 130 (132).

[23] Nothing in S. 144 can affect decree in another suit in respect of same property between the same parties. (Vol 16) 1929 All 527 (528).

[24] Fact that payment to party's *vakil* was not certified to Court will not defeat application for restitution. (Vol 26) 1939 Mad 176 (176).

14. Interest. — [1] Where money is recovered in execution of a decree and the decree is subsequently reversed the judgment-debtor is entitled to get back not only the sum recovered but also interest for the period the amount was withheld from him. (Vol 22) 1935 P C 12 (13) (P C) * (Vol 8) 1921 All 241 (241) * (Vol 19) 1932 Cal 313 (315) * (Vol 4) 1917 Cal 188 (194) * (Vol 13) 1926 Lah 488 (488): 7 Lah 232. (Reversal of decree in Privy Council—Interest should be allowed on money to be paid back on reversal.) * (Vol 18) 1931 Mad 561 (561): 54 Mad 887. (Decree reversed on appeal—Appellant is entitled to interest on costs paid by him.) * (Vol 11) 1924 Mad 87 (87). (Interest is a good substitute for profits.) * (Vol 5) 1918 Mad 511 (512): 41 Mad 316 * (Vol 28) 1941 Nag 195 (196, 197): I L R (1942) Nag 273. (Where decretal amount is reduced on appeal plaintiff is liable to pay interest at the court rate on the difference between amount of trial Court's decree and that of appellate decree.) * (Vol 5) 1918 Oudh 119 (120): 20 Oudh Cas 327. (Interest on costs can be awarded.) * (Vol 4) 1917 Pat 696 (696): 2 Pat L Jour 149. (Liability to pay interest is not affected by execution of security bond by which principal alone was secured.)

[2] In granting restitution it is injury to a party that is sought to be remedied—Benefit to opposite party is immaterial—Money ordered to be deposited for obtaining stay—On success of appeal, money though, not withdrawn by other party was refunded with interest. (Vol 20) 1933 Mad 33 (37, 38): 55 Mad 1025 * (Vol 12) 1925 Bom 313 (314). (Decree against defendants 1 and 2 for damages—Plaintiff appealing on ground of his being entitled to specific performance against defendant 3—Defendant 1 paying

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decree money pending appeal — Plaintiff succeeding in appeal — Defendant 1 is entitled to interest while withdrawing his money.)

[3] Interest on deposit is not to be awarded unless party from whom it is claimed has in some way benefited by the deposit or is in some way to blame. (Vol 29) 1942 Mad 166 (167). (Reversing (Vol 27) 1940 Mad 15.) * (Vol 21) 1934 All 13 (18). (Pre-emption—Suit decreed — Money deposited — Decree set aside in appeal — Plaintiff is entitled to get his money back — Money used by defendant—Defendant must pay interest as he has benefited by its use.) * (Vol 30) 1943 Pat 427 (429). (Amount deposited by defendant to get stay of execution—Decree reversed—Plaintiff not withdrawing money when he could have done it — Defendant is entitled to interest from date when there was no obstacle for plaintiff to withdraw money.) * (Vol 16) 1929 Pat 593 (594) * (Following (Vol 12) 1925 Bom 313.) * (1942) 1942 Pat W N 103 (104, 105, 106). (Interest allowed not from date of deposit but from date on which there was no obstacle to its withdrawal by the other side.) * (Vol 12) 1925 Rang 215 (216, 217) : 3 Rang 251. (Money lying in Court and none deriving benefit from it—No interest is payable.)

[4] A mortgagee decree-holder purchased the mortgaged properties in execution and obtained possession of the same. The purchase money was set off against the amount due under the decree, which contained no provision for future interest on the amount decreed. The sale was ultimately set aside for irregularity. Subsequently, the mortgagors paid the sum found due under the decree, and possession of the property was restored to them. Then the mortgagors applied in execution proceedings for mesne profits and interest thereon during the period of their dispossession. *Held*, that the claim of the mortgagors to have the question in dispute determined in the execution proceedings was justified by Ss. 144 and 47 and that the claim of the mortgagee to be allowed interest was absurd as the purchase money was not actually paid and as the sale was set aside only owing to his fault. (1909) 31 All 551 (555, 556) : 36 Ind App 197 (P C).

[5] Order for return of costs silent as to interest — No interest can be awarded in restitution under S. 144. (Vol 27) 1940 Cal 260 (264) : I L R (1940) 1 Cal 486.

[6] Amount refunded under S. 144 — Executing Court has discretion to allow interest even if refund is occasioned by compromise which does not mention interest. (Vol 21) 1934 Lah 604 (604).

[7] Decree varied — Restitution of money paid under original decree — Interest not provided in security bond — Interest can still be awarded. (Vol 17) 1930 Mad 577 (578) : 53 Mad 708.

[8] Under S. 144 court rate of interest must be taken as fairly compensating litigant — Evidence to determine rate of interest is not necessary unless some special reason is shown. (Vol 28) 1941 Nag 195 (196) : I L R (1942) Nag 273 * (Vol 30) 1943 All 267 (270) : I L R (1943) All 510 (In absence of special circumstances court rate of interest should be allowed.) * (Vol 30) 1943 Pat 427 (430). (Ordinary rate is 6 per cent.)

[9] Separate application for interest on money refunded under reversed decree is not barred. (Vol 4) 1917 Mad 185 (185) : 40 Mad 780.

[10] Interest granted by trial Court up to date of its decree — Appeals to higher Courts — Trial Court's decree sustained finally — Claim for interest subsequent to original decree, by way of compensation for delay in realising decree money is not claim for restitution within S. 144. (Vol 11) 1924 Rang 275 (277).

15. Mesne profits.—[1] Section 144 makes distinction between restitution which is properly conse-

quential on variation or reversal of decree and restitution which is not—On reversal of decree it cannot always be said that possession taken under original decree is wrongful. (Vol 27) 1940 Bom 30 (32).

[2] Where a decree is reversed the judgment-debtor will be entitled not only to possession of property taken from him in execution of the decree but also to mesne profits during the period he was kept out of possession. (Vol 27) 1940 Mad 850 (861) * (1913) 19 Ind Cas 1 (1) (All) * (1910) 32 All 79 (84) * (Vol 7) 1920 Cal 550 (551, 552) * (Vol 1) 1914 Cal 692 (693). (Sale set aside on ground of fraud—Judgment-debtor applying to executing Court for mesne profits from auction-purchaser—Court has jurisdiction to grant application and order compensation.) * (Vol 21) 1934 Lah 991 (993). (Pre-emption decree by trial Court—Price deposited by plaintiff—Decree reversed by Chief Court and amount withdrawn by plaintiff—Appeal to Privy Council accepted and trial Court decree restored—Plaintiff is entitled to mesne profits under S. 144 for the period the amount was in deposit) * (Vol 11) 1924 Lah 486 (487) * (Vol 6) 1919 Lah 218 (220) * (1892) 15 Mad 203 (212). (Auction-purchaser who preferred an appeal to Privy Council was made to deliver possession on security by third persons for its re-delivery to him with mesne profits in the event of his being successful. In the meanwhile the property was put into custody of Receiver. The purchaser who succeeded in appeal was held entitled to mesne profits).

[3] Suit under O. 21, R. 103 for declaration and possession—decree—Application for mesne profits does not lie under S. 144. (Vol 14) 1927 Mad 898 (900).

[4] Landlord obtaining possession of his tenant's land in execution of decree for ejectment—Decree subsequently reversed—Application by tenant under S. 144 for mesne profits—Landlord is entitled to deduct rent payable by tenant from mesne profits for period of his possession. (Vol 28) 1941 Mad 36 (37) : I L R (1941) Mad 212 (F B). ((Vol 4) 1917 Mad 314, overruled.)

[5] The first Court passed a decree for redemption of a usufructuary mortgage and the mortgagor obtained possession in pursuance thereof. On appeal by the mortgagee the amount due to him was increased but the mortgagor not having paid the additional sum, the mortgagee obtained possession under orders of Court from the mortgagor. *Held*, that the first Court had jurisdiction to award mesne profits to the mortgagee during the time he was out of possession. If the mortgagee purchased the equity of redemption in execution of the decree for mesne profits the mortgagor would lose all right to redeem. (Vol 2) 1915 P C 92 (93) : 38 All 163 : 43 Ind App 43 (P C).

[6] In a suit for partition by A, a house given to B—A appealed regarding compensation which he was ordered to pay—High Court allotted to him the house given to B (by first Court)—In pursuance of this decree A obtained possession of house—10 years later, B applied for review and obtained decree for possession and under S. 144 applied for mesne profits—*Held* that S. 144 had no application—Applicant being grossly negligent should under S. 151 get mesne profits only from date of High Court's decree in review. (1906) 28 All 665 (667, 668, 669).

[7] Decree-holder purchasing property in suit at sale — Sale confirmed during pendency of appeal by judgment-debtor — Possession granted to decree-holder — Appeal compromised — Decree-holder agreeing to give possession on receipt of first instalment from judgment-debtor — Instalment paid but possession not transferred — Application by judgment-debtor for mesne profits from date of delivery of possession by way of restitution — *Held* that mesne profits could not be granted from date

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of delivery of possession. (Vol 17) 1930 Cal 89 (92) : 56 Cal 550.

[8] Possession of receiver is possession of party ultimately declared successful — Plaintiff succeeding in Court of first instance in suit for possession — Receiver appointed during pendency of appeal by defendant to High Court — Appeal having been allowed defendant got possession from receiver — High Court's decree reversed by Privy Council decree and that of Court of first instance restored — Plaintiff held entitled to restitution of possession and mesne profits under S. 144 — Fact that he was refused decree for mesne profits by Court of first instance and High Court did not deprive him of his right to profits accruing to his opponent after latter dispossessed him in consequence of High Court's decree. (Vol 27) 1940 Mad 850 (858, 870, 871, 872) (Per *Wadsworth and Stodart JJ. Burn J.*; contra).

[9] Mesne profits — Calculation of gross profit — It is amount which person in wrongful possession had or could have realized with due diligence, and not what person finally adjudged rightful owner could have realized. (Vol 24) 1937 Cal 478 (480) (Vol 22) 1935 Cal 206 (208) : 62 Cal 217.

[10] Claim for mesne profits need not be made in application for reinstatement whether S. 144 applies or not. (Vol 8) 1921 Nag 112 (113) : 17 Nag L R 62.

16. Possession obtained otherwise than in execution. — [1] Section 144 applies even when possession is taken not in execution of the decree but under colour of or in consequence of the decree. (Vol 28) 1941 Pat 577 (581) : 20 Pat 346 (Vol 7) 1920 All 190 (191) : 42 All 568 (1913) 21 Ind Cas 84 (85) (Cal). (Vol 14) 1927 Lah 37 (38) : 8 Lah 41 (1910) 5 Ind Cas 776 (776) (Mad).

[2] Decree-holder obtaining decree for holding charge of institution — Decree-holder obtaining possession of buildings under colour of decree — Decree set aside on appeal — Decree-holder must restore possession under S. 144. (Vol 24) 1937 All 728 (730).

[3] Section 144 authorises the grant of relief in order to restore the parties to the position they would have occupied but for the decree. It does not apply where possession is taken independent of and in opposition to the decree. (Vol 5) 1918 Mad 1293 (1294).

17. "Shall cause restitution to be made." — [1] Section 144 is imperative and leaves no discretion to Court. (Vol 5) 1918 Mad 673 (674) (Vol 31) 1944 Nag 59 (62) : I L R (1944) Nag 451 (Vol 15) 1928 Rang 293 (294). (Court must pass the order as a matter of course.)

[2] Section is mandatory — Refusal to order restitution on equitable considerations arising from events subsequent to decree is not warranted. (Vol 18) 1926 Lah 685 (687).

[3] A party realising costs awarded under a decree must refund the amount on reversal of the decree quite apart from the fact that property in the suit was given to a charity or applied to any other purpose. (Vol 7) 1920 All 127 (128).

[4] Where a decree-holder has obtained possession of the mortgaged property through Court on the basis of the decree absolute which was erroneously made, he is bound to make restitution to the mortgagor. (Vol 2) 1915 Cal 502 (503).

[5] Cases not falling strictly within S. 144 — Restitution depends on sound discretion of the Court and will be granted if justice demands it. (Vol 4) 1917 Cal 188 (192).

[6] A obtaining decree for possession against B and executing it — Reversal of decree in appeal and suit dismissed — B who was dispossessed sought restitution under S. 144 — A pleaded that he was entitled to re-

main in possession in spite of the reversal by virtue of certain rights existing in his favour — Held such defence could not be raised and restitution must ensue. (Vol 15) 1928 Oudh 208 (208).

18. Inherent power to grant restitution. — [1] Court has inherent power of restitution, because it is inherent in the general jurisdiction of Court to act rightly and fairly, according to circumstances, towards all parties concerned. (Vol 11) 1924 All 718 (719) : 46 All 767 (Vol 21) 1934 Lah 322 (323) (Vol 4) 1917 Lah 426 (428) : 1917 Pun Re No. 61 (Vol 25) 1938 Oudh 169 (170) : 14 Luck 106 (Vol 17) 1930 Pat 473 (476) (1907) 6 Cal L Jour 662 (666).

[2] Power to grant restitution is not confined to cases under S. 144 — To prevent injustice, Court exercises that power under S. 151 when a case is not strictly covered by S. 144. (Vol 20) 1933 All 218 (221) : 55 All 221 (Vol 29) 1942 All 14 (16) (Vol 31) 1944 Bom 264 (265) (Vol 22) 1935 Cal 90 (90) (Vol 19) 1932 Cal 29 (31) : 58 Cal 1070 (Vol 21) 1934 Lah 1023 (1024) (Vol 14) 1927 Lah 635 (637) (1940) 42 Pun L R 429 (431) (Vol 21) 1934 Mad 320 (321) : 57 Mad 849 (Vol 12) 1925 Mad 365 (366) (Vol 8) 1921 Nag 112 (113) : 17 Nag L R 62 (Vol 21) 1934 Pat 150 (151) (Vol 11) 1924 Pat 800 (801).

[3] The Court can grant restitution under its inherent powers under S. 151 only when it is made out that it cannot be obtained in any other way. (Vol 24) 1937 All 232 (234) (Vol 33) 1946 All 329 (330, 331). (Pre-emption decree — Decree-holder obtaining possession — Decree not varied or reversed — Vendee has no right to apply for restitution — Restitution under S. 151 cannot be granted when vendee has failed to avail of remedy open to him.) (Vol 26) 1939 All 66 (69) : I L R (1939) All 103. (Remedy by way of suit proper — No exercise of inherent power.)

[4] Application for relief which has nothing to do with application for restitution cannot be converted into application for restitution in exercise of the inherent powers. (Vol 4) 1917 Mad 453 (453).

[5] Order refusing to set aside sale reversed on appeal — Auction purchaser not a party — Application by judgment-debtor for restitution — Auction-purchaser not a representative of a decree-holder — Held order for restitution could not be granted under S. 151. (Vol 6) 1919 Mad 581 (581) : 41 Mad 467.

[6] Application claiming interest on refund of court-fee paid in trial Court in pauper suit — Money paid to Government in pauper suit cannot be dealt with by way of restitution under S. 144 — S. 151 is applicable, but power is discretionary. (Vol 24) 1937 Mad 178 (179).

[7] Attachment by creditor of debtor's property — Insolvency Court asking to deliver property to interim Receiver — Petition allowed to be withdrawn under S. 14, Provincial Insolvency Act, 1920 — Insolvency Court must follow the principle of S. 144, Civil P. C., and return the property not to debtor but to executing Court. (Vol 29) 1942 Nag 132 (133) : I L R (1943) Nag 599.

[8] P obtaining mortgage decree against D and in execution putting mortgage property to sale and purchasing it himself — On deposit by D under O. 21, R. 89 sale set aside — T who held decree against P attaching portion of deposit and obtaining payment — Mortgage decree set aside on appeal by D — Court held could order restitution by ordering T and P to refund amounts withdrawn by them from deposit by D. (Vol 29) 1942 Mad 472 (473, 474) : I L R (1942) Mad 949.

[9] The following are further illustrative cases in which the Court exercised its inherent power to grant restitution: (Vol 20) 1933 All 117 (118). (Adjudication annulled yet distribution ordered — Order set aside — Payments under distribution order can be ordered to be refunded.) (Vol 13) 1926 All 274 (276). (Mortgage

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property sold in execution of prior mortgage decree and again sold in execution of subsequent mortgage decree—Subsequent sale set aside — Court can order refund to auction-purchaser.) * (Vol 18) 1931 Cal 779 (780). (Sale set aside under O. 21, R. 92.) * (Vol 24) 1937 Mad 694 (695) (Sale set aside under O. 21, R. 90.) * (Vol 24) 1937 Mad 95 (96) (Restitution of money wrongly paid to a person not entitled to it.) * (Vol 23) 1936 Mad 636 (639). (Proceedings under Section 145, Criminal P. C. — Party put in possession ordered to pay profits realised by him when decree in his favour was set aside by Appellate Court.) * (Vol 22) 1935 Mad 783 (783). (Variation of order as to rate of interest in appeal under S. 75, Provincial Insolvency—Refund of excess amount of interest paid.) * (Vol 26) 1939 Nag 101 (102) : I L R (1939) Nag 492. (Suit remanded — Meanwhile in application for execution defendant depositing sum which plaintiff withdrew — On remand fresh decree passed for lesser amount than that deposited — Defendant applying for refund of surplus.) * (Vol 9) 1922 Nag 82 (84) : 18 Nag L R 24 (Do.) * (Vol 20) 1933 Pat 564 (566). (Partly dispossessed of property in consequence of erroneous order of Court.) * (Vol 17) 1930 Pat 280 (281, 282) : 9 Pat 685. (Sale set aside under O. 26, R. 90.) * (Vol 5) 1918 Pat 52 (53) : 2 Pat L Jour 206. (Sale set aside under O. 21, R. 92 and judgment-debtors restored to possession — Application for compensation does not fall within S. 144, but is covered by S. 151.) * (1905) 27 All 378 (380). (Attachment of debt—Improper realization by third party—Court has inherent power to compel refund—See also (1905) 27 All 380 (380).) * (Vol 27) 1940 Sind 191 (192). (Property of judgment-debtor's transferee before suit wrongly ordered to be attached in execution of decree against judgment-debtor—Transferee paying decretal amount under protest to save attachment—Court can order refund under S. 151.)

19. Nature of proceedings and limitation.—[1] Proceedings under S. 144, Civil P. C. are not proceedings in execution of a decree and are therefore governed by Art. 181, Limitation Act, 1908. (Vol 26) 1939 All 66 (67, 68) : I L R (1939) All 103 * (Vol 25) 1938 All 552 (554) * (Vol 27) 1940 Cal 260 (262, 263) : I L R (1940) 1 Cal 486 * (Vol 26) 1939 Cal 612 (613) * (Vol 17) 1930 Lah 961 (968) * (Vol 13) 1926 Lah 635 (636) * (Vol 10) 1923 Nag 94 (94) * (Vol 8) 1921 Nag 112 (113) : 17 Nag L R 62 * (Vol 2) 1915 Low Bur 141 (142) : 8 Low Bur Rul 262.

[2] Application for restitution being one in execution is governed for purpose of limitation by Art. 182, Limitation Act and not by Art. 181. (Vol 27) 1940 Bom 30 (32) * (Vol 8) 1921 Bom 67 (67) : 45 Bom 1137 * (Vol 5) 1918 Lah 378 (379, 380) : 1918 Pun Re No 67 * (Vol 13) 1926 Mad 813 (814) * (Vol 4) 1917 Mad 194 (195) * (Vol 23) 1936 Oudh 185 (188) : 12 Luck 52 * (Vol 18) 1931 Oudh 51 (52) : 6 Luck 448 * (Vol 21) 1934 Pat 646 (647) * (Vol 21) 1934 Pat 246 (251) (FB). ((Vol 12) 1925 Pat 1 : 3 Pat 371 (FB), overruled.) * (Vol 20) 1933 Rang 180 (183) : 11 Rang 275.

[3] For a fuller discussion, see under Arts. 181, 182 and 183, Limitation Act.

[4] Application for restitution in pursuance of order of Privy Council is governed by Limitation Act, Art. 183. (Vol 15) 1928 All 293 (294) : 50 All 767.

[5] Section 6, Limitation Act applies to proceedings under S. 144. (Vol 13) 1926 Oudh 199 (200) : 1 Luck 40.

[6] Application for restitution — Applicants failing to file Privy Council decree with application — Copy furnished to the trial Court before order — Held, proceedings for restitution are not proceedings in execution and therefore, O. 45, R. 15 did not apply. Also there was no irregularity in procedure. (Vol 14) 1927 Pat 208 (208) : 6 Pat 252.

[7] Proceedings under S. 144 are not proceedings in execution of decree and S. 141 does not apply to such proceedings. Hence order dismissing application for restitution can be set aside and application restored. (Vol 9) 1922 All 223 (225, 226) : 44 All 407.

[8] Application for restitution is neither suit nor execution—Rules applicable to execution apply — Section 141 and O. 2, R. 2 do not apply. (Vol 5) 1918 Pat 396 (397, 398) : 3 Pat L Jour 367.

[9] A claim for money in an application for restitution is one for debt within Succession Act. (Vol 29) 1942 Mad 445 (445).

[10] Application for restitution under S. 144, need not be by execution petition as required by O. 21, R. 11. (Vol 24) 1937 Mad 173 (175, 176).

20. Court-fee.—[1] An order under S. 144, is an order having the force of a decree, and Art. 11 of Sch. II, Court-Fees Act, has no application when an appeal is preferred from such order. The appeal should be stamped with *ad valorem* Court-fee under Sch. I, Art. 1. (Vol 24) 1937 Cal 152 (154) : I L R (1937) 1 Cal 637 * (Vol 17) 1930 Lah 24 (25) * (Vol 28) 1941 Nag 313 (316) : I L R (1941) Nag 662 (Order under S. 144 is not for court-fee purposes the same as an order under S. 47—(Vol 9) 1922 Nag 62 : 18 Nag L R 15, overruled.) * (Vol 17) 1930 Rang 241 (242, 243) : 8 Rang 271.

[But see (Vol 5) 1918 Cal 335 (335, 336) (Order under S. 144 is one deciding question falling under S. 47—Appeal to High Court is chargeable with a fixed fee under Sch. II, Art. 11.) * (1910) 11 Cal L Jour 541 (542) * (Vol 15) 1928 Lah 143 (143, 144) (Do.) * (Vol 14) 1927 Lah 635 (636) (Do.) * (Vol 12) 1925 Pat 577 (580) : 4 Pat 294.]

Also see under Sch. II, Art. 11, Court-fees Act.

21. Splitting up claim of restitution.—[1] Restitution proceedings — S. 141 does not require that O. 2, R. 2 or S. 11, Expl. 4 should be applied to such proceedings. (Vol 22) 1935 All 195 (197). (Application under S. 144 for principal amount allowed—Subsequent application for interest is not barred.)

[2] An application for restitution under S. 144 of the Code is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. The provisions of O. 2, R. 2 of the Code are not applicable to such a proceeding. (Vol 5) 1918 Pat 396 (397, 398) : 3 Pat L Jour 367.

[3] Suit for declaration that decree is null and void — Omission to ask for restitution — Right is not relinquished — Subsequent application is maintainable. (Vol 6) 1919 Sind 79 (79) : 13 Sind L R 153.

[4] Where on an application for restitution the Court directed delivery of actual possession under O. 21, R. 35 and the applicant accepted such delivery in satisfaction of his claim on a subsequent petition being filed praying for execution in restitution. Held, that the final order of the Court on the previous application was not a nullity and that the second application was barred as the process for delivery issued on the order on the first application had been carried out. (Vol 4) 1917 Mad 202 (203).

[5] Decree in favour of A for sale of property—Purchase by himself — Sale set aside on application of B (purchaser pending suit) under O. 21, R. 89—On appeal, decree in favour of A reversed by District Judge—Application by B for restitution of deposit amount — Application granted — Appeal by A to High Court against decree of District Judge — Decision reversed — Letters Patent appeal — Decision restored — Second application for restitution — Application held sustainable. (Vol 24) 1937 Mad 173 (174, 175).

22. Who may apply for restitution. — [1] Section 144 does not apply to person who was not

*Enforcement of liability of surety.***145.** Where any person has become liable as surety—

- (a) for the performance of any decree² or any part thereof, or
- (b) for the restitution⁹ of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person,¹ under an order of the Court in any suit or in any proceedings consequent thereon,¹⁴

the decree or order may be executed against him,⁶ to the extent⁷ to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

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party to suit. (Vol 28) 1941 All 28 (29) * (Vol 9) 1922 Mad 228 (229, 230).

[But see (Vol 16) 1929 Lah 657 (658).]

[2] "Party" means "party to the application" and not "party to suit." (Vol 9) 1922 All 238 (238) : 44 All 555.

[3] The word "parties" in S. 144 includes their representatives which mean not only a party's legal representative but also his representative-in-interest—Sections 47 and 144 must be read together. (Vol 5) 1918 Pat 306 (307) * (Vol 25) 1938 Oudh 169 (170) : 14 Luck 106.

[4] Where an assignment takes place even after the appellate decree which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144 of the Code. (Vol 5) 1918 Pat 306 (307) * (Vol 28) 1941 Mad 480 (480). (Assignee of mesne profits.)

[5] Not only party can recover possession by restitution, but even son of such person is entitled to represent him after his death unless father's possession terminates with his death. (Vol 19) 1932 All 239 (240).

[6] Suit against A and S for recovery of property decreed—A delivering possession and S alone appealing against the decree—Plaintiff filing objection claiming mesne profits from A—A is entitled to apply under S. 144. (Vol 14) 1927 All 182 (183).

[7] Decree with costs by trial Court against A, B and C—Decree for costs executed against A—Appeal by B and C only—Decree reversed—A is entitled to restitution though not party to appeal. (Vol 24) 1937 Bom 101 (102, 103) : I L R (1937) Bom 150.

[8] Reversal of decree in appeal—Party losing possession by first decision can apply for restitution. (Vol 22) 1935 Mad 476 (477).

[9] Immovable property of judgment-debtor sold in execution—Decree modified on appeal—Though judgment-debtor is not entitled to set aside sale, he is entitled to restitution. (Vol 13) 1926 Rang 126 (126).

[10] Joint decree in favour of A and B—Properties put to sale in execution—A's application for substitution in place of B allowed in appeal—Meanwhile B's decree-holder attached and withdrew B's share—Application for restitution of money withdrawn is not maintainable under S. 144 as the attaching decree-holder was neither a party nor representative of the party to the decree in execution of which the sale took place. (Vol 6) 1919 Cal 503 (504).

[11] Objector under O. 21, R. 58 is to be deemed as party to suit in objection proceedings and proceedings arising therefrom and therefore can claim restitution. (Vol 16) 1929 Lah 657 (658)

23. Auction-purchaser.—[1] Section 144 does not apply to a stranger auction-purchaser as his case is expressly dealt with by O. 21, R. 93. (Vol 27) 1940 Bom 210 (214) : I L R (1940) Bom 370 * (Vol 11) 1924 All 273 (273) * (Vol 12) 1925 Rang 215 (216) : 3 Rang 251.

[2] Right of auction-purchaser to a refund of money paid by him arises both under S. 144 and also on principle of equity and justice. If the case does not come

under S. 144 Court can exercise inherent jurisdiction to direct a refund of the money to the auction-purchaser. (Vol 23) 1936 Lah 497 (498, 499) * (1931) 1931 Mad W N 1006 (1007).

[3] Where an execution sale is declared a nullity the auction-purchaser is entitled to sue for a refund from the decree-holder of the purchase money with interest. (1918) 15 Bom L R 41 (44, 45).

[4] A purchaser at a sale in execution of a mortgage decree paid Government revenue on the property for 4 years after which period the sale was set aside. Held he was entitled to be reimbursed by the receiver of the mortgaged property. (Vol 6) 1919 Pat 554 (555).

24. Party not in possession.—[1] No question of restitution arises where appellant is not deprived of possession owing to lower Court's decree. (Vol 19) 1932 Pat 317 (319) : 11 Pat 553 * (Vol 11) 1924 Cal 769 (771) : 51 Cal 324.

[2] Suit for redemption of four items of mortgaged property—Decree for redemption of three on deposit into Court of balance of mortgage money by mortgagor—Mortgagor after such deposit filing appeal for redemption of fourth item—Appeal decreed—Application under S. 144 for mesne profit—Mortgagor not being in possession of that item at date of trial Court's decree, S. 144 did not apply—Under S. 47, application under S. 144 was allowed to be converted into plaint. (Vol 18) 1931 Mad 81 (83).

[3] Applicability—Property held by receiver until one of rival claimants succeeded in establishing his title—Receiver holds on behalf of rightful claimant—Delivery of property to successful party is direct consequence of decree in his favour whether decree is for possession or not—S. 144 applies. (Vol 28) 1941 Lah 343 (343, 344) * (Vol 27) 1940 Mad 850 (870, 871) * (Vol 15) 1928 Pat 260 (262, 263) : 7 Pat 319.

[4] Where at a sale in execution of a decree on a mortgage, the mortgagee decree-holder purchases the property and a final order putting the mortgagee in possession of the properties is made, but subsequently the decree is modified on appeal after sale, the mortgagors are not entitled to get back possession. (1909) 36 Cal 386 (343, 344) : 36 Ind App 27 (P C).

[5] Statement of partition commissioner embodied in final partition decree is not conclusive evidence of prior possession as between parties in proceeding under S. 144—Question must be determined on evidence. (Vol 7) 1920 Cal 919 (919, 920).

SECTION 145—SYNOPSIS.

1. "Any condition imposed on any person"—Clause (c).
2. "Any decree"—Clause (a).
3. Appeal and revision.
4. Applicability, scope and object.
5. Discharge of surety.
6. Execution against surety.
7. Extent of surety's liability.
8. Form of surety bond.

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

[1882—S. 253; 1877—S. 253; 1859—S. 204; See S. 55 (4); O. 25, R. 1; O. 38, Rr. 2 and 5; O. 41, R. 10; O. 45, R. 7.]

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9. Liability for restitution—Clause (b).

10. Limitation.

11. Notice to surety.

12. Separate suit by or against surety.

13. Surety—Who is.

14. "Under an order . . . thereon"—Clause (c).

1. "Any condition imposed on any person."—Clause (c). [1] Clause (c) is wide in its scope and includes a case where security is given for the production of a judgment-debtor who is arrested in execution of a decree and who is released on furnishing security and on expressing his intention to apply to be declared an insolvent. (Vol 4) 1917 Mad 237 (238).

[2] The section refers to a 'condition imposed on any person' and is therefore applicable even to a person who is surety for himself. (Vol 18) 1931 Rang 65 (65).

2. "Any decree"—Cl. (a). [1] "Any decree" covers decree that may be passed after person has become surety. (Vol 22) 1935 Lah 189 (190).

3. Appeal and revision.—[1] Surety is not party to suit under S. 47, but S. 145 makes him a party for purpose of appeal. (Vol 7) 1920 Mad 75 (77) : 43 Mad 325 * (Vol 12) 1925 All 344 (345) * (1927) 28 Pun L R 525 (536) * (Vol 13) 1926 Sind 105 (106) : 20 Sind L R 362.

[2] Order against surety in respect of execution of decree is appealable. (Vol 22) 1935 Rang 39 (41) * (Vol 19) 1932 Bom 77 (78) * (1888) 12 Bom 71 (76) * (Vol 2) 1915 Cal 237 (237).

[See (Vol 4) 1917 Pat 596 (596) : 2 Pat L Jour 197. (Order directing surety to pay is not decree except for purposes of appeal.) * (Vol 2) 1915 Cal 688 (688). (Surety for release can appeal against his own arrest for failure of condition.)]

[3] Surety asked to produce judgment-debtor—Surety appearing without judgment-debtor—Decree ordered to be executed against surety—No appeal by surety, but producing judgment-debtor and praying for being relieved—Surety not having appealed, held no order inconsistent with previous order could be passed. (Vol 21) 1934 Lah 538 (539).

[4] Section 145 does not restrict right of appeal to sureties only—Refusal to enforce surety's liability—Interested party can appeal. (Vol 2) 1915 Mad 653 (654) * (Vol 4) 1917 Upp Bur 16 (17) : 2 Upp Bur Rul 103. (Order rejecting application for forfeiture of security bond is appealable.)

[5] Order passed by Court not under S. 145 but under general power against sureties—Surety has right of appeal from such order. (Vol 20) 1933 Mad 780 (781) : 56 Mad 909 * (Vol 25) 1938 Mad 215 (216).

[6] There can be no appeal from an order discharging surety, where such order was not made during execution proceedings. (Vol 18) 1931 Lah 503 (503).

[See (Vol 3) 1916 Bom 55 (56) : 41 Bom 402. (Wrong order in discharging surety can be interfered with under S. 115.)]

[But see (Vol 12) 1925 All 344 (345). (Order discharging surety from suretyship is decree and is appealable.)]

[7] Order dismissing petition to arrest surety is not appealable. (Vol 20) 1933 Mad 342 (342).

[8] Inherent jurisdiction to proceed against surety exercised—Appeal by surety is incompetent. (Vol 15) 1928 Lah 802 (803).

[9] Attachment before judgment—Property released on third person executing security bond and mortgaging

certain property—Application by decree-holder in suit for sale of mortgaged property rejected—Appeal also dismissed—Second appeal held not competent. (Vol 32) 1945 Cal 193 (194) : 1 L R (1944) 1 Cal 563.

[10] Order under S. 145 passed by Sub-Judge is open to revision although appeal lies to District Court. (Vol 20) 1933 Rang 64 (66) : 11 Rang 134.

[11] Order for rateable distribution affecting creditors and surety to a considerable extent—Order is appealable under S. 47 read with S. 145. (Vol 26) 1939 Bom 112 (114) : 1 L R (1939) Bom 133.

4. Applicability, scope and object.—[1] The object of S. 145 is two-fold. It provides a summary remedy by way of an application available to the party entitled to enforce the bond and at the same time confers on the surety proceeded against a right of appeal as if he were a party within S. 47. (Vol 30) 1930 Mad 238 (239) : 1 L R (1943) Mad 509 * (Vol 4) 1917 Mad 237 (238) * (Vol 27) 1940 Mad 850 (852).

[2] Section 145 does not profess to define in any way liability of surety. It merely describes procedure when the surety is liable for enforcing his liability. (Vol 14) 1927 Rang 316 (316) : 5 Rang 494.

[3] Provisions analogous to S. 145 apply in cases where S. 145 does not literally apply. (Vol 25) 1938 Mad 215 (216).

[4] Section 145 does not apply unless the person sought to be proceeded against has taken upon himself the liability of another. Liability need not be of the judgment-debtor or the decree-holder but it may be of an officer of the Court charged with the conduct of execution proceedings. (Vol 26) 1939 Cal 316 (319).

[5] Surety for successor in interest of party to suit who remained to be brought on record comes under S. 145. (Vol 15) 1928 Nag 294 (294, 295).

[6] Surety for receiver becoming liable under surety bond—Order of Court to pay up amount due on bond can be enforced by procedure under S. 145. (Vol 27) 1940 Rang 151 (151) * (Vol 2) 1915 Cal 331 (333, 334) * (Vol 7) 1920 Low Bur 58 (59) : 10 Low Bur Rul 236 * (Vol 14) 1927 Rang 334 (334).

[7] Bonds should be taken in the name of some officer of the Court and not by the Court itself, which is not a juridical person. (Vol 6) 1919 P C 55 (59) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC) * (Vol 32) 1945 Sind 146 (148) : 1 L R (1945) Kar 116.

[8] Security bond not binding surety to any individual—Bond can be enforced by Court making order upon application in suit to which surety is party that property charged be sold unless before day named surety finds money. (Vol 30) 1943 P C 189 (191, 192) : 1 L R (1944) Kar P C 16 (P C) * (Vol 6) 1919 P C 55 (59) : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (P C) * (Vol 11) 1924 All 105 (106, 107) : 45 All 649 * (Vol 15) 1928 Bom 42 (47, 48) : 52 Bom 72 * (Vol 21) 1934 Cal 64 (67) : 60 Cal 1298 * (Vol 21) 1934 Mad 262 (263, 264) : 57 Mad 803.

[9] Execution of certificate under Bengal Public Demands Recovery Act by arrest of certificate debtor—Defendant executing surety bond to certificate officer agreeing to be liable for amount due from certificate debtor on his default—Default—Certificate-holder held could sue on surety bond though it was executed to certificate officer. (Vol 24) 1937 Cal 625 (627) : 1 L R (1937) 2 Cal 698. ((Vol 6) 1919 P C 55 : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212 (PC), distinguished.)

Security for payment of money.—[10] The following are the provisions of the Code under which security is taken: Section 32 (d); Section 55 (4); Section 94 (b); O. 25

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R. 1; O. 32 R. 8; O. 37 R. 3 (2); O. 38 R. 2; O. 38 R. 5; O. 41 R. 5 (3) (c); O. 41 R. 10; O. 45 R. 7; and O. 45 R. 13 (2) (c).

5. Discharge of surety.—[1] Security bond is a contract and can be enforced as such. (Vol 15) 1928 Lah 61 (62).

[2] Liability of surety continues till discharge by Court. (Vol 29) 1936 Mad 576 (578).

[3] Where there is doubt about construction of security bond it must be considered in light of order directing security to be given. (Vol 21) 1934 Cal 569 (570); 61 Cal 890 * (Vol 24) 1937 Mad 229 (231). (Where there is no ambiguity, the clear language of the bond must be enforced.) * (Vol 21) 1934 Mad 186 (188, 189); 57 Mad 688* (Vol 25) 1938 Nag 75 (75); I L R (1939) Nag 371.

[4] Surety bond must be construed strictly. (Vol 15) 1928 Bom 42 (46); 52 Bom 72* (Vol 21) 1934 Lah 401 (401).

[5] Surety agreeing to pay amount withdrawn by decree-holder personally or out of property secured on condition of defendants succeeding in appeal is not liable when only one defendant succeeds. (Vol 24) 1937 Mad 229 (231).

[6] Liability of surety cannot extend to different proceeding altogether. (Vol 29) 1941 Nag 339 (342); I L R (1942) Nag 198 * (Vol 11) 1924 All 64 (65).

[7] Order of Court changing terms of bond puts an end to surety's obligation. (Vol 13) 1926 Bom 565 (566). (Amount of security changed.)

[8] Sections 133 to 139, Contract Act, do not apply to bond executed by surety in favour of Court—Court not responsible for any change in situation of surety—Surety cannot claim to be relieved of his obligation by reason of any arrangement between decree-holder and principal debtor. (Vol 22) 1935 Nag 258 (263, 264); 31 Nag L R 83.

[9] Arrangement between creditor and debtor, without surety's knowledge and consent granting time for payment operates as surety's discharge. (Vol 31) 1944 Lah 428 (432) * (Vol 26) 1939 Lah 368 (368). (Surety for appearance—Adjournments to pay given to judgment-debtor without surety's consent.) * (Vol 31) 1944 Mad 396 (396, 397); I L R (1944) Mad 708.

[10] Surety for performance of decree—Extension of time to judgment-debtor by decree-holder—Discharging surety is entirely within discretion of Court. (Vol 17) 1930 Lah 896 (897).

[11] Court and not decree-holder granting time to judgment-debtor to pay—Surety is not discharged. (Vol 31) 1944 Nag 277 (277) * (Vol 31) 1944 Mad 396 (397); I L R (1944) Mad 708.

[12] Surety undertaking to be liable in case a decree was passed against the debtor and the debtor failed to pay—Compromise decree passed granting certain period to debtor for payment—Surety is discharged. (Vol 14) 1927 Cal 239 (240)* (Vol 23) 1936 Mad 576 (579). (Security bond by receiver appointed by consent order—Order as it were expresses contract and any variance in term absolves surety.) * (Vol 19) 1932 Pat 313 (315); 11 Pat 590. (Surety for mesne profits in case of decree—Claim compromised and time granted—Both facts discharge surety.)

[13] Surety undertaking to be bound by decree that may be passed—Surety is bound even by consent decree that is passed unless there is fraud or collusion or decree comprises matters beyond litigation. (Vol 22) 1935 Nag 16 (19); 31 Nag L R 172 * (Vol 18) 1931 Bom 55 (56); 55 Bom 97 * (Vol 19) 1932 Cal 858 (861, 863); 59 Cal 1450 * (Vol 5) 1918 Lah 134 (135). (Surety making himself liable for decretal money in case dispute was not settled—Suit compromised—Decree based on

compromise cannot be executed against surety.) * (Vol 20) 1933 Mad 809 (810); 56 Mad 625.

[14] Temporary injunction—Discharge of, on producing surety—Bond making surety responsible for decretal amount if suit not dismissed—Suit decreed—Decree paid—Appellate Court enhancing decretal amount—Surety is liable to pay the enhanced decretal amount. (Vol 22) 1935 Lah 21 (22, 23).

[15] Surety's liability continues up to appellate decree unless it is limited to first Court's decree. (Vol 7) 1920 Bom 331 (331); 44 Bom 34 * (Vol 6) 1919 P C 55 (56, 57, 59); 42 All 158; 46 Ind App 228; 22 Oudh Cas 212 (P C). (Decree-holder asked to furnish security in appellate Court—Liability continues to Privy Council stage.) * (Vol 19) 1932 Mad 188 (188) * (Vol 14) 1927 Rang 321 (321); 5 Rang 496.

[But see (Vol 21) 1934 Mad 13 (14).]

[16] Surety guaranteeing payment by defendant under decree that might be passed—Bond does not become inoperative merely because suit is dismissed for default and then restored. (Vol 19) 1932 Cal 859 (860); 59 Cal 1450.

[17] Dismissal of suit cancels surety bond without formal order—Surety is not liable for appellate decree. (Vol 2) 1915 Mad 653 (654). (Bond under O. 38, R. 5.) * (1910) 5 Low Bur Rul 156 (157)* (Vol 14) 1927 Rang 310 (310); 5 Rang 492.

[See also (Vol 12) 1925 Mad 114 (115). (Whether surety is liable for appellate decree depends upon language of bond.)]

[But see (Vol 14) 1927 Bom 84 (85); 51 Bom 81.]

[18] Death of defendant does not discharge his surety if cause of action survives against defendant's legal representatives and they are brought on record. (Vol 3) 1916 Bom 55 (56); 41 Bom 402 * (Vol 11) 1924 Lah 428 (429).

[19] Defendant dying—Person not legal representative brought on record—Decree is not binding on the real heir nor on the surety. (Vol 14) 1927 Bom 63 (65); 50 Bom 802.

[20] Surety for appearance of judgment-debtor—Surety unable to produce him on required date owing to his being in jail for criminal offence—Surety is discharged. (Vol 10) 1923 Rang 26 (26); 4 Upp Bur Rul 99.

[But see (Vol 9) 1922 All 390 (390); 44 All 174.]

[21] Surety for appearance of judgment-debtor—Execution application dismissed for default of decree-holder and surety discharged—Mere restoration of execution petition does not revive liability of surety. (Vol 21) 1934 Lah 349 (351) * (1913) 21 Ind Cas 612 (613, 614) (Cal).

[See (Vol 24) 1937 Mad 721 (722, 723).]

[22] Surety for production of judgment-debtor before Court—Fact that in the meantime the judgment-debtor had got a protection order does not absolve the surety of his duty to produce judgment-debtor on the adjourned date. (Vol 13) 1926 Mad 958 (959).

[23] Surety bond given in execution proceedings—Liability of surety is not affected by dismissal of execution case. (Vol 5) 1918 Cal 488 (488, 489) * (Vol 11) 1924 Pat 487 (488)* (Vol 8) 1921 Pat 72 (73); 5 Pat L Jour 417. (Condition in surety bond that if judgment-debtor failed to apply in Insolvency Court for his discharge, surety would render himself liable for certain sum—Surety's liability held did not terminate on striking off or dismissal of execution case.)

[24] Death of judgment-debtor discharges surety under S. 55 (4). (Vol 1) 1914 Cal 162 (163); 41 Cal 50.

[25] Although under S. 55, Cl. (4), judgment-creditor is given alternative and not concurrent remedies against the debtor and the surety, still the mere re-arrest of the judgment-debtor does not have the effect of discharging the surety. (Vol 18) 1931 Bom 444 (446).

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[26] Filing false affidavit that judgment-debtor was ill and obtaining adjournment may be ground for proceeding against surety criminally, but production of judgment-debtor on the adjourned date discharges his liability under the section. (Vol 11) 1924 Rang 347 (347).

[27] Surety for judgment-debtor engaging that judgment-debtor would apply for being declared insolvent within 15 days—Judgment-debtor applying within that time — Application rejected as not containing all particulars required by S. 13, Provincial Insolvency Act — Still liability of surety comes to end. (Vol 18) 1931 Bom 444 (446).

[28] Surety for appearance of judgment-debtor — Appearance by judgment-debtor and payment of part of decree debt and acceptance of such amount by decree holder's pleader — Surety is discharged. (Vol 20) 1933 Cal 337 (338) (Vol 1) 1914 Low Bur 54 (55).

[29] Surety bond under S. 17 (1), Provincial Small Cause Courts Act — Decree set aside and new decree passed — Surety cannot be proceeded against under S. 145. (Vol 25) 1938 Nag 75 (76) : I L R (1939) Nag 871.

[30] Surety is discharged if decree-holder executes decree contrary to his agreement. (Vol 16) 1929 Lah 770 (771) : 11 Lah 77 (Vol 12) 1925 Lah 552 (555).

[31] Surety for restitution—Decree reversed—Surety dying, decree can be enforced against his legal representative. (Vol 13) 1926 Sind 294 (295) : 19 Sind L R 165.

[32] Surety can be proceeded against for liability accrued before dismissal of execution application. (Vol 26) 1939 Sind 270 (272) : I L R (1939) Kar 401.

[33] Where sureties agreed to produce judgment-debtor on the fixed date but failed, the closing without dismissal of the execution petition does not put an end to their liability. (Vol 11) 1924 Mad 241 (241, 242).

[34] Surety executing bond in favour of decree-holder — Judgment-debtor absenting in execution proceedings — Warrant against surety — Surety asking time for settlement — Surety ultimately denying his liability — Surety held liable to decree-holder, his liability having become *res judicata*. (Vol 17) 1930 Lah 80 (80).

[35] Surety in case of arrest before judgment can apply for discharge under O. 38, R. 3, but surety for due performance of decree cannot be discharged. (Vol 16) 1929 Lah 435 (436) (Vol 18) 1931 Lah 503 (503) (Vol 14) 1927 Mad 294 (295).

[36] Contract of surety for appearance of judgment-debtor is one of continuing guarantee and is revocable by notice to creditor. (Vol 18) 1931 All 243 (244) : 52 All 1014.

[37] Person becoming bound by oral or written contract is liable. (Vol 13) 1926 Cal 877 (879) : 53 Cal 515.

[38] If a consent decree is passed without the knowledge and consent of surety of judgment-debtor, the surety is discharged. (Vol 13) 1926 Cal 818 (818).

6. Execution against surety. — [1] The words "in the manner herein provided for the execution of decrees" in S. 145 refer not to mode of applying for execution but to mode of effecting execution in any suitable manner provided under O. 21. (Vol 29) 1942 Sind 134 (135) : I L R (1942) Kar 79 (Vol 21) 1934 Oudh 139 (140) : 9 Luck 534.

[2] The word "decree" in the operative part of section 145 refers only to cls. (a) and (b) and not to cl. (c), to which the word "order" only applies. (Vol 15) 1928 Rang 249 (250) : 6 Rang 474.

[3] Breach of any condition in surety bond empowers Court to proceed against surety even if such breach is not mentioned by judgment-creditor in his execution application. (Vol 23) 1936 Sind 244 (246) : 30 Sind L R 177.

[4] Court has discretion to refuse execution against surety. (Vol 9) 1922 Bom 340 (341) : 46 Bom 702 (Vol 12) 1925 Rang 135 (137) : 2 Rang 567.

[5] Security—Forfeiture is not by way of penalty — Benefit goes to creditor and not to Government. (Vol 23) 1936 Sind 244 (246) : 30 Sind L R 177 (Vol 32) 1945 Sind 146 (148) : I L R (1945) Kar 116.

[6] Surety for judgment-debtor incurring penalty under his bond—Amount paid by surety should be credited against decree amount only. (Vol 8) 1921 Cal 559 560.

[7] In proceedings under S. 145 surety can plead all defences open to him as defendant in a suit. (Vol 10) 1923 Mad 340 (342) (Vol 12) 1925 Lah 618 (618). (Surety can raise plea of fraud) (Vol 25) 1938 Mad 215 (216). (Surety is entitled to raise objections to executability.)

[8] Surety can apply to Court to see whether bond has spent itself and become unenforceable. (Vol 30) 1943 Mad 288 (290, 291) : I L R (1943) Mad 509.

[9] Surety executing bond cannot raise objection as to illegality of bond in execution proceedings. (Vol 23) 1936 Cal 143 (145)

[10] Section does not deal with refund of deposit of surety (Vol 13) 1926 Lah 544 (544).

[11] Surety must be deemed to be party to suit as well as to decree for purposes of S. 145, and same considerations which apply to judgment-debtor should apply to him as well. (1940) 1940 Nag L Jour 244 (247).

[12] Decree against judgment-debtor can be executed against his surety to the extent of his liability even if his name is not mentioned in the decree. (Vol 23) 1936 Lah 463 (464).

[13] Warrant issued by one Court — Surety bond attested by another Court and forwarded to executing Court—Section 145 applies and bond can be enforced against surety. (Vol 20) 1933 Lah 913 (914) : 15 Lah 44.

[14] Suit for declaration and permanent injunction — Temporary injunction granted on plaintiff's executing security bond to Court undertaking to make good loss occasioned by grant of temporary injunction—Suit dismissed — Bond can be enforced only under S. 151. (Vol 20) 1933 Mad 691 (693) : 56 Mad 989.

7. Extent of surety's liability. — [1] Section 145 applies only to personal liability of surety. (Vol 30) 1943 P C 189 (191) : I L R (1944) Kar P C 16 (P C) (Vol 4) 1917 All 104 (106) : 39 All 225 (Vol 15) 1928 Bom 42 (48) : 52 Bom 72 (Vol 3) 1916 Cal 30 (30) (Vol 21) 1934 Mad 262 (263) : 57 Mad 808.

[2] Personal liability attaches to surety for costs — Liability is not excluded by deposit of money as security. (Vol 19) 1932 Mad 188 (188).

[3] Surety bond under S. 55 — Extent of liability is determined by S. 145. (Vol 4) 1917 Mad 237 (238).

[4] Surety for appearance is liable personally for decree debt, if he undertakes and fails to produce judgment-debtor in Court on any day of hearing. (Vol 11) 1924 Lah 490 (491, 492).

[5] Surety bond stating that A was standing surety for B — Bond further stating that A agreed that his movable and immovable properties detailed therein should be liable — Bond held limited scope of liability to properties specified and excluded all personal liability. (Vol 32) 1945 P C 91 (93) : 72 Ind App 165 : I L R (1945) Lah 411 (P C). ((Vol 29) 1942 Lah 6, reversed.)

[6] Section applies where liability is incurred independently of the decree — Liability of surety contained in or declared by decree itself — Surety becomes judgment-debtor and liable as such. (Vol 15) 1928 Lah 209 (210) (Vol 13) 1926 Cal 889 (892) : 54 Cal 1.

[7] Section 145 does not apply where surety bond only gives a charge or creates mortgage over property,

Section 145 (contd.)

(Vol 6) 1919 P C 55 (59) : 46 Ind App 228 : 22 Oudh Cas 212 : 42 All 158 (P C) * (Vol 15) 1928 Bom 42 (48) : 52 Bom 72.

[8] Security bond — Surety undertaking personal liability and also charging property as further security — Only personal liability and not liability under hypothecated property can be enforced under S. 145. (Vol 21) 1934 Oudh 139 (140) : 9 Luck 534 * (Vol 4) 1917 All 104 (105) : 39 All 225.

[9] Surety making himself personally liable as well as mortgaging property mentioned in bond as security for his liability. — Decree-holder is not obliged to rely upon security given by hypothecation — He can rely upon personal liability of surety and seek to attach mortgaged property on account of that liability. (Vol 13) 1926 Bom 279 (280) : 50 Bom 339 * (Vol 3) 1916 All 57 (59, 60) : 38 All 327 * (Vol 32) 1945 Cal 193 (194) : I L R (1944) 1 Cal 563 * (Vol 2) 1915 Cal 533 (533, 534) * (Vol 16) 1929 Lah 393 (394) * (Vol 14) 1927 Mad 416 (418) * (Vol 31) 1944 Oudh 264 (265) * (Vol 4) 1917 Pat 596 (596) : 2 Pat L Jour 197 * (Vol 4) 1917 Pat 489 (489) * (Vol 16) 1929 Rang 126 (126, 127) : 7 Rang 352.

[10] Property given by judgment-debtor as security — Property can be realised in execution. (1913) 17 Cal L Jour 267 (275, 276, 277) (F B) * (Vol 23) 1936 Mad 589 (591) * (Vol 5) 1918 Mad 442 (442) : 41 Mad 327 * (Vol 17) 1930 Pat 108 (109, 110) : 8 Pat 801.

[11] Security bond creating personal liability and hypothecating property given to executing Court and not to any particular individual by surety — Decree-holder can move Court to enforce bond against surety. (Vol 21) 1934 Lah 138 (139) : 15 Lah 282 (F B).

[12] Punjab Courts can in their inherent jurisdiction proceed against surety's property whether obligee is named or not in the bond. (Vol 15) 1928 Lah 802 (804).

[13] Suit for permanent injunction — Application for temporary injunction during pendency restraining defendant from interfering with plaintiff's possession — But defendant given possession during pendency on his executing security bond for mesne profits in case plaintiff succeeds in suit — Security bond held should be considered as proceeding in Court importing enforceable liability — Court had jurisdiction to enforce liability under bond. (Vol 23) 1936 Mad 990 (990, 991).

[14] Decree against principal is decree against surety. (Vol 21) 1934 Bom 252 (254) : 58 Bom 485 * (Vol 13) 1926 Mad 674 (676) : 49 Mad 325.

[15] Liability of surety is enforceable to the extent to which he is personally liable. (Vol 3) 1916 Cal 30 (30) * (Vol 16) 1929 All 905 (906). (Security given by person in possession of property and profits, is liable for all claims of the decree-holder to the extent of that security.) * (1888) 12 Bom 71 (76) * (1910) 5 Ind Cas 139 (141) (Cal). (When a surety binds himself to pay the amount by which the sale proceeds fall short of decretal amount, the sale proceeds mean the whole price recovered minus sale expenses and poundage fees.) * (Vol 16) 1929 Lah 386 (387). (Judgment-debtor's property attached — Price of property entered in supradnama — No condition in supradnama that such price only would be recoverable if article lost from supradar's custody — Judgment-debtor is not bound by price as entered in supradnama.) * (Vol 31) 1944 Nag 277 (277). (Liability of surety is not limited to amount reduced by Debt Relief Court but is to be determined on surety bond.) * (Vol 3) 1916 Pat 66 (67). (Bullock attached in execution of Small Cause Court decree — Application for setting aside *ex parte* decree — Certain persona remaining surety for whole amount — Bullock released — Application dismissed — Surety is liable for

whole amount.) * (Vol 32) 1945 Sind 146 (149) : I L R (1945) Kar 116. (Security given — Default made — Amount of security is maximum — But final liability is determined as per loss suffered.)

[16] Surety undertaking to pay additional interest — Decree-holder is entitled to claim such interest from surety. (Vol 14) 1927 Mad 416 (418).

[17] Father becoming liable as surety for decree passed against stranger — Interest of surety's sons can be taken in execution. (Vol 25) 1938 Nag 148 (149) : I L R (1939) Nag 536.

[18] Surety can be proceeded against without using coercive measures against judgment-debtor. (Vol 20) 1943 Nag 287 (288, 289) * (Vol 16) 1929 Lah 205 (206) * (1913) 7 Sind L R 19 (20).

[19] Surety undertaking to pay if principal judgment-debtors failed — Decree should be first executed against the latter. (Vol 14) 1927 Lah 846 (846).

[20] Partition decree — Judgment-debtor depositing certain property in Court, but not whole property — Execution against surety — Surety paying full sum stipulated in bond — Property produced by judgment-debtor should be first applied towards satisfaction of decree. (1895) 19 Bom 578 (580, 581).

[21] Giving of security in no way detracts from right of decree-holder to enforce his decree against judgment-debtor — Fact that security is given does not take away any legal right which decree-holder otherwise has. (Vol 5) 1918 Pat 384 (385) : 3 Pat L Jour 176.

8 Form of surety bond. — [1] Section 145 does not require that liability of surety must have accrued on an application presented to the Court or on a security bond filed in the proceedings. (1912) 16 Ind Cas 859 (860) (Cal).

[2] Surety bond need not be in writing or in favour of Court. (Vol 20) 1933 Lah 913 (914) : 15 Lah 44.

[3] It is not necessary that surety should have specifically said in bond that the decree could be executed against him. (Vol 17) 1930 Lah 185 (186).

[4] Section 145 does not apply to surety bonds executed outside Court. (Vol 20) 1933 All 68 (69) * (Vol 6) 1919 Mad 818 (818).

[But see (Vol 22) 1935 Mad 209 (210) : 58 Mad 777.]

[5] Security bond in favour of decree-holder for release of debtor from jail — Release ordered under S. 53 — Bond must be deemed to be on record and is enforceable in execution (Vol 6) 1919 Mad 527 (528).

9. Liability for restitution — Clause (b). — [1] Property attached and placed in custody of supradar — On failure to return property executing Court has no power to proceed against him — Separate suit must be brought. (Vol 7) 1920 All 245 (245) : 42 All 394 * (1927) 28 Pun L R 525 (533). (Supradar is not a surety within the meaning of S. 145.) * (Vol 7) 1920 Mad 321 (322) * (Vol 6) 1919 Mad 649 (649, 650) * (Vol 5) 1918 Nag 98 (98).

[2] Section 145 applies only in the case of surety for payment of money under Court's order — Surety to produce property attached — Default in producing property — Surety bond can be enforced apart from S. 145 by way of execution. (Vol 13) 1926 Mad 1005 (1006, 1007) * (Vol 20) 1933 Mad 342 (342) * (Vol 20) 1933 Mad 219 (220).

[3] Supradar who has given an undertaking to produce the goods when ordered by the Court is a surety and by such undertaking he becomes liable under S. 145. (Vol 18) 1931 All 567 (571) : 54 All 263 (F B) * (Vol 23) 1936 All 555 (557) * (Vol 8) 1921 All 220 (220, 221) * (Vol 15) 1928 Lah 181 (183) * (Vol 12) 1925 Lah 412 (413) * (Vol 11) 1924 Nag 268 (262, 263) : 20 Nag L R 93. (Vol 6) 1919 Nag 23 : 16 Nag L R 178, overruled.)

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[4] Attachment under O. 21, R. 43 — Attaching officer using discretion under O. 21-A, R. 3 and leaving goods with custodian — Obligation imposed upon custodian is accessory — But if after attachment Court intervenes and directs attaching officer to deliver goods to custodian on his furnishing bond, liability of custodian is not accessory and he is not surety within meaning of S. 145. (Vol 26) 1939 Cal 316 (319).

10. Limitation.—[1] Surety undertaking to pay on failure of decree-holder to recover from judgment-debtor — Limitation is governed by Art. 181, Limitation Act. (Vol 20) 1933 Oudh 209 (213) : 8 Luck 427 (Vol 7) 1920 Bom 331 (331, 332) : 44 Bom 84.

[2] Application against judgment-debtor alone saves limitation against sureties also. (Vol 9) 1922 All 481 (482, 483) : 44 All 743.

[3] Proceedings taken against judgment-debtor in execution of decree or against one of the sureties for enforcing bond in which other is simply impleaded without any relief being claimed against him, are not steps against other surety to enforce bond so as to save limitation. (Vol 20) 1933 Mad 722 (723, 724).

[4] Surety for appearance of judgment-debtor — Execution petition dismissed for default of decree-holder and surety discharged — Application for restoration also dismissed — Appeal from order discharging surety — Extension of time spent in application for restoration cannot be allowed. (Vol 21) 1934 Lah 349 (351).

11. Notice to surety.—[1] Notice is essential for enforcing liability against surety. (Vol 15) 1928 Rang 249 (251) : 6 Rang 674 (Vol 25) 1938 Lah 593 (593) : I L R (1938) Lah 624 (Vol 16) 1929 Lah 205 (206) (Vol 12) 1925 Lah 170 (171) (Vol 3) 1916 Mad 1078 (1078, 1079) (Vol 18) 1931 Oudh 311 (311) (Vol 12) 1925 Rang 135 (136) : 2 Rang 567 (Vol 10) 1923 Rang 26 (26) : 4 Upp Bur Rul 99.

[2] Notice issued to surety under O. 38, R. 2, to produce judgment-debtor — Execution sought to be issued against him on failure — Further notice to show cause why execution should not issue is necessary. (Vol 18) 1931 Mad 828 (829).

[3] Notice need not be in writing. (Vol 24) 1937 Lah 772 (776).

[4] Condition of notice to judgment-debtor before enforcing liability of surety can be waived. (Vol 4) 1917 Mad 237 (239).

[5] It is immaterial whether notice is given by the Court or by decree-holder, or whether it is given by the Court which passed the decree or by the Court to which the decree is sent for execution. (1905) 29 Bom 29 (34) (Vol 25) 1938 Lah 593 (593) : I L R (1938) Lah 624.

[6] Notice to surety by Court under the proviso to S. 145, along with the warrant for his arrest is not invalid. (Vol 14) 1927 Lah 131 (132).

[7] Notice of attachment to surety before actual attachment is sufficient. (Vol 24) 1937 Lah 772 (776, 777).

[8] Surety undertaking to produce judgment-debtor on every date fixed and first fixed date in presence of surety and judgment-debtor — No specific notice to surety to produce on that day is necessary — But notice under S. 145, regarding realization of decretal amount is necessary. (Vol 22) 1935 Lah 145 (146).

12. Separate suit by or against surety.—[1] The surety is not a party to the suit or to the decree made therein nor does he become a party to the execution proceedings until application is made for an order against him. He is not a party to the suit within S. 47, and S. 145 only makes him a party for a limited purpose, namely, for appeal. (Vol 7) 1920 Mad 75 (77) : 43 Mad 325 (Vol 15) 1928 All 527 (530) : 51 All 346 (

(Vol 12) 1925 Lah 552 (553) (1927) 28 Pun L R 525 (536) (Vol 18) 1931 Rang 206 (207) : 9 Rang 434. (Surety cannot file application coming under S. 47.)

[2] Section 145 does not bar regular suit against surety. (Vol 26) 1939 Lah 175 (176) : I L R (1939) Lah 470 (Vol 22) 1935 All 373 (374) (Vol 15) 1928 Rang 249 (251) : 6 Rang 474.

[3] Suit against a supradar on ground of damages due to his misappropriating the property is barred. (Vol 16) 1929 All 266 (266).

[4] Surety's property attached and sold in execution — Separate suit to set aside the sale lies. (Vol 15) 1928 All 527 (528, 529) : 51 All 346.

[5] Surety must file separate suit for cancellation of bond on ground of fraud and cannot proceed under S. 47. (Vol 7) 1920 Mad 75 (77) : 43 Mad 325.

[6] Surety made party to execution proceedings — Defence raised and decided — He cannot raise it again in separate suit. The principle of *res judicata* applies. (Vol 29) 1942 Nag 107 (108) : I L R (1942) Nag 779.

[See also (Vol 29) 1942 All 260 (260).]

13. Surety — Who is. — [1] A surety is one who takes upon himself, and guarantees the performance of an obligation which rests primarily upon another. His obligation is an accessory one. (Vol 26) 1939 Cal 316 (319).

[2] Commissioner appointed to attach goods and asked to keep them in custody — Appointment of watchmen by Commissioner — Some of the goods missing — Watchmen are not liable as sureties. (Vol 20) 1933 All 385 (386).

[3] Objector who in his suit for declaration against decree-holder undertakes to pay him the decretal amount within a particular period is a surety and is liable as judgment-debtor in both suits. (Vol 26) 1939 All 517 (517, 518).

[4] Amin entrusting property attached in execution to supradar is not surety within the meaning of S. 145. (Vol 22) 1935 All 768 (769).

14. "Under an order.....thereon"—Cl. (c).—[1] Order must be enforceable through execution by one party against another — Surety for guardian of minor — Attachment of property of surety for moneys due to minor's estate — Order of attachment of surety's property does not fall under S. 145 as it is passed for protection of minor's interests against his own next friend. (Vol 5) 1918 Mad 661 (663) : 41 Mad 40 (Vol 23) 1936 Mad 953 (953). (Suit is the proper means to enforce such bond.)

[2] Words "under an order of the Court" apply equally to payment of money and fulfilment of a condition. (Vol 8) 1921 Nag 99 (100).

[3] Application for stay of execution of decree obtained in another suit pending decision of appeal — Court ordering that if appellant furnished security execution would be stayed — Security bond executed — Appeal dismissed — Property under bond cannot be realized in execution as there is no order capable of execution — Separate suit is necessary. (Vol 20) 1933 All 269 (272) : 55 All 346 (FB).

[4] Section 145 cannot be extended to apply to enforcement of surety bond given in proceedings other than suits. (Vol 13) 1926 Sind 35 (36) : 19 Sind L R 390.

[5] Proceeding for grant of Letters of Administration may take form of suit, but is not in fact suit; nor is it proceeding consequent on suit — Hence, S. 145 does not apply to sureties of administration bond. (Vol 15) 1928 Rang 249 (250, 252) : 6 Rang 474.

[6] Money paid by judgment-debtor into Court — Application before disbursement of money to convert into Government pro-notes is "proceeding consequent" on

Proceedings by or against representative.

146. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

[1882, cf. S. 582A; See Order 22.]

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suit within S. 145. (Vol 20) 1933 Mad 678 (678, 679) : 56 Mad 687 (FB).

[7] Section 145 does not apply to surety under Guardians and Wards Act. (Vol 13) 1926 Sind 35 (36) : 19 Sind L R 390.

[8] Surety under adjustment of application for execution of award filed previously in Court can be proceeded against in execution under S. 145. (Vol 12) 1925 Sind 25 (26) : 17 Sind L R 257.

SECTION 146—SYNOPSIS.

1. Application by representative not on record.
2. Application for execution by or against representatives.
3. Application to set aside *ex parte* decree.
4. "Claiming under"—Meaning of.
5. Person detained in enemy country—Representation.
6. Proceeding or application.
7. Scope.

1. Application by representative not on record. [1] Petition for execution presented by one of the surviving coparceners of deceased decree-holder — Presentation will not invalidate proceedings before the Collector. (Vol 14) 1927 Bom 123 (124, 125) : 51 Bom 143.

[2] Legal representative not actually brought on record can apply under O. 9, R. 13. (Vol 12) 1925 Oudh 370 (371) : 27 Oudh Cas 299.

2. Application for execution by or against representatives. [1] Order 21, R. 16 is a provision to which S. 146 is subject. Transferee of property during pendency of a suit cannot apply for execution of the decree unless his name is substituted in the suit for his vendor. (Vol 9) 1922 Pat 563 (564) * (1912) 17 Ind Cas 512 (513) (All).

[2] Assignment of entire amounts due under promissory notes for consideration during pendency of suits on them — Decrees passed—Assignee can execute them under S. 146, though not under O. 21, R. 16. (Vol 29) 1942 Mad 21 (22, 23).

[3] Transferee of a decree is entitled to apply to continue execution proceedings already instituted by his transferor. (Vol 8) 1921 Mad 599 (603) : 44 Mad 919 (FB).

[4] Purchaser during suit can be proceeded against in execution. (Vol 8) 1921 Mad 126 (132).

[5] Terms of S. 146 are wide enough to enable the Court to recognise part transfer of a decree. (Vol 8) 1921 Mad 599 (601) : 44 Mad 919 (FB).

[See (Vol 31) 1944 Oudh 280 (280) : 20 Luck 271. (There can be no objection to execution by an assignee where the whole of the decree which can be executed has been assigned and is being executed.)

[6] Decree-holder dying during pendency of his petition for execution — His legal representative can be substituted in petition and be allowed to continue it. (Vol 19) 1932 Mad 73 (79) : 55 Mad 352 (FB). ((Vol 14) 1927 Mad 184 : 50 Mad 1, overruled.) * (Vol 13) 1931 Bom 423 (423) * (1942) 1942 Oudh W N (B R) 385 (385) * (Vol 17) 1930 Sind 283 (284) : 24 Sind L R 195.

[7] Execution proceedings, already commenced, can be continued after the death of the judgment-debtor by substitution of the name of the legal representative in place of that of the judgment-debtor in the application for execution. There is no need to have a fresh application under O. 21, R. 11 filed. (1910) 34 Bom 142 (151).

[8] Decree assigned jointly to more than one person — Assignees may be deemed joint decree-holders for application of O. 21, R. 15. (Vol 32) 1945 Bom 380 (381, 382) : 1 L R (1945) Bom 463.

[9] Transferee of property, covered by a decree is not entitled to execute the decree without conforming to O. 21, R. 16—Section 146 does not apply. (Vol 9) 1922 All 98 (99).

[See also under O. 21, R. 16.]

3. Application to set aside *ex parte* decree—[1] Where defendant against whom an *ex parte* decree has been passed dies, his legal representative can apply for setting aside the *ex parte* decree under O. 9, R. 13. (1902) 29 Cal 33 (35)* (Vol 10) 1923 All 30 (30).

4. "Claiming under" — Meaning of.—[1] The words "claiming under" in S. 146 include a case where the interest of a person has been assigned to or has devolved upon another under O. 22, R. 10. (Vol 11) 1924 Mad 709 (710)* (Vol 6) 1919 Mad 755 (756) : 41 Mad 510.

[2] Principle of devolution underlying O. 22, R. 10 and S. 146 is same — Person claiming must have right to take proceedings. (Vol 21) 1934 Mad 485 (490).

[3] Party to suit creating mortgage during pendency of suit — Mortgagee can appeal from decree passed in such suit. (Vol 28) 1941 Mad 245 (245, 246).

[4] Assignee of interest in suit is competent to prefer appeal against decree passed in suit. (Vol 6) 1919 Mad 755 (756) : 41 Mad 510.

[5] Compromise in partition suit breaking down — Simple mortgagee subsequent to suit of share of party to partition suit is not necessary or proper party to partition suit nor is he entitled to be impleaded either under O. 22, R. 10 or S. 146. (Vol 21) 1934 Mad 485 (488) 489.

[6] Suit by A against B for recovery of property decreed — Pending suit, A's son C acquiring suit property by final partition decree — Appeal by B — Application by C to be impleaded as respondent — Neither S. 146 nor O. 22, R. 10 held could apply. (Vol 27) 1940 Mad 876 (877, 878).

[7] Transfer of preliminary decree — Assignee is not a person claiming under decree-holder. (Vol 13) 1926 Mad 1129 (1129).

[8] Section 146 contemplates change of title after decree—Person acquiring mortgagee rights and obtaining possession of mortgaged property from under-proprietor — Long thereafter, arrears of rent falling due for certain year and decree passed against under-proprietor—Rent decree cannot be executed against mortgagee. (Vol 24) 1937 Oudh 488 (489, 490) : 13 Luck 554.

[9] Combined effect of S. 154, Oudh Rent Act and S. 146, is to render auction-purchaser of under-proprietary tenure liable to satisfy decree for arrears of rent obtained against original under-proprietor, although such purchaser is not judgment-debtor on record of that decree. (Vol 16) 1929 Oudh 353 (354).

Consent or agreement by persons under disability.

147. In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

[R. S. C., Order 16 Rule 21; See Order 32.]

Section 146 (contd.)

[10] A sub-mortgagee who is party to a mortgage suit is, on general principle of S. 146, Civil P. C., entitled to apply for a final decree for sale, where the original mortgagee-plaintiff fails to make such application, as a person claiming under him. (Vol 32) 1945 Mad 463 (465).

[11] When karta or manager of joint Hindu family is alive, co-parcener has no right to sue in his place. (Vol 24) 1937 Sind 94 (95) : 30 Sind L R 467.

[12] Private purchaser cannot continue appeal, withdrawn by judgment-debtor, against order under O. 21, R. 89. (Vol 11) 1924 Mad 470 (471).

[13] Puisse mortgagee not a party to a suit on a charge cannot apply for setting aside *ex-parte* decree either under S. 146 or O. 9, R. 13. (Vol 13) 1926 Cal 1015 (1015).

5. Person detained in enemy country — Representation. — [1] Civil P. C. makes no provision for the representation of a person who is still alive by a person who intermeddles with his estate. Where, therefore, a defendant is detained in enemy country, he cannot be represented by the intermeddler of his estate. Substituted service under O. 5, R. 20 is the only remedy in such a case. (Vol 32) 1945 All 45 (46) : 1 L R (1945) All 18.

6. Proceeding or application. — [1] Proceedings contemplated by S. 146 include an appeal. (Vol 6) 1919 Mad 755 (756) : 41 Mad 510 (Vol 30) 1943 Mad 381 (383) : 1 L R (1943) Mad 702. (Person claiming under judgment-debtor can question the correctness of an order passed under O. 21, R. 98 by appeal under S. 47.) (Vol 27) 1940 Mad 16 (16). (Benamidar releasing right in property claimed by him in suit in favour of real purchaser—Latter can file appeal against dismissal of benamidar's suit.) (Vol 5) 1918 Mad 409 (410). (New party alleging acquisition of interest taking action after decree and before appeal—O. 22, R. 10 does not apply—Appeal can however be entertained under S. 146, if merits are in favour of appellant.) (1903) 26 Mad 101 (103). (Decree-holder appellant dying after hearing of appeal but before delivery of judgment — His son applying to High Court to be brought on record and be allowed to present appeal—Procedure held proper — He need not apply to original Court for execution.) (Vol 4) 1917 Oudh 176 (176, 177) (Assignment of interest between date of decision of first Court and filing of appeal — Order 22, R. 10 does not apply—Assignee should be allowed to join in appeal under S. 146.)

[2] A transferee from an auction-purchaser is competent to apply for possession of the property transferred under O. 21, R. 95 and S. 146. (Vol 5) 1918 All 405 (405) : 40 All 216.

[3] Right to recover mesne profits by way of restitution is assignable and the assignee can apply under S. 144, Civil P. C. The transfer in his favour can be recognised under S. 146, though O. 20 R. 16 may not be strictly applicable. (Vol 28) 1941 Mad 480 (480).

[4] Where decree attached and executed by attaching decree-holder is reversed in appeal, restitution proceedings can be allowed against attaching decree-holder, who is representative of original decree-holder even for

purposes of restitution. (Vol 17) 1930 Mad 787 (788, 789) : 53 Mad 796.

[5] Auction-purchaser in execution of a simple money decree is a representative of the judgment-debtor for O. 21 R. 98, against whom proceedings can be taken under S. 146. (Vol 7) 1920 Mad 943 (944).

7. Scope.—[1] Section should be interpreted as supplementing the rules. (Vol 4) 1921 Mad 599 (601) : 44 Mad 919 (F B) (Vol 29) 1942 Mad 21 (23). (Expression "save as otherwise provided by this Code" should be interpreted liberally as permitting applications under S. 146 which do not conflict with the provisions of the Code.) (Vol 21) 1934 Mad 485 (489) (Section 146 is a residuary provision, which cannot be resorted to where a case falls under a specific provision.)

[2] Section 146 cannot override O. 22. (Vol 29) 1942 Rang 15 (17) : 1941 Rang-L R 371.

[3] Section 146 cannot enlarge S. 73 of the Code. (Vol 22) 1935 Cal 738 (739).

[4] Section 146 is not limited only to filing fresh suit or appeal already filed. (Vol 13) 1926 Mad 573 (574).

[But see (Vol 14) 1927 Mad 507 (508). (Legal representative cannot continue an application already made.)]

[5] Appellant claiming substitution in deceased plaintiff's place under plaintiff's living daughter — Appellant held could apply for substitution of daughter's name but not for his own. (Vol 23) 1936 Pat 123 (125) : 15 Pat 82 (Vol 12) 1925 Mad 1166 (1166, 1167). (Deceased's heirs not brought on record—Assignee from heir cannot apply under O. 22, R. 10.)

[6] Assignment of interest during period intervening between date of trial Court decree and filing of appeal—Assignor cannot file appeal — Nor can assignee be made appellant at the time of hearing of appeal. (Vol 22) 1935 Lah 119 (120).

[7] Pauper plaintiff dying *pendente lite* — Heir impleaded as legal representative—Heir himself not pauper — Heir can be dispaupered under O. 33, R. 9 read with S. 146, (Vol 18) 1931 Mad 324 (324, 325).

Section 147 — Note 1

[1] The section enacts the substantive rule that a minor shall be bound by a compromise entered into by his guardian with the leave of the Court. See Notes on S. 147. A. I. R. Commentaries on Civil P. C. and also O. 32, R. 7.

[2] The leave of the Court must be *expressly* given. (1906) 28 All 585 (588, 589) : 9 Oudh Cas 219 : 33 Ind App 128 (P C). (Case under old Code).

[3] Section 147 does not place consent decrees obtained against minors on higher footing than decrees obtained after contest—Consent decree against minor can be avoided in same manner as contested decrees in spite of S. 147. (Vol 33) 1946 Lah 233 (237) (F B).

[4] Minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian *ad litem*, even if he has not succeeded in proving fraud or collusion. (Vol 33) 1946 Lah 233 (234, 242) (F B). (Vol 26) 1939 Bom 66 : 1 L R (1939) Bom 340 (F B) diss. from; (Vol 29) 1942 Lah 205 : 1 L R (1943) Lah 113 held not correctly decided; Case law discussed.)

[5] See also O. 32, R. 7.

Enlargement of time. **148.** Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

[R. S. C., Order 64 Rule 7.]

SECTION 148 — SYNOPSIS.

1. "Where any period is fixed or granted by Court."
2. Extension of time fixed by decree.
3. Extension of time fixed by consent decree.
4. Extension of time fixed by award. See Notes on S. 28, Arbitration Act, 1940.
5. "Act prescribed or allowed by this Code."
6. Discretion of Court.
7. Implied extension of time.
8. Court to which application for extension should be made.
9. Appeal.
10. Revision.

1. "Where any period is fixed or granted by Court." — [1] The Registrar of a Small Cause Court cannot make an order under S. 148 for extension of time. (1911) 13 Cal L Jour 78 (82).

[2] Section 148 applies only where period is fixed by Court. It does not apply when period is fixed by law. (Vol 19) 1932 Mad 112 (113).

[3] Court cannot extend period of one month prescribed by S. 55 (4), Civil P. C. even under S. 148. (Vol 13) 1926 Mad 689 (690).

[4] Period under O. 21, R. 85 cannot be extended. (Vol 19) 1932 Cal 126 (130) : 59 Cal 117.

[5] Limitation for application for restoration of suit dismissed for default cannot be extended. (Vol-6) 1919 Pat 543 (544) : 4 Pat L Jour 428.

[6] Period of thirty days prescribed by O. 21, R. 92 cannot be extended. (Vol 21) 1934 Lah 875 (876) * (Vol 4) 1917 Pat 344 (344) : 2 Pat L Jour 164 * (Vol 21) 1934 Pesh 25 (26). (Period fixed by Art. 166, Limitation Act cannot be extended) * (Vol 20) 1933 Rang 8 (9). (Period fixed for deposit under O. 21, R. 89 cannot be extended.)

2. Extension of time fixed by decree.—[1] The general principle enacted in the section is that where time is granted by an order of the Court for doing any act prescribed or allowed by the Code, it can be extended by the Court. (Vol 1) 1914 All 55 (56) : 36 All 77. (Order for setting aside *ex parte* decree on payment of costs within a fixed period) * (Vol 10) 1923 Cal 612 (614). (Time for additional court-fee.) * (Vol 19) 1932 Lah 235 (236). (Order of remand directing payment of additional court-fee within certain time — Time can be extended.) (Vol 23) 1936 Oudh 56 (58) : 11 Luck 567 (Lease for running mill owned by company in liquidation — Money to be deposited by lessee within fixed period, not deposited — Court can extend time under S. 148.) * (Vol 11) 1924 Lah 222 (222) (Do.) * (Vol 5) 1918 Mad 638 (639) (Do.).

[2] The jurisdiction with which a Court is invested by provisions of S. 148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its decree. Where time is fixed or granted by a decree it cannot be extended by the Court. (Vol 15) 1928 Oudh 32 (33) : 2 Luck 425 * (Vol 21) 1934 Cal 21 (22) * (Vol 19) 1932 Mad 223 (223) * (Vol 3) 1916 Mad 694 (695) : 39 Mad 876 * (Vol 2) 1915 Mad 69 (70). (Decree directing delivery of property by plaintiff to defendant on payment of certain amount.) * (Vol 21) 1934 Nag 109 (110, 111) : 30 Nag L R 268. (Application to extend before decree—Court must consider it—Omission to consider through mistake — Mistake must be rectified though decree be required to be re-opened — Party should not suffer for Court's negligence.) * (Vol 5) 1918 Nag 66 (66, 67) :

15 Nag L R 39 * (Vol 10) 1923 Oudh 16 (17) * (Vol 22) 1935 Rang 341 (343). (Court cannot extend time for payment of instalment of decretal amount.)

[3] Decree by trial Court directing that plaint shall stand rejected if certain act is not done within time prescribed—Appeal by party without doing act—Appellate Court can extend time and suspend order made by lower Court by arranging decree under O. 41, R. 32. (Vol 25) 1938 All 150 (150, 151).

[4] Once a decree is signed it cannot, under O. 20, R. 3, be altered or added to, save under S 152 or on review. S. 148 cannot nullify this rule. Section 148 therefore does not apply to decree or order of final character made by Court but applies only to acts preliminary to or during course of trial of a case before the final order is actually made. (Vol 27) 1940 Cal 275 (276) * (Vol 23) 1936 All 477 (478). (Suit dismissed for default restored on condition of payment of costs to opposite party within particular time — Application for restoration to stand dismissed if costs not paid within period fixed — No payment made within time — Court ceases to be seized of matter and cannot extend period for payment under S. 148.) * (Vol 20) 1933 All 262 (264) : 55 All 326 (F B) (Time given for production of document by remand order can be extended under S 148, such order not being final order; affirming (Vol 20) 1933 All 261 on Letters Patent appeal.) * (Vol 20) 1933 All 157 (158). (Suit to redeem usufructuary mortgage—Preliminary decree passed conditional on plaintiff's depositing certain amount in Court within six months — In default suit to stand dismissed — No payment within time — Court held did not intend to pass final decree concluding suit and consequently it could extend time.) * (Vol 18) 1931 All 318 (319). (Decree ordering possession in favour of plaintiff—If deficit court-fee not paid within time fixed suit to stand dismissed—Default by plaintiff—Court is deprived of jurisdiction to extend time.) * (Vol 5) 1918 All 98 (99) : 40 All 579. (Dismissing from (Vol 4) 1917 All 164 (165) which held that where a decree is passed for possession conditional on the plaintiff's paying a certain sum within one month of the date of the decree, the Court which passed the decree has jurisdiction to extend the time.) * (Vol 26) 1939 Cal 581 (581, 582) : 1 L R (1939) 1 Cal 468 * (Vol 26) 1939 Cal 309 (309). (Application to set aside sale granted subject to applicant's depositing amount within certain period—Application to stand rejected on default — Upon applicant's failure to comply with order, Court has no jurisdiction to extend time for making deposit — S. 148 does not apply.) * (Vol 8) 1921 Lah 6 (7) (F B) * (Vol 28) 1941 Mad 706 (706, 707). (Order that in default of payment of certain sum within specified time, appeal would stand dismissed — Default in payment due to error of Court's officer — Application for extension of time — Court has no power to extend time under S. 148 but it can do so under S. 151 for ends of justice.) * (Vol 15) 1928 Mad 154 (157). (Order allowing application passed on certain condition providing dismissal if condition not fulfilled within time allowed — Condition not fulfilled — No further order is necessary to effect dismissal — Time cannot be extended.) * (Vol 13) 1926 Mad 1059 (1060) * (Vol 13) 1926 Mad 133 (134) * (1932) 1932 Mad W N 655 (659). (Order "security to be furnished on or before 4th February 1927, failing which appeal will be rejected" cannot be construed as final — Court can extend time under S. 148.) * (Vol 13) 1926 Nag 44 (47) : 21 Nag L R 111. (Court can extend time

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for payment of money antecedent to the passing of decree under S. 148) * (Vol 23) 1936 Oudh 125 (125, 126, 128): 11 Luck 241. (Application for restoration of an appeal dismissed in default allowed on condition of applicant depositing or paying to the opposite party certain sum within specific date—On failure to pay, appeal to stand dismissed—Failure by applicant—Court has no jurisdiction to extend time.) * (Vol 15) 1928 Oudh 492 (493). (Decree for pre-emption—Plaintiff to pay certain amount within fixed period—Plaintiff unsuccessfully appealing against decision—No prayer to Appellate Court to extend time — Plaintiff trying to deposit money after expiry of period — Court not accepting — Court is not bound to extend time as S. 148 relates only to proceedings antecedent to the passing of the final decree.) * (Vol 11) 1924 Oudh 330 (331). (Time fixed by decree which has become final cannot be extended.) * (Vol 11) 1924 Oudh 179 (179). (Section 148 does not apply after final decree is passed.) * (1941) 1941 Pat W N 516 (519). (Suit to stand dismissed if court-fee not paid within date fixed — Order is final — Court becomes *functus officio* — Time for paying court-fee cannot be extended.) * (Vol 27) 1940 Pat 50 (51, 52). (Court can extend time fixed by its decree when decree is not final.)

[5] The Court should not insert contingent clauses, like "the suit shall stand dismissed if deficient court-fee is not paid within 15 days" in the decree. The proper course is to fix the time and after its expiry make the decree final dismissing the suit. (Vol 21) 1934 Nag 109 (111): 30 Nag L R 258.

[6] Section 148 does not apply to decrees in pre-emption suits and the Court cannot extend the time fixed by the pre-emption decree for payment of the purchase money. (Vol 11) 1924 Lah 359 (359) * (1913) 35 All 582 (586) * (1912) 10 All L Jour 520 (521) * (Vol 10) 1923 Lah 162 (163) * (1911) 1911 Pun L R No. 22 p. 135 (136) * (Vol 10) 1923 Nag 210 (211): 19 Nag L R 8 * (Vol 21) 1934 Oudh 17 (17, 18): 9 Luck 215 * (Vol 7) 1920 Oudh 25 (29): 23 Oudh Cas 254 * (Vol 2) 1915 Oudh 197 (197, 198). (Even when application is made before expiry of time fixed by decree, time cannot be extended).

[But see (Vol 3) 1916 Pat 268 (269): 1 Pat L Jour 92.]

[7] Purchase-money due under a pre-emption decree was to be paid by the 10th December. Money was remitted by the 5th but it was not paid by the post office until the 6th January. Held that, the delay not being due to any fault of decree-holder, Court could extend time. (1913) 1913 Pun L R No. 58 page 208 (209): 1913 Pun Re No. 60.

[8] Pre-emption suit — Conditional decree on payment of certain sum within certain time passed—Appeal within time for payment preferred — Appellate Court can extend time for payment under O. 41, R. 32 (Vol 15) 1928 Oudh 32 (33): 2 Luck 425.

[9] Trial Court cannot extend time fixed by its pre-emption decree for payment of the purchase money. Appellate Court can do so by its decree and not by an interlocutory order under S. 148. (Vol 31) 1944 Pesh 22 (23).

[10] The Court, either original or appellate, has no power to extend the time fixed for payment while decreeing the specific performance of a contract of sale. (Vol 4) 1917 Mad 838 (838).

[11] Redemption suit — Court can extend time fixed in decree for payment of decretal amount only under O. 34, R. 8 and not under S. 148. (1912) 34 All 888 (890) * (1910) 7 Ind Cas 36 (38) (All).

[But see (Vol 2) 1915 Low Bur 100 (101). (Section 148 gives Court power to enlarge period of redemption if it thinks fit.)]

[12] Plaintiff in whose favour conditional decree was passed neither fulfilling condition within time allowed nor applying for extension — Plaintiff cannot execute decree. (Vol 11) 1924 Rang 375 (376).

3. Extension of time fixed by consent decree.—

[1] A Court can extend the time fixed in a consent decree for the doing of an act directed thereby where time is not of the essence of the contract of compromise. (Vol 8) 1921 Cal 356 (358, 359) * (Vol 6) 1919 Cal 68 (69) * (Vol 16) 1929 Nag 164 (169): 25 Nag L R 110. (Section 148 is no bar to extending time in compromise decree with independent and separately enforceable terms.) * (Vol 10) 1923 Nag 88 (90) * (Vol 12) 1925 Pat 691 (692). (Date of payment of decretal amount fixed by consent of parties — Sale to be cancelled on payment of money agreed — Time is essence of the compromise and cannot be extended by the Court.)

[But see (Vol 16) 1929 All 666 (666, 667). (Consent decree on condition that if defendant deposited certain amount within certain time suit shall stand dismissed or else it shall stand decreed — Defendant depositing amount but after period fixed — Court cannot extend time for making deposit as decree is final.) * (Vol 27) 1940 Mad 817 (818). (If a time stipulated, in a compromise decree, for the performance of an obligation is an essential part of the terms of the contract, embodied in the decree, and not a mere threat of a penal nature, there is no power in the Court to make a new contract for the parties fixing some other time.) * (Vol 21) 1934 Oudh 44 (45): 9 Luck 387. (Court cannot under S. 148 enlarge time fixed by a decree. The same rule applies to time fixed for payment of mortgage-money by a compromise mortgage decree.) * (Vol 20) 1933 Pat 563 (563, 564): 13 Pat 1. (Under S. 148 Court cannot extend time fixed for payment in a compromise decree as the payment is not an act prescribed or allowed by the Code.)]

4. Extension of time fixed by award. — See Notes on S. 28, Arbitration Act, 1940.**5. "Act prescribed or allowed by this Code."**

—[1] The words "act prescribed by this Code" in S. 148 refer to those matters, which, by the Code, are ordered to be done within a certain time. In those matters the Court has discretion under S. 148 to extend the time. (Vol 17) 1930 Pat 279 (280) * (Vol 20) 1933 Cal 20 (21). (Appellate decree allowing amendment of plaint on condition of payment of additional court-fee and costs of defendant—Time extended for both—Order is correct as to former though not so as to latter.) * (Vol 21) 1934 Lah 424 (425). (Counsel presenting appeal with insufficient stamp without any *bona fide* mistake — Extension of time cannot be granted.) * (Vol 20) 1933 Mad 563 (564). (Order of stay of delivery of possession conditional on payment of kist and rent by certain date made under inherent powers under S. 151 — S. 148 applies.) * (Vol 12) 1925 Pat 153 (154). (Time fixed for payment of costs on payment of which appeal was accepted cannot be extended as payment is not an act directed by the Code).

[2] Following are the provisions fixing time for doing an act under the Code: — S. 55 (4); S. 143; O. 6 R. 18; O. 7 R. 11 (b) and (c); O. 8 R. 9; O. 9 R. 9; O. 9 R. 13; O. 21 R. 17; O. 23 R. 1; O. 25 R. 1; O. 41 R. 3, 10, 19, 21 and 26; and O. 47, R. 7 (2).

[3] Insolvency Court can extend time fixed for applying for discharge even after the expiry of the period originally fixed. (Vol 12) 1925 Lah 416 (416).

[4] Court has no power under S. 148 to extend time fixed for making deposit provided under S. 174, Bengal Tenancy Act. (Vol 27) 1940 Cal 275 (276) * (Vol 26) 1939 Cal 30 (31, 32).

[5] Section 148 does not authorise the Court to grant extension of time for doing an act prescribed by Pro-

149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

[1882 cf. S. 582A.]

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vincial Small Cause Courts Act e. g. giving security or making deposit under S. 17 of that Act. (Vol 7) 1920 Pat 111 (112).

[6] Section 148 does not apply to the extension of time for deposit of printing charges under R. 13, Oudh Rules of Practice (Vol 6) 1919 Oudh 183 (184); 22 Oudh Cas 13.

6. Discretion of Court. — [1] The power to enlarge time under S. 148 is discretionary. (Vol 25) 1938 Mad 542 (543).

[2] The Appellate Court should not interfere with the discretion of the lower Court under S. 148 except in extreme cases. (Vol 12) 1925 Pat 299 (302); 4 Pat 190.

[3] Partition suit with prayer to set aside alienation — Final decree of High Court putting plaintiff in possession of share of property conditional on making deposit of certain amount and on failure to do so, suit to be dismissed — Amount not deposited deliberately within time allowed by trial Court and suit dismissed — Appellate Court cannot interfere with exercise of discretion by trial Court and grant further time. (Vol 21) 1934 Mad 82 (84).

[4] Litigants who are guilty of gross laches and who refuse to comply with the orders of the Court ought to be shown no indulgence under S. 148. (Vol 6) 1919 Pat 543 (545); 4 Pat L Jour 428.

[5] The discretion conferred by S. 148 of the Code cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which, by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under S. 5 or the fraud established under S. 18, Limitation Act. A Court arbitrarily granting an application for restoration of a suit long after the period of limitation has expired acts without jurisdiction and its order is open to revision. (Vol 6) 1919 Pat 543 (544, 545); 4 Pat L Jour 428. ((Vol 5) 1918 Pat 390; 3 Pat L Jour 376 distinguished.)

7. Implied extension of time. — [1] Where an application for execution was made just within the limitation period but was returned by Court for amendment of certain formal defects within a certain time and the application after amendment was re-filed after that time and beyond the limitation period, with a prayer that the delay might be excused in view of the circumstances stated therein and the Court accepted and acted upon the application, it was held that the Court had in effect enlarged the time in the exercise of its discretion under this section. (Vol 3) 1916 Cal 356 (357).

8. Court to which application for extension should be made. — [1] An Appellate Court only can modify the terms of the decree after it is appealed against and it is only that Court that can extend time fixed for execution or suspend the order made in it. (1910) 37 Cal 548 (550).

[2] Where an appeal has been dismissed the trial Court can enlarge the time fixed by the order appealed from. (Vol 22) 1935 Rang 500 (501).

9. Appeal. — [1] No appeal lies from an order under S. 148. (Vol 10) 1923 Lah 162 (163) * (Vol 22) 1935 Rang 500 (501).

[2] Under S. 148, Court cannot extend the time fixed by the pre-emption decree for payment of the purchase money. An order extending time fixed for payment

comes under S. 47 and is appealable as a decree. (1912) 10 All L Jour 520 (521).

10. Revision. — [1] A revision lies against an order dismissing an application under S. 148 for extension of time fixed for payment under the terms of a decree. (Vol 11) 1924 Oudh 330 (330).

[2] Order under S. 148 without jurisdiction — Court should not refuse to interfere in revision merely on ground of hardship to person adversely affected. (Vol 28) 1941 Mad 706 (706).

SECTION 149—SYNOPSIS

1. Applicability and scope.
2. Payment of court-fees after the period of limitation.
3. "Any document."
4. "For the time being in force."
5. Discretion of Court.
6. "Whole or any part of any fee."
7. "At any stage."
8. Power of appellate or revisional Court to interfere with the discretion of the lower Court.
9. Memoranda of appeals.
10. Application for leave to sue as pauper.
11. Power to call for court-fees after judgment is pronounced.
12. Extension of time by admission Court.
13. Revision.
14. Review.

1. Applicability and scope. — [1] Section 6 of Court-fees Act does not bar application of S. 149. (Vol 28) 1941 Nag 220 (221); 1 I L R (1941) Nag 467.

[2] Section 4, Court-fees Act, cannot be nullified by S. 149. (Vol 4) 1917 Pat 26 (27); 3 Pat L Jour 74.

[3] Section 149 does not control O. 7, R. 11. (Vol 4) 1917 Lah 377 (378); 1917 Pun Re No. 27.

[4] Payment of court-fee after presentation of plaint — Plaintiff takes effect as if presented with full court-fee on date of its first presentation — No question of limitation arises where plaint as originally filed is within time. (Vol 27) 1940 Mad 934 (936) * (Vol 24) 1937 Lah 111 (112) * (Vol 23) 1936 Lah 564 (566) * (Vol 20) 1933 Lah 598 (598, 599); 14 Lah 312. (Proper court-fee not affixed in appeal filed in time — Court giving time for making up court-fee — Dismissal of appeal as being time-barred for not having affixed proper court-fee at time of presentation is wrong.) * (Vol 19) 1932 Lah 21 (22) * (Vol 25) 1938 Mad 560 (562) * (Vol 3) 1916 Pat 136 (137, 138); 1 Pat L Jour 420.

2. Payment of court-fees after the period of limitation. — [1] Appeal presented on unstamped or insufficiently stamped paper — No order granting time passed under S. 149 — Presentation of appeal is not valid presentation. (Vol 25) 1938 Mad 316 (317) * (Vol 20) 1933 Cal 796 (797).

[2] Suit presented to Senior Sub-Judge being officer for distributing plaints — Plaintiff being insufficiently stamped he called upon plaintiff to make up deficiency within certain time — Deficiency made up but at such time when suit was barred by time and plaintiff then sent to proper Court — Suit having reached trial Court pro-

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perly stamped, fact of Senior Subordinate Judge extending time to make up deficiency, though not authorized to do so, held was immaterial — Suit held to be in time. (Vol 24) 1937 Lah 392 (393).

[3] Court calling upon plaintiff to pay deficient court-fee within certain time — Plaintiff failing to do so — Deficiency made good after period of limitation — Suit will be barred. (1911) 13 Cal L Jour 78 (80).

[4] Plaint presented within limitation — Deficiency in court-fee made good beyond limitation — Court accepting same — Court must be deemed to have granted time by such acceptance. (Vol 24) 1937 Lah 111 (112) * (Vol 21) 1934 Lah 701 (703) * (Vol 7) 1920 Pat 170 (170).

3. "Any document." — [1] Section applies to an application to set aside an award. (Vol 15) 1928 Sind 87 (88) : 23 Sind L R 91.

[2] Section 149 applies to written statement claiming set-off. (Vol 22) 1935 Pat 110 (111).

4. "For the time being in force." — [1] Court-fee payable according to the law "for the time being in force" must mean the court-fee payable according to the scale which was in force when the document was filed. (Vol 19) 1932 Oudh 343 (344).

5. Discretion of Court. — [1] Court will not exercise its discretion under S. 149 unless it is satisfied that some grounds exist for the exercise of its discretion and a *bona fide* mistake has been made in the valuation. (Vol 5) 1918 Cal 193 (194) * (Vol 19) 1932 Cal 482 (484, 485) : 59 Cal 388. (Memorandum of appeal deliberately stamped insufficiently should be returned forthwith.) * (Vol 1) 1914 Cal 735 (736) : 41 Cal 1092 * (1913) 21 Ind Cas 866 (867) (Cal). (Regular appeal filed as miscellaneous appeal with Rs. 2 stamp owing to *bona fide* mistake.) * (Vol 21) 1934 Lah 424 (425). (Counsel presenting appeal with insufficient stamp — Mistake pointed out but counsel persisting that court-fee paid was adequate — Question being simple one — Mistake is not *bona fide*.) * (Vol 13) 1926 Lah 509 (510). (Appellant misled by error of Court and paying insufficient court-fee due to *bona fide* mistake is protected.) * (Vol 12) 1925 Lah 246 (246). (Deficit court-fee made up after limitation — Deficiency caused unintentionally — Limitation bar was excused.) * (Vol 11) 1924 Lah 325 (327). (Insufficiency of court-fee brought to the notice of appellant's pleader while filing the appeal — Deliberate refusal to pay — No extension should be allowed.) * (Vol 10) 1923 Lah 629 (630) * (Vol 10) 1923 Lah 309 (309). (Deliberate under-payment — Time should not be extended for supplying deficiency.) * (Vol 10) 1923 Lah 135 (137). (Deficient court-fee paid on memorandum of appeal owing to *bona fide* mistake — Time can be extended.) * (Vol 9) 1922 Lah 440 (441). (No *bona fide* mistake — Time cannot be extended.) * (Vol 8) 1921 Lah 43 (43) * (Vol 7) 1920 Lah 92 (93) : 1 Lah 234. (In case of deliberate attempt to avoid or defer payment as much as possible no time to pay deficit court-fee can be granted.) * (Vol 6) 1919 Lah 280 (281) : 1919 Pun Re No. 10 * (Vol 6) 1919 Lah 62 (63) * (1936) 38 Pun L R 262 (263) * (Vol 16) 1929 Nag 294 (295). (Appellant not caring to find out proper court-fee payable on memorandum of appeal — Discretion cannot be exercised.) * (Vol 16) 1929 Pat 731 (732) : 8 Pat. 906. (Appellant paying deficient fee — Court may not allow to make up deficiency in case there is no doubt or honest attempt to comply with law.) * (Vol 9) 1922 Pat 56 (56) * (Vol 4) 1917 Pat 26 (27) : 3 Pat L Jour 74. (Appellant deliberately paying insufficient court-fee.) * (1923) 73 Ind Cas 788 (791) (Pesh).

[But see (Vol 1) 1914 Bom 249 (250, 251) : 38 Bom 41. (Concession in S. 149 is not restricted to cases of

bona fide misunderstanding of law as to valuation — Court should have free discretion in matter.)

[2] Under S. 149 Court has judicial discretion to grant time to make good deficient court-fee. (Vol 28) 1941 Oudh 30 (31).

[3] Discretion under S. 149 should be exercised in favour of litigant except in cases of contumacy or positive mala fides. (Vol 25) 1938 Lah 361 (365) (F B).

[4] Appeals without proper court-fee accepted by Court without objection — Question of court-fee not free from doubt — No deliberate attempt to avoid payment — Held time could be allowed to pay proper court-fee. (Vol 22) 1935 Lah 448 (450) : 17 Lah 122.

[5] Court-fee on objections to award not paid through inadvertence, owing to *bona fide* mistake of party's counsel — Requisite court-fee paid at earliest opportunity — Court should accept it under S. 149. (Vol 24) 1937 Lah 276 (276).

[6] Appeal filed within time on insufficient stamp on basis of valuation of suit — Appellant making good deficiency within time allowed but after limitation — Appeal is not barred — Delay can be condoned under S. 149. (Vol 24) 1937 Lah 688 (688).

[7] Memorandum of appeal insufficiently stamped accepted by Court by inadvertence — Appellant appearing to have made honest attempt to comply with law — Court may allow time to make up deficiency. (Vol 26) 1939 Pat 83 (85) : 17 Pat 687.

[8] Permission to deposit deficit court-fees must be given by the Court after considering the circumstances of the case and the reason for not filing the complete court-fee in the first instance. (1921) 60 Ind Cas 493 (495) (Pat) * (1911) 13 Cal L Jour 78 (83) * (Vol 7) 1920 Pat 818 (820).

[See (Vol 25) 1938 Nag 322 (323). (Substantial court-fee paid in time — Discretion to grant extension is matter for the Court — No question whether there was sufficient cause for failure.)]

[9] Inability to raise money is not sufficient ground for permitting payment of deficit court-fee. (Vol 21) 1934 Cal 659 (660) : 81 Cal 663 * (Vol 6) 1919 Lah 252 (253). (Poverty is not sufficient ground.) * (Vol 22) 1935 Rang 336 (339) : 13 Rang 50.

[See (Vol 28) 1941 Oudh 30 (31, 32). (Application showing no reason for grant of time but merely stating that applicant had not got amount of necessary court-fee without offering explanation — Refusal to grant time held justified.)]

[10] Discretion under S. 149 should not be exercised in favour of litigant who does not show reasonable diligence in prosecution of case. (1913) 1913 Pun L R No. 180, p. 464 : 1913 Pun Re No. 55. (Appeal was filed with deficient court-fees, on a certain date and the deficiency was made up one year after — Held, the appeal should be dismissed.) * (Vol 23) 1936 Lah 935 (936). (Deficient court-fee — Application for extension of time to make up deficiency not made till after about 7 months after its discovery — Appeal barred during that time — Mistake of counsel not *bona fide* — No extension should be granted.) * (Vol 18) 1931 Lah 343 (343). (Question of insufficient court-fee brought to notice of party — Deficiency not removed — No more time for making up deficiency can be granted.) * (1932) 33 Pun L R 187 (188). (Value of suit raised at the instance of a party — Deficiency in court-fee brought to his notice — Court fees not paid for a long time — Extension of time for making up the deficiency will not be granted.) * (Vol 30) 1943 Pesh 43 (45). (Court-fee not paid in first instance through negligence — Time held could not be extended.)

[11] Difficulty in procuring necessary court-fee is sufficient cause for delay. (Vol 4) 1917 Pat 26 (27) : 3 Pat L Jour 74 * (Vol 11) 1924 Pat 663 (663, 664) : 3

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Pat 337. (Court-fee stamp not filed in time because of Stamp Vendor having no stamp—Time was extended.)

[12] Insufficient court-fee on memorandum of appeal according to old practice — Change of practice — Deficiency made up — Time was extended. (Vol 16) 1929 Lah 748 (748).

[13] Amount of court-fee controversial — Appellant showing reasonable cause for not paying requisite court-fee — Time should be extended. (Vol 17) 1930 Lah 24 (26).

6. "Whole or any part of any fee."—[1] Discretion under S. 149 is given to Court even where no part of court-fee has been paid. (Vol 16) 1929 P C 147 (148) : 56 Ind App 232 : 10 Lah 737 (PC) * (Vol 22) 1935 Pat 110 (111). (Court is not debarred from going into question of set-off if proper court-fee is not paid—It can do so and ask party to pay it at any time.)

[2] Section 149 contemplates cases in which payment of duty is insufficient *ab initio* and not those under S. 11, para. 2, Court-fees Act, (Vol 3) 1916 Mad 224 (227). [See also (1911) 13 Cal L Jour 432 (433). (In such cases under S. 11., Court-fees Act, Court can enlarge time originally fixed.)]

[8] Appeal insufficiently stamped — Court refusing indulgence under S. 149 and dismissing appeal as time barred — Court should have heard appeal so far as court-fee was paid and was within time. (Vol 18) 1931 Lah 237 (238).

7. "At any stage."—[1] Under S. 149 Court has power to allow payment of court-fee at any time — Deficiency in court-fee made within time allowed by Court — Plaintiff is validated retrospectively from date of presentation. (Vol 16) 1929 P C 147 (148) : 56 Ind App 232 : 10 Lah 737 (P C) * (Vol 21) 1934 All 160 (160) * (Vol 10) 1923 All 588 (588) : 45 All 518 * (Vol 1) 1914 All 216 (216) * (1907) 29 All 749 (772) (F B) * (Vol 3) 1916 Cal 616 (616) * (1909) 3 Ind Cas 435 (436) (Cal) * (Vol 13) 1926 Lah 346 (347) * (Vol 2) 1915 Mad 426 (427). (Court can allow payment of court-fee at any time.) * (Vol 13) 1926 Nag 156 (158). (Court can grant time to pay deficient court-fee before or after registration of plaintiff.) * (Vol 23) 1936 Oudh 340 (354) * (Vol 22) 1935 Oudh 231 (232) : 10 Luck 569 * (Vol 24) 1937 Pat 550 (553) : 16 Pat 600 (S B) * (Vol 22) 1935 Pat 201 (201) * (Vol 3) 1916 Pat 136 (137, 138) : 1 Pat L Jour 420.

[See (Vol 22) 1935 All 985 (986). (Deficiency of court-fees ordered to be made good — Court rejecting plaintiff under O. 7, R. 11.—Plaintiff filing restoration application, after making good deficient court-fee — Court can treat such application as fresh plaintiff and can allow court-fee paid on rejected plaintiff to be counted towards court-fee on fresh plaintiff under Ss. 149 and 151.)]

[2] The Court can extend time to put in the insufficient court-fee on a plaintiff, after the expiry of the time originally granted. (1910) 12 Cal L Jour 62 (64) * (Vol 23) 1936 Cal 221 (223) * (Vol 9) 1922 Cal 234 (234) * (1909) 2 Ind Cas 1 (2) (Cal) * (Vol 21) 1934 Lah 537 (538) * (Vol 13) 1926 Mad 676 (677).

[See (Vol 12) 1925 Pat 299 (303) : 4 Pat 190. (Accepting deficit court-fee after time fixed is equal to extending time.)]

[3] Decree passed conditional on plaintiff's paying deficit court fee within certain time—Time cannot be extended except upon review. (Vo 10) 1923 Lah 372 (373).

[4] Appellate Court directing plaintiff to pay deficit court-fees within particular period — Suit to stand dismissed in case of failure to pay court-fees — Plaintiff applying for extension of time before expiry of period—Court can extend time under S. 149. (Vol 23) 1936 Cal 245 (246) * (1938) 40 Pun L R 33 (35).

[5] Execution application in time—Court-fee payable

in decree but no time fixed for payment—Court-fee paid late—Application is not time barred and Court can allow time. (Vol 24) 1937 Lah 720 (720).

[6] Decree passed on condition that court-fees were to be deposited—Court accepting court-fees paid more than three years after decree — Limitation starts only from date decree becomes complete by payment of such court-fees. (Vol 25) 1938 All 539 (540) : I L R (1938) All 848.

8. Power of appellate or revisional Court to interfere with the discretion of the lower Court. — [1] An Appellate Court cannot question the propriety of an order under S. 149 for the payment of the deficit court-fee if the order is not objected to when made or in the Court which made it. (Vol 7) 1920 Pat 281 (282).

[2] Appellate Court should not interfere save in extreme cases with the discretion exercised under S. 149. (Vol 12) 1925 Pat 299 (302) : 4 Pat 190 * (Vol 3) 1916 Cal 616 (616) * (Vol 13) 1926 Nag 156 (157).

[3] Court acting under S. 149 should be presumed to have exercised real discretion and Appellate Court should not go into question whether it exercised discretion. (Vol 25) 1938 Mad 542 (544).

[4] Appellate Court not exercising its discretion as regards granting time to make deficiency in court-fees and rejecting memorandum of appeal — Order will be set aside in second appeal. (Vol 10) 1923 All 349 (349).

[5] Suit by plaintiff for possession of his share in house — At advanced stage of suit, defendant raising plea that value of house was much more — Plaintiff is entitled to extension of time to make good deficiency in court-fee — Refusal to grant extension amounts to improper exercise of discretion. (Vol 28) 1941 Nag 304 (305) : I L R (1941) Nag 629.

[6] Written statement by defendant claiming set off accepted although not stamped — Court subsequently directing payment of court-fees — Court-fees still deficient—High Court can in second appeal direct payment of additional court-fee. (Vol 23) 1936 Cal 277 (278).

9. Memoranda of appeals. — [1] Appeal memo insufficiently stamped — Court has discretion under S. 149 to grant time to make up deficiency — S. 149 is general rule while O. 7, R. 11 is particular and applies to plaintiffs only. (Vol 28) 1941 Pesh 69 (72) * (Vol 5) 1918 Cal 193 (194) * (Vol 6) 1919 Lah 280 (281) : 1919 Pun Re No. 10.

10. Application for leave to sue as pauper. — [1] Application to sue as pauper rejected under O. 33, R. 5 — Court can while rejecting application allow plaintiff to pay court-fees under S. 149. (Vol 23) 1936 All 584 (592) : I L R (1937) All 22 (F B) * (Vol 30) 1943 Bom 292 (296) * (Vol 31) 1944 Nag 357 (359) : I L R (1944) Nag 623.

[2] Court deciding to refuse to allow applicant to sue as pauper under O. 33, R. 7—Court may either before or at the time of passing order under R. 7 allow applicant time to pay court-fee under S. 149. (Vol 30) 1943 Bom 292 (296) * (Vol 25) 1938 Lah 41 (42). (Application to sue as pauper rejected — Simultaneous order to pay court-fee by certain date.) * (Vol 31) 1944 Nag 357 (359) : I L R (1944) Nag 623.

[But see (Vol 23) 1936 All 584 (592) : I L R (1937) All 22 (F B).]

[3] Application to sue as pauper rejected under O. 33, R. 5 or refused under O. 33, R. 7—Court cannot after rejecting or refusing application allow court-fees to be paid under S. 149 and treat application as plaintiff. (Vol 23) 1936 All 584 (592) : I L R (1937) All 22 (F B) * (Vol 31) 1944 Bom 63 (64, 65) : I L R (1943) Bom 721 (Applicant must file fresh suit under O. 33, R. 15.) * (Vol 30) 1943 Bom 292 (296) * (Vol 26) 1939 Cal 394 (398) : I L R (1939) 2 Cal 68 * (Vol 24) 1937 Lah 151

150. Save as otherwise provided, where the business of any Court is transferred to any other *Transfer of business.* Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Section 149 (contd.)

(153, 154): 17 Lah 831* (Vol 26) 1939 Mad 316 (317)* (Vol 20) 1933 Nag 237 (238)* (Vol 16) 1929 Nag 268 (269)* (Vol 25) 1938 Pat 120 (123): 17 Pat 281* (Vol 24) 1937 Rang 185 (187, 188, 189): 1937 Rang L R 331.

[But see (Vol 25) 1938 Cal 730 (734): I L R (1939) 1 Cal 112 * (Vol 23) 1936 Cal 28 (29): 62 Cal 711 * (Vol 30) 1943 Mad 646 (646)* (Vol 22) 1935 Mad 878 (880)* (Vol 21) 1934 Mad 467 (469): 58 Mad 169 * (Vol 11) 1924 Mad 118 (119)* (Vol 5) 1918 Mad 1039 (1039, 1040, 1043, 1044): 40 Mad 687 * (Vol 16) 1929 Pat 637 (639): 9 Pat 439.]

[4] Application to sue as pauper refused — Regular suit under O. 33, R. 15 filed — Suit must be taken as instituted on day it is actually filed — Plaintiff cannot avail himself of time spent in pauper proceedings to save limitation (Vol 30) 1943 Bom 292 (297)* (Vol 26) 1939 Cal 394 (398): I L R (1939) 2 Cal 68. (Application to sue as pauper not *bona fide*.)

[5] Petition to sue as pauper — Applicant subsequently paying court-fee and his petition allowed to be registered — Suit is deemed to have been filed on the day he presented his pauper petition. (1880) 2 All 241 (251): 6 Ind App 126 (P C)* (Vol 24) 1937 Nag 36 (37): I L R (1938) Nag 133 * (Vol 9) 1922 Nag 160 (161): 18 Nag L R 44 * (Vol 27) 1940 Oudh 59 (61, 62): 15 Luck 68. (Application for leave to sue in *forma pauperis* — Pending application, Court on request of applicant granting time to pay court-fee under S. 149 — Suit for purposes of limitation should be regarded as instituted on date when application for leave to sue is made and not on date when court-fees paid.) * (Vol 29) 1942 Pesh 27 (27).

[See however (Vol 10) 1923 Rang 256 (257): 1 Rang 196. (Application fraudulent)]

11. Power to call for court-fees after judgment is pronounced. — [1] Order stating that in event of court-fee not being paid by certain date suit will stand dismissed is final — Court cannot extend time under S. 149. (Vol 29) 1942 Pat 234 (235)* (Vol 5) 1918 All 98 (99): 40 All 579 * (Vol 33) 1946 Oudh 52 (52)* (Vol 29) 1942 Pat 302 (303).

[2] After the decision of the suit the trial Court is no longer seized of the case and has no jurisdiction to require the plaintiff to make good the deficiency in court-fee. (Vol 20) 1933 Lah 208 (208)* (Vol 19) 1932 All 316 (317)* (Vol 20) 1933 Mad 321 (321)* (Vol 19) 1932 Pat 228 (231): 11 Pat 532.

12. Extension of time by admission Court. — [1] Single Judge cannot allow revision to be converted into an appeal, which has to be heard by Division Bench, on payment of court-fee — Such payment though within time fixed will not save appeal from bar of limitation. (Vol 9) 1922 Lah 233 (234): 2 Lah 1.

[2] An order of admission Court excusing delay in payment of deficient court-fee on appeal is, according to the practice of the High Court of Madras, made subject to objection before the Court hearing the appeal. (Vol 1) 1914 Mad 386 (386).

[3] Memo of appeal presented on last day of limitation on insufficient stamp — On report by office, deficiency made up — Single Judge allowing to receive deficiency — Bench admitting appeal under O. 41, R. 11 — Paper book prepared and case coming for hearing — Preliminary objection that no valid appeal filed — Order of Single Judge held could not be questioned at such late stage. (Vol 20) 1933 All 572 (573, 574).

13. Revision. — [1] Order to pay additional court-fee — No revision lies — Dismissal for non-payment of court-fee — Appeal lies. (Vol 6) 1919 Cal 840 (841)* (Vol 8) 1921 Pat 180 (180): 5 Pat L Jour 400.

[But see (Vol 29) 1942 Mad 585 (585)* (Vol 14) 1927 Nag 256 (258).]

[2] Court refusing to extend time for payment of deficient court-fee on ground of want of power fails to exercise jurisdiction within S. 115 — Order is open to revision. (Vol 21) 1934 Lah 537 (538).

[See also (1936) 38 Pun L R 1163 (1164). (Objections to an award filed without stamp — Court must grant time for making up the court-fee — Not doing so is acting with material irregularity.)]

[3] Court has no inherent power to amend decree for extending time to pay deficit court-fee — If it does so, High Court will interfere in revision. (Vol 10) 1923 Cal 612 (614).

14. Review. — [1] Insufficiently stamped plaint filed on last date of limitation with application for extension of time to pay full court-fees — Court granting time and admitting plaint — On date of hearing of suit defendant contended that order was obtained by plaintiff under false pretences — Court reviewing its previous order and finding defendant's contention true, rejected plaint as time-barred — Court held had power to review its order granting extension of time. (Vol 24) 1937 Nag 87 (87, 88): I L R (1938) Nag 359.

[2] Extension of time to pay deficient court-fees granted under S. 149, even after rejection of plaint — Order granting extension not set aside by superior Court in review or revision — Order whether right or wrong stands and suit cannot be dismissed as time-barred. (Vol 28) 1939 Cal 722 (722).

[3] Accepting deficient court-fees after time fixed — Review lies. (Vol 13) 1926 Mad 676 (677).

SECTION 150 — SYNOPSIS

1a. Object of the section.

1. "Save as otherwise provided."
2. Transfer of business.
3. Abolition of Court.

1a Object of the section. — [1] Section 150 has been framed to meet the difficulties, which sometimes arise, on account of the abolition of any Court, or the transfer of any local area from the jurisdiction of one Court to that of another Court in consequence of which the business of one Court is transferred to another Court. (Vol 24) 1937 All 515 (522): I L R (1937) All 670.

1. "Save as otherwise provided." — [1] The words "save as otherwise provided" in S. 150 only mean that the Court, to which the business is transferred, will have all the powers, unless it is expressly or impliedly provided that no Court, other than the one specified, can exercise the power. (Vol 29) 1942 Oudh 226 (229): 17 Luck 739. (Oudh Chief Court can amend decree of Judicial Commissioner's Court.)

[2] Words "save as otherwise provided" do not exclude execution cases from purview of section. (Vol 7) 1920 Cal 532 (533): 47 Cal 1100. (Preliminary decree passed by Munsif — Successor not having power, final decree passed by Sub-Judge — Munsif in meantime obtaining power — He can execute decree.)

[3] Section 150 enables decree-holder to file execution petition in the first instance in Court to which business has been transferred. (Vol 8) 1921 Pat 152 (155).

151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Section 150 (contd.)

(Transfer of business must be proved for section to apply.) * (Vol 19) 1932 Mad 260 (262, 263).

[4] Whole business of Court passing *ex parte* decree transferred to another Court—Latter Court has jurisdiction to set aside *ex parte* decree. (Vol 9) 1922 Mad 10 (11) : 46 Mad 1.

2. Transfer of business.—[1] Section 150 refers only to case where business is actually transferred. (Vol 15) 1928 Mad 746 (749).

[2] High Court notification effecting change of venue and of jurisdiction cannot be interpreted as effecting transfer of past business under S. 150. (Vol 19) 1932 Mad 418 (421) : 55 Mad 801 (S B).

[3] Notification regarding re-distribution of territorial jurisdiction made applicable only to future business and not to pending cases—S. 150 does not apply to application under S. 144 arising out of pending suit. (Vol 24) 1937 All 515 (522) : I L R (1937) All 670.

[4] The word "transfer" in S. 150 is not confined only to transfer made under special provisions of Civil P. C., such as S. 24, but it covers transfers of a local area from the jurisdiction of one Court to another. (Vol 24) 1937 All 515 (522) : I L R (1937) All 670.

[5] Court passing decree can execute same although it has lost territorial jurisdiction. (Vol 7) 1920 Mad 427 (431) : 42 Mad 821 (F B) * (Vol 19) 1932 Mad 418 (419, 420) : 55 Mad 801 (S B). ((Vol 1) 1914 Mad 162 : 37 Mad 462, held overruled in (Vol 7) 1920 Mad 427 : 42 Mad 821 (F B); (Vol 14) 1927 Mad 627 : 50 Mad 882 which is opposed to (Vol 7) 1920 Mad 427 : 42 Mad 821 (F B) held no longer good law.) * (Vol 15) 1928 Mad 746 (749).

[6] Mortgage decree—Subsequent transfer of territorial jurisdiction—Second Court cannot execute decree without its transmission by first Court. (Vol 19) 1932 Mad 418 (419) : 55 Mad 801 (S B) * (Vol 17) 1930 Mad 528 (530) : 53 Mad 378 * (Vol 15) 1928 Mad 746 (750, 751) * (Vol 5) 1918 Mad 1140 (1142).

[7] An assignment of business under Civil Courts Act is not a transfer of business within the meaning of S. 150. (Vol 29) 1942 Cal 321 (323) : I L R (1942) I Cal 289 * (1935) 61 Cal L Jour 543 (544) * (Vol 9) 1922 Cal 41 (41) * (Vol 8) 1921 Pat 152 (154).

[But see (Vol 10) 1923 Mad 92 (94) : 46 Mad 83.]

[8] Court which passed decree transferred to another province but property covered by decree retained in original province—Business of former Court held transferred to Court in latter province. (Vol 30) 1943 Mad 617 (625).

[9] Section 150 applies not only when the whole of the business of the Court with reference to the whole of its jurisdiction is transferred to another Court, but also to a case of partial adjustment of jurisdiction and transfer of its business with reference to that part alone to another Court (Vol 9) 1922 Mad 10 (11) : 46 Mad 1.

3. Abolition of Court.—[1] Court in which suit was filed abolished—On abolition, Court in which suit might have been instituted has jurisdiction to continue suit. (1912) 13 Ind Cas 542 (543, 544) (Cal).

[2] Court passing decree abolished and re-established—It can execute decree if it can try the suit to which decree relates. (Vol 13) 1926 Pat 209 (209) : 4 Pat 688.

[3] Court passing decree abolished—Court to which its business is transferred is competent to execute decree. (Vol 16) 1929 All 677 (680).

[4] In Punjab Court of District is essentially new Court and not merely successor or transferee of business of Court of former Divisional Judge—Former Court cannot

continue proceedings instituted in latter Court. (Vol 2) 1915 Lah 171 (172) : 1915 Pun Re No. 30.

[5] Section 150 only applies to cases of transfer from a Court and not to cases of a Court ceasing to exist. (Vol 14) 1927 Mad 627 (628) : 50 Mad 882.

SECTION 151 — SYNOPSIS

1. Inherent power.
2. Court cannot override express provisions of law.
3. Ex parte decisions and suits dismissed for default.
4. Interim injunctions and appointment of receivers.
5. Remand.
6. Joinder of parties.
7. Stay of execution and other proceedings.
8. Setting aside execution sales.
9. Court cannot override general principles of law.
10. Ends of justice.
11. Abuse of the process of the Court.
12. Criminal cases.
13. Contempt of Court.
14. Insolvency Court.
15. Reinstatement of legal practitioner dismissed from profession.
16. Appeal.
17. Revision.

1. Inherent power.—[1] The Court has power to act under this section in cases which are not covered by the express provisions of the Code and where-in justice has to be done. (1906) 33 Cal 927 (932) * (1906) 33 Cal 1094 (1098) * (1895) 17 All 29 (31) * (Vol 15) 1928 Pat 187 (188) * (Vol 17) 1930 Lah 20 (21) : 11 Lah 93 * (Vol 5) 1918 Mad 580 (584) : 40 Mad 1069 (F B).

[2] The Court may act under this section where prescribed rules of procedure are abused, or used to give a mere formality the significance of substantive effect. (Vol 10) 1923 P C 128 (135) : 50 Ind App 183 : 2 Pat 676 (P C) * (Vol 15) 1928 P C 261 (262) (P C).

[3] The Court is not powerless to do justice or redress a wrong merely because there is no express provision of the Code to meet the requirements of a case. (Vol 29) 1942 Pat 185 (187) * (Vol 27) 1940 Rang 162 (167) : 1940 Rang L R 512 (F B) * (1897) 19 All 155 (164) : 24 Ind App 22 (P C) * (1909) 36 Cal 193 (204) * (1898) 15 All 84 (95) (F B) * (Vol 11) 1924 Bom 90 (92, 93). (No reported decision.)

[4] Courts are to act upon the principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed. (1883) 5 All 163 (172) (F B).

[5] Every Court must, in the absence of express provision, be deemed to possess all such powers as are necessary to do the right and to undo a wrong. (1856) 6 Moo Ind App 393 (410, 411) (P O).

[6] Where there is no express provision, the Court has inherent power to determine how its proceedings should be conducted. (Vol 20) 1933 P C 43 (44, 45) (P C).

[7] The Court has an inherent power to act according to justice, equity and good conscience, especially in India, where every Court is a Court of equity as well as of law. (Vol 26) 1939 All 668 (669) * (Vol 12) 1925

Section 151 (*contd.*)

All 280 (281, 282) : 47 All 538 * (Vol 19) 1932 Mad 263 (264) * (Vol 15) 1928 Oudh 262 (263) * (Vol 1) 1914 Cal 129 (131) : 41 Cal 137 * (Vol 11) 1924 Bom 231 (231) : 47 Bom 593 * (Vol 12) 1925 Oudh 264 (265) * (Vol 17) 1930 Mad 618 (621) : 53 Mad 533 * (Vol 23) 1936 Bom 250 (255) : 60 Bom 645.

[8] Section 151 is not one of the sections open to Commissioner under the Workmen's Compensation Act. (Vol 17) 1930 Lah 657 (658).

[9] This section saves the inherent powers of the Courts to make orders necessary for the ends of justice. (1913) 35 All 331 (336, 337) : 40 Ind App 151 : 16 Oudh Cas 194 (P C) * (Vol 22) 1935 All 599 (599) : 57 All 977 (F B) * (Vol 23) 1936 Rang 208 (210) : 14 Rang 173 (F B).

[10] The inherent powers of the Court are very wide and indefinable. (Vol 11) 1924 Oudh 11 (13). (It is dangerous to attempt definition of the inherent powers of the Court.)

[11] The inherent jurisdiction should be exercised carefully and not in an arbitrary and capricious manner. (Vol 28) 1941 All 314 (315, 316) : I L R (1941) All 612 * (Vol 28) 1941 Pesh 34 (36) * (Vol 27) 1940 Oudh 298 (300) * (Vol 7) 1920 Pat 56 (59) * (1913) 40 Cal 955 (959) * (Vol 23) 1936 Rang 208 (210) : 14 Rang 173 (F B) * (Vol 29) 1942 Cal 390 (393).

[11a] Where there are express provisions of law there is no inherent power in the Court to override them. (Vol 27) 1940 Nag 349 (351) : I L R (1940) Nag 538 * (Vol 1) 1914 All 314 (316) : 36 All 354 * (Vol 21) 1934 Mad 199 (200, 201) : 57 Mad 635 * (Vol 19) 1932 Lah 443 (443) * (Vol 20) 1933 Sind 29 (31) : 26 Sind L R 395 * (Vol 22) 1935 Cal 707 (709) * (Vol 23) 1936 Bom 250 (255) : 60 Bom 645 * (Vol 26) 1939 Sind 137 (142) : I L R (1939) Kar 330 * (Vol 30) 1943 Oudh 136 (138) * (Vol 16) 1929 Lah 694 (695) * (Vol 12) 1925 Mad 42 (44) : 48 Mad 494 * (Vol 14) 1927 Cal 657 (658) * (Vol 21) 1934 Pat 582 (582).

[12] The exercise of inherent power by the Court must be consistent with general principles of law, and with the intention of the Legislature. (1906) 33 Cal 927 (931) * (1910) 37 Cal 399 (404) * (Vol 23) 1936 Rang 208 (210) : 14 Rang 173 (F B).

[13] The inherent powers can be exercised only for the ends of justice or to prevent the abuse of the process of the Court. (Vol 29) 1942 Oudh 189 (193) : 17 Luak 297 * (Vol 27) 1940 Rang 162 (167) : 1940 Rang L R 512 (F B) * (Vol 15) 1928 Mad 522 (523) * (Vol 9) 1922 Sind 6 (9) : 16 Sind L R 79 * (Vol 2) 1915 All 172 (173) : 37 All 380.

[14] The Court has a special inherent jurisdiction derived from the Crown as *parens patrie* to protect the interests of minors. (Vol 29) 1942 All 150 (152) : I L R (1942) All 144.

[15] Section 151 does not confer upon a Court the power to exercise a jurisdiction which it does not otherwise possess (Vol 32) 1945 Mad 103 (104).

2. Court cannot override express provisions of law.—[1] The inherent power of a Court exists only where there is no express provision of law applicable to the case. (Vol 30) 1943 Cal 361 (367) * (Vol 30) 1943 Mad 235 (236) * (Vol 29) 1942 Pat 328 (328) * (Vol 31) 1944 Lah 76 (87) (F B). (Order 41, R. 20.) * (Vol 32) 1945 Oudh 96 (101) * (1876) 2 Cal 233 (261) : 4 Ind App 23 (P C).

[2] Where there is a specific prohibition of a particular act or order, the Court cannot do the act or make the order under its inherent powers. (Vol 27) 1940 Rang 156 (156) : 1940 Rang L R 392 * (Vol 2) 1915 Cal 137 (140) * (Vol 11) 1924 Oudh 420 (421) : 27 Oudh Cas 187 * (Vol 23) 1936 Bom 250 (255) : 60 Bom 645 * (Vol 25) 1938 Mad 67 (67).

[3] Where a decree is silent as to further interest after date of decree, the Court cannot grant it under its inherent powers. (Vol 11) 1924 Rang 275 (277).

[4] No appeal can be allowed from a non-appealable order, under the inherent powers of the Court. (Vol 27) 1940 Bom 10 (11, 12) : I L R (1939) Bom 708. (Order refusing to amend decree.) * (Vol 10) 1923 Oudh 177 (179) : 26 Oudh Cas 10.

[5] A Court cannot, under its inherent powers, set aside its own decree or recall an order made by it previously or question the validity of a decree in execution. (Vol 28) 1941 Lah 419 (419, 420) : I L R (1942) Lah 212 * (Vol 12) 1925 Pat 47 (47) : 3 Pat 654 * (Vol 20) 1933 Bom 244 (244, 245) : 57 Bom 369 * (Vol 12) 1925 Pat 36 (36) : 3 Pat 778 * (Vol 10) 1923 All 603 (603) * (Vol 9) 1922 Mad 186 (186) * (Vol 8) 1921 Bom 301 (302) : 45 Bom 459 * (Vol 4) 1917 Mad 290 (292) * (Vol 11) 1924 All 62 (62) : 45 All 628 * (Vol 10) 1923 Pat 354 (355) : 2 Pat 504 * (1932) 136 Ind Cas 253 (254) (Oudh).

[See (Vol 27) 1940 Oudh 298 (300).]

[But see (Vol 21) 1934 Nag 234 (235) : 31 Nag L R 53. (Order 20, R. 3 is not exhaustive and it is the duty of a Court to invoke its inherent powers to correct errors that have led to injustice through no fault of a party.) * (Vol 21) 1934 Rang 108 (109). (Decree as per compromise when the compromise and joint statements prayed for dismissal amended — No review or suit needed.) * (Vol 21) 1934 All 287 (288). (Order under misapprehension of facts — True facts known — Corrected.)]

[6] An order under R. 58 of O. 21, even though it be a dismissal for default, cannot be set aside under inherent powers. (Vol 21) 1934 Mad 699 (699) * (Vol 23) 1936 Pesh 115 (116).

[7] A Court cannot set aside a sale of moveable property for an irregularity in publishing or conducting the sale. (Vol 17) 1930 All 513 (513).

[8] No application for review can be entertained in respect of any decree or order passed in a suit under S. 9 of the Specific Relief Act. (Vol 5) 1918 Cal 925 (927) : 45 Cal 519.

[9] No injunction can be granted under the Court's inherent powers, in contravention of the provisions of S. 56 of the Specific Relief Act. (Vol 6) 1919 Oudh 154 (159).

[10] Case falling within the intendment of a provision laying down the procedure to be adopted in the case — Court cannot use inherent power. (Vol 30) 1943 Mad 235 (236) * (Vol 28) 1941 All 219 (221) : I L R (1941) All 418 * (Vol 28) 1941 Bom 395 (397) : I L R (1941) Bom 652 * (Vol 28) 1941 Oudh 383 (385) : 16 Luak 765 * (Vol 27) 1940 Lah 85 (87). (Where S. 10 does not apply, inherent power cannot be invoked.) * (Vol 27) 1940 Nag 349 (351, 352) : I L R (1940) Nag 538 * (Vol 27) 1940 Oudh 298 (300) * (1876) 2 Cal 233 (261) : 4 Ind App 23 (P C) * (Vol 8) 1919 Cal 44 (45) : 20 Cri L Jour 373 * (Vol 10) 1923 Mad 331 (331) * (Vol 17) 1930 Lah 26 (31, 32) : 11 Lah 342 * (1906) 33 Cal 927 (931) * (Vol 16) 1929 Sind 110 (111) * (Vol 24) 1937 All 141 (142) (S B) * (1902) 29 Cal 707 (715) : 29 Ind App 196 (P C) * (Vol 11) 1924 Mad 114 (115, 116) : 47 Mad 171.

[11] Court cannot refuse to be bound by limitation prescribed by the Limitation Act. (Vol 30) 1943 Sind 132 (134) : I L R (1943) Kar 409. ((Vol 8) 1921 Bom 20 : 45 Bom 648 held overruled by (Vol 22) 1935 P C 85 : 62 Ind App 80 : 57 All 242 (P C) * (Vol 11) 1924 All 668 (669) : 46 All 631. ((Vol 11) 1924 All 446 : 46 All 144, followed.) * (Vol 9) 1922 Pat 479 (480) : 1 Pat 277 * (Vol 15) 1928 Nag 91 (92) : 23 Nag L R 183 * (Vol 13) 1926 Mad 980 (984) : 50 Mad 67 * (Vol 9) 1922 Mad 417 (421) * (Vol 19) 1932 Oudh 220 (222) * (Vol 21) 1934 Nag 43 (44) * (Vol 24) 1937 Oudh 426 (426) : 18 Luak 425 * (Vol 22) 1935 Rang 466 (471) : 18 Rang 595

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(Vol 22) 1935 Pesh 146 (147);(Vol 22) 1939 Cal 310 (312) : I L R (1939) 1 Cal 452 *(Vol 22) 1935 Lah 60 (61);*(Vol 23) 1936 Pat 270 (273) : 15 Pat 422.

[See also (Vol 20) 1933 Mad 418 (420, 424) : 56 Mad 490 (FB).]

[12] Doubt or difficulty as to which provision will apply—Inherent powers may be invoked. (Vol 12) 1925 Pat 435 (437) : 4 Pat 180.

[13] As to instances of cases in which the Court can invoke the inherent powers, see the following decisions : (Vol 20) 1942 Cal 390 (393). (Court may under S. 151 substitute parties in execution proceedings.)*(Vol 29) 1942 Mad 369 (370). (Application for copies struck off for non-deposit of stamp paper—Subsequent application to restore previous application—Court can restore former application and treat subsequent application as continuation of original application.)*(Vol 28) 1941 Cal 156 (158) : ILR (1940) 2 Cal 277. (Execution application dismissed as time-barred—On decree-holder's application under S. 151, Court reconsidering previous order and reviving execution case—Order under S. 151 is not illegal.)*(Vol 28) 1941 Cal 207 (215) : ILR (1940) 2 Cal 131. (In a suit for damages for nuisance, Court may grant damages for period of pendency of suit under S. 151.)*(Vol 28) 1941 Mad 55 (55). (A Court has no inherent power under S. 151, to pass an interim order of maintenance.)*(Vol 27) 1940 Oudh 421 (423) : 15 Luck 730. (A scheme prepared under S. 92, particularly one relating to a Muslim wakf, can be modified by an application under S. 151.)*(Vol 31) 1944 Mad 293 (294) : ILR (1944) Mad 857. (Absence of party is no ground for review.)*(Vol 33) 1944 Oudh 63 (64, 65) : 20 Luck 499. (U. P. Debt Redemption Act.)*(Vol 31) 1944 Mad 161 (162). (Slay.)*(Vol 30) 1943 Lah 252 (254, 255). (Order 41, Rule 20 not exhaustive.)*(Vol 26) 1939 Oudh 277 (278) : 15 Luck 26. (Provisions of O. 22, Rr. 1 to 11 are not applicable to revision petition. If however a party to a revision petition dies the Court can pass an order under S. 151 to bring his legal representative on record—There is no limitation for an application for substitution of parties in a revision petition.)*(Vol 20) 1933 Mad 691 (693) : 56 Mad 989. (Security bond to Court for loss by temporary injunction is enforceable in execution under S. 151 since no other remedy is open.)*(Vol 15) 1928 All 494 (496) : 50 All 748. (Court can record or refuse to record a compromise apart from O. 23, R. 3.)*(Vol 17) 1930 Pat 395 (399) : 9 Pat 314. (Postponing passing of decree after recording compromise under O. 23, R. 3.)*(1912) 35 Mad 607 (612) : 39 Ind App 218 (PC). (Framing vital issues at any stage.)*(Vol 12) 1925 All 280 (282) : 47 All 533. (Striking off defence for default in payment of adjournment costs before date fixed.)*(Vol 24) 1937 Cal 199 (201) : I L R (1937) 2 Cal 48. (Even if a share of debt be not attachable under O. 21, R. 46 or under any other rule, a Court can pass prohibitory orders.)*(Vol 25) 1938 Cal 287 (290) : ILR (1938) 1 Cal 53. (Plaintiff in interpleader suit can apply on completion of pleadings that he should be removed from proceedings—Court can grant such relief under S. 151.)*(Vol 23) 1936 Cal 409 (412) : I L R (1937) 1 Cal 57. (Executing Court can entertain and give effect to a claim to set-off even in case which does not come strictly under O. 21, R. 19.)*(Vol 22) 1935 Cal 231 (234) : 62 Cal 223. (On premature threat from Bench, pleader agreeing to settlement of case—Counsel held intimidated and Court had inherent power to set aside settlement.)*(Vol 22) 1935 Pat 439 (444) : 14 Pat 356. (Decree on the basis of a compromise without a formal order for recording the compromise can be set aside under S. 151.)*(Vol 23) 1936 Pat 93 (94) : 15 Pat 51. (Mortgage suit—Application for final decree beyond time—Similar previous application made in time dis-

missed for failure to comply with some steps concerning service of notice on judgment-debtors—Court held could restore previous application.)

[14] In exercising inherent powers in cases not provided for, the Courts may apply *analogous provisions* of the Code. (Vol 8) 1921 Mad 599 (605) : 44 Mad 919 (FB). (For example, assignee of portion of decree comes under O. 21, Rr. 15 and 16.)*(Vol 16) 1929 All 211 (212) *(1907) 34 Cal 860 (862) *(Vol 32) 1945 Bom 380 (382) : ILR (1945) Bom 463 *(Vol 13) 1926 Mad 1005 (1006). (Enforcement of surety bond in execution, on the analogy of S. 145.)*(Vol 16) 1929 Mad 828 (829) : 53 Mad 43. (To continue suit in *forma pauperis*.)*(Vol 7) 1920 Mad 230 (231). (Appeal to be continued in *forma pauperis*.)*(1910) 14 Cal W N 836 (838). (Resistance outside O. 21, Rr. 97 to 99.)*(Vol 15) 1928 Pat 187 (188). (Directing successful respondent to furnish security for restitution.)*(1893) 15 All 84 (95) (FB). (Dismissal of execution petition for default.)*(Vol 18) 1931 Mad 303 (306, 312). (Applicability of O. 22, Rr. 2 and 3 to execution applications.)*(Vol 26) 1939 Pat 678 (681) : 19 Pat 159 (FB). (Appeal dismissed for non-filing of the appellants' list within time—Application for restoration—*Held*, failure to file list stands on no worse footing than O. 47, Rr. 11, 17 and 18—Appeal can be restored under S. 151.)

[But see (Vol 17) 1930 Rang 280 (281) : 8 Rang 423. (No inherent power to grant application for review in *forma pauperis* of order in appeal.)]

3. *Ex parte* decisions and suits dismissed for default. — [1] There is no inherent power to set aside an *ex parte* decree or to restore a suit dismissed for default, except under O. 9, R. 13 and R. 9 respectively. (Vol 12) 1925 All 610 (614) : 48 All 175 *(Vol 18) 1931 All 294 (296) : 53 All 612 (F B) *(Vol 17) 1930 Cal 387 (388) *(Vol 17) 1930 Cal 488 (489) *(Vol 14) 1927 Lah 622 (624, 625) *(Vol 12) 1925 Lah 321 (321) *(Vol 7) 1920 Mad 640 (642, 643) : 43 Mad 94 (FB) *(Vol 21) 1934 Mad 428 (429) : 57 Mad 1069 *(Vol 29) 1942 Nag 78 (79) : I L R (1942) Nag 675 *(Vol 17) 1930 Nag 48 (49) : 26 Nag L R 30 *(Vol 9) 1922 Pat 479 (480) : 1 Pat 277 *(1941) 22 Pat L Tim 965 (967) *(Vol 27) 1940 Rang 162 (166) : 1940 Rang L R 512 (F B) *(Vol 27) 1940 Oudh 279 (282) : 15 Luck 350 *(Vol 13) 1926 Sind 249 (250) : 20 Sind L R 266 *(Vol 14) 1927 Sind 223 (224) : 22 Sind L R 192.

[2] A view contrary to the above view was adopted in the following cases: (Vol 29) 1942 Sind 97 (98) : I L R (1942) Kar 218 *(Vol 29) 1942 Sind 99 (100) : I L R (1942) Kar 220 *(Vol 28) 1941 Oudh 367 (378) *(Vol 15) 1928 Lah 534 (535) *(Vol 11) 1924 Pat 274 (275) *(Vol 11) 1924 Pat 698 (700) *(Vol 15) 1928 Cal 772 (774) : 55 Cal 473 *(Vol 22) 1935 Nag 189 (190) : 31 Nag L R 374 *(Vol 22) 1935 Pesh 136 (188) *(Vol 7) 1920 Bom 337 (337) : 44 Bom 82 *(Vol 19) 1932 Bom 634 (636).

[See also (Vol 29) 1942 Bom 198 (199).]

[3] Where an application under O. 9, R. 9 is itself dismissed for default, or an execution application is so dismissed, or an *ex parte* order is passed in execution proceedings, the application can be restored or the order set aside under the inherent powers if O. 9, Rr. 9 and 13 do not apply to such proceedings by virtue of S. 141. (Vol 20) 1933 Pesh 59 (61). (Order 9, R. 9 applies—So no inherent power.)*(Vol 29) 1942 Lah 71 (72) *(Vol 20) 1933 All 783 (784, 785) : 55 All 891 (F B) *(Vol 19) 1932 Nag 101 (102) : 28 Nag L R 111 *(Vol 9) 1922 Oudh 201 (202) *(Vol 13) 1926 Oudh 59 (59) *(Vol 8) 1921 Sind 55 (56) : 17 Sind L R 105 *(Vol 18) 1931 Sind 97 (98) : 25 Sind L R 475 (F B) *(1944) 1944 All L Jour 437 (437) *(Vol 32) 1945 Oudh 210 (213) : 20 Luck 317 *(Vol 32) 1945 Pesh 31 (31, 32) *(Vol 31) 1944 Nag 59 (61) : I L R (1944) Nag

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451 * (Vol 19) 1932 Cal 569 (571) * (Vol 14) 1927 Cal 534 (536) : 54 Cal 405. (No proper remedy provided but no prohibition provided—Section 151 is to be invoked.) * (Vol 17) 1930 Lah 20 (21) : 11 Lah 93 * (Vol 9) 1922 Nag 267 (271) : 18 Nag L R 152.

4. Interim injunctions and appointment of receivers. — [1] In S. 94, O. 39, R. 1 and O. 40, there is no inherent power to grant an injunction or appoint a receiver. (Vol 26) 1939 All 643 (645, 646) : I L R (1939) All 825 * (Vol 20) 1933 Mad 500 (501) : 56 Mad 563 * (Vol 25) 1938 Mad 190 (192).

[2] Case outside the provisions mentioned above — S. 151 applies. (Vol 30) 1943 Cal 93 (99) : I L R (1942) 2 Cal 203 * (Vol 28) 1941 Bom 219 (222) * (Vol 28) 1941 Cal 434 (435) : I L R (1941) 1 Cal 373 * (Vol 28) 1941 Cal 670 (672) : I L R (1941) 1 Cal 490 * (Vol 27) 1940 All 185 (186) : I L R (1940) All 201 * (Vol 27) 1940 All 241 (241, 242) : I L R (1940) All 232 * (Vol 12) 1925 Sind 102 (102) : 18 Sind L R 303 * (Vol 21) 1934 Lah 79 (80) * (Vol 20) 1933 Lah 73 (74). (Injunction.) * (Vol 13) 1926 Mad 1126 (1127). (High Court has power to stay execution in another suit.) * (Vol 14) 1927 Mad 210 (211, 212) * (1909) 3 Sind L R 128 (129, 130) * (Vol 19) 1932 Mad 180 (181).

[3] Receiver not appointed.— Party can be put upon terms and be asked to give security for fulfilment of those terms. (Vol 32) 1945 Sind 146 (148) : ILR (1945) Kar 116.

5. Remand. — See Notes on O. 41, R. 23.

6. Joinder of parties. — [1] Court may at any stage ascertain whether or not proper parties are before it. (1906) 33 Cal 927 (932) * (1918) 40 Cal 955 (959, 960) * (1888) 10 All 223 (239) (F B).

[2] Court may add proper parties at any stage. (Vol 28) 1941 Lah 402 (403, 404) : I L R (1942) Lah 603 * (Vol 28) 1941 Nag 178 (179) * (1911) 35 Bom 893 (395) * (Vol 13) 1926 Sind 26 (26) * (Vol 20) 1933 Bom 200 (202) * (Vol 3) 1916 Pat 45 (46).

7. Stay of execution and other proceedings. —

[1] The Court can stay its own process except where its jurisdiction in this respect is taken away. (Vol 27) 1940 Mad 917 (917) * (Vol 14) 1927 Cal 581 (585) * (Vol 21) 1934 Pat 637 (637) * (Vol 10) 1923 Lah 514 (515) * (Vol 11) 1924 Lah 602 (603).

[2] Court can stay the execution of a decree on an application for leave to appeal to the Privy Council or on special leave thereto. (Vol 12) 1925 Sind 216 (217) * (Vol 20) 1933 All 18 (18) * (Vol 18) 1931 Cal 79 (81) * (1913) 40 Cal 955 (959).

[3] Court has inherent powers to stay a suit pending the decision in a connected proceeding, apart from S. 10. (Vol 28) 1941 Pesh 34 (36) * (Vol 21) 1934 Cal 33 (36) * (Vol 16) 1929 Lah 12 (14) * (Vol 20) 1933 Lah 50 (50, 51) * (Vol 2) 1915 Mad 608 (611) * (Vol 11) 1924 Cal 757 (760) * (Vol 11) 1924 Bom 90 (93) * (Vol 16) 1929 Oudh 341 (346) : 4 Luck 573 * (Vol 18) 1931 Oudh 313 (314) * (Vol 4) 1917 Sind 95 (96) : 10 Sind L R 1 * (Vol 22) 1935 Rang 355 (356) * (Vol 23) 1936 Pat 408 (409) * (Vol 28) 1941 Cal 236 (240) : I L R (1940) 1 Cal 497.

[But see (Vol 27) 1940 Lah 85 (87).]

[4] An Appellate or Revision Court has inherent power to stay further proceedings in the suit in the lower Court, apart from O. 41, R. 5. (1904) 31 Cal 722 (724) (F B) * (Vol 19) 1932 All 655 (656) * (Vol 21) 1934 Lah 909 (910) * (Vol 8) 1921 Pat 328 (329, 330) * (Vol 19) 1932 All 238 (238) : 54 All 344 * (Vol 18) 1931 Bom 384 (384) : 55 Bom 801 * (Vol 15) 1928 Lah 912 (912).

[5] Where an appeal has been preferred to the Privy Council, the High Court can, under its inherent powers, stay further proceedings in the trial Court apart from

O. 45, R. 13. (Vol 29) 1942 Cal 488 (491) : I L R (1942) 1 Cal 67 * (Vol 21) 1934 Cal 823 (824) * (Vol 26) 1939 Cal 308 (309) * (Vol 21) 1934 Lah 238 (238, 239).

- [But see (Vol 21) 1934 All 585 (586) : 56 All 907.]

[6] Administration suit—Creditor obtaining preliminary decree is entitled to order against another decree-holder attaching property of deceased judgment-debtor, staying all proceedings taken by him and restraining him from executing his decree — Court is entitled to pass appropriate orders to safeguard interests of all creditors—Such orders cannot be strictly called injunction orders — Recourse to provisions of S. 151 is not necessary. (Vol 26) 1939 Mad 204 (208).

[7] A Court in the United Provinces is not competent under S. 151, to issue a stay order to a Court in another province. (Vol 25) 1938 All 434 (434) : I L R (1938) All 650.

8. Setting aside execution sales — [1] Courts have inherent power to set aside or refuse to confirm an execution sale in cases not provided for by O. 21, Rr. 89 to 91. (Vol 29) 1942 Lah 153 (160) : I L R (1942) Lah 559 (F B) * (Vol 29) 1942 Pat 262 (264) * (Vol 20) 1933 Mad 399 (400, 401) * (Vol 12) 1925 Oudh 128 (129) : 27 Oudh Cas 89. * (Vol 10) 1923 Mad 635 (636, 638) : 46 Mad 583 * (Vol 13) 1926 Nag 17 (18) : 24 Nag L R 48 * (193) 20 Cal 8 (11) : 19 Ind App 154 (P C) * (Vol 19) 1932 Lah 238 (239). (Case covered by O. 21 Rr. 89 to 91 — No inherent power.) * (Vol 25) 1938 Lah 232 (234).

[See (Vol 15) 1928 Nag 265 (272) : 24 Nag L R 127 (F B) * (Vol 26) 1939 Cal 161 (162).]

[But see (Vol 29) 1942 Bom 306 (308) : I L R (1942) Bom 704 * (Vol 28) 1941 Mad 399 (401) * (Vol 19) 1932 All 403 (404).]

9. Court cannot override general principles of law. — [1] No inherent power can be exercised so as to conflict with sound general principles of law. (1904) 26 All 407 (427) (F B) * (Vol 9) 1922 Cal 1 (1) * (Vol 24) 1937 All 18 (19) * (Vol 24) 1937 Pat 647 (650) : 16 Pat 729.

[2] A Court has no inherent power to recall an order previously made by it, or entertain an application barred by *res judicata*. (Vol 27) 1940 Rang 156 (156) : 1940 Rang L R 392 * (Vol 14) 1927 Cal 57 (60) * (Vol 9) 1922 Pat 204 (205) * (Vol 11) 1924 Mad 489 (489) * (Vol 22) 1935 Lah 60 (61) * (Vol 25) 1938 Pat 593 (594). (Order passed by Court having jurisdiction to pass it cannot be recalled.)

[See however (Vol 27) 1940 Rang 17 (17) : 1939 Rang L R 626. (A Judge can always reconsider an order which he has passed *ad interim* until he comes to his final decision.)]

[But see (Vol 15) 1928 Lah 244 (245) * (Vol 4) 1917 All 477 (479) : 39 All 8 * (Vol 17) 1930 All 644 (645, 646) : 52 All 924.]

[3] Court cannot under its inherent powers deal with matters over which it has no jurisdiction. (Vol 6) 1919 Pat 240 (241) * (Vol 9) 1922 Bom 444 (445, 446) : 47 Bom 250 * (Vol 13) 1926 Lah 284 (284). (Injunction against Government Officers not subordinate to Court.) * (1910) 34 Bom 467 (483). (Caste questions.) * (Vol 5) 1918 Mad 580 (584) : 40 Mad 1069 (F B) * (Vol 3) 1916 Mad 554 (554) * (Vol 12) 1925 Oudh 142 (142).

[4] Court has always jurisdiction to determine whether it has jurisdiction. (Vol 2) 1915 Cal 49 (51).

[5] A Court cannot, under its inherent powers, hear an appeal or review its previous order. (Vol 29) 1942 Bom 279 (280) * (Vol 27) 1940 Lah 123 (123) * (Vol 6) 1919 Mad 244 (246) * (Vol 20) 1933 Lah 169 (171) * (Vol 13) 1926 All 50 (55) : 48 All 160 * (Vol 5) 1918 Cal 925 (927) : 45 Cal 519 * (Vol 14) 1927 Cal 920 (921). * (Vol 16) 1929 Cal 162 (162) * (Vol 26) 1939 Sind 137 (140) : I L R (1939) Kar 330 * (Vol 21) 1934 Pat 229

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(231) : 13 Pat 165. (Review can only be granted on grounds set out in O. 47.)

[But see (Vol 23) 1936 Pesh 213 (214).]

[6] The Court has no inherent power to transfer a case. Similarly, the High Court has no *inherent* power of revision over proceedings in subordinate Courts. (1905) 32 Cal 875 (881) * (Vol 21) 1934 All 677 (679).

[But see (Vol 11) 1924 Lah 306 (310) * (1931) 133 Ind Cas 876 (876) (Lah).]

[7] The power of revision is a creature of the statute and does not exist if it is not provided for by statute. (1940) 1940 Nag L Jour 93 (94) * (Vol 25) 1938 FC 1 (3) : I L R (1939) Kar F C 1 : 1939 F C R 13 (F C) * (Vol 22) 1935 All 599 (600) : 57 All 977 (F B). (Overruling (Vol 15) 1928 All 108 : 50 All 335.)

[See however (Vol 29) 1942 Oudh 392 (394).]

[8] Neither the High Court nor the Federal Court can vacate a certificate granted by the High Court under S. 205, Government of India Act, 1935, because of some subsequent event. (Vol 27) 1940 F C 7 (8) : I L R (1940) Kar F C 45 : 1940 F C R 31 (F C).

10. Ends of justice.—[1] The inherent powers saved by the section are to be used only to secure the ends of justice or to prevent the abuse of process of the Court. (Vol 8) 1921 P C 80 (84) : 48 Ind App 76 : 48 Cal 481 (P C) * (Vol 32) 1945 Bom 370 (373) : I L R (1945) Bom 665.

[2] Court may exercise inherent power to remedy an injury or to avoid needless expense and inconvenience. (Vol 28) 1941 Cal 434 (435) : I L R (1941) 1 Cal 373 * (Vol 10) 1923 Bom 419 (419) * (Vol 19) 1932 Lah 295 (296) * (Vol 21) 1934 Pat 683 (685).

[3] A Court can remedy an obvious injustice by refund of court-fee. (Vol 30) 1943 Bom 50 (52) : I L R (1943) Bom 25 * (Vol 29) 1942 Mad 316 (317) * (Vol 17) 1930 All 471 (471) : 52 All 546 * (Vol 19) 1932 Cal 450 (451) * (Vol 20) 1933 Oudh 170 (170) : 7 Luck 588 * (Vol 20) 1933 Lah 351 (351) * (Vol 21) 1934 Cal 615 (616) * (Vol 5) 1918 Pat 496 (496) : 3 Pat L Jour 452 * (Vol 16) 1929 Rang 158 (160) : 7 Rang 88 * (Vol 15) 1928 Pat 35 (36) : 6 Pat 599 * (Vol 19) 1932 Mad 438 (439) : 55 Mad 641 * (Vol 38) 1946 Oudh 9 (10) * (Vol 23) 1936 Cal 347 (348) * (Vol 26) 1939 Lah 257 (258) * (Vol 23) 1936 Rang 208 (210) : 14 Rang 173. ((Vol 13) 1926 Rang 129 : 4 Rang 66, overruled.)

[But see (Vol 27) 1940 Mad 451 (452) * (Vol 21) 1934 Mad 409 (410) * (Vol 22) 1935 Pesh 8 (10) * (Vol 22) 1935 Cal 707 (709).]

[4] The Court will vacate manifestly unjust orders. (Vol 9) 1922 Bom 335 (335) : 47 Bom 104. (Ordering pauper to pay Rupees 500 as costs of amendment.) * (Vol 21) 1934 Lah 156 (157) : 15 Lah 80.

[5] The Court may grant relief even where application therefor is made under a wrong section. (Vol 19) 1932 Mad 223 (224) * (Vol 11) 1924 Cal 90 (91) * (1904) 31 Cal 737 (741) * (Vol 5) 1918 Pat 668 (671, 672) * (Vol 15) 1928 Pat 197 (198) * (1911) 5 Sind L R 61 (66) * (Vol 12) 1925 Rang 192 (192) : 2 Rang 659 * (Vol 8) 1921 All 321 (322).

[6] See the following cases in which there was a merely technical defect and hence inherent power was exercised: (Vol 12) 1925 Rang 188 (189). (Filing a different decree with appeal — Substitution of correct one allowed.) * (Vol 9) 1922 Nag 125 (125) : 5 Nag L R 265. (Presentation of plaint to proper Court without fresh vakalat — Time may be granted for vakalat.) * (Vol 19) 1932 Pat 3 (5). (Omission of name of vakil in vakalatnama.) * (Vol 14) 1927 P C 264 (265) (P C). (Technical defect in security bond.) * (Vol 14) 1927 Oudh 455 (456) : 2 Luck 731 * (Vol 19) 1932 Lah 267 (268).

[7] An appeal dismissed for want of a subsisting decree may be revived when that decree is subsequently

restored. (Vol 17) 1930 All 100 (100) * (Vol 7) 1920 Cal 399 (400).

[8] Court cannot restore an appeal dismissed on the application of the appellant stating that he wished to withdraw it, though he might have acted under a mistake of law. (Vol 29) 1942 All 253 (253).

[9] Court can restore a suit the decree in which has been set aside in a separate suit on the ground that the minor or lunatic defendant was not properly defended. (Vol 4) 1917 All 477 (479) : 39 All 8 * (Vol 17) 1930 All 644 (645, 646) : 52 All 924 * (Vol 18) 1931 Cal 168 (169) * (Vol 24) 1937 All 552 (556).

[10] The Court can re-hear a matter before final order is passed in it, in order to avoid inconvenience and delay. (1910) 37 Cal 259 (262) * (1837-41) 2 Moo Ind App 181 (216) (P C). (Rehearing of an appeal before the Privy Council.) * (Vol 19) 1932 All 656 (657).

[11] Suits may be consolidated by Court. (Vol 30) 1943 Bom 12 (17, 18) : I L R (1943) Bom 104 * (1895) 22 Cal 511 (517) * (Vol 4) 1917 All 336 (337). (Even without the consent of parties) * (Vol 9) 1922 Pat 566 (566) : 1 Pat 669 * (Vol 2) 1915 Bom 146 (148) : 39 Bom 604 (F B) * (Vol 24) 1937 Nag 132 (133) : I L R (1937) Nag 6 * (Vol 26) 1939 Pat 30 (31) * (Vol 33) 1946 Oudh 33 (35) : 20 Luck 339 (F B).

[12] Court can consolidate appeals. (Vol 5) 1918 Mad 368 (369) * (Vol 15) 1928 Mad 463 (463) * (Vol 10) 1923 All 490 (491) : 45 All 506 (F B) * (Vol 12) 1925 Pat 765 (769) : 4 Pat 448 * (Vol 5) 1918 Pat 196 (197) : 3 Pat L Jour 446 * (Vol 33) 1946 Bom 184 (186) : 47 Cr L J 555 * (Vol 2) 1916 All 832 (833) : I L R (1937) All 105. (High Court has no inherent power to pass orders under O. 45, R. 4 directing consolidation of appeals pending before their Lordships of the Privy Council.)

[13] As to joinder of proceedings see the following cases. (Vol 5) 1918 Pat 415 (416). (Application to set aside *ex parte* decree — Another to set aside sale thereunder — Fraud — Joint trial.)

[See (Vol 17) 1930 Mad 381 (382) : 53 Mad 262 (F B). (Several revisions against common respondent cannot be consolidated for purposes of vakalat and process fee.)]

[14] The Court may, to secure the ends of justice, take notice of subsequent events. (Vol 4) 1917 Cal 716 (719) : 44 Cal 47 * (Vol 2) 1915 Cal 103 (104) * (Vol 10) 1923 Lah 24 (25) * (Vol 12) 1925 Nag 104 (107) * (Vol 11) 1924 Nag 188 (189) * (Vol 13) 1926 Oudh 32 (32) * (Vol 10) 1923 Lah 590 (591) * (Vol 18) 1938 Bom 230 (232) * (Vol 16) 1929 Lah 409 (415).

See however the following cases *holding to the contrary*: (Vol 11) 1924 Pat 438 (438) : 3 Pat 224 * (1918) 46 Ind Cas 794 (796) (Nag) * (Vol 9) 1922 Lah 437 (439) * (Vol 13) 1926 Mad 594 (597) * (Vol 9) 1922 All 526 (526).

[15] Questions which go to the root of the controversy may be considered by the Court. (1912) 35 Mad 607 (612) : 39 Ind App 218 (P C). (Question of attestation.) * (Vol 14) 1927 Mad 143 (144).

[16] Where the records are lost by accident, they may be reconstructed from memory of the Court or on evidence or affidavit. (Vol 2) 1915 Mad 1038 (1039) : 38 Mad 498 * (Vol 10) 1923 Mad 647 (648) : 46 Mad 679 (F B) * (Vol 31) 1944 Mad 56 (56).

[17] Money allowed by mistake to be withdrawn by a party may be ordered to be refunded. (Vol 22) 1935 Mad 212 (212, 213) * (Vol 20) 1933 Lah 850 (851) * (Vol 21) 1934 Lah 142 (143).

[18] In the following cases the Court exercised inherent power to secure justice. (Vol 29) 1942 Mad 519 (520). (Court returning application due to mistake caused by misunderstanding of parties and Court itself — Court has power to restore application.) * (Vol 28) 1941 Cal 80 (85). (There is no bar in bringing decree in conformity with final judgment where rights of third party

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have not intervened.) * (Vol 31) 1944 Nag 148 (149) : I L R (1944) Nag 379. (Suit re-opened.) * (Vol 31) 1944 Oudh 5 (7). (Clerical mistake in mortgage deed — Mistake repeated in plaint and decrees — Amendment.) * (Vol 22) 1935 All 868 (871) : 53 All 249. (Collector acting under S. 68 has inherent power to cancel his order on valid grounds.) * (Vol 25) 1938 Mad 360 (363) : I L R (1938) Mad 744 (F B). (Money realised by execution sale of attached property — Application for payment by Crown towards arrears of income-tax due by judgment-debtor — Court can order payment—Separate suit by Crown not necessary.)

[19] Where a party has another remedy open the Court will not, as a general rule, grant him relief under the inherent powers. (Vol 30) 1943 Pat 13 (14) * (Vol 29) 1942 Oudh 189 (193) : 17 Luck 297 * (Vol 28) 1941 Bom 219 (222) * (Vol 28) 1941 Oudh 83 (84) : 16 Luck 492 * (Vol 28) 1941 Pat 408 (409). (Order appealable — No interference under S. 151.) * (Vol 26) 1939 Cal 658 (660). (Setting aside consent decree on ground of fraud.) * (Vol 20) 1933 All 382 (384) : 55 All 548 * (Vol 32) 1945 Mad 108 (111) : I L R (1945) Mad 482 * (Vol 14) 1927 Nag 212 (212, 213) : 23 Nag L R 79 * (Vol 14) 1927 Nag 95 (96) * (Vol 16) 1929 Cal 470 (472) : 57 Cal 154 * (Vol 16) 1929 Mad 757 (763) : 52 Mad 899 (F B). (Application under O. 21 Rr. 97 and 100 dismissed for default.) * (Vol 8) 1921 Upp Bur 5 (7) : 4 Upp Rul 1 * (Vol 3) 1916 Sind 70 (70) : 9 Sind L R 132 * (Vol 2) 1915 Mad 392 (395) * (Vol 20) 1933 Sind 29 (31) : 26 Sind L R 395 * (Vol 26) 1939 Cal 349 (350) * (Vol 25) 1938 Pesh 15 (17). (Leave granted under S. 20 (b) without notice to opposite party — Objections against such leave cannot be heard under S. 151, as opposite party could resort to S. 23.) * (Vol 25) 1938 Rang 433 (435). (Where a party has not applied under O. 21 Rr. 89, 90 or 91, it is not open to him to seek the inherent power of the Court to set aside the sale.) * (Vol 25) 1938 Bom 510 (512) : I L R (1938) Bom 743 * (Vol 26) 1939 All 66 (69) : I L R (1939) All 103 * (Vol 22) 1935 Pesh 151 (152) * (Vol 22) 1935 Cal 336 (337) : 62 Cal 61 * (Vol 23) 1936 Lah 672 (673) * (Vol 25) 1938 Lah 4 (5).

[20] In the following cases the Court granted relief under its inherent powers though another remedy was open but not resorted to by the party. (Vol 30) 1943 Oudh 186 (138). (The view that S. 151 is intended to meet only cases for which there is no other provision is not adopted by 'this Court in some recent cases.') * (Vol 29) 1942 Oudh 343 (344) : 17 Luck 673. (Lower Court passing *ex parte* decree even when the Judge had discovered that notice necessary under S. 14, U. P. Encumbered Estates Act, had not been served on the creditors.) * (Vol 28) 1941 Oudh 91 (93) : 16 Luck 294 * (Vol 9) 1922 Mad 193 (193). (Decree against corporation with wrong representative — Right representative may apply to vacate it — Separate suit not just.) * (Vol 20) 1933 Nag 176 (177) : 29 Nag L R 176 * (Vol 8) 1921 Pat 491 (493, 494). (Personal decree against non-mortgagor defendants by mistake of Court, may be rectified though no appeal or review preferred.) * (Vol 19) 1932 Bom 271 (272). (An order under O. 11 R. 21 set aside since appeal was costly.) * (Vol 24) 1937 Sind 101 (103) : 31 Sind L R 32 * (Vol 32) 1945 Bom 85 (86, 87) (Revival of execution application rendered infructuous by certificate under S. 10, Watan Act.) * (Vol 25) 1938 Pat 468 (469). (Restitution of the property which had been taken away from an innocent person under orders.) * (Vol 26) 1939 Lah 223 (224). (Inherent power to restore an application in execution proceedings which has been dismissed for default.) * (Vol 25) 1938 Pat 447 (450).

[21] Courts will not exercise inherent powers if it would interfere with the rights of third parties or cause mischief or injustice. (Vol 27) 1940 Rang 201 (202) :

1940 Rang L R 421 (S B) * (Vol 11) 1924 Nag 98 (101) : 20 Nag L R 11 * (Vol 13) 1926 Bom 377 (378) : 50 Bom 457 * (Vol 9) 1922 Mad 228 (229) * (Vol 12) 1925 Mad 443 (443) * (Vol 23) 1936 Oudh 50 (51) : 11 Luck 519.

[22] Party guilty of laches — New rights arising against him — No exercise of inherent powers. (Vol 12) 1925 All 236 (237) : 47 All 304. (Mistake in execution sale will not be rectified after three years.) * (Vol 21) 1934 All 250 (252). (Review after appeal is time-barred.) * (Vol 5) 1918 Bom 105 (106) : 43 Bom 240 * (Vol 15) 1928 Nag 149 (149) * (Vol 13) 1926 Rang 50 (51) : 3 Rang 488 * (Vol 10) 1923 Oudh 59 (60) : 25 Oudh Cas 286 * (Vol 31) 1944 Nag 335 (336) : I L R (1944) Nag 408.

11. "Abuse of the process of the Court." — [1] Where a Court employs a procedure in doing something which it never intended to do and there is miscarriage of justice, there is an abuse of the process of the Court. (Vol 16) 1929 All 147 (148) : 50 All 859. (Property other than the judgment-debtor's included in judgment, decree and map by accident.) * (1909) 36 Cal 193 (203) * (Vol 4) 1917 Pat 495 (497) : 2 Pat L Jour 361 * (Vol 22) 1935 All 27 (28) * (1938) 32 Sind L R 215 (219).

[2] The principle *actus curae neminem gravabit* — An act of the Court shall prejudice no person is to be applied. (Vol 7) 1920 Cal 399 (400) * (Vol 13) 1926 Nag 331 (331) * (Vol 1) 1914 Sind 61 (62) : 8 Sind L R 327 * (Vol 25) 1938 All 8 (11) : I L R (1938) All 71 * (Vol 26) 1939 Bom 51 (52) : I L R (1939) Bom. 27 * (Vol 23) 1936 Cal 343 (346) : 63 Cal 1079 * (Vol 24) 1937 Mad 150 (151) * (Vol 22) 1935 Sind 214 (215) : 29 Sind L R 251.

[3] The abuse of the process may be by the mistake of the Court. See the following cases: (Vol 30) 1943 Pat 72 (73). (Amendment of consent decree without notice to party affected.) * (Vol 28) 1941 Oudh 91 (93) : 16 Luck 294 * (Vol 3) 1916 Cal 241 (244) : 43 Cal 269. (Adverse order without notice) * (Vol 8) 1916 P C 85 (85) (P C). (Adverse order without notice.) * (1912) 34 All 518 (522) * (Vol 20) 1933 Oudh 229 (230, 231) : 8 Luck 496 * (Vol 21) 1934 Mad 506 (507) : 58 Mad 84. (Disposal of appeal without full hearing.) * (Vol 7) 1920 Cal 434 (435) (S B). (Dismissal of a petition under misapprehension.) * (Vol 15) 1928 All 108 (110) : 50 All 335. (Failure to enquire under O. 32 R. 15.) * (Vol 12) 1925 All 622 (623) : 47 All 546. (Application for final decree—Applicants' default — Dismissal of suit itself.) * (Vol 16) 1929 Rang 158 (160) : 7 Rang 88. (Error in drafting the decree.) * (Vol 19) 1932 Nag 31 (31) : 27 Nag L R 341. (Decree directing partition in impossible manner.) * (Vol 16) 1929 Oudh 385 (387) : 4 Luck 562 (F B). (Passing decree on a compromise not signed by a party or his authorized agent.) * (Vol 14) 1927 Cal 636 (642) : 54 Cal 836 * (Vol 13) 1926 Pat 218 (226, 231) : 5 Pat 361 (F B). (Wrong order for payment of court-fee, and wrong dismissal on default of payment.) * (Vol 8) 1921 Bom 394 (395) : 45 Bom 1127 * (Vol 24) 1937 Mad 95 (96). (Court paying to wrong person by mistake is bound to restore it to right person.) * (Vol 24) 1937 Lah 204 (205). (Court failing to pass personal decree under O. 34 R. 6 through oversight.) * (Vol 21) 1934 Nag 234 (235) : 31 Nag L R 53 * (Vol 25) 1938 Pat 468 (469, 470). (Property wrongly taken away in execution against another under erroneous order.) * (Vol 23) 1936 Cal 343 (346) : 63 Cal 1079.

[4] As to instances of the abuse of the process by officers of the Court see the following decisions. (Vol 28) 1941 Mad 706 (707) * (Vol 1) 1914 Sind 61 (62) : 8 Sind L R 327. (Failure of Court officer to notify date of hearing.) * (Vol 16) 1929 Pat 391 (392). (Delivery of wrong property by plaintiff.) * (Vol 11) 1924 All 313 (324) : 46 All 864. (Wrongful acts of the Court permitted or performed by its officials.) * (Vol 12) 1925 Mad

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1212 (1212, 1213). (Dishonesty of officer of Court in execution.) * (Vol 18) 1931 Lah 344 (344): 12 Lah 602. (Sale ordered free of, but conducted subject to a mortgage.) * (Vol 22) 1935 Sind 214 (216): 29 Sind L R 251 * (Vol 23) 1936 Pat 176 (177). (Application under O. 21, R. 58 — Officers of Court not informing decree-holder.) * (Vol 23) 1936 Cal 343 (346): 63 Cal 1079.

[But see (Vol 14) 1927 Lah 372 (372). (*Ex parte* decree on the basis of return of summons in a different suit.)]

[5] Acts of parties may give rise to the abuse of the process. (Vol 30) 1943 Pat 127 (129): 21 Pat 838. (Order induced by misrepresentation against party *ex parte*.) * (Vol 28) 1941 Cal 336 (336, 337): 1 L R (1941) 1 Cal 405. (Decree obtained by fraud on Court.) * (Vol 27) 1940 Lah 265 (266). (Order obtained on a fraudulent misrepresentation.) * (Vol 21) 1934 Pat 229 (231): 13 Pat 165 (Fraud upon Court in a compromise.) * (Vol 21) 1934 Pat 41 (42). (Fraud in compromise.) * (Vol 10) 1923 Mad 635 (636): 46 Mad 538. (Court misled in granting leave to bid and fixing upset price.) * (Vol 2) 1915 Cal 49 (51). (Appointment of guardian — Fact of majority suppressed.) * (Vol 2) 1915 Cal 622 (624). (Compromise — Suppression of service of summons — False vakalatnama — Fraudulent consent.) * (Vol 1) 1914 Dom 123 (124): 38 B m 638. (Arbitration — No differences between parties.) * (1910) 34 Bom 408 (410). (Pleader not engaged — Consenting to decree.) * (Vol 13) 1926 Oudh 315 (315): 1 Luck 341. (Compromise signed by pleader not authorized.) * (Vol 10) 1923 Pat 483 (486, 487): 2 Pat 731. (Fraudulent alteration of terms of compromise.) * (Vol 14) 1927 Pat 354 (363): 6 Pat 108 * (Vol 24) 1937 Sind 101 (103): 31 Sind L R 32 * (Vol 24) 1937 Lah 29 (31). (Restoration of property wrongfully attached.) * (Vol 24) 1937 Lah 631 (631).

[6] Where fraud by a party is fraud on another party, and not fraud on the Court, this section cannot be applied. (Vol 30) 1943 Pat 13 (14). (Vol 26) 1939 Bom 490 (491) * (Vol 22) 1935 Pat 439 (444): 14 Pat 356 * (Vol 26) 1939 Cal 658 (661).

[7] Dismissal for default of a party who was dead — Application under O. 9, R. 9 — Suit restored — Appellate Court reversing the order on the ground that the dismissal was right — Held that S 151 could be invoked. (1913) 35 All 331 (337): 40 Ind App 151: 16 Oudh Cas 194 (P C).

[8] Gaining an unfair advantage by the use of a rule of procedure is abuse of the process by the party. (Vol 15) 1928 Nag 106 (107, 108) * (Vol 11) 1924 Oudh 230 (231) * (1913) 1913 Pun L R No. 226, p. 763 (765): 1913 Pun Re No. 3 * (Vol 15) 1928 Oudh 260 (261). (Valuation under S. 7, cl. (iv) (c) and (d), Court-fees Act outrageously low — Court can interfere.)

[9] Contempt of the authority of the Court by a party or stranger — S. 151 applies. (1884) 10 Cal 109 (131, 132): 10 Ind App 171 (P C). (Power to punish summarily for a contempt by the publication of a libel out of Court when the Court is not sitting — High Court — Common law.) * (Vol 12) 1925 All 280 (282): 47 All 538 * (Vol 5) 1913 Pat 100 (103): 4 Pat L Jour 20 * (Vol 16) 1929 Sind 136 (136). (An application to sue in *forma pauperis* rejected for vexatious delay in impleading legal representative.)

[10] Fraud or collusion in court proceedings as between parties — Inherent power may be invoked. (Vol 30) 1943 Pat 13 (14) * (1879) 2 Mad 264 (267, 268). (Fraud between auction purchaser and decree-holder.) * (Vol 2) 1915 Mad 281 (282). (Fraud in procuring order.) * (1910) 34 Bom 408 (410) * (Vol 14) 1927 Pat 354 (363): 6 Pat 108.

[11] Retention of a benefit wrongly received is abuse of process. (Vol 11) 1924 Rang 181 (181): 1 Rang 770 * (Vol 3) 1916 Cal 241 (244): 43 Cal 269 * (Vol 5) 1913 Pat 418 (419) * (Vol 4) 1917 Pat 495 (497): 2 Pat L Jour 361.

[12] Resorting to multiplicity of proceedings — Exercise of inherent power is proper. (Vol 28) 1941 Pesh 34 (36) * (Vol 11) 1924 All 818 (824): 46 All 864 * (Vol 13) 1926 All 212 (214): 48 All 356 * (Vol 16) 1929 Lah 317 (318) * (Vol 13) 1926 Pat 171 (173).

[13] Presence of witness during examination of previous witness — Court can refuse to take his evidence. (Vol 21) 1934 All 840 (841).

[14] Instituting vexatious actions will invoke the exercise of inherent powers. (1905) 28 Mad 560 (564, 565) * (1909) 5 Nag L R 181 (185) * (1905) 28 Mad 28 (32) * (1909) 31 All 116 (122): 36 Ind App 9 (PC) (Witness — Citing opponent as.) * (1010) 32 All 104 (109): 37 Ind App 1 (PC) * (1898) 23 Cal 203 (206) * (Vol 19) 1932 Mad 263 (264).

[15] Executing a decree manifestly at variance with its purpose will justify exercise of inherent powers. (Vol 5) 1918 Pat 352 (354): 3 Pat L Jour 435.

[16] A person who brings himself within the terms of a statute is not to be deprived of a right conferred by that statute on "so treacherous a ground of decision as an abuse of the process of the Court". (Vol 3) 1916 P C 64 (65): 44 Cal 535: 44 Ind App 11 (PC) * (Vol 29) 1942 Lah 119 (120). (Execution of decree for Rs. 44 — Property attached worth about Rs. 3000.) * (1910) 8 Ind Cas 474 (475): (1910) 1 Upp Bur Rul 26. (Solvent co-heirs of a pauper putting him forward to get a decision of their rights.) * (Vol 2) 1915 Mad 608 (612) (Choice of *forum* no abuse though defendant suffers.) * (Vol 2) 1915 Mad 461 (463). (Second suit against same party for same relief on same cause of action pending first suit, is no abuse because first may fail on some technicality.)

[17] The failure to conform to a mere rule of practice is not an abuse of process in every case. (Vol 15) 1928 Mad 522 (523) * (Vol 16) 1929 Nag 251 (254): 27 Nag L R 102 (F B).

12. Criminal cases. — [1] See the following decisions: — (Vol 12) 1925 Lah 323 (323). (Forged receipt — Question of forgery in appeal before High Court — Stay of proceedings under S. 476, Criminal P.C.) * (Vol 19) 1932 Oudh 31 (32). (Stay of criminal proceedings, pending civil litigation in respect of the same matter.)

13. Contempt of Court. — [1] High Court has jurisdiction to award costs in a criminal prosecution for contempt of Court and to order its recovery on the lines on which decrees are executed by the Civil Court. (Vol 22) 1935 All 1013 (1014): 58 All 874.

[2] As to the powers of a Chief Court to punish for contempt, see (Vol 27) 1940 Sind 239 (241): 1 L R (1941) Kar 3 (F B).

14. Insolvency Court. — [1] An Insolvency Court has inherent powers to pass necessary orders in cases not provided for by the Insolvency Act. (Vol 27) 1940 Rang 156 (156): 1940 Rang L R 392 * (Vol 20) 1933 Pat 84 (87): 12 Pat 163.

[2] An Insolvency Court has power to rectify mistakes in its proceedings. (Vol 21) 1934 Lah 177 (178) * (Vol 21) 1934 Mad 31 (31) * (Vol 20) 1933 Mad 345 (346).

[3] An Insolvency Court can set aside an *ex parte* order obtained by fraud or misrepresentation. (Vol 24) 1937 Lah 631 (631, 632).

[4] An Insolvency Court has no power to stay an execution sale going on in another Court. (Vol 4) 1917 Mad 945 (946).

[5] The Court in which an execution sale is going on, may on a claim by the Official Receiver under S. 51

152. Clerical or arithmetical mistakes in judgments, decrees or orders arising there. *Amendment of judgments, decrees or orders.* in from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

[1882—cf. S. 206, para. 3; 1877—Ss. 204 to 206; 1859—S. 189; R. S. C., O. 28 R. 11; See also S. 153 and O. 6 R. 17.]

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or S. 52, Insolvency Act, stay the execution. (Vol 11) 1924 Sind 69 (71).

[6] Where an applicant is entitled to an order of adjudication as of right under the Insolvency Act, the Courts cannot refuse adjudication on the ground that it is an abuse of the process of the Court. (Vol 3) 1916 P C 64 (65) : 44 Ind App 11 : 44 Cal 535 (P C).

[7] Court has inherent power to restore an application under S. 9 (1) (c), Provincial Insolvency Act, filed by a creditor, dismissed for default, at the instance of another creditor who applies under S. 16 for substituting his name. (Vol 33) 1946 Bom 20 (23) : I L R (1945) Bom 734.

15. Reinstatement of legal practitioner dismissed from profession.—[1] High Court has power to reinstate legal practitioners. (Vol 21) 1934 Oudh 140 (142) : 35 Cri L Jour 678 (SB) * (Vol 22) 1935 All 321 (322) (FB).

16. Appeal.—[1] No appeal lies from an order under S. 151, as an appeal from an order. (Vol 30) 1943 Oudh 35 (36)* (Vol 29) 1942 Bom 306 (307) : I L R (1942) Bom 704* (Vol 29) 1942 Pat 195 (195)* (Vol 28) 1941 Lah 419 (420) : I L R (1942) Lah 212 * (Vol 27) 1940 Bom 10 (11, 12) : I L R (1939) Bom 708* (Vol 27) 1940 Oudh 387 (390) : 16 Luck 27 * (Vol 26) 1939 Lah 508 (508) * (Vol 19) 1932 Nag 101 (102) : 28 Nag L R 88* (Vol 17) 1930 Nag 199 (200) : 26 Nag L R 187* (Vol 31) 1944 All 218 (219, 220) : I L R (1944) All 331* (Vol 12) 1925 Mad 229 (229) : 48 Mad 713* (Vol 14) 1927 Mad 335 (336)* (Vol 11) 1924 Rang 177 (177) : 1 Rang 656* (Vol 26) 1939 All 28 (29)* (Vol 25) 1938 Pesh 81 (82)* (Vol 23) 1936 Sind 166 (167) : 30 Sind L R 170* (Vol 24) 1937 Cal 152 (155, 156) : I L R (1937) 1 Cal 637* (Vol 23) 1936 Pesh 79 (80).

[2] Order under S. 151 amounting to decree—Appeal lies (Vol 23) 1936 Lah 212 (213)* (Vol 27) 1940 Bom 10 (11, 12) : I L R (1939) Bom 708 * (Vol 27) 1940 Cal 92 (92) : I L R (1939) 2 Cal 378* (Vol 27) 1940 Nag 349 (354) : I L R (1940) Nag 538* (Vol 13) 1926 Pat 457 (459) : 6 Pat 160* (Vol 14) 1927 Pat 296 (297) : 6 Pat 380* (1943) I L R (1943) Kar 245 (249)* (Vol 20) 1933 Mad 399 (400)* (Vol 24) 1937 Cal 152 (156) : I L R (1937) 1 Cal 637* (Vol 23) 1936 Lah 725 (727)* (Vol 23) 1936 Mad 636 (638)* (Vol 22) 1935 All 27 (28).

[3] Order under S. 151 can be challenged under S. 105. (Vol 21) 1934 Lah 812 (312).

[4] Order not specifically passed under S. 151—Appeal—Appellate Court must decide the provision under which order falls. (Vol 17) 1930 Mad 158 (159) : 53 Mad 395* (Vol 13) 1926 Pat 516 (516)* (Vol 10) 1923 Mad 331 (331)* (Vol 19) 1932 Lah 311 (311)* (Vol 25) 1938 Sind 124 (126) : I L R (1939) Kar 50.

[5] Order in fact under S. 151, actually passed as an appealable order—Appeal lies. (Vol 15) 1928 Lah 341 (341)* (Vol 19) 1932 Pat 317 (319) : 11 Pat 553.

[But see (Vol 27) 1940 Nag 349 (351, 352) : I L R (1940) Nag 538. ((Vol 23) 1936 Nag 8 : 31 Nag L R (Sup) 72, overruled.)]

[6] Order passed under S. 151—Jurisdiction analogous to that conferred by appealable provision exercised—No appeal lies. (Vol 4) 1917 Pat 495 (496, 497) : 2 Pat L Jour 361* (Vol 26) 1939 Oudh 273 (275).

[But see (Vol 30) 1943 Nag 172 (174) : I L R (1943) Nag 699* (Vol 28) 1941 Mad 564 (565)* (Vol 27) 1940 Nag 349 (352) : I L R (1940) Nag 538. (Obiter.)* (Vol 14)

1927 Cal 285 (286)* (Vol 18) 1931 Cal 779 (781)* (Vol 25) 1938 Nag 326 (328) : I L R (1939) Nag 350* (Vol 26) 1939 Sind 303 (304) : I L R (1939) Kar 428.]

[7] Where the discretion permitted under S. 151 is used to enlarge a provision of procedural law, an appeal lies. (Vol 30) 1943 Nag 335 (339) : I L R (1944) Nag 370.

17. Revision.—[1] Revision lies from an order under S. 151. (Vol 30) 1943 Oudh 35 (36) * (Vol 28) 1941 Lah 419 (420) : I L R (1942) Lah 212 * (Vol 28) 1941 Rang 60 (61) : 1940 Rang L R 749* (Vol 27) 1940 Pat 475 (476).

[2] Ordinarily Court will not interfere in revision with an order under S. 151. (1940) 1940 All W R (H O) 62 (63) * (Vol 1) 1914 All 125 (125) * (Vol 19) 1932 Mad 223 (224) * (Vol 21) 1934 Cal 780 (781)* (Vol 14) 1927 Cal 420 (421) * (Vol 1) 1914 Lah 9 (11) : 1914 Fun Re No. 10.

[3] Refusal to exercise jurisdiction—Revision lies. (Vol 29) 1942 Bom 306 (307) : I L R (1942) Bom 704* (Vol 12) 1925 Cal 420 (421) * (Vol 21) 1934 Lah 108 (108) * (Vol 21) 1934 Mad 84 (84, 85) : 57 Mad 542* (Vol 6) 1919 Mad 14 (15)* (Vol 24) 1937 Lah 894 (895).

[4] Order under S. 151 without jurisdiction—Revision lies. (Vol 29) 1942 Pat 328 (328) * (Vol 26) 1939 All 668 (669, 670) * (Vol 16) 1929 Cal 158 (159) * (Vol 17) 1930 Nag 48 (49) : 26 Nag L R 30 * (Vol 5) 1918 Pat 100 (103) : 4 Pat L Jour 20 * (Vol 22) 1935 Cal 336 (338) : 62 Cal 61* (Vol 26) 1939 Sind 137 (142) : I L R (1939) Kar 330.

[5] Section 115 cannot be applied to cases where the Court has considered a matter judicially and has refused to exercise its discretion under S. 151 so that no question of jurisdiction arises at all. (Vol 22) 1935 All 49 (49).

[6] See also Notes on S. 115.

SECTION 152—SYNOPSIS

1. Clerical, arithmetical mistakes and errors arising from accidental slip or omission.
2. Mistakes originating in pleadings.
3. Mistakes anterior to suit.
4. Inherent powers of Court.
5. "May be corrected".
6. "At any time".
7. Court by which amendment can be made.
8. "Of its own motion."
9. Who may apply.
10. Notice of amendment.
11. Effect of amendment.
12. Successive applications for amendment.
13. Consent decrees.
14. Award.
15. Suit to rectify mistake, if lies.
16. Appeal.
17. Revision.

1. Clerical, arithmetical mistakes and errors arising from accidental slip or omission.—[1] Under S. 152 Court cannot only correct clerical or arithmetical mistakes in judgments, decrees and orders but also accidental slip or omission therein. (Vol 16) 1929 All 337 (337) : 51 All 672 * (Vol 19) 1932 Pat 321 (322). (Accidental and unintentional errors.) * (Vol 11) 1924 All 690 (690). (Palpable mistakes.) * (Vol 15) 1928 Lah 636 (637) * (Vol 10) 1923 Lah 147 (148)* (Vol 13) 1926

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Oudh 223 (223, 224) * (Vol 10) 1923 Mad 663 (664). (Court cannot substitute a new decision.) * (Vol 9) 1922 Mad 192 (192) * (Vol 20) 1933 Oudh 385 (386) * (Vol 30) 1943 Cal 1 (4) : I L R (1942) 2 Cal 268 * (Vol 14) 1927 Pat 25 (27). (Accidental omission of direction in judgment.) * (Vol 17) 1930 Sind 96 (96) 26 Sind L R 150. (Accidental inclusion of the name of deceased party instead of the legal representative brought on record.) * (Vol 4) 1917 Oudh 141 (143). (Omission to fix period of payment in a redemption decree.) * (Vol 25) 1938 Mad 573 (575). (Dismissal of entire suit instead of against the appealing defendant.) * (1913) 7 Low Bur Rul 81 (82). (Decree for foreclosure inadvertently passed in lieu of one for sale.) * (Vol 24) 1937 Oudh 191 (192) : 12 Luck 759. (Suit for possession and mesne profits — Court permitting inquiry about mesne profits to be determined in execution proceedings — Judgment and decree granting possession but omitting order as to mesne profits — Omission held accidental.) * (Vol 17) 1930 Lah 210 (211). (By inadvertence relief as to possession not granted.) * (Vol 26) 1939 Lah 255 (256). (Suit for accounts — Final decree including costs only after preliminary decree — Decree can be amended so as to include costs prior to preliminary decree.) * (Vol 13) 1926 Lah 664 (665). (Error in judgment that a certain party being *pro forma* defendant was not liable to pay costs.) * (Vol 7) 1920 Nag 157 (157). (Mistake as to costs.) * (Vol 23) 1936 Pesh 196 (197). (Question of award of costs not in dispute — Only method of assessment or item awarded in controversy — Application for amendment of decree lies under S. 152.) * (Vol 27) 1940 Cal 202 (203, 204) : I L R (1939) 1 Cal 305. (Passing of personal decree against legal representative.) * (Vol 11) 1924 Lah 621 (622). (Passing personal decree against the legal representative.) * (Vol 2) 1915 All 188 (189) : 37 All 323. (Defendant's mortgage held prior, but no mention made in decree.) * (Vol 2) 1915 All 323 (323). (Inadvertent recording of order of dismissal instead of an order decreeing the suit or appeal.) * (Vol 5) 1918 All 78 (78). (Inadvertent misdescription of property covered by the decree or judgment.) * (Vol 16) 1929 All 147 (147, 148) : 50 All 859. (Judgment accidentally including property of a stranger.) * (Vol 20) 1933 All 102 (103). (Omission to specify property in decree in a mortgage suit.) * (Vol 25) 1938 Oudh 7 (8). (Full pleader's fee awarded against an admitting defendant contrary to rules.) * (Vol 14) 1927 Rang 311 (312) : 5 Rang 615. (Date for performance not fixed in a decree for specific performance — Court can fix date subsequently.) * (Vol 6) 1919 Pat 141 (142). (Delivery of possession of property not covered by decree — Application by judgment-debtor for restoration of property and correction of mistake — Court should correct its mistake.)

[2] Clerical and arithmetical mistakes can always be corrected even though the decree agrees with the judgment. (Vol 7) 1920 Pat 180 (180). (Order as to costs can be added to a judgment already pronounced.) * (Vol 14) 1927 Mad 435 (436) * (1939) 41 Pun L R 119 (120). (Correction of error should not be refused on the ground that the mistake appears on the judgment and therefore it is not accidental.)

[3] Decree in accordance with judgment cannot be amended without judgment being amended. (Vol 14) 1927 Cal 203 (206) * (1911) 11 Ind Cas 896 (896, 897) (All) * (1937) 1937 Mad W N 1013 (1013). (Decree and judgment not in terms of O. 34 R. 4 read with O. 34 R. 15.) * (Vol 2) 1915 Mad 939 (940) * (1907) 31 Bom 447 (449).

[4] Where by accidental slip the name of a wrong person is inserted in the decree as the guardian of a minor the mistake can be corrected. (Vol 13) 1926 Pat 564 (565) * (Vol 15) 1928 Mad 1057 (1059). (Where it

is not case of misdescription alone but a case of real non-representation the defect cannot be cured.)

[5] Where there is no clerical or arithmetical or any errors arising from accidental slip or omission the section does not apply. (Vol 29) 1942 Oudh 189 (193) : 17 Luck 297 * (Vol 28) 1941 Lah 419 (420). (Judge deliberately not passing decree in form No 9 in Appendix D of the Code — Successor cannot amend.) * (Vol 26) 1939 All 96 (96, 97). (Amending decree by reducing the decretal amount in the light of accounts newly filed is not justified.) * (1909) 33 Bom 216 (218). (Omission to declare the manner of taking accounts, and the person by whom they are to be taken, in a decree on mortgage suit.) * (Vol 28) 1941 Lah 212 (214). (Court reviewing judgment *sue motu* and allowing interest at 9 per cent per annum since 1927 — Original judgment not containing a finding that rent was due from 1927 — Modification cannot be allowed.) * (Vol 27) 1940 Lah 182 (182). (Method of assessment of costs wrong — Decree cannot be amended (Vol 23) 1936 Pesh 196 dissented from.) * (Vol 27) 1940 Mad 538 (539, 540). (Court cannot rectify decree because it was wrong or unfair or parties did not realize their rights.) * (Vol 11) 1924 Oudh 403 (409). (Deliberate error or omission cannot be corrected.) * (Vol 22) 1935 Pesh 104 (106) * (Vol 31) 1944 All 198 (199) : I L R (1944) All 588. (Court making mistake of law and passing wrong decree — Mistake cannot be said to have arisen through accidental slip or omission.) * (Vol 25) 1938 Cal 187 (188). (Judgment and decree though ambiguous, decree following judgment entirely — No accidental slip or omission — S. 152 does not apply.) * (Vol 13) 1926 Cal 1100 (1101) * (1913) 1913 Pun L R No. 25 page 93 : 1913 Pun Re No. 47 * (1912) 11 Mad L Tim 33 (37). (Even where the order has been passed under an erroneous impression as to the facts of the case.) * (Vol 21) 1934 All 128 (128, 129).

[6] Order of apportionment of compensation awarded for acquisition of land under misapprehension of facts — Decree in conformity with judgment — Section 152 has no application. (Vol 7) 1920 Pat 743 (744) : 5 Pat L Jour 253.

[7] Test whether the slip or omission is accidental or not is to see whether the order as it stands represents the intention of the Judge at the time he made it. (Vol 29) 1942 Oudh 226 (229) : 17 Luck 739 * (Vol 18) 1931 Oudh 422 (423) * (1910) 13 Oudh Cas 114 (118).

[8] Whereby allowing a correct description of property the plaint will be completely altered and also the decree and the deed on which the plaint is based, the correction is not of a clerical mistake. (Vol 21) 1934 All 100 (101).

[See also (Vol 28) 1941 Pat 399 (401). (Question involving identity of property mortgaged cannot be dealt with on an application to amend.)]

[9] Court which amends a decree on account of clerical or accidental slip or omission must be satisfied that such a slip or omission has occurred, either because it was obvious on the face of record or because of evidence adduced before it. (Vol 32) 1945 Mad 280 (280).

[See however (Vol 14) 1927 Cal 203 (205). (Evidence is not admissible to show that there is any arithmetical or clerical error in judgment)]

[10] A judgment once signed shall not afterwards be altered or added to, save as provided by this section or on review : see Order 20 Rule 3.

2. Mistakes originating in pleadings.—[1] Court can amend errors in decree without amending pleadings where errors first appeared. (Vol 1) 1914 Mad 297 (297) * (Vol 11) 1924 All 520 (521) * (Vol 1) 1914 All 61 (61, 62). (Court has power to amend clerical error in plaint throughout record beginning with plaint down to decree. * (Vol 10) 1923 All (349 350). (Misdescription of land

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in plaint should be allowed to be corrected.) * (1898) 22 Bom 370 (375). (Sum mentioned as due in the plaint and incorporated in the decree found incorrect—Decree can be amended.) * (1898) 16 Mad 424 (427). (Error in description of mortgaged properties creeping in from the plaint.) * (1909) 5 Nag L R 159 (160). (Error in description of mortgaged property arising out of the plaint.) * (Vol 22) 1935 Oudh 92 (93) : 10 Luck 496. (Error in description of mortgaged property in plaint—Preliminary and final decree drawn up in accordance with it can be amended.) * (Vol 28) 1941 Pat 399 (400). (Error in description of mortgaged property in the plaint—Only preliminary and final decree can be amended—The execution papers cannot be amended.) * (Vol 29) 1942 Rang 56 (57). (Heading of application by mistake stating that an application by the legal representative to record adjustment was by A who was dead. Section 152 applies.)

[But see (Vol 14) 1927 All 585 (585). (Section 152 deals with orders and decrees, but does not apply to a case where wrong sum is entered in judgment itself through mistake of parties.) * (Vol 6) 1919 All 264 (265) * (1906) 1906 All W N 220 (221).]

3. Mistakes anterior to suit. — [1] Accidental mistakes may be amended even though they may have an origin anterior to the suit. (Vol 18) 1931 Mad 260 (262, 263) * (Vol 28) 1941 Mad 940 (940). (Section 152 applies to mistakes in document evidencing transaction itself and copied in plaint and decree in suit to enforce transaction.) * (Vol 19) 1932 Mad 275 (278, 279). (Decree may be amended after rectification of deed in the suit.) * (Vol 11) 1924 Rang 104 (104).

[But see (1912) 8 Nag L R 13 (16). (Suit for rectification alone is the remedy.)]

4. Inherent powers of Court. — [1] Court can correct any mistake in judgment, decree or order—This power is granted not only under S. 152 but under S. 151 and S. 153 also. (Vol 22) 1935 Oudh 92 (93) : 10 Luck 496 * (Vol 19) 1932 All 587 (589) : 54 All 800 * (1910) 37 Cal 649 (657) * (Vol 21) 1934 Oudh 352 (353) : 8 Luck 734 * (Vol 20) 1933 Pat 135 (138) * (Vol 10) 1923 All 119 (120). (Person not appellant shown as appellant.) * (Vol 22) 1935 Bom 75 (75) : 59 Bom 158. (Decree drawn up in terms of interlocutory application instead of according to final order owing to mistake on part of ministerial servant.) * (Vol 24) 1937 Cal 96 (98). (Judgment directing that costs of appeal would be costs in suit—Decree providing that costs of original hearing and re-trial ordered thereby as well as the costs of appeal, to abide result of trial—Decree held could be amended to agree with judgment.) * (Vol 3) 1916 Mad 520 (521). (Judgment giving mortgage decree—Decree wrongly drafted so as to give only a charge—Decree may be amended.)

[2] Courts in India have inherent power to amend or vary decrees so as to bring them in accord with the judgments even if the amendments do not fall within S. 152. (Vol 6) 1919 Lah 30 (31) : 1919 Pun Re No. 92 * (Vol 4) 1917 Lah 216 (216). (Powers are wide to avoid *reductio ad absurdum*.)

[3] Misake not clerical nor arithmetical nor arising from accidental slip or omission—Court cannot correct it under S. 152—Ss. 151 and 152 cannot be invoked to correct erroneous judgment or decree—Remedy of aggrieved party is to appeal or apply for review. (Vol 28) 1941 Lah 419 (420) * (1913) 7 Sind L R 186 (187). (Section 152 does not contemplate the practical reversal of the Court's finding on a formal issue.) * (Vol 18) 1931 All 427 (428) * (Vol 29) 1942 Pat 328 (328, 329). (Question of contentious nature—S. 152 cannot be invoked—Execution sale—Question whether description of property by khewat numbers or its

description by area should prevail—Question cannot be dealt with under Ss. 151 and 152—It can be decided in separate suit.) * (Vol 33) 1946 Pat 190 (191). (Question of contentious nature—S. 152 cannot be invoked—Usufructuary mortgage right whether sold not determined—Sale certificate cannot be amended by adding reference to mortgage bond.) * (Vol 27) 1940 Oudh 298 (300, 301). (Error in opinion of trial Court not being one arising from accidental slip or omission—Error in opinion of High Court due to negligence of parties—It is not proper for High Court to amend decree and judgment.) * (Vol 17) 1930 Lah 589 (591). (Judgment containing two contradictory directions as regards decree—Decree drawn according to earlier and operative part of judgment—No application under S. 152 for amendment of decree lies.) * (Vol 4) 1917 Mad 290 (292) * (Vol 25) 1938 Lah 381 (382, 383).

[4] A Court cannot amend a decree which is already in conformity with the judgment, so as to make it conform with facts which the plaintiff could have but has not alleged in his plaint. (1909) 2 Ind Cas 551 (551) (All) * (Vol 14) 1927 Pat 405 (406) * (1886) 8 All 377 (380) * (Vol 14) 1927 Lah 403 (404) * (Vol 27) 1940 Mad 29 (30). (Decree following judgment and silent with respect to payment of further interest from date of decree to date of payment—Omission even if accidental cannot be rectified.) * (Vol 11) 1924 Mad 225 (226) * (Vol 4) 1917 All 166 (167). (A decree against one person cannot be amended by adding another as judgment-debtor when no decree has been passed against him.)

[5] The jurisdiction of Privy Council to recommend alteration of a former order on the ground that by inadvertence it does not give effect to its intention as expressed in the judgment is undoubted. (Vol 18) 1931 P C 104 (106) : 58 Ind App 141 : 58 Cal 1281 (P C).

5. "May ... be corrected." — [1] Party has no right to have mistakes corrected—Discretion is left with Court. (Vol 20) 1933 Oudh 529 (530) : 9 Luck 162 * (Vol 12) 1925 All 187 (188) : 47 All 44 * (Vol 12) 1925 All 556 (556). (Court has jurisdiction to refuse amendment of decree.) * (Vol 25) 1938 Lah 4 (6). (Court has to exercise discretion after duly considering all the circumstances.) * (Vol 24) 1937 Lah 894 (895) * (Vol 22) 1935 Oudh 369 (371) : 11 Luck 150 * (Vol 20) 1933 Oudh 466 (468) : 9 Luck 90. (Amendment of preliminary decree after passing of final decree and sale of mortgaged property, cannot be allowed.) * (Vol 20) 1933 Oudh 425 (425, 426) * (1932) 15 Nag L Jour 124 (128).

[2] Mistakes can be corrected unless it is inequitable to do so. (Vol 29) 1942 Oudh 226 (229, 230) : 17 Luck 739.

[3] Sufficient explanation for delay in amending decree not forthcoming—Amendment was refused. (Vol 19) 1932 Cal 563 (564, 566, 568).

6. "At any time." — [1] There is no period of limitation for an amendment of decree to correct an accidental slip or omission under S. 152. (Vol 27) 1940 Mad 127 (128) : 1 L R (1940) Mad 349 (FB) * (1887) 10 Mad 51 (52) * (1913) 7 Sind L R 53 (54).

[2] Court can amend decree to conform with judgment at any time—There is no time limit to such amendment. (Vol 11) 1924 Cal 895 (897) * (Vol 10) 1923 Bom 414 (415) * (1887) 11 Bom 284 (285) * (Vol 16) 1929 Mad 830 (832). (Payment of decree-money to decree-holder does not disentitle him from applying for amendment of decree.) * (Vol 3) 1916 Mad 908 (908) * (Vol 29) 1942 Oudh 226 (230) : 17 Luck 739. (Amendment can be allowed even if limitation for appeal against decree has expired.) * (Vol 28) 1941 Oudh 344 (347, 348) * (Vol 12) 1925 Oudh 418 (419) * (Vol 8) 1921 Oudh 190 (190) * (Vol 10) 1923 Pat 218 (218).

Section 152 (contd.)

[3] The amendment of a decree the satisfaction of which had been recorded is a nullity unless steps were also taken to have the order of satisfaction set aside. (1902) 12 Mad L Jour 96 (97) * (Vol 13) 1926 Mad 516 (517). (Correction involving a larger sum due by one party to another long after satisfaction of decree cannot be made.)

[But see (Vol 28) 1941 Oudh 344 (347).]

[4] Amendment of a decree should be refused if there be laches on the part of applicant. (1932) 15 Nag L Jour 124 (129) * (1935) 37 Pun L R 623 (623). (Error as to costs in the decree.) * (Vol 27) 1940 Lah 182 (182). (Costs wrongly awarded.) * (Vol 2) 1915 Lah 213 (214). (Delay unless with sufficient reason is fatal.)

[See also (Vol 24) 1937 Cal 96 (99). (Applicant not appearing in appeal which resulted in decree and hence having no knowledge of discrepancy between judgment and decree — Delay in making application in these circumstances held not fatal to granting it.)]

[See however (Vol 29) 1942 Oudh 226 (230) : 17 Luck 739. (Mistake of Court — No question of laches arises.)]

[5] Even accidental error should not be amended if third parties have acquired rights under the erroneous judgment in the interval. (Vol 11) 1924 Oudh 408 (410) * (Vol 18) 1931 Mad 399 (403) : 54 Mad 184 * (Vol 24) 1937 Oudh 217 (220) : 13 Luck 101 (F B) * (Vol 28) 1941 Oudh 344 (348) * (Vol 20) 1933 Cal 627 (629) : 60 Cal 753 * (Vol 10) 1923 Mad 57 (57) * (1913) 7 Low Bur Rul 81 (82) * (Vol 12) 1925 Bom 389 (390).

7. Court by which amendment can be made.—

[1] Amendment of decree — Lower Court cannot amend after decree has been superseded by that of the superior Court. (Vol 8) 1921 Upp Bur 5 (6) : 4 Upp Bur Rul 1 * (Vol 4) 1917 All 417 (418).

[2] Where the decree of the lower Court is confirmed, reversed or varied in appeal it is superseded by the decree of the appellate Court and the Court that can amend decree in such a case is the appellate Court. (1910) 11 Cal L Jour 159 (160) * (Vol 5) 1918 Cal 133 (134). (Where an Appellate Court affirms the decree of the Court below it must be taken as embodying or superseding that decree.) * (1910) 32 All 295 (300, 301) : 37 Ind App 70 (P C). (Affirmed.) * (1910) 11 Cal L Jour 81 (82). (Decree modified on appeal by the consent of parties.) * (Vol 16) 1929 Mad 830 (831). (Confirmed.) * (Vol 4) 1917 Mad 589 (589). (Affirmed.) * (Vol 2) 1915 Mad 1068 (1088). (Affirmed.) * (Vol 18) 1931 Rang 153 (154) : 9 Rang 186 (Preliminary mortgage decree by lower Court merged in and superseded by preliminary decree of High Court — Lower Court cannot amend its preliminary decree.) * (Vol 8) 1921 All 130 (130) (Affirmed.) * (Vol 28) 1941 Mad 123 (125). (Appeal abating against deceased respondent but decided on merits against other respondents—Legal representatives of deceased respondent should apply to appellate Court for amendment of decree and not to trial Court.)

[See also (1941) 1941 Oudh W N 270 (271). (Trial Court has ordinarily no jurisdiction left to amend a decree in cases where the decree of that Court has merged in the decree of the appellate Court.) * (1905) 9 Cal W N 605 (608). (Decree appealed and affirmed by appellate Court — Subsequently decree corrected under S. 152 by original Court — Amended decree not questioned — Held validity of decree cannot be challenged in proceedings for execution of decree.) * (1897) 24 Cal 759 (762). (Confirmed.) * (1913) 7 Sind L R 53 (54) * (Vol 5) 1918 All 341 (342) * (1889) 11 All 267 (274) (F B) * (Vol 1) 1914 Mad 99 (100) * (Vol 3) 1916 Mad 1202 (1202) * (Vol 17) 1930 Nag 138

(138). (Appeal to Privy Council — Decree of lower appellate Court substantially altered restoring that of lower Court — Clerical error in record can only be rectified by His Majesty in Council.) * (1910) 11 Cal L Jour 155 (157).]

[See however (Vol 21) 1934 All 971 (972). (Section 152 deals only with special cases of correction of clerical or arithmetical error — Words 'at any time' refer to cases where decree of lower Court has merged in Appellate Court decree — In such cases lower Court has power to make amendment if it is merely of a clerical or arithmetical mistake.)]

[3] The dismissal of an appeal on the ground that no appeal lies on the judgment does not amount to the confirmation of the original decree or superseding it, and the lower Court can amend its own decree. (1912) 16 Ind Cas 933 (933) (Mad) * (Vol 19) 1932 Pat 238 (239) : 11 Pat 409. (Appeal summarily dismissed — Lower Court and not appellate Court can amend decree.)

[4] Revision petition dismissed — Decree of lower Court left intact — Lower Court is entitled to amend the decree. (Vol 22) 1935 Pesh 91 (92) * (Vol 7) 1920 Lah 321 (322) : 1 Lah 342.

[5] Where an appeal is dismissed for default, the dismissal does not amount to a confirmation and an application for amendment of the decree must be made to the Court which passed the decree appealed from and not to the Court which dismissed the appeal. (Vol 4) 1917 Nag 24 (24).

[But see (1911) 10 Ind Cas 96 (97) (Mad). (Appellate Court can amend decree of lower Court and bring it in conformity with its own judgment even though appeal is dismissed in default.)]

[6] Amendment relating to portion of the decree outside the scope of appeal — Application for amendment of decree lies to lower Court. (Vol 7) 1920 Cal 286 (286).

[See also (Vol 20) 1933 Cal 335 (336). (Mistake as to double payment of Court-fee in High Court decree discovered after confirmation by Privy Council — Mistake was corrected by High Court.)]

[7] When an appeal has been dismissed under O. 41, R. 11 the decree of the lower Court is left untouched and therefore lower Court has jurisdiction to amend the decree so as to bring it in conformity with its judgment. (1897) 21 Bom 548 (551) * (Vol 28) 1941 Oudh 251 (251, 252) : 16 Luck 697.

[But see (Vol 7) 1920 Nag 80 (80). (Decree confirmed — Appellate Court has jurisdiction to amend decree even if appeal is dismissed under O. 41, R. 11.)]

[8] The clerical errors or slips in a decree or order can be corrected by the Court which passed it although an appeal against the same is pending in a superior Court. (Vol 5) 1918 Mad 295 (296) * (Vol 13) 1926 All 304 (304) : 48 All 224 * (Vol 11) 1924 All 127 (127) * (Vol 11) 1924 Pat 528 (528) * (1912) 15 Cal L Jour 432 (434, 435). (Lower Court's control over the decree does not come to an end as soon as an appeal is preferred against it.)

[See also (Vol 19) 1932 Oudh 291 (293) : 8 Luck 93. (Clerical error resulting in wrong order — Court may correct such error and pass proper order independently of fact that such error could have been corrected by Court of appeal.)]

[See however (Vol 3) 1916 All 170 (170). (High Court cannot amend a decree which is the subject-matter of an appeal to the Privy Council.)]

[9] Appeal pending — Appellate Court can also correct clerical or arithmetical mistake in the trial Court's decree. (Vol 15) 1928 All 458 (459).

Section 152 (*contd.*)

[10] The executing Court has no power to go behind the decree and therefore a plaintiff obtaining a decree for specific share will not be entitled to more on the ground of arithmetical error unless the mistake is rectified under S. 152 by the Court which passed the decree. (1911) 9 Ind Cas 433 (434) (Oudh).

[11] "Court" in S. 152, Civil P. C., does not mean only the particular presiding Judge, who may have made the mistakes—"Court" must always mean Court, whoever may be the presiding officer of the Court. (Vol 8) 1921 Pat 306 (307).

[12] Successor of Judge can correct clerical error. (Vol 7) 1920 All 64(65) (Vol 20) 1933 Lah 423(424). [See also (Vol 4) 1917 Cal 184 (185) : 44 Cal 28.]

[13] Power of successor is wider than that under Civil P. C. (1908), O. 47, R. 2. (Vol 19) 1932 Pat 321 (322).

[14] Insolvency Court has jurisdiction to correct errors under S. 152. (Vol 6) 1919 All 264 (264).

8. "Of its own motion."—[1] Under S. 152 the correction of the decree can be made by the Court of its own motion. (Vol 16) 1929 All 337 (337) : 51 All 672 (Vol 23) 1936 Sind 53 (55) : 29 Sind L R 445 (1913) 7 Sind L R 53 (54) (1897) 11 Bom 284 (285) (Vol 5) 1918 Nag 41 (44).

[2] It is the duty of the Court to amend the decree under this section whenever it is found to be not in conformity with its judgment. (1894) 21 Cal 259 (261).

9. Who may apply.—[1] Non-party can move Court under S. 152 to correct decree. (Vol 29) 1942 Oudh 226 (229) : 17 Luck 739.

[2] A purchaser of decree purchases the rights in the decree and if one of these rights vesting in the vendor is a right to have the decree amended under the law, this right also passes to vendee. (Vol 26) 1939 Lah 255 (256).

[3] Appeal abating against deceased respondent but decided on merits against other respondents—Legal representatives of deceased respondent should apply to appellate Court for amendment of decree. (Vol 28) 1941 Mad 123 (123, 125).

10. Notice of amendment.—[1] Entry in decree made on application of party and after hearing objection of opposite party—Court cannot correct such entry on application of opposite party behind back of applicant. (Vol 22) 1935 All 841 (841) (1865) 25 Suth W R (Misc) 15 (16).

[2] Amendment of decree without giving opportunity to the party against whom it is to operate is open to review. (Vol 13) 1926 All 384 (386) : 48 All 281.

11. Effect of amendment.—[1] General rule is that amendment of decree dates back to date of decree. (Vol 24) 1937 Oudh 217 (220) : 13 Luck 101 (F B).

[2] Transferees in good faith for valuable consideration and without notice of mistake are protected—Persons not parties to amendment—Amendment takes effect from date it is made and not date of decree. (Vol 29) 1942 Oudh 226 (231) : 17 Luck 739.

[3] A correction made in a time-barred decree leaves the decree still time barred. (Vol 27) 1940 Mad 127 (128) : 1 L R (1940) Mad 349 (F B).

12. Successive applications for amendment.—

[1] First application for amendment of decree dismissed on merits—Subsequent application for substantially the same relief is ordinarily barred. (Vol 15) 1928 Lah 244 (245) (1912) 39 Cal 265 (274). (Application for amendment dismissed for default—There is nothing to prevent Court from hearing another application in the same matter.)

[2] First application for amendment of decree refused erroneously—Second application materially differing from the first is competent. (Vol 14) 1927 Rang 57 (57) : 4 Rang 347.

13. Consent decrees.—[1] Consent order—Clerical or mathematical mistake can be corrected under S. 152. (Vol 24) 1937 Bom 457 (457, 458) : 1 L R (1937) Bom 837.

[2] Section 152, Civil P. C., authorises the Court to remedy errors in formal expression of its order occasioned by its own indolence and if a compromise decree does not embody all the terms of the compromise the decree can be corrected. (1913) 21 Ind Cas 115 (116) (Cal) (Vol 15) 1928 Lah 352 (353) : 9 Lah 176 (Vol 16) 1929 Lah 400 (402). (Judgment-debtor applying for correction of compromise decree—Decree-holder cannot plead that compromise was obtained by fraud.)

[3] Suit compromised—Decree agreed to be realized from assets of deceased in A's hands—Court in the decree making A also personally liable if decree not realized from assets—Court itself has jurisdiction to correct it under S. 152. (Vol 16) 1929 Lah 254 (254).

[4] Petition of compromise ambiguous—Clause not contained in compromise petition added in decree with knowledge and consent of parties—*Held* decree gave expression to true intention of parties and should not be amended. (1903) 7 Cal W N 880 (882, 883) (F B).

[5] Suit for partnership accounts compromised deciding S entitled to three annas share—Decree ordering in terms of compromise, S to be entitled to that share—S seeking execution of decree and praying alternatively to amend decree if it be not in terms of compromise—Decree held was in terms of compromise, merely declaratory and incapable of execution, and it could not be amended. (Vol 16) 1929 Nag 34 (36).

[6] Consent decree—Application to amend consent decree on ground of fraud is entirely outside S. 152. (Vol 16) 1929 Cal 470 (471) : 57 Cal 154.

[7] Amendment of decree under S. 152 is justified only when it is for clerical error or arithmetical mistake. The only remedy in the case of a decree not agreeing with compromise arrived at, is by suit to set it aside either on the ground of fraud, mistake or some other ground. (Vol 6) 1919 Pat 232 (232) : 4 Pat L Jour 205.

[8] A consent decree can be varied for reasons not coming under S. 152 only by consent. (Vol 1) 1914 Bom 127 (127) (Vol 1) 1914 Bom 109 (109) (Vol 18) 1931 Cal 51 (51) : 57 Cal 1143.

14. Award.—[1] Section applies to clerical and accidental errors in judgments and decrees based on awards. Court can refer to arbitrator to ascertain whether there was clerical error in the award. (Vol 29) 1942 Oudh 426 (427) (Vol 19) 1932 Oudh 293 (295).

[See also (Vol 14) 1927 Mad 720 (727).]

[2] Court cannot amend by calling for a report from the arbitrators but should examine them. (Vol 32) 1945 Mad 230 (230).

15. Suit to rectify mistake, if lies.—[1] Where a decree has been passed by a Court of competent jurisdiction no suit will lie to set it aside except on the ground of fraud. (Vol 2) 1915 P C 99 (101) : 37 All 485 : 42 Ind App 171 (P O) (Vol 3) 1916 Cal 816 (817) : 43 Cal 217. (Variation between decree and judgment—Suit does not lie—It is matter for amendment.) (Vol 18) 1931 Pat 296 (298). (Suit for possession based on decree in partition suit—Decree alleged to be incorrect—Action for rectification of decree does not lie.)

[2] It has been held in the undermentioned cases that a suit lies to rectify a decree on the ground of mistake (1904) 8 Cal W N 473 (476) (1911) 11 Ind Cas 537 (539) (Oudh).

[3] The following cases hold that a suit to correct a decree on the ground of mistake does not lie. (1912) 15 Cal L Jour 675 (677) (1906) 10 Cal W N 1024 (1025).

153. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

[R. S. C., O. 28 R. 12; See O. 6 R. 17.]

Section 152 (*contd.*)

[4] Amendment sought on the ground of subsequent change in the circumstances — Suit and not an amendment would be appropriate remedy. (Vol 2) 1915 Cal 696 (698).

16. Appeal. — [1] An order under this section is not a decree. (1901) 28 Cal 177 (180) * (1911) 1911 Pun L R No. 186 page 687 (688) : 1911 Pun Re No. 24.

[2] Order amending or refusing to amend judgment, decree or order under S. 151 or S. 152 is not appealable. (Vol 28) 1941 Lah 419 (419, 420) : I L R (1942) Lah 212 * (Vol 6) 1919 All 30 (31) * (1904) 1 All L Jour 701 (702) * (1901) 28 Cal 177 (180) * (Vol 14) 1927 Lah 68 (68) * (Vol 13) 1926 Lah 664 (665).

[3] An appeal lies from the amended decree. (Vol 28) 1941 Lah 419 (420) : I L R (1942) Lah 212 * (1881) 6 Cal 22 (25) * (1906) 3 Cal L Jour 188 (190, 191) * (Vol 2) 1915 Nag 37 (38) : 11 Nag L R 92. (Appeal lies from amended decree where amendment has effect of appreciably adding to right of decree-holder.)

[See also (Vol 25) 1938 Mad 573 (575). (Correction of accidental or clerical mistakes though purporting to be made in review really falls under this section and in such cases no new decree is substituted for the old one and appeal lies from the original decree.)]

[4] Judge, instead of amending decree, wrongly passing fresh decree — Appeal against fresh decree will lie. (Vol 21) 1934 Lah 899 (899).

[5] New decree substituted for original decree — Appeal does not lie from original decree. (Vol 23) 1936 Sind 53 (55) : 29 Sind L R 445.

17. Revision. — [1] There is no remedy except by revision in respect of an order passed under S. 152. (1885) 7 All 876 (877) (FB) * (Vol 28) 1941 Lah 419 (419, 420) : I L R (1942) Lah 212 * (Vol 1) 1914 Mad 143 (143). (Vakeel's fee entered wrongly in decree owing to mistaken calculation.) * (Vol 28) 1941 Oudh 66 (66) : 16 Luck 252 * (Vol 21) 1934 All 100 (101) * (Vol 25) 1938 Lah 4 (5). (The mere fact that an appeal lies from the amended decree is no bar.) * (Vol 16) 1929 Lah 400 (401) * (Vol 2) 1915 Mad 1068 (1068) * (Vol 12) 1925 Oudh 373 (373). (Amendment refused to be considered on merits on ground of decree having been signed by party's pleader—Revision allowed.)

[2] Wrong refusal to amend decree is failure to exercise jurisdiction and the order is revisable. (Vol 16) 1929 Lah 664 (664) * (Vol 22) 1935 Oudh 461 (462) : 11 Luck 413 * (Vol 21) 1934 Oudh 352 (354) : 8 Luck 734 * (Vol 18) 1931 Oudh 422 (424).

[3] Order amending decree without jurisdiction — High Court can in special circumstances entertain revision even when remedy by way of appeal from amended decree is available. (Vol 27) 1940 Mad 538 (539). (1901) 24 Mad 646, not approved).

[4] Refusal to amend a decree on the ground that previous applications were dismissed for default is an error in law which will justify a review but not revision. (1887) 10 Mad 51 (52).

[5] Decree-holder applying to have decree amended by bringing description of land contained therein in accordance with that contained in the hypothecation bond — Decree amended — High Court will not interfere merely because lower Court relied on wrong section. (1893) 16 Mad 424 (427, 428).

[6] High Court will not in revision interfere with an order where it is doubtful whether the error can be

considered as clerical or arithmetical mistake. (Vol 2) 1915 All 102 (104).

SECTION 153 — SYNOPSIS.

1. "Any proceeding in suit."
2. Applicability and scope.
3. "At any time."
4. "Defect or error."

1. "Any proceeding in suit." — [1] Word 'proceeding' means 'any application to a Court of justice, however made, for aid in enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.' (Vol 24) 1937 Mad 342 (343).

[2] "Proceeding" includes an appeal. (Vol 17) 1930 All 131 (132) * (Vol 19) 1932 Lah 305 (306). (Appeal against dead respondent—Legal representative can be substituted and time for substitution can be excused.) * (Vol 12) 1925 Mad 1210 (1210) : 49 Mad 18 (F B). (Appeal against dead person—Cause title may be amended by inserting the name of respondent's legal representatives — (Vol 11) 1924 Mad 56, overruled.)

[3] Application for execution. (Vol 2) 1915 Mad 337 (337). (Application for execution dismissed — Attachment ceases—Subsequent application for execution by sale only is defective—Defect is curable by amendment.) * (Vol 24) 1937 Mad 342 (343). (Application for challan and application for deposit not containing express prayer for setting aside sale — Amendment by addition of necessary prayer should be allowed.)

[4] Vakalatnama. (Vol 21) 1934 All 810 (811). (Vakil's name omitted in body of vakalatnama by clerical error—Vakil accepting vakalatnama and presenting plaint — Application to correct vakalatnama — Court can do so and presentation of plaint is valid.)

[5] Sale certificate. (Vol 9) 1922 Mad 63 (64, 65). (No notice to judgment-debtor of amendment of sale certificate—Amendment is irregular—But not revisable in absence of injustice to parties.)

[6] See also the following cases : (Vol 7) 1920 P C 121 (123) (P C). (Entirely misconceived suit was not allowed to be amended before Privy Council.) * (Vol 11) 1924 All 804 (805). (Court should allow parties to supply, by way of amendment, signature to application.) * (Vol 24) 1937 Nag 108 (110) : I L R (1938) Nag 245. (Application for leave to appeal as pauper not verified in manner as prescribed—Court should offer chance to applicant to correct verification.) * (Vol 16) 1929 Oudh 385 (387, 388) : 4 Luck 562 (F B). (Decree on basis of compromise—Party verifying or admitting on behalf of other without authority—Other party can invoke inherent powers under Ss. 151, 152 and 153 to remove name from decree—Review also lies.)

2. Applicability and scope. — [1] Powers of amendment under this section are very wide. (Vol 3) 1916 Pat 347 (348) : 1 Pat L Jour 898 * (Vol 19) 1932 All 587 (588, 589) : 54 All 800.

[2] The object of the section is that merest technicalities may not stand in the way of substantial justice. (Vol 30) 1943 Nag 293 (295) : I L R (1943) Nag 603 * (Vol 20) 1933 All 295 (297) : 55 All 216 * (Vol 12) 1925 Rang 282 (283) : 3 Rang 183 (FB). (Amendment should be allowed where the refusal would result in another but successful suit.)

[3] Exercise of power under this section is discretionary with Court with reference to facts. (Vol 22) 1935

Saving of present right of appeal.

154. Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

[1882—S. 3, para. 3.]

Amendment of certain Acts.

155. The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

156. [Repeals.] *Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914), Section 3 and Schedule II.*

157. Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

[1882—S. 3, Second sentence.]

158. In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

[1882—S. 3, para. 2.]

Section 153 (*contd.*)

Oudh 369 (371) : 11 Luck 150*(Vol 23) 1936 Pesh 192 (192, 193).

[4] Where there is no prejudice or injustice to the other party, amendment can be allowed. (Vol 9) 1922 Mad 417 (418) * (Vol 8) 1921 All 321 (322) * (Vol 24) 1937 Nag 173 (174) : I L R (1937) Nag 514 * (1887) 19 Q B D 394 (396).

[5] But Court cannot allow an amendment so as to alter the real matter in controversy between the parties. (Vol 9) 1922 P C 249 (250) : 48 Cal 832 : 48 Ind App 214 : 4 Upp Bur Rul 30 (P C). (Suit for specific performance for delivery of certain sites cannot be converted into a claim for damages for breach.)

[6] See also the following decisions : (Vol 12) 1925 All 142 (142). (Overvaluing a suit to get round a previous decision — Proper procedure is to return plaint.) * (Vol 11) 1924 Bom 166 (169). (Rule 258 of Bombay High Court Rules does not bar application for amendment of decree or order that is not final.) * (Vol 30) 1943 Nag 293 (295) : I L R (1943) Nag 603. (Having once chosen a forum the plaintiff cannot alter the forum by relinquishing a part of the claim; and such power cannot be exercised by Court under O. 2, R. 2 or S. 153 or even under S. 151.)

3. "At any time."—[1] Amendment of pleadings by original Court cannot be allowed after the decree has been actually drawn up and sealed.—Review is the only remedy. (Vol 11) 1924 Bom 166 (166, 168).

[2] Amendments of clerical mistakes are allowed even in second appeals. (Vol 9) 1922 All 81 (81).

[3] Pleadings engaged by authorised agent of appellant — Appellant died before presentation of appeal — Memo itself is not existent — Court has no discretion to amend memo of appeal under S. 153. (Vol 21) 1934 Nag 274 (276) : 31 Nag L R 57.

[4] Application returned for amendment — No time fixed — Amended application though presented long after, must be deemed to be a continuation of prior proceeding. (Vol 9) 1922 All 446 (447).

4. "Defect or error." — [1] When the dismissal order was not an error or defect in the proceedings, this section has no application. (Vol 9) 1922 Pat 121 (121) : 4 Pat L Jour 287.

Section 154 — Note 1.

[1] The general law that a right of appeal is more than a matter of procedure and an alteration of the law of procedure would not react upon the right of appeal, is superseded by S. 154. (1912) 6 Sind L R 168 (174).

[2] Section 154 does not affect any right of appeal accrued to a party before the new Code came into force and was open to the party at the commencement of the new Code. (1910) 7 All L Jour 1070 (1073) * (1911) 21 Mad L Jour 631 (635) * (Vol 8) 1921 Mad 126 (128).

[But see (1912) 1912 Pun L R No. 156, p. 482(486, 487); 1913 Pun Re No. 1. (The words "any present right of appeal" in S. 154, Civil P. C., mean a right of appeal *in esse* and not *in passe i. e.*, a right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party at the commencement of the new statute.)]

[3] Section 154 has no bearing on the powers of an Appellate Court in dealing with appeals before it. (1911) 9 Ind Cas 815 (816) (Cal).

Section 155. — [1] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see section 8.

Section 157 — Note 1.

[1] "Rules made" means rules properly and validly framed by proper authority. (Vol 3) 1916 Mad 1165 (1166).

[2] Madras Civil Rules of Practice (framed under 1882 Code)—Rules not re-enacted and published under Part 10 and inconsistent with rules of First Schedule are invalid. (Vol 25) 1938 Mad 438 (441) : I L R (1938) Mad 734 (F B). ((Vol 1) 1914 Mad 652 : 37 Mad 17 (F B), overruled.)

[3] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see section 8.

Section 158 — Note 1.

[1] As to the applicability of this section to any suit or proceeding in the Court of Small Causes established in the towns of Calcutta, Madras and Bombay, see section 8.

THE FIRST SCHEDULE

ORDER I.

PARTIES TO SUITS.

RULES.

1. Who may be joined as plaintiffs.
2. Power of Court to order separate trials.
3. Who may be joined as defendants.
4. Court may give judgment for or against one or more of joint parties.
5. Defendant need not be interested in all the relief claimed.
6. Joinder of parties liable on same contract.
7. When plaintiff in doubt from whom redress is to be sought.
8. One person may sue or defend on behalf of all in same interest.
9. Misjoinder and nonjoinder.
10. Suit in name of wrong plaintiff.
Court may strike out or add parties.
Where defendant added, plaint to be amended.
11. Conduct of suit.
12. Appearance of one of several plaintiffs or defendants for others.
13. Objections as to nonjoinder or misjoinder.

ORDER II.

FRAME OF SUIT.

1. Frame of suit.
2. Suit to include the whole claim.
Relinquishment of part of claim.
Omission to sue for one of several reliefs.
3. Joinder of causes of action.
4. Only certain claims to be joined for recovery of immoveable property.
5. Claims by or against executor, administrator or heir.
6. Power of Court to order separate trials.
7. Objections as to misjoinder.

ORDER III.

RECOGNIZED AGENTS AND PLEADERS.

1. Appearances, etc., may be in person, by recognized agent or by pleader.
2. Recognized agents.
3. Service of process on recognized agent.
4. Appointment of pleader.
5. Service of process on pleader.
6. Agent to accept service.
Appointment to be in writing and to be filed in Court.

ORDER IV.

INSTITUTION OF SUITS.

RULES.

1. Suit to be commenced by plaint.
2. Register of suits.

ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

1. Summons.
2. Copy or statement annexed to summons.
3. Court may order defendant or plaintiff to appear in person.
4. No party to be ordered to appear in person unless resident within certain limits.
5. Summons to be either to settle issues or for final disposal.
6. Fixing day for appearance of defendant.
7. Summons to order defendant to produce documents relied on by him.
8. On issue of summons for final disposal, defendant to be directed to produce his witnesses.

Service of Summons.

9. Delivery or transmission of summons for service.
10. Mode of service.
11. Service on several defendants.
12. Service to be on defendant in person when practicable, or on his agent.
13. Service on agent by whom defendant carries on business.
14. Service on agent in charge in suits for immoveable property.
15. Where service may be on male member of defendant's family.
16. Person served to sign acknowledgment.
17. Procedure when defendant refuses to accept service, or cannot be found.
18. Endorsement of time and manner of service.
19. Examination of serving officer.
20. Substituted service.
Effect of substituted service.
Where service substituted, time for appearance to be fixed.
21. Service of summons where defendant resides within jurisdiction of another Court.
22. Service, within Presidency towns, of summons issued by Courts outside.

RULES.

23. Duty of Court to which summons is sent.
24. Service on defendant in prison.
25. Service where defendant resides out of British India and has no agent.
26. Service in foreign territory through Political Agent or Court.
27. Service on civil public officer or on servant of railway company or local authority.
28. Service on soldiers, sailors or airmen.
29. Duty of person to whom summons is delivered or sent for service.
30. Substitution of letter for summons.

ORDER VI.

PLEADINGS GENERALLY.

1. Pleading.
2. Pleading to state material facts and not evidence.
3. Forms of pleading.
4. Particulars to be given where necessary.
5. Further and better statement, or particulars.
6. Condition precedent.
7. Departure. —
8. Denial of contract.
9. Effect of document to be stated.
10. Malice, knowledge, etc.
11. Notice.
12. Implied contract, or relation.
13. Presumptions of law.
14. Pleading to be signed.
15. Verification of pleadings.
16. Striking out pleadings.
17. Amendment of pleadings.
18. Failure to amend after order.

ORDER VII.

PLAINT.

1. Particulars to be contained in plaint.
2. In money suits.
3. Where the subject-matter of the suit is immoveable property.
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure of admitting plaint.
Concise statements.
10. Return of plaint.
Procedure on returning plaint.
11. Rejection of plaint.
12. Procedure on rejecting plaint.

RULES.

13. Where rejection of plaint does not preclude presentation of fresh plaint.
Documents relied on in Plaint.
14. Production of document on which plaintiff sues.
List of other documents.
15. Statement in case of documents not in plaintiff's possession or power.
16. Suits on lost negotiable instruments.
17. Production of shop-book.
Original entry to be marked and returned.
18. Inadmissibility of document not produced when plaint filed.

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

1. Written statement.
2. New facts must be specially pleaded.
3. Denial to be specific.
4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement.
Effect of set-off.
7. Defence or set-off founded on separate grounds.
8. New ground of defence.
9. Subsequent pleadings.
10. Procedure when party fails to present written statement called for by Court.

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. Parties to appear on day fixed in summons for defendant to appear and answer.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.
3. Where neither party appears, suit to be dismissed.
4. Plaintiff may bring fresh suit or Court may restore suit to file.
5. Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.
6. Procedure when only plaintiff appears.
When summons duly served.
When summons not duly served.
When summons served, but not in due time.
7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

RULES.

8. Procedure where defendant only appears.
9. Decree against plaintiff by default bars fresh suit.
10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.
Setting aside Decrees ex parte.
13. Setting aside decree ex parte against defendant.
14. No decree to be set aside without notice to opposite party.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

1. Ascertainment whether allegations in pleadings are admitted or denied.
2. Oral examination of party or companion of party.
3. Substance of examination to be written.
4. Consequence of refusal or inability of pleader to answer.

ORDER XI.

DISCOVERY AND INSPECTION.

1. Discovery by interrogatories.
2. Particular interrogatories to be submitted.
3. Costs of interrogatories.
4. Form of interrogatories.
5. Corporations.
6. Objections to interrogatories by answer.
7. Setting aside and striking out interrogatories.
8. Affidavit in answer, filing.
9. Form of affidavit in answer.
10. No exception to be taken.
11. Order to answer or answer further.
12. Application for discovery of documents.
13. Affidavit of documents.
14. Production of documents.
15. Inspection of documents referred to in pleadings or affidavits.
16. Notice to produce.
17. Time for inspection when notice given.
18. Order for inspection.
19. Verified copies.
20. Premature discovery.
21. Non-compliance with order for discovery.
22. Using answers to interrogatories at trial.
23. Order to apply to minors.

ORDER XII.

ADMISSIONS.

1. Notice of admission of case.

RULES.

2. Notice to admit documents.
3. Form of notice.
4. Notice to admit facts.
5. Form of admissions.
6. Judgment on admissions.
7. Affidavit of signature.
8. Notice to produce documents.
9. Costs.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. Documentary evidence to be produced at first hearing.
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence.
5. Endorsements on copies of admitted entries in books, accounts and records.
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents.
8. Court may order any document to be impounded.
9. Return of admitted documents.
10. Court may send for papers from its own records or from other Courts.
11. Provisions as to documents applied to material objects.

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

1. Framing of issues.
2. Issues of law and of fact.
3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend, and strike out, issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Parties not at issue.
2. One of several defendants not at issue.
3. Parties at issue.
4. Failure to produce evidence.

ORDER XVI.

SUMMONING AND ATTENDANCE OF
WITNESSES.

RULES.

1. Summons to attend to give evidence or produce documents.
2. Expenses of witness to be paid into Court on applying for summons.
Experts.
Scale of expenses.
3. Tender of expenses to witness.
4. Procedure where insufficient sum paid in.
Expenses of witnesses detained more than one day.
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in Court to give evidence or produce document.
8. Summons how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of Rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witnesses to apply to parties summoned.

ORDER XVII.

ADJOURNMENTS.

1. Court may grant time and adjourn hearing.
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party fails to produce evidence, etc.

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION
OF WITNESSES.

1. Right to begin.
2. Statement and production of evidence.

RULES.

3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under Section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down.
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases.
14. Judge unable to make such memorandum to record reasons of his inability.
15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect.

ORDER XIX.

AFFIDAVITS.

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination.
3. Matters to which affidavits shall be confined.

ORDER XX.

JUDGMENT AND DECREE.

1. Judgment when pronounced.
2. Power to pronounce judgment written by Judge's predecessor.
3. Judgment to be signed.
4. Judgments of Small Cause Courts.
Judgments of other Courts.
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where Judge has vacated office before signing decree.
9. Decree for recovery of immoveable property.
10. Decree for delivery of moveable property.
11. Decree may direct payment by instalments.
Order, after decree, for payment by instalments.
12. Decree for possession and mesne profits.
13. Decree in administration suit.
14. Decree in pre-emption suit.

RULES.

15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to accounts.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off is allowed.
Appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.

ORDER XXI.

EXECUTION OF DECREES AND ORDERS
Payment under Decree.

1. Modes of paying money under decree.
2. Payment out of Court to decree-holder.

Courts executing Decrees.

3. Lands situate in more than one jurisdiction.
4. Transfer to Court of Small Causes.
5. Mode of transfer.
6. Procedure where Court desires that its own decree shall be executed by another Court.
7. Court receiving copies of decree, etc., to file same without proof.
8. Execution of decree or order by Court to which it is sent.
9. Execution by High Court of decree transferred by other Court.

Application for Execution.

10. Application for execution.
11. Oral application.
Written application.
12. Application for attachment of moveable property not in judgment-debtor's possession.
13. Application for attachment of immoveable property to contain certain particulars.
14. Power to require certified extract from Collector's register in certain cases.
15. Application for execution by joint decree-holder.
16. Application for execution by transferee of decree.
17. Procedure on receiving application for execution of decree.
18. Execution in case of cross-decrees.
19. Execution in case of cross-claims under same decree.
20. Cross-decrees and cross-claims in mortgage-suits.
21. Simultaneous execution.
22. Notice to show cause against execution in certain cases.
23. Procedure after issue of notice.

Process for Execution.

RULES.

24. Process for execution.
25. Endorsement on process.

Stay of Execution.

26. When Court may stay execution.
Power to require security from, or impose conditions upon, judgment-debtor.
27. Liability of judgment-debtor discharged.
28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.
29. Stay of execution pending suit between decree-holder and judgment debtor.

Mode of Execution.

30. Decree for payment of money.
31. Decree for specific moveable property.
32. Decree for specific performance, for restitution of conjugal rights, or for an injunction.
33. Discretion of Court in executing decrees for restitution of conjugal rights.
34. Decree for execution of document, or endorsement of negotiable instrument.
35. Decree for immoveable property.
36. Decree for delivery of immoveable property when in occupancy of tenant.

Arrest and Detention in the Civil Prison.

37. Discretionary power to permit judgment-debtor to show cause against detention in prison.
38. Warrant for arrest to direct judgment-debtor to be brought up.
39. Subsistence-allowance.
40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

Attachment of Property.

41. Examination of judgment-debtor as to his property.
42. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.
43. Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.
44. Attachment of agricultural produce.
45. Provisions as to agricultural produce under attachment.
46. Attachment of debt, share and other property not in possession of judgment-debtor.
47. Attachment of share in moveables.
48. Attachment of salary or allowances of public officer or servant of railway company or local authority.

RULES.

49. Attachment of partnership property.
50. Execution of decree against firm.
51. Attachment of negotiable instruments.
52. Attachment of property in custody of Court or public officer.
53. Attachment of decrees.
54. Attachment of immoveable property.
55. Removal of attachment after satisfaction of decree.
56. Order for payment of coin or currency notes to party entitled under decree.
57. Determination of attachment.

Investigation of Claims and Objections.

58. Investigation of claims to, and objections to attachment of, attached property.
- Postponement of sale.
59. Evidence to be adduced by claimant.
60. Release of property from attachment.
61. Disallowance of claim to property attached.
62. Continuance of attachment subject to claim of incumbrancer.
63. Saving of suits to establish right to attached property.

Sale Generally.

64. Power to order property attached to be sold and proceeds to be paid to person entitled.
65. Sales by whom conducted and how made.
66. Proclamation of sales by public auction.
67. Mode of making proclamation.
68. Time of sale.
69. Adjournment or stoppage of sale.
70. Saving of certain sales.
71. Defaulting purchaser answerable for loss on re-sale.
72. Decree-holder not to bid for or buy property without permission.
- Where decree-holder purchases, amount of decree may be taken as payment.
73. Restriction on bidding or purchase by officers.

Sale of Moveable Property.

74. Sale of agricultural produce.
75. Special provisions relating to growing crops.
76. Negotiable instruments and shares in corporations.
77. Sale by public auction.
78. Irregularity not to vitiate sale, but any person injured may sue.
79. Delivery of moveable property, debts and shares.
80. Transfer of negotiable instruments and shares.
81. Vesting order in case of other property.

*Sale of Immoveable Property.***RULES.**

82. What Courts may order sales.
83. Postponement of sale to enable judgment-debtor to raise amount of decree.
84. Deposit by purchaser and re-sale on default.
85. Time for payment in full of purchase-money.
86. Procedure in default of payment.
87. Notification on re-sale.
88. Bid of co-sharer to have preference.
89. Application to set aside sale on deposit.
90. Application to set aside sale on ground of irregularity or fraud.
91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.
92. Sale when to become absolute or be set aside.
93. Return of purchase-money in certain cases.
94. Certificate to purchaser.
95. Delivery of property in occupancy of judgment-debtor.
96. Delivery of property in occupancy of tenant.

Resistance to Delivery of Possession to Decree-holder or Purchaser.

97. Resistance or obstruction to possession of immoveable property.
98. Resistance or obstruction by judgment-debtor.
99. Resistance or obstruction by bona fide claimant.
100. Dispossession by decree-holder or purchaser.
101. Bona fide claimant to be restored to possession.
102. Rules not applicable to transferee pendente lite.
103. Orders conclusive subject to regular suit.

ORDER XXII.**DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.**

1. No abatement by party's death if right to sue survives.
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.

RULES.

7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit.
Procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
12. Application of Order to proceedings.

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

ORDER XXIV.

PAYMENT INTO COURT.

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in part.
Procedure where he accepts it as satisfaction in full.

ORDER XXV.

SECURITY FOR COSTS.

1. When security for costs may be required from plaintiff.
Residence out of British India.
2. Effect of failure to furnish security.

ORDER XXVI.

COMMISSIONS.

Commissions to examine witnesses.

1. Cases in which Court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue.
5. Commission or request to examine witness not within British India.
6. Court to examine witness pursuant to commission.

RULES.

7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.
Commissions for local investigations.
9. Commissions to make local investigations.
10. Procedure of Commissioner.
Report and depositions to be evidence in suit.
Commissioner may be examined in person.
Commissions to examine Accounts.
11. Commission to examine or adjust accounts.
12. Court to give Commissioner necessary instructions.
Proceedings and report to be evidence.
Court may direct further enquiry.
Commissions to make partitions.
13. Commission to make partition of immoveable property.
14. Procedure of Commissioner.
General Provisions.
15. Expenses of commission to be paid into Court.
16. Powers of Commissioners.
17. Attendance and examination of witnesses before Commissioner.
18. Parties to appear before Commissioner.
Commissions issued at the instance of foreign Tribunals.
19. Cases in which High Court may issue commission to examine witness.
20. Application for commission.
21. To whom commission may be issued.
22. Issue, execution and return of commissions, and transmission of evidence to foreign Court.

ORDER XXVII.

SUITS BY OR AGAINST THE CROWN OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. Suits by or against Crown.
2. Persons authorised to act for Crown.
3. Plaints in suits by or against Crown.
4. Agent for Crown to receive process.
5. Fixing of day for appearance on behalf of Crown.
6. Attendance of person able to answer questions relating to suit against Crown.
7. Extension of time to enable public officer to make reference to Crown.
8. Procedure in suits against public officer.
- 8A. No security to be required from Crown or a public officer in certain cases.
- 8B. Definitions of "Crown" and "Crown pleader".

ORDER XXVIIA.

SUITS INVOLVING A SUBSTANTIAL QUESTION OF LAW AS TO THE INTERPRETATION OF THE GOVERNMENT OF INDIA ACT, 1935, OR ANY ORDER-IN-COUNCIL MADE THEREUNDER.

RULES.

1. Notice to the Advocate-General.
2. Court may add Government as party.
3. Costs.
4. Application of Order to appeals.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY OR NAVAL MEN OR AIRMEN.

1. Officers, soldiers, sailors or airmen who cannot obtain leave may authorise any person to sue or defend for them.
2. Person so authorised may act personally or appoint pleader.
3. Service on person so authorised, or on his pleader, to be good service.

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. Subscription and verification of pleading.
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. Suing of partners in name of firm.
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.
10. Suit against person carrying on business in name other than his own.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

1. Representation of beneficiaries in suits concerning property vested in trustees, etc.
2. Joinder of trustees, executors and administrators.
3. Husband of married executrix not to join.

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

RULES.

1. Minor to sue by next friend.
2. Where suit is instituted without next friend, plaint to be taken off the file.
3. Guardian for the suit to be appointed by Court for minor defendant.
4. Who may act as next friend or be appointed guardian for the suit.
5. Representation of minor by next friend or guardian for the suit.
6. Receipt by next friend or guardian for the suit of property under decree for minor.
7. Agreement or compromise by next friend or guardian for the suit.
8. Retirement of next friend.
9. Removal of next friend.
10. Stay of proceedings on removal, etc., of next friend.
11. Retirement, removal or death of guardian for the suit.
12. Course to be followed by minor plaintiff or applicant on attaining majority.
13. Where minor co-plaintiff attaining majority desires to repudiate suit.
14. Unreasonable or improper suit.
15. Application of rules to persons of unsound mind.
16. Saving for Princes and Chiefs.

ORDER XXXIII.

SUITS BY PAUPERS.

1. Suits may be instituted in forma pauperis.
2. Contents of application.
3. Presentation of application.
4. Examination of applicant.
If presented by agent, Court may order applicant to be examined by commission.
5. Rejection of application.
6. Notice of day for receiving evidence of applicant's pauperism.
7. Procedure at hearing.
8. Procedure if application admitted.
9. Dispaupering.
10. Costs where pauper succeeds.
11. Procedure where pauper fails.
- 11A. Procedure where pauper suit abates.
12. Provincial Government may apply for payment of court-fees.
13. Provincial Government to be deemed a party.
14. Recovery of amount of court-fees.

RULES.

15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.
16. Costs.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Parties to suits for foreclosure, sale and redemption.
2. Preliminary decree in foreclosure suit.
3. Final decree in foreclosure suit.
4. Preliminary decree in suit for sale.
Power to decree sale in foreclosure suit.
5. Final decree in suit for sale.
6. Recovery of balance due on mortgage in suit for sale.
7. Preliminary decree in redemption suit.
8. Final decree in redemption suit.
- 8A. Recovery of balance due on mortgage in suit for redemption.
9. Decree where nothing is found due or where mortgagee has been overpaid.
10. Costs of mortgagee subsequent to decree.
11. Payment of interest.
12. Sale of property subject to prior mortgage.
13. Application of proceeds.
14. Suit for sale necessary for bringing mortgaged property to sale.
15. Mortgages by the deposit of title-deeds and charges.

ORDER XXXV.

INTERPLEADER.

1. Plaintiff in interpleader-suits.
2. Payment of thing claimed into Court.
3. Procedure where defendant is suing plaintiff.
4. Procedure at first hearing.
5. Agents and tenants may not institute interpleader-suits.
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THE FIFTH SCHEDULE

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THE FIRST SCHEDULE.

ORDER I.

PARTIES TO SUITS.

1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly,³ severally,⁴ or in the alternative,⁵ where, if such persons brought separate suits, any common question of law or fact would arise.

[1882—S. 26; 1877—S. 26; R. S. C., O. 16 R. 1. See O. 2-R. 3.]

Objects and Reasons.

'Rule 1. — The words 'act or' have been added before the word "transaction." — S. C. R.

Order 1 — General.

1. Scope. — [1] Per *Jenkins, C. J.*—"If we turn to the Code we find, as the essentials of a suit opposing parties, a subject in dispute, a cause of action and a demand of relief." (1907) 31 Bom 393 (398).

[2] This Order deals with the subject of parties to suits and, among other things, with the joinder, misjoinder and nonjoinder of parties and to a certain extent with the joinder of causes of action. (Vol 5) 1918 Cal 858 (859) : 45 Cal 111 * (Vol 22) 1935 Cal 573 (574); 63 Cal 163. (Order 1, R. 1 applies to joinder of parties as well as causes of action.) * (Vol 15) 1928 Cal 199 (200, 201) : 55 Cal 164 * (Vol 13) 1926 Sind 66 (68) : 19 Sind L R 395.

[3] Though Order 1 in terms refers only to 'suits', its provisions are also applicable to joinder of parties to appeals. (Vol 10) 1923 Lah 688 (639).

2. Parties. — [1] Parties to suit are persons whose names appear on record as parties. (Vol 17) 1930 Cal 263 (264).

[2] Benamidar being party to suit does not make real owner party to suit. (Vol 17) 1930 Cal 263 (264).

[3] The same individual, even in different capacities cannot be both a plaintiff and defendant to one and the same action—Hence where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. (1901) 25 Bom 606 (612). [See (Vol 13)

1926 Sind 4 (4). (The above rule was relaxed in this case on grounds of equity.)]

ORDER 1, RULE 1—SYNOPSIS.

1. Scope.
2. What persons may be joined as plaintiffs.
3. Jointly.
4. Severally.
5. In the alternative.
6. Appeal.
7. Necessary and proper parties.—See O. 1 R. 10.

1. Scope. — [1] Under the old law, separate causes of action in respect of several plaintiffs could not be joined. The present Civil P. C. permits different causes of action to be joined in respect of several plaintiffs provided they satisfy the conditions of O. 1, R. 1. (Vol 10) 1923 Mad 331 (332) * (Vol 23) 1936 Cal 650 (651). (Order 1, Rule 1 applies to joinder of causes of action also.)

[2] It is not the law that every plaintiff should be interested in the entire subject-matter of the suit. (Vol 29) 1942 All 122 (126) : I L R (1942) All 103.

[3] The rule is an enabling one allowing a number of plaintiffs, with the same right to relief to join in one suit instead of bringing of separate suits. It should not be read as though all such persons *must* be joined as plaintiffs. (1897) 24 Cal 385 (388).

O. 1, R. 1 (*contd.*)

2. What persons may be joined as plaintiffs:—

[1] Decree ordering payment of maintenance to mother and widow of deceased nephew — Joint suit by two women for arrears of maintenance is maintainable. (Vol 20) 1933 Pat 644 (645).

[2] *S* purchasing property from *P* — *P* wrongfully receiving mesne profits — *S* selling to *Y* — *Y* suing *P* for mesne profits making *S* *pro forma* plaintiff but praying decree in his favour only — *S* applying for amendment for decree for his claim for mesne profits due before transfer to *Y* — Amendment having no legal bar could be granted. (Vol 16) 1929 Bom 51 (53).

[3] Co-sharers suing lambaradar for profits can join in same suit. (Vol 16) 1929 All 668 (668) : 51 All 994.

[4] The co-sharer landlords can sue the tenants collectively even if they collect rent separately and the rent refers to different periods. (1911) 14 Cal L Jour 373 (374).

[5] In a suit by a presumptive reversioner to declare the invalidity of an adoption or alienation by the widow, the remote reversioner has a right to be joined in the suit along with or on the death of presumptive reversioner. (Vol 2) 1915 P O 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 (P O).

[6] Suit to set aside the attachment and sale of certain property by a widow and her alleged adopted son — Both asserting adoption — *Held*, their interests were not in any way antagonistic and they could jointly sue. (1892) 16 Bom 119 (123).

[7] Party defendant to an action claiming relief against co-defendants in respect of same transaction can be joined as co-plaintiff. (Vol 26) 1939 Pat 157 (153).

[8] No misjoinder if two different sets of persons join to eject trespasser. (Vol 16) 1929 All 790 (790).

[9] Is no bar to plaintiffs suing in double capacity. (Vol 2) 1915 Bom 284 (285) : 40 Bom 401.

[10] Plaintiff suing to recover certain properties in his personal capacity from certain defendants and to recover another property in the capacity of shebait from one of the defendants in the same suit — Action as framed is justified by O. 1, R. 1. (Vol 15) 1928 Cal 199 (200, 202) : 55 Cal 164. (Plaint should be treated as comprising two suits and they should be tried separately in view of provisions of O. 1, R. 2.)

[11] Where charges of misconduct against the several plaintiff's are not identical and each plaintiff's case has to be dealt with on its own merits, they cannot be joined together as co-plaintiffs. (Vol 13) 1926 Mad 57 (57, 58).

[12] The Code does not warrant the joinder of rival claimants as plaintiffs where each of them denies the right of the other. Each plaintiff should be in harmony with his co-plaintiff. (1920) 57 Ind Cas 784 (784) (Nag).

[13] Suit by several plaintiffs — Each plaintiff having separate cause of action in which others not interested — Misjoinder of causes of action arises. (Vol 13) 1926 Mad 1140 (1140).

3. Jointly. — [1] Persons having joint right — Some only of them cannot sue without joining others as defendants. (Vol 14) 1927 Mad 984 (984) & (Vol 29) 1942 Cal 295 (296). (Suit by some of shebait's — Other shebait's unwilling to join as plaintiffs impleaded as defendants — Procedure is proper.) & (Vol 4) 1917 Cal 585 (586).

[2] Refusal to join as co-plaintiff — The person may be joined as co-defendant. (Vol 12) 1925 Oudh 71 (72).

[3] Some members of a joint family who should have been joined as plaintiffs were arrayed as co-defendants — The suit should not be dismissed where it is proved that they should not willingly have been made co-plaintiffs to the suit. (1902) 24 All 226 (228).

[4] Joining a co-promisor as defendant — Whether he refused to join as co-plaintiff not known — Suit is not bad for misjoinder. (Vol 10) 1923 Cal 506 (507).

[5] Landlord and tenant — Ejectment — Suit for, by one cosharer — Other cosharers made *pro forma* defendants — Plaintiff is entitled to decree to the extent of his share jointly with others. (Vol 21) 1934 Cal 127 (128).

[6] Zamindars of village on bank of river bringing suit for possession of land which is subject of fluvial action of river and for mesne profits — Zamindars of village on opposite side of river claiming land as their own on basis of custom and tenants holding under them impleaded as defendants — Cosharers of plaintiffs made *pro forma* defendants — Suit is not bad for misjoinder or nonjoinder. (Vol 26) 1939 All 626 (633).

[7] Where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed, merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff. (Vol 18) 1931 Lah 445 (446).

[8] One of the two co-uralans may bring a suit to redeem a mortgage without averring or proving that the other uralan was asked to join as plaintiff in the suit. (1903) 26 Mad 649 (653) (F B).

[9] Promissory note executed in favour of several persons — In a suit to recover the amount due on promissory note, held, that the suit should not be dismissed when some in whose favour the note was executed are made defendants even though it was not shown that they had refused to be made plaintiffs. (1906) 29 Mad 302 (303).

[10] Trustees should ordinarily be co-plaintiffs — Those not willing to be plaintiffs should be made defendants. (Vol 19) 1932 Cal 27 (29).

[11] Debt due to joint promisees — Suit by one of them to recover his share only is not maintainable. (Vol 14) 1927 Mad 84 (84, 85) & (Vol 15) 1928 Bom 191 (193).

[See also (Vol 26) 1939 Nag 242 (244) : I L R (1939) Nag 515. (Mortgage in favour of *B* and *D* — Suit by *B* alone — *D* dying during course of suit — *B* acquiring *D*'s rights of recovering debt — Non-joinder of *D* held immaterial.)

4. Severally. — [1] Joint suit can be brought by plaintiffs, where each can bring separate suit against all defendants. (Vol 19) 1932 All 401 (402).

5. In the alternative. — [1] Suits by different sets of plaintiffs claiming in the alternative is maintainable provided there is a common question of law or fact. (Vol 8) 1916 Lah 47 (47) : 1916 Pun Re No. 10 & (Vol 9) 1922 Mad 174 (176) & (Vol 8) 1921 Nag 9 (10). (Second plaintiff can be added to provide against first plaintiff being held not entitled to sue).

[2] A plaint praying for a decree in favour of all the plaintiffs or, in the alternative, in favour of one of them if he alone was found entitled is admissible. (1905) 28 Mad 500 (503).

[3] A widow and her alleged adopted son suing the defendant for the recovery of money — They are agreed that either shall take the amount found due — Held, there was no misjoinder of plaintiffs. (1903) 26 Mad 647 (649) (F B).

[4] Suit for money — Person entitled to such money in the alternative joined as defendant to the suit at institution but subsequently made a plaintiff — Joinder as plaintiff is proper. (Vol 14) 1927 Oudh 484 (485) : 3 Luck 241.

[5] Where plaintiff 1 simply stated that she was daughter of *N* but did not claim property in dispute on the strength of that relation but put up her right along with plaintiff 2 on the ground that plaintiff 2 was the son of *N* and that she lived with him, it was held suit was not bad for misjoinder of parties. (1904) 28 Bom 94 (99).

2. Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

[R. S. C., O. 16 R. 1.]

3. All persons² may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction⁵ or series of acts or transactions is alleged⁴ to exist, whether jointly,⁶ severally⁸ or in the alternative,⁹ where, if separate suits were brought against such persons, any common question of law or fact would arise.

[1882—S. 28; 1877—S. 28; Cf. R. S. C., O. 16 R. 4. See O. 11 R. 3.]

Objects and Reasons.

The first sentence of S. 28 of the Code of 1882 ran as follows:—“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter”.

“O. I, R. 3 (S. 28). — The Committee realise that

the words ‘in respect of the same matter’ in R. 3 have given rise to great difficulty, and they think it advisable to follow the wording of the English Rule and to omit them”. — S. O. R.

“Rule 3.—The words ‘act or’ have been added before the word ‘transaction’. Rule 3 has been amplified so as to bring it into line with R. 1”. — S. C. R.

O. 1, R. 1 (*contd.*)

6 Appeal.—[1] Suit dismissed against defendant 1 and decreed against defendant 2 — Joint appeal by plaintiff and defendant 2 against defendant 1 is maintainable. (Vol 10) 1923 Lah 638 (639).

7. Necessary and proper parties. — See O. 1, R. 10.

Order 1, Rule 2 — Note 1

[1] This rule has no application to cases of misjoinder of parties. It applies only to cases where the plaintiffs are properly joined but separate trials are necessary for the purpose of avoiding inconvenience, embarrassment or delay. (1904) 26 All 218 (220). (Parties with different causes of action joined as co-plaintiffs—Suit is bad for mis-joinder of parties.) * (1913) 18 Ind Cas 181 (182) (Low Bur). (Order 1, R. 2, merely refers to procedure.)

[But see (Vol 1) 1914 Cal 795 (795). (Suit bad for mis-joinder — Court should treat it as one under O. 1, R. 2 and not dismiss it.)]

ORDER 1, RULE 3 — SYNOPSIS.

1. Scope and object.
2. All persons may be joined as defendants against whom any right to relief exists.
3. Parties must be within jurisdiction of the Court.
4. “Alleged”.
5. Same act or transaction.
6. “Jointly”.
7. Joint tort-feasors.
8. “Severally”.
9. “In the alternative”
10. Ancillary reliefs.
11. Effect of multifariousness.

1. Scope and object. — [1] The object of O. 1, R. 3 seems to be to avoid multiplicity of suits if it could be done without embarrassment to any of the defendants. (1907) 31 Bom 516 (522).

[2] Both the conditions referred to in O. 1, R. 3 must be fulfilled in order to justify the joinder provided for therein. (Vol 29) 1942 Mad 334 (335) * (Vol 17) 1930 All 180 (185) * (1910) 84 Bom 358 (366-368) * (1907) 31 Bom 516 (522) * (Vol 8) 1921 Cal 653 (655) * (Vol 12) 1925 Oudh 75 (76). (Order 1, R. 3 requires that all persons should be joined as defendants against whom any right to relief in respect of, or arising out of the same act is alleged to exist.) * (Vol 20) 1933 Pat 653 (653) * (Vol 21) 1934 Sind 176 (176).

[3] Persons added as defendants need not be inter-

ested in all reliefs. (Vol 23) 1936 Mad 449 (453, 454) * (1907) 31 Bom 516 (522) * (Vol 13) 1926 Sind 66 (68) : 19 Sind L R 395. (Plaintiffs must prove that common question arises as regards each.)

[4] It is not necessary that the evidence as regards each of the defendants should be the same or that all questions arising regarding the liability of each of the defendants should be common to them. (Vol 15) 1928 Bom 91 (94).

[5] Order 1, R. 3 applies not only to joinder of parties but also to joinder of causes of action. (Vol 29) 1942 Mad 334 (335) * (Vol 19) 1932 Bom 1 (1, 2) * (Vol 23) 1936 Cal 650 (651) * (Vol 5) 1918 Cal 858 (859, 861) : 45 Cal 111 * (Vol 21) 1934 Mad 367 (368) : 57 Mad 1031 * (1908) 31 Mad 252 (257).

[See also (1912) 35 Mad 39 (41, 42). (The test is not whether the cause of action against the defendants is the same but whether relief is sought in the same matter.)]

[6] Different causes of action against different defendants also can be joined if case can be brought within the Rule. (Vol 13) 1926 Sind 66 (68) : 19 Sind L R 395 * (Vol 20) 1938 Mad 622 (622, 624).

[7] Rule 3 of O. 2 must be so read as not to clash with the provisions of R. 3 of O. 1. (1911) 7 Nag L R 130 (131).

[8] Order 1, R. 3 is in no way limited by O. 34, R. 1. (Vol 19) 1932 Cal 512 (513) : 59 Cal 548.

[9] Decree for damages for breach of contract against one defendant and for damages in tort against another in respect of damages arising in same transaction, can be passed in same action — There is no misjoinder of defendants. (Vol 25) 1938 Rang 185 (189) : 1938 Rang L R 308 (S B).

[10] Where after the death of a Muhammadan, his widow under a compromise with A remained in possession of 1/8 of the estate as her share, and the 7/8 as dower, and she gifted the whole to P who mortgaged it to Q and after her death A sued P for possession while P had sold the property to Q, and Q applied to be joined as defendant, in the suit by A against P; Held, that he could not be joined, as no relief was sought against him and the case against him was not the same as that against other defendants. (1912) 10 All L Jour 387 (389).

[11] Order 1, R. 3 is very similar in terms, in fact almost identical, with O. 16, R. 4, English Procedure Rules, and is probably founded thereon and consequently the opinions expressed on O. 16, R. 4 by the English Judges may well be considered in construing the provi-

O. 1 R. 3 (*contd.*)

sions of O. 1 R. 3. (Vol 3) 1916 Cal 935 (936); 42 Cal 1135.

[But see (1908) 31 Mad 252 (256).]

[12] Mortgage suit — Stranger to mortgage claiming by title paramount impleaded — Misjoinder can be pleaded but on ground of inconvenience—*Per Rankin, J.* — Correct view is to see if case comes under R. 3. (Vol 12) 1925 Cal 973 (976, 978).

2. All persons may be joined as defendants against whom any right to relief exists. — [1] The provisions of O. 1 R. 3 are not imperative but they allow discretion. (1882) 8 Cal 238 (245) * (Vol 31) 1944 Mad 98 (102).

[2] Defendants against whom no cause of action exists are not necessary parties. (Vol 11) 1924 Cal 369 (369)* (Vol 13) 1926 Mad 1110 (1117). (In an administration action of the property of the deceased, the debtors to the estate are not necessary parties.) * (Vol 10) 1923 Pat 65 (70) : 2 Pat 110.

[3] The cause of action for a suit arises only against the persons who are responsible for the infringement of the right. (Vol 15) 1928 Cal 23 (24).

[4] Dispute as to right of irrigation from private water-course of canal—No relief against Government — Government is not necessary party. (Vol 6) 1919 Lah 119 (120).

[5] In order that a party must be considered a necessary party defendant, two conditions must be satisfied, first, that there must be a right to some relief against him in respect of the matter involved in the suit; and, second, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. (1900) 27 Cal 493 (497).

[6] Ejectment suit—Persons in actual physical possession are necessary parties—Persons only receiving rents are not. (Vol 11) 1924 Pat 172 (173).

[7] Ejectment suit against three brothers—One brother on field service — Claim reduced and that brother given up — Claim held not bad for misjoinder. (Vol 7) 1920 Lah 314 (315).

3. Parties must be within jurisdiction of the Court. — [1] Rule 3 will apply where Court has jurisdiction to entertain the suit — Suit against A and B — Court having jurisdiction against A but none against B — O. 1 R. 3 does not apply. (Vol 9) 1922 Cal 500* (501, 502) : 49 Cal 895 * (Vol 29) 1942 All 387 (389) : I L R (1942) All 862.

4. "Alleged." — [1] The determination as to whether or not the suit is framed is open to objection on the ground of mis-joinder of parties and causes of action, depends upon the allegations in the plaint. (Vol 5) 1918 Cal 858 (859, 861) : 45 Cal 111 * (Vol 25) 1938 Mad 329 (330).

[2] Under O. 1 R. 3 the test is not whether the decree awarded to the plaintiff against the defendant is joint but whether it is alleged in the plaint that there is against the said defendants any right to relief in respect of the same act or transaction. (Vol 16) 1919 Sind 55 (56) : 13 Sind L R 133.

5. Same act or transaction. — [1] In R. 3 the word "same" before the words "act" or "transaction" must be read also before "series of acts or transactions" in the same rule. (1910) 34 Bom 353 (365, 366.)

[2] Act or transactions when different should be so connected as to constitute one entity and cause of action against all defendants jointly. (Vol 29) 1942 All 387 (389).

[3] Joinder of parties and causes of action — Joint interest or same transaction is necessary. (Vol 6) 1919 Low Bur 121 (122).

[4] Whether joinder is proper is to be determined with reference to facts of case. (Vol 21) 1934 Mad 367 (369) : 57 Mad 1031.

[5] Contract of sale — Right to possession arises out of contract so as to be covered by O. 1 R. 3. (Vol 5) 1918 Mad 681 (690) : 40 Mad 365 (FB).

[6] A suit for declaration of title, mesne profits and possession of the property purchased by different sets of defendants in different lots in auction sale, which was fraudulently brought by the judgment-debtor is bad for multifariousness. (Vol 5) 1918 All 425 (429) : 40 All 7.

[7] Plaintiff aggrieved by decision of survey authorities that certain lands were not in plaintiff's village — Plaintiff suing against the decision and impleading as defendants persons in possession of different plots — Suit is not bad for multifariousness. (Vol 12) 1925 Mad 1237 (1238) * (1909) 6 All L Jour 456 (457, 458) * (Vol 12) 1925 Pat 228 (232).

[8] The general rule is that all owners of the servient tenement, as regards which there is a cause of action and over which the easement is claimed, should be made parties, e. g., persons who have an interest entitling them to present possession of the servient tenement. (Vol 20) 1933 Cal 882 (884) : 60 Cal 1072* (Vol 23) 1936 Cal 534 (535).

[9] Suit for ejectment of several defendants setting up titles to different parts of a single plot of land is not bad for misjoinder of parties and causes of action. (Vol 11) 1924 Nag 55 (56) : 19 Nag L R 178* (Vol 18) 1931 Bom 330 (331). * (1902) 29 Cal 871 (881).

[10] A suit based on distinct causes of action is bad for multifariousness and cannot be tried anywhere. Separate invasions of plaintiff's rights constitute different causes of action. A person was dispossessed of some of his property at Delhi by one person and another property by another person at Almora ; his suit in Delhi Court for recovery of possession against both is bad for multifariousness. (1910) 1910 Pun L Re No. 59 p. 149 (158)* (Vol 25) 1938 Rang 420 (421, 422) : 1938 Rang L R 397.

[11] Removal of crops by each individual tenant — Absence of conspiracy or collusion among them — As many causes of action exist as there are tenants and single suit against all is bad for misjoinder. (Vol 1) 1914 Mad 67 (67).

[12] Where a number of persons defame the plaintiff, a suit against all of them to recover damages therefor will not lie, unless it is proved that the defendants acted together in defaming plaintiff. (Vol 5) 1918 Cal 586 (587).

[13] Sons of Hindu father suing their father and his creditor for declaration that debts incurred by father are tainted with immorality and are not binding on them — Suit is not bad for misjoinder of defendants and causes of action — Court may order separate trial of different issues affecting particular defendants. (Vol 25) 1938 Nag 461 (461, 462) : I L R (1939) Nag 229.

[14] Suit against fraudulent trustee for embezzlement of money — His several agents who had connived at breach of trust impleaded — There is no misjoinder. (Vol 21) 1934 Mad 367 (373) : 57 Mad 1031.

[15] Suit for accounts—Defendant raising plea that accounts were settled with plaintiff's brothers—Plaintiff's application to join brothers rejected on ground of multifariousness — *Held* plaintiff's application should be allowed. (Vol 20) 1933 All 957 (958) * (Vol 21) 1934 Cal 405 (405).

[See also (Vol 30) 1943 Oudh 315 (315). (Plaintiffs suing defendants as trespassers — A alleging himself to be co-sharer with plaintiffs and sir holder of suit lands — Defendants alleging to hold as sub tenants of sir of A — A held should be made defendant.)]

[16] Execution of promissory note and subsequent guarantee of debt are series of transactions — Co-execu-

O. 1 R. 3 (contd.)

tants and subsequent surety can be joined in suit on promissory note. (Vol 24) 1937 Rang 197 (198).

[17] Mortgage — Mortgages distinct — Executants not same — Mortgagees cannot ask for joint decree. (Vol 19) 1932 All 676 (677)* (Vol 24) 1937 Nag 99 (100) : 1 L R (1937) Nag 349.

[18] Two properties mortgaged—Suit by vendee from mortgagor for redemption of mortgage—It is not possible in such suit to pass decree for redemption in favour of plaintiff as well as to give him decree against his vendor for another sum charged on one of the properties — Two claims cannot be combined. (Vol 26) 1939 Lah 129 (135).

[19] One joint suit against cashier for accounts and against Sadar Naib for negligence is bad. (Vol 11) 1924 Cal 511 (511).

[20] A claim to direct a trustee to render accounts of trust property for a certain period may be joined with a claim against the trustee and others to render accounts of trust property for another period. (1911) 9 Ind Cas 565 (565, 566) (Mad).

[21] Lease of temple land by trustees in favour of four brothers under separate muchilikas for one year — Even after expiry of lease, lessees continuing in possession as tenants from year to year and after them their descendants—Tenancies terminated by notice—Suit for ejecting all tenants from possession held not bad for multifariousness. (Vol 29) 1942 Mad 334 (335, 336).

[22] Suit to eject third persons from trust properties cannot be brought under S. 92—Transferees of trust properties cannot be made parties under O. 1 R. 3 and 10 to suit under S. 92. (Vol 5) 1918 Cal 5 (7) (SB) * (Vol 19) 1932 Rang 132 (135) : 10 Rang 342.

[But see (Vol 12) 1925 All 683 (685); 47 All 770* (Vol 3) 1916 Cal 935 (935, 936) : 42 Cal 1135. (Suit for removal of mutwalli on ground of unlawful alienation of trust property — Alienee may be made a party — In case of alienation being set aside alienee may be declared a trustee and directed to convey property —(Obiter). In such suit no decree for ejectment of alienee can be passed).]

[23] Suit for specific performance of contract by member of Hindu undivided family to sell his share — Joinder of other members as defendants amounts to misjoinder. (Vol 5) 1918 Mad 681 (687) : 40 Mad 365 (FB).

6. "Jointly"—[1] In all cases of joint liability or joint and several liability all the persons liable may be joined as defendants. (1896) 19 Mad 60 (61). (Joint covenant for quiet possession by vendor and his benamidar — Suit for damages for breach is maintainable against both).

7. Joint tort-feasors.—[1] Three persons attached certain property and the proceeds of the execution were distributed between them. The plaintiff sued one of them for damages for wrongful attachment. The other two were not necessary parties as the cause of action against each was separate and distinct. (1911) 12 Ind Cas 866 (866, 867) (Low Bur).

8. "Severally." — [1] Several leases granted by trustee — One suit to set aside all leases by receiver against all lessees is not bad for multifariousness. (Vol 13) 1926 Mad 911 (912, 913) : 49 Mad 836 (FB).

[2] Suit by adoptee to set aside number of alienations to several alienors by adoptive mother is not bad for misjoinder. (Vol 15) 1928 Mad 820 (820).

[3] Several transfers by widow to different persons — Reversikner can claim declaration or possession against all transferees in one suit. (Vol 13) 1926 Nag 318 (317)* (Vol 1) 1914 All 393 (394) : 36 All 406. (Suit for possession)* (1908) 33 Bom 293 (305) (Do.)*(1910) 4 Ind Cas 248 (249) (Cal). (Suit to set aside alienations.)

*(Vol 7) 1920 Lah 19 (20) : 1 Lah 295. (Declaratory suit.)

[4] Claims by heirs against different alienees can be joined— Separate and various defences do not affect— Difficulty can be met by framing separate issues. (Vol 5) 1918 Lah 184 (185) : 1918 Pun Re No 59*(Vol 3) 1916 Bom 310 (311) : 40 Bom 351*(11) 1911 Pun L R No. 76 p. 321 (323).

[5] Plaintiff alienated a portion of his moiety and brought a suit for contribution from the defendants as per agreement — Suit decreed by Munsif — Reversed by Sub-judge on the ground of misjoinder and invalidity of agreement — Parties liable to contribute, *held*, were proper parties to the suit. (1905) 15 Mad L Jour 24 (25).

[6] The impleading of creditors in a partition suit is not bad for misjoinder of parties or causes of action under O. 1 R. 3 when the plaintiffs question the binding nature of those debts. (Vol 9) 1922 Mad 332 (333) : 45 Mad 194*(Vol 18) 1931 Cal 594 (595, 596).

[7] When interests of different persons in an estate are opposed to one another except where they are joint, a person suing for his share therein cannot join all persons as defendants in one suit, unless they are in possession in virtue of the same transaction or the same series of transactions within the meaning of R. 3, O. 1. (Vol 6) 1919 Low Bur 121 (122).

9. "In the alternative".—[1] Joinder of causes of action—Suit for rent by cosharer landlord — Prayer for recovery of share of rent against tenants can be joined with prayer for alternative relief against cosharer landlords. (Vol 6) 1919 Cal 903 (904) *(Vol 5) 1918 Cal 813 (814).

[2] Suit to recover amount of rent from either party against two sets of defendants — *Held*, that suit was not bad for misjoinder of parties and causes of action. (1907) 31 Bom 516 (522, 523).

[3] Suit against debtor — Liability of his transferee can be tried in the suit. (*obiter*). (Vol 13) 1926 Mad 135 (136).

[4] An assignee of a mortgage can rightly implead his assignor along with the mortgagors in his suit on the mortgage and is entitled to ask for the relief against his assignor if he failed to obtain a decree against the property. (1910) 7 Ind Cas 69 (69) (All) * (Vol 28) 1941 Oudh 56 (58, 59) : 16 Luck 113.

[5] Plaintiff purchased land from B but was dispossessed of it by A who had obtained registration of his name — Suit by plaintiff for possession against A and in the alternative for a refund of the purchase-money paid by him to B is not bad for misjoinder of parties and causes of action. (1902) 29 Cal 257 (259).

[6] In a mortgage suit plaintiff claimed foreclosure against the mortgagor and two-thirds of the amount received by co-mortgagors — Plaintiff asked by District Judge to omit either claim in the plaint—*Held* the case is covered by O. 1 R. 3 and the plaintiff can put both claims together. (1911) 7 Nag J. R 130 (132, 133).

[7] Where the defendant denied that any loan had been made to him by the agent of the plaintiff, the agent was impleaded as co-defendant and relief against him was prayed for in the alternative in respect of the sum admitted by the agent to have been lent—*Held*, claim is made within the meaning of O. 1 R. 3. (1906) 29 Mad 50 (51)* (Vol 20) 1933 All 147 (148, 149).

[8] Suit against B on mortgage—B denying plaintiff's title and also pleading discharge by payment to A — A may be impleaded as a claim of alternative relief against A is in proper form. (Vol 18) 1931 Nag 20 (23) : 26 Nag L R 359.

[9] Where the plaintiffs alleged that both 1st and 2nd defendants claimed a charge for the use of certain water and prayed the Court to determine which of the defendants was entitled to it, and to restrain the other

Court may give judgment for or against one or more of joint parties.

4. Judgment may be given without any amendment —

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

[1882—Ss. 26, 28; 1877—Ss. 26, 28.]

Defendant need not be interested in all the relief claimed.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

[R. S. C., O. 16, R. 5.]

Objects and Reasons.

"O. 1, R. 5. — The Committee thought that it was desirable to add O. XVI, R. 5 of the English rules". — S. O. R.

"Rule 5. — The words 'cause of action' have been struck out. They have given rise to considerable difficulty in England". — S. O. R.

6. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

[1882—S. 29; 1877—S. 29; R. S. C. O. 16 R. 6.]

O. 1 R. 3 (contd.)

from interfering with plaintiff—*Held*, that the suit was not bad for mis-joinder of parties and causes of action. (1910) 7 Mad L Tim 16 (16).

10. Ancillary reliefs.—[1] This rule covers a case even where the relief against some of the defendants is merely ancillary to the relief claimed against the others. For a plaintiff can avail himself of O. 1 R. 3 if, while the case against the defendants is substantially the same, certain "ancillary" relief is necessary against some and not against others. (Vol 25) 1938 Rang 420 (422) : 1938 Rang L R 397.

11. Effect of multifariousness.—[1] Suit should not be dismissed for multifariousness—Plaintiff should be given opportunity to amend plaint and to elect. (Vol 21) 1934 Mad 367 (372) : 57 Mad 1031.

[2] Misjoinder of parties and causes of action permitted by a Court under O. 1, R. 3 should not be condemned in appeal if plaintiff has by that time lost his remedy. (Vol 11) 1924 Oudh 337 (337) : 27 Oudh Cas 35.

Order 1 Rule 4 — Note 1.

[1] Where several persons in whom any right to relief is alleged to exist join together as plaintiffs in a suit, but it is found that only some of them are entitled to relief, a judgment may under this rule be given for such relief in favour of such persons. (Vol 14) 1927 Oudh 484 (485) : 3 Luck 241.

[2] Four members of an undivided family sued the widow of a deceased coparcener for possession of certain properties. The Court found that only one of these was entitled to relief. It was held that judgment was properly given in his favour without any amendment. (1905) 28 Mad 500 (503).

[But see (1885) 7 All 860 (862). (*A* and *B* claiming joint right against *C*—*B* was found to have no right at all—*Held A* could not be given relief without amendment.)]

[3] *A* and *B* sued *C* alleging that *A* alone was entitled to relief. *B* was added merely as a *pro forma* party. The Court found that *B* alone was entitled to relief. It was held that judgment could not be given in his favour without amendment. (Vol 16) 1929 Bom 51 (53).

Order 1 Rule 5 — Note 1.

[1] Suit for ejectment of several defendants setting up titles to different parts of a single plot of land is not bad for misjoinder of parties and causes of action. (Vol 11) 1924 Nag 55 (56) : 19 Nag L R 178.

[2] It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action on which all the defendants are more or less interested although the relief asked against them may vary. (1910) 34 Bom 358 (368).

[3] Sons of Hindu father suing their father and his creditor for declaration that debts incurred by father are tainted with immorality and are not binding on them—Suit is not bad for misjoinder of defendants and causes of action—Court may order separate trial of different issues affecting particular defendants. (Vol 25) 1938 Nag 461 (463) : 1 L R (1939) Nag 229.

[4] Two causes of action, one for specific performance, other for partition and possession—Question of joinder depends upon O. 1, Rr. 3 and 5 and also on O. 2, Rr. 3 and 4. (Vol 5) 1918 Mad 681 (692) : 40 Mad 365 (F B).

Order 1 Rule 6 — Note 1.

[1] By virtue of this rule read with S. 43, Contract Act, plaintiff in enforcing a contract entered into with a partnership is not bound to implead all the members of a firm as defendants; but is entitled to sue as he chooses, one or more of them, for the performance of entire contract. (1898) 21 Mad 256 (257) & (1899) 17 Bom 6 (11).

[2] Suit against some of several persons jointly and severally liable for a single liability—All need not be added as defendants—Even "proper" parties may not be added if suit can be decided without them. (Vol 21) 1934 Pesh 94 (95).

[3] Plaintiff as payee of an order on its being dishonoured on presentation filed a suit in the Court at X, against the drawer who resided at Y and an agent of the firm on which it was drawn and who was residing at X—*Held* that the drawer and the firm ought not to have been joined as defendants in the same suit as the plaintiff had no cause of action against the drawee. (1878) 3 Bom 182 (183).

[4] Hundi dishonoured—Suit against endorser—Drawer can be impleaded as co-defendant. (Vol 1) 1914 Lah 405 (406).

[5] In a suit brought by the holder of a bill of exchange, drawer and acceptor can be joined as co-defendants. (1877-78) 3 Cal 541 (541).

[6] Where the endorsee of a cheque sues the endorser for renewal of a lost cheque, the drawer must also be impleaded as the cheque cannot be renewed without his co-operation. (1878-80) 2 All 754 (755).

7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, *When plaintiff in doubt from whom redress is to be sought.* he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

[R. S. C., O. 16 R. 7.]

^a8. (1) Where there are numerous persons² having the same interest⁷ in one suit, one or *One person may sue or defend on behalf of all in same interest.* more of such persons may, with the permission of the Court,⁹ sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit¹¹ to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party¹³ to such suit.

[1882—Ss. 30, 32; 1877—Ss. 30, 32. Cf. R. S. C., O. 16 R. 9.]

[a] This rule has no application to suits concerning the Tirumalai-Tirupati Devasthanams : see the Tirumalai-Tirupati Devasthanams Act (Madras Act 19 [XIX] of 1933), S. 44 (2).

Objects and Reasons.

"Rule 8.—We have, on the suggestion of the Advocate-General of Madras, added the words 'or for the benefit of' after the words 'on behalf of.'" — S. C. R.

Provincial Amendment.

CALCUTTA.

In sub-rule (1) for the first sentence commencing with the words "where there are" and ending with "persons so interested," substitute the following—

"Where there are numerous persons having the same interest in one suit, the Court may direct that one or more such persons may sue or be sued, or may defend, in such suit, on behalf of, or for the benefit of, all persons so interested." [2-4-1938]

Order 1 Rule 7 — Note 1.

[1] This rule enables the plaintiff to bring one suit against a number of persons in the alternative where he is in doubt as to which of them is liable to him. (1906) 29 Mad 50 (51) & (Vol 15) 1928 Bom 91 (94).

[See (Vol 31) 1944 Nag 130 (131) : I L R (1944) Nag 687. (Suit for possession against defendants as trespassers — Defendants stating that they acted as per Village Panchayat's resolution — Plaintiff can continue suit and show that Panchayat's act is *ultra vires* — Without deciding question of *ultra vires*, Court cannot dismiss suit for not joining Panchayat as defendant—O. 1, R. 7 held not applicable as there was no doubt in plaintiff's mind as to persons against whom he was entitled to redress.)]

ORDER 1 RULE 8 — SYNOPSIS.

1. Applicability and scope.
2. "Numerous persons".
3. Clubs and associations.
4. Suit to set aside fraudulent transfers.
5. Suit by member of community in his own right.
6. Suit to establish or negative public right.
7. "Having the same interest".
8. Matters in respect of which representative suit can be brought.
9. Permission of Court.
10. May be sued.
11. Notice of institution of suit.
12. Title of suit.
13. Addition of parties.
14. Decree in representative suit.
15. Costs in representative suit.
16. Compromise of representative suit.
17. Withdrawal of representative suits—See O. 23 R. 1.
18. Abatement of suit or appeal.

19. Arbitration proceedings.

20. Revision.

1. Applicability and scope. — [1] Rule 8 forms exception to general principle that all persons interested in suit shall be parties thereto. (Vol 20) 1933 P C 183 (186); 60 Ind App 278; 56 Mad 657 (P C).

[2] Convenience, where community of interest exists, requires that a few out of a large number of persons should under proper conditions be allowed to represent the whole body. (Vol 20) 1933 P C 183 (185); 60 Ind App 278; 56 Mad 657 (P C) & (Vol 30) 1943 Mad 531 (536); I L R (1944) Mad 133. (Entire body of persons should not be deemed to be actually parties to suit).

[3] It is an enabling rule of convenience prescribing the conditions upon which such persons when not made parties to a suit may still be bound by the proceedings therein. (Vol 31) 1944 Sind 165 (167) : I L R (1944) Kar 62.

[4] Rule is enacted for benefit of defendants *only* to the extent of preventing multiplicity of suits. (Vol 16) 1929 Mad 44 (45).

[5] A suit in representative capacity can ordinarily be maintained only if the conditions mentioned in this rule are complied with. (Vol 27) 1940 Mad 789 (790) : I L R (1940) Mad 808.

[6] Bona fide litigation — Omission to follow procedure under O. 1 R. 8, is only technical irregularity. (Vol 25) 1938 Lah 369 (390) (F B).

[7] This rule is permissive and not prohibitive. It is dealing with procedure only and not affecting substantive rights. (1902) 23 Mad 29 (31).

[8] Reversioner suing to restrain alienation by limited owner can do so without making other reversioners parties and without following procedure in O. 1 Rule 8. (Vol 27) 1940 Cal 885 (387).

[9] The procedure laid down in O. 1 R. 8 need not be followed in suits under S. 92, Civil P. C. (Vol 28) 1941 Bom 317 (319) : I L R (1941) Bom 556.

O. 1 R. 8 (*contd.*)

[10] Provisions of O. 1 R. 8 apply to petitions which can be heard and tried as suits. (Vol 23) 1936 Bom 250 (255) : 60 Bom 645.

[11] Application for probate by executor—Any beneficiary can intervene—Proceedings are in representative character—Death of executor—Beneficiaries can continue proceedings. (Vol 20) 1933 Mad 114 (117) : 56 Mad 346.

[12] Suit in a representative capacity — Question as to, should be decided with reference to substance and not the form of pleadings. (Vol 15) 1928 Mad 445 (446, 447).

[13] Defendant permitted to represent public—Written statement not specifically mentioning that he was appearing in representative capacity — Public cannot be said as not represented. (Vol 14) 1927 Cal 608 (610).

2. "Numerous persons."—[1] Rule 8 only provides for case where numerous persons are interested in suit. (Vol 19) 1932 Bom 65 (68) * (1885) 7 All 178 (182, 183) (FB). (Rule applies to cases where no individual right is interfered with.) * (Vol 33) 1946 Bom 203 (204). (Decision likely to affect large number — Rule 8 should be resorted to.) * (1921) 63 Ind Cas 963 (967) (Low Bur) * (Vol 7) 1920 Low Bur 151 (155). (O. 1, R. 8 provides remedy for cases in which it would be difficult to implead all persons it is sought to affect.)

[2] This rule contemplates the case of parties too numerous to be conveniently made parties to the suit. (1878-80) 2 Mad 328 (332).

[3] 100 is a sufficient number to apply R. 8. (Vol 16) 1929 Mad 44 (46).

[4] "Numerous persons" does not mean "persons capable of being ascertained". (Vol 20) 1933 Lah 749 (751) : 15 Lah 123.

[But see (1893) 20 Cal 397 (407).]

[5] Satchasi sect of Chatra is a defined class of the general public and a suit by them is maintainable under this rule, whether all the members of such sect are or are not capable of being so accurately ascertained that notices could if required be served upon each and all of them. (1906) 33 Cal 905 (912, 913).

[6] Where certain persons of the Jain Setambari sect of Paresb Nath Hill brought a suit on behalf of their sect for setting aside a lease of temple lands without joining the Jain Digumbary sect who were also interested in Paresb Nath Hill, it was held that the suit was not bad under this rule, as there was nothing to show that the Jain Digumbary sect was also interested in like manner as the plaintiffs in the suit. (1894) 21 Cal 180 (189).

[7] Suit by a panchayat through its president is representative. (Vol 14) 1927 Lah 196 (197).

[8] Inhabitants of group of villages restraining defendants from discharging rain water on plaintiffs' lands—Representative suit held quite in order. (Vol 29) 1942 Cal 261 (262, 263).

[9] A suit by certain persons on behalf of themselves and their co-villagers for a declaration that they had a prescriptive right to conserve water of a natural stream and for other reliefs was held maintainable. (1902) 29 Cal 100 (109, 110).

[10] Every member of a caste of Hindus is entitled to inspection of account books regarding management of caste property by its manager — Suit for declaration of such right in civil Courts is not barred — Such suit is representative. (Vol 19) 1932 Bom 122 (125) : 56 Bom 242 (F B).

[11] Suit by some of the raiyats of a village on behalf of themselves and other raiyats against the proprietor of the village for a declaration of their general rights and for injunction is maintainable under this rule. (1895) 19 Bom 391 (398, 399).

[12] Religious endowment—Akhra community owning akhra for time immemorial has right to hold and manage and sue through panchayat. (Vol 7) 1920 Cal 245 (248).

3. Clubs and associations. — [1] An officer of an unregistered or unincorporated body or society can file a suit on behalf of the body only with the special permission of the Court under the rule. (Vol 4) 1917 Low Bur 36 (37) * (1884) 6 All 284 (285). (Secretary of Association.) * (Vol 16) 1929 Cal 445 (447). (Secretary of Samaj.)

[See also (Vol 29) 1942 Sind 130 (131) : I L R (1942) Kar 56. (Suit by Secretary of Mutual Insurance Society which was registered—Held assuming society was a corporation O. 29, R. 1 is enabling and does not prohibit suit appropriately brought under O. 1, R. 8.)]

[2] Suit against association or unregistered body—Procedure laid down in O. 1, R. 8 not followed — Members not on record are not bound by decree in such suit. (Vol 27) 1940 Oudh 129 (130) : 15 Luck 253.

[3] Suit by panchayat—All members not on record — Provisions of O. 1, R. 8 not invoked—Suit must fail. (Vol 27) 1940 Sind 63 (64) : I L R (1940) Kar 190.

[4] Caste — Management vested in Managing Committee — President though authorised by resolution to file ejectment suits in his own name cannot do so except under O. 1, R. 8. (Vol 9) 1922 Bom 109 (110) : 46 Bom 132.

[5] A suit by a person, authorised by a resolution made at the meeting of the community to receive subscriptions from subscribers, for payment of the subscription is to be filed under this rule and necessary permission of the Court has to be obtained. (1898) 22 Bom 729 (730).

4. Suit to set aside fraudulent transfers. — [1] A suit by decree-holder for cancellation of sale deed on ground that it was executed with intent to defeat and delay creditors is one under S. 53, T. P. Act and must fail for want of Court's permission under O. 1, R. 8. (Vol 27) 1940 Mad 789 (790) : I L R (1940) Mad 808.

[2] Suit brought under O. 21, R. 63 — In order to succeed, avoiding transfer of property necessary—Suit is governed by S. 53 (4), T. P. Act, and O. 1, R. 8. (Vol 21) 1934 Rang 302 (302, 303) : 12 Rang 666 * (Vol 21) 1934 Rang 332 (332, 333) : 12 Rang 670. ((Vol 21) 1934 Rang 302 : 12 Rang 666, followed.)

[But see (Vol 33) 1946 Sind 78 (80) : I L R (1946) Kar 98. (Suit under O. 21, R. 63 by judgment-creditor alleging transfer to be void and in fraud of creditors — Suit need not be brought on behalf of all creditors—Order 1, R. 8 not applicable.)]

[3] All creditors interested made parties to suit under S. 53, T. P. Act—Leave of Court need not be applied for under this rule. (Vol 33) 1946 Mad 25 (30) : I L R (1946) Mad 486.

[4] Creditor proceeding under O. 21, R. 63 not knowing existence of other creditors is not bound to bring representative suit. (Vol 27) 1940 Oudh 200 (201) : 15 Luck 503.

[5] Objection as to non-joinder should be taken in trial Court—Omission cannot be repaired in appeal. (Vol 22) 1935 Rang 275 (275).

5. Suit by member of community in his own right. — [1] Rule is merely enabling — It does not force one to represent many if action is maintainable without joinder of others. (Vol 24) 1937 Pat 481 (482, 483) : 16 Pat 190.

[2] Rule is enabling — Plaintiff found entitled to relief should not be refused the same on the ground that others are also interested. (Vol 14) 1927 Pat 221 (222). (Especially when the suit was allowed to proceed as ordinary suit without objection by defendant.)

[3] The rule does not bar some members of a community from maintaining a suit in their own right. The

O. 1 R. 8 (*contd.*)

rule is an enabling one. (1910) 32 All 234 (286)* (Vol 26) 1930 All 586 (588) : 1 L R (1939) All 754 * (Vol 8) 1921 Lah 76 (77)* (Vol 7) 1920 Low Bur 151 (155).

[4] Right of worship interfered with — Every person whose right is interfered with can institute suit against persons interfering. (Vol 7) 1920 Low Bur 151 (153).

[5] Temple dedicated to use of particular class — Suit by member of class for injunction to restrain persons not members of class from entering temple and taking part in worship is competent. (Vol 7) 1920 Low Bur 151 (154, 155).

[6] An individual worshipper can sue anybody interfering with his right to worship in a Mahomedan mosque. (1913) 35 All 197 (199). (Though the Court might in its discretion refuse a declaration in the absence of all the parties.) * (1885) 7 All 178 (182) (F B) * (1893) 20 Cal 810 (816, 817). (Suit by a worshipper for the removal of mutwalli of a Mahomedan endowment.) * (Vol 9) 1922 Oudh 1 (2); 26 Oudh Cas 82.

[7] Beneficiary in a Mahomedan waqf can sue to set aside alienations by mutwalli without recourse to O. 1, R. 8. (Vol 10) 1923 Pat 475 (477) : 2 Pat 391.

[8] Mutwalli of a wakf in respect of a mosque need not obtain the permission of the Court to maintain a suit on behalf of the trust. (1921) 63 Ind Cas 171 (173) (All).

[9] Where some only of the total proprietary body appealed from adverse decision of trial Court in respect of a custom in the village affecting the whole proprietary body — *Held*, that the appeal was not incompetent. (Vol 13) 1926 Lah 502 (503) : 7 Lah 451.

[10] Plaintiff having no special interest — Permission of Court is necessary. (Vol 21) 1934 Cal 345 (347, 348).

6. Suit to establish or negative public right. —

[1] A private individual cannot obtain a declaration that a right is a public one, but he can sue for damages for injury sustained by him in the exercise of his privileges connected with a public right. (Vol 5) 1918 Mad 166 (167).

[2] Order 1, Rule 8 does not vest right of suit in any person — Public nuisance — Suit by private individual — Necessity to prove special damage is not obviated by bringing suit under O. 1, R. 8. (Vol 29) 1942 Cal 360 (364) : 1 L R (1942) 1 Cal 533. (1935) 62 Cal 692, overruled.)

[3] Interference with public right of irrigation — Suit by member of public in individual capacity — His half-hearted resort to O. 1, R. 8 would not prevent him from obtaining relief as member of public specially injured by interference. (Vol 28) 1941 Pat 181 (184, 185) : 19 Pat 352.

[4] Section 91, Civil P. C., does not control or restrict R. 8 — It does not take away right of plaintiffs to sue which may exist independently of its provisions. (Vol 12) 1925 Cal 1233 (1233).

[5] Suit for removal of obstruction to village pathway — Plaintiff not using S. 91 or proving special damage — He must show that he sues not on behalf of general public but on behalf of limited and defined class with which he has common interest — Path must be shown to be quasi-public. (Vol 27) 1940 Pat 449 (465, 466) : 19 Pat 208.

[6] Suit for declaration that a pathway is public and for injunction to remove obstruction is one under R. 8 — Court's permission obtained — Advocate-General's permission under S. 91, Civil P. C., is unnecessary. (Vol 8) 1921 Cal 405 (406).

[7] Headman of community can sue on its behalf for infringement of the right of his community to pass through public street without special damage. (Vol 3) 1916 Mad 593 (594, 595).

[8] Public thoroughfare — Encroachment on — Suit not framed under S. 91 or O. 1, R. 8 — People in immediate neighbourhood entitled to use thoroughfare can sue to remove obstruction without proving special damage. (Vol 28) 1941 Pat 249 (249, 250).

[9] In a suit for a declaration that plaintiff is the owner of a piece of land free from any right of highway, it is not necessary for the plaintiff to proceed by way of O. 1, R. 8, Civil P. C. — But the decree in the suit would bind only the defendants to the suit — Where, however, the plaintiff chooses to bind the public and gives a public character to his suit he must sue under O. 1, R. 8 and must observe the conditions on which permission is given by the Court under that rule. (Vol 6) 1919 Pat 280 (281).

7. "Having the same interest." — [1] Community of interest is the essence of representative suit. (Vol 13) 1926 Pat 321 (324) : 5 Pat 539.

[2] The plaintiff in the suit must have himself the same interest as the persons he seeks to represent. (1891) 14 Mad 57 (61) * (Vol 14) 1927 All 96 (97).

[3] The person suing on behalf of others must have interest common to himself and others — If this is not so, no member of the class is constructively a party to it. (Vol 11) 1924 Mad 883 (884).

[4] R purchasing plot of land evicting several persons about 150 with aid of corporation and police — Six persons claiming to be representatives of entire body of occupants bringing suit against R and corporation obtaining permission to file plaint under O. 1, R. 8 — Two of the plaintiffs withdrawing from suit — Remaining plaintiffs applying for permission to continue suit — Main basis of suit was that all occupants were entitled to continue in possession of property until evicted in due course of law — Plaintiffs however putting varying legal claims in support of the position — Remaining plaintiffs held did not truly represent whole of occupants — Representative character depended upon their reducing themselves to level of those occupants who had weakest case to put forward. (Vol 26) 1939 Mad 428 (428, 429).

[5] Order 1, Rule 8, applies not only to concurrent interest but also to similar ones, though distinct. (1912) 1912 Mad IV N 105 (107). (In the event of a voter's death pending a suit for declaration, with sanction under O. 1, R. 8, that an elected member's election was void and for an injunction to restrain him from exercising his office, another voter can be brought on record, and continue the suit.)

[6] Order 1, R. 8, is enabling provision and provides no new right of suit — It enables some of class having special interest to represent rest of class — Individuals cannot sue on behalf of general public under O. 1, R. 8. (Vol 27) 1940 Pat 449 (464, 465) : 19 Pat 208 * (1886) 9 Mad 463 (466)* (Vol 18) 1931 Pat 418 (419) : 10 Pat 568.

[7] No rule as to how many necessary to represent a class. (Vol 20) 1933 Pat 302 (302).

[8] All the members of the body on whose behalf the suit is sought to be instituted need not be of the same opinion. (Vol 12) 1925 Mad 985 (986) * (Vol 16) 1929 Mad 633 (634). (There need not be absolute unanimity among those represented.)

[9] Leave to file a suit may be granted on behalf of a whole community or body of persons though some persons object to it. (Vol 6) 1919 Mad 1143 (1144).

[10] Mere fact that member of society objects to institution of suit does not show that he has not same interest as other members in suit or that it is not for his benefit as such member. (Vol 21) 1934 Rang 347 (348).

[11] Consultation with community need not be proved. (Vol 16) 1929 Mad 44 (46).

[12] Suit by some members of caste against others, relating to caste property — Rule 8 applies and consent of

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majority of caste members is not condition precedent to filing of suit. (Vol 8) 1921 Mad 682 (683, 684).

[13] Plaintiff alone can sue whether other persons having similar rights join or not. (Vol 1) 1914 Cal 854 (856).

[14] Dissentient person should be made *pro forma* defendant. (Vol 21) 1934 Rang 347 (348, 349).

[15] Community divided into two sections *M* and *S* — Meeting of members of *M* section attended by only 60 out of 183 authorizing plaintiffs to sue *S* section — After institution 112 members consenting but remaining 71 supporting defendant — Suit on behalf of members not consenting is incompetent — Authority being lacking at time of suit it must fail — Subsequent consent is of no avail — Permission to amend cannot be granted. (Vol 3) 1916 Bom 261 (262) : 40 Bom 158.

[16] Suit by a plaintiff on behalf of a community for recovery of rent on behalf of village deity — Amount of rent disputed — Other members added as plaintiffs but plaint not amended — Newly joined plaintiffs siding with the defendant — There is no change in the constitution of the suit and the plaintiff does not lose his representative character. (Vol 15) 1928 Cal 741 (742).

[17] Representation on both sides may be allowed in same suit. (Vol 22) 1935 Mad 542 (543).

[18] Trust property — Tambirans of mutt representing worshippers can sue to set aside alienation of mutt property made by Mahant and for delivery of possession to succeeding Mahant. (Vol 5) 1918 Mad 464 (464) : 41 Mad 124.

[19] The worshippers of a temple can bring a suit under O. 1, R. 8 to declare that a permanent lease granted to the *Archakas* in possession of the property is invalid. (Vol 7) 1920 Mad 665 (666) : 43 Mad 410.

[20] Right to worship idol dedicated in common with others — No right of suit under O. 1, R. 8, is created. (Vol 4) 1917 Cal 678 (678).

[21] Dedication to temple by members of community — Pujari setting up adverse title — Members can sue for declaration of their right. (Vol 3) 1916 Pat 404 (405).

[22] Management of village temple vesting in community of worshippers — They can sue under O. 1, R. 8. (Vol 10) 1923 Mad 276 (277).

[23] Suit for a declaratory decree — Plaintiffs were the hereditary *gors* (priests) — Defendants were the *shevals* (ministers) — *Shevals* issued rules prohibiting people from entering sacred chambers in the temple except on payment of certain fees — Held, the rules by the *Shevals* gave a common cause of action to all the *gors* (plaintiffs), and they were, therefore, entitled to sue jointly. (1891) 15 Bom 309 (315).

[24] Five men alleged to be managers of certain community sued in representative capacity under O. 1, R. 8 — Suit based on pro-note effected by these men and for community — Suit held maintainable. (Vol 19) 1932 Mad 163 (163, 164).

[25] The owners of the taluk and the holders of subordinate tenures have the same interest. (Vol 19) 1932 Cal 275 (282) : 59 Cal 961.

[26] One co-sharer can bring representative suit on behalf of another. (Vol 18) 1929 All 439 (440).

[27] One co-owner can maintain suit on behalf of all for recovery of land against trespassers. (Vol 3) 1916 Pat 26 (27).

[28] Without the leave of the Court obtained under this rule, a legatee cannot sue on behalf of himself and other legatees under a will for administration of testator's estate. (1885) 11 Cal 213 (218).

[29] Suit by individual tax-payers restraining municipality from misapplying its funds is maintainable. (1898) 22 Bom 646 (649, 650, 651).

[30] Revised assessment by Municipality — Suit for

restraining Municipality for collecting revised taxes — Some assesses cannot represent others. (Vol 20) 1933 Bom 175 (176) : 57 Bom 270.

[31] The fishermen of a village can sue to establish their exclusive right of fishery in a creek. (1888) 12 Bom 221 (225).

[32] Debt due by whole village — Some of villagers can be sued as representing rest. (Vol 30) 1943 Mad 161 (164) : 1 L R (1943) Mad 267.

[33] Order 1, R. 8, applies to defendants in a partition suit. (Vol 15) 1928 Lah 693 (694).

[34] Request for education of Hindu boys and girls not of any particular locality — Representative suit on behalf of boys and girls of Hindu community for declaration of trust in their favour is maintainable. (Vol 27) 1940 Cal 236 (241) : 1 L R (1940) 1 Cal 14.

[35] A representative suit brought by a person on behalf of himself and another or others is different from a suit in a representative capacity, i. e., as executor, guardian, trustee, etc. A suit brought by a Hindu reversioner is really brought on behalf of the entire body of reversioners. (Vol 6) 1919 Mad 479 (480) & (1912) 8 Nag L R 113 (121, 122). (Reversionary suit to set aside an alienation.)

[36] One of the several karnavans in a family having got a preferential right as to management — It does not make the right he possesses different to what the other members possess. (Vol 26) 1939 Mad 751 (754).

[37] Where subscribers as such, under the rules of the society had no control over the officers of the society a suit by some of the subscribers for removal of the office-bearers is not maintainable under this rule. (1909) 32 Mad 131 (134, 135).

[38] Suit under S. 14, Religious Endowments Act (1863), is representative suit. (Vol 5) 1918 Mad 560 (562) : 41 Mad 237.

[39] Suit under S. 92 — Advocate General's sanction obtained — Procedure under O. 1, R. 8, need not be followed. (Vol 12) 1925 Mad 1070 (1070, 1072) & (1900) 23 Mad 99 (100).

[40] Suit to recover temple property — No proper trustee to the suit temple — Suit under O. 1, R. 8, for restoring property to proper trustee is not maintainable. (Vol 15) 1928 Mad 614 (620).

[41] Where a case is not covered by S. 92, Civil P. C., the suit may be brought under O. 1, R. 8, although it relates to a public trust. (Vol 19) 1932 Bom 305 (308, 309) & (Vol 6) 1919 Cal 179 (180, 181) & (1885) 11 Cal 33 (37) & (Vol 27) 1940 Mad 81 (81).

[42] Scheme of management can be claimed in representative capacity — Suit how framed illustrated. (Vol 6) 1919 Mad 1143 (1144).

8. Matters in respect of which representative suit can be brought. — [1] Representative suit lies in respect of declaration and injunction but not in respect of actions of debt, money claims, or liabilities in contract or tort. (Vol 25) 1938 Mad 755 (755, 756) : 1 L R (1938) Mad 1094.

[See also (Vol 27) 1940 Pat 247 (248). (Suit by co-sharer in fishery estate for declaration that principal defendants, namely, persons following trade of fishermen and others of their caste had no right in fishery — Relief against principal defendants only for damages for fish actually caught and for injunction restraining principal defendants from further trespass can be joined with former relief.)]

[2] No representative suit can lie when sole relief claimed is damages suffered. (Vol 17) 1930 Rang 177 (181) : 8 Rang 250. (By publication of a libel.)

[3] But if damages are coupled with other reliefs, then leave may be granted, provided the damages are not claimed in a representative capacity but by each individual. (Vol 6) 1919 Mad 1143 (1144). & (Vol 26

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1939 Mad 783 (788). (When a representative suit properly framed for other relief incidentally involves a claim for damages put forward by certain individuals among the plaintiffs, such a claim can be urged as ancillary to the main suit.)

[4] Under law an unincorporated body cannot be sued as such for recovery of a debt or on a contract. The procedure under O. 1, R. 8 is inapplicable to a case of this kind. (Vol 30) 1943 Mad 530 (531).

[5] A suit for damages for breach of a contract of employment against an unregistered society whose property and funds are not vested in any individual but belongs to the members, through some of its members is maintainable. (Vol 32) 1945 Bom 465 (469).

9. **Permission of Court.** — [1] A suit in order to be representative may be brought in the manner provided by O. 1, R. 8. (Vol 14) 1927 Mad 666 (666).

[2] No representative suit can be brought without permission of Court — Courts cannot go into merits of representative action unless permission is obtained. (Vol 16) 1929 All 806 (807).

[3] Where a suit is not properly a representative suit, a Court cannot adjudicate upon a public right claimed on behalf of a community. (Vol 5) 1918 Cal 487 (488).

[4] Suit by decree-holder under O. 21, R. 63 and S. 53, T. P. Act, alleged to be on behalf of all creditors — Permission under O. 1, R. 8 not obtained — Suit is not representative. (Vol 30) 1943 Lah 96 (97).

[5] Judicial permission not obtained — Consequently notices not issued — Suit is not representative but one between named plaintiffs and named defendants only. (Vol 21) 1934 Lah 366 (368) : 15 Lah 807.

[6] Provisions of R. 8 not called in aid, nor Court's permission taken — Decree binds only actual parties to suit. (Vol 6) 1919 Pat 230 (231) * (Vol 27) 1940 Oudh 129 (131) : 15 Luck 253. (Suit against association — Procedure under O. 1, R. 8 not followed — Prejudice is obvious if members not on record are held bound by decree.) * (Vol 15) 1928 Pat 205 (208) : 7 Pat 197. (Decree can be passed only as against the defendants actually before the Court.)

[7] Permission not obtained — Requirements not satisfied — Suit must be dismissed. (Vol 4) 1917 Cal 809 (809, 810) : 44 Cal 258 * (1885) 11 Cal 213 (218). (Representative suit by a legatee on behalf of all the legatees under a will.)

[8] Before instituting a suit under O. 1, R. 8, leave of the Court must be obtained and the requirements of the rule must be complied with before the suit can be proceeded with and unless this is done the suit must be dismissed. But the Court has discretion to grant leave under O. 1, R. 8 and its provisions may be complied with subsequent to the filing of the suit and when that has been done the suit cannot be dismissed. (Vol 4) 1917 Cal 809 (809, 810) : 44 Cal 258 * (1898) 22 All 269 (270) * (Vol 10) 1923 Bom 805 (819) : 47 Bom 809 * (1897) 21 Bom 784 (785, 786) (F B) * (Vol 30) 1943 Mad 161 (164) : I L R (1943) Mad 267. (Permission to plaintiffs under O. 1, R. 8, given after issue of notice of institution of suit by public advertisement—Order 1, R. 8 held sufficiently complied with.) * (Vol 3) 1916 Mad 593 (594, 595) * (1900) 23 Mad 29 (33) * (Vol 15) 1928 Nag 39 (40) * (Vol 14) 1927 Rang 134 (134). (Suit without permission — Permission obtained afterwards — Court does not act without jurisdiction within Civil P. C., S. 115.)

[9] The fact that leave had previously been refused does not affect the matter. (1902) 25 Mad 399 (401).

[10] Omission to apply for permission under this rule is not by itself ground for dismissing suit but if objection has been taken, it ought not to be allowed to

proceed unless the plaint being amended and requisite leave being obtained. (1900) 23 Mad 29 (32).

[11] Plea as to absence of permission if not raised in trial Court cannot be raised in appeal. (Vol 8) 1921 Lah 76 (77).

[12] Permission once obtained under R. 8 in suit is good for appeal also. (Vol 6) 1919 Lah 273 (274) : 1919 Pun Re No. 46.

[13] Court should exercise a judicial discretion in granting permission to a person to sue in a representative capacity under this rule. (1890) 17 Cal 906 (910).

[14] Permission granted to sue under O. 1, R. 8 — Order cannot be reviewed by successor of Judge passing order. (Vol 19) 1932 Bom 65 (66).

[15] Leave need not be express. (Vol 14) 1927 Cal 608 (611).

[16] Formal order recording permission is not necessary — Permission can be inferred from proceedings. (Vol 20) 1933 Lah 749 (751) : 15 Lah 123 * (1902) 29 Cal 100 (108) * (1894) 21 Cal 180 (188).

[17] Publication of notice — Permission should be inferred. (Vol 16) 1929 Mad 451 (452).

[18] Where an order referring to S. 80 old Code (O. 1, R. 8) directed that a proclamation be made "inviting all persons interested to come in and be made parties..." it was held, on the language of the order that permission was not granted. (1891) 14 Mad 57 (60, 61).

[19] Where plaintiffs sued for a declaration of their right to the regular offerings made out of the funds of a temple without the Court giving permission to any *definitely named persons* among those interested to represent the rest and where the notice issued by Court did not show who the persons were that had been selected to represent the remaining persons interested, it was held that the suit must fail by reason of defect of parties. (1890) 17 Cal 906 (911).

[20] Where the trial Judge *suo motu* acted under O. 1, R. 8 without any application being made by plaintiffs making out a case for adopting the procedure under O. 1, R. 8, it was held that the procedure adopted by trial Judge was irregular. (1932) 33 Pun L R 221 (222).

[21] Permission granted for representative suit — Some of several representatives not joining in the suit — Fresh permission is necessary. (Vol 12) 1925 Cal 547 (548).

10. **May be sued.** — [1] The consent of the defendants on the record is not necessary to enable a Court to allow a plaintiff to sue persons as representing themselves and others, having the same interest in the subject-matter of the suit. (1918) 36 Mad 418 (425) * (Vol 14) 1927 Cal 608 (610). (Order for representation can be made against the will of the person asked to represent.)

[2] Representative suit — Other persons having common interests with defendant need not be joined directly or indirectly if they have not invaded plaintiffs' rights. (Vol 29) 1942 Cal 261 (263).

11. **Notice of institution of suit.** — [1] Issue of proper notice is mandatory. (Vol 20) 1933 Lah 749 (751) : 15 Lah 123 * (Vol 12) 1925 Cal 547 (551). (Notice is not a mere matter of formality.) * (Vol 24) 1937 Pat 54 (55). (Village lane is public highway—Even assuming that village lane is one over which certain class of community has right, notice to persons interested is necessary under O. 1 R. 8.)

[2] Permission to sue granted — Publication of notice is essential but failure due to mistake of Court will not entail dismissal of suit. (Vol 9) 1922 All 16 (17) : 44 All 231 (F B).

[3] Notice under R. 8 served only three days before date of hearing of suit — Hearing of suit continuing for two months — Judgment delivered nine weeks after institution of suit — There was no prejudice done to

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defendants and case ought not to be remanded. (Vol 24) 1937 Cal 245 (250).

[4] Notice must show names of persons permitted to represent other persons interested. (Vol 14) 1927 Cal 608 (611).

[5] Notices issued under O. 1, R. 8 are definite enough though a particular person is not directed by an express order to defend the suit. (1910) 6 Ind Cas 46 (47) (Cal).

[6] Defendant knowing about representative suit but not applying to be impleaded and decree passed — Fact of his name not being mentioned in notice does not make decree nullity. (Vol 29) 1942 Lah 136 (137).

[7] Suit instituted for self and Zamindar Sabha — Sabha consisting of 70 members — No notice issued to them or to members generally — Notice on eight named persons of which three not mentioned in proceedings — No mention about asking or giving of permission under O. 1, R. 8 — Notice published in English newspaper — Members not knowing English — Notice and its service held not proper — Irregularity vitiated whole proceedings. (Vol 20) 1933 Lah 749 (751, 752) : 15 Lah 123.

[8] Permission to plaintiffs under O. 1, R. 8 given after issue of notice of institution of suit by public advertisement — Order 1, R. 8 held sufficiently complied with. (Vol 30) 1943 Mad 161 (164) : 1 I L R (1943) Mad 267.

12. Title of suit. — [1] Suit in representative capacity — It is not necessary to state in cause title of plaint, nature of representative capacity, although it is convenient place for statement. (Vol 6) 1919 Cal 245 (247) : 46 Cal 877 * (1900) 23 Mad 29 (31). (Rule is permissive and not prohibitive.)

[See also (Vol 29) 1942 Oudh 339 (339, 340). (Express mention as to litigating in representative capacity is necessary.)

[2] Suit for declaration that wakf was for benefit of Shia community — Cause title of plaint containing names of plaintiffs — Copy of plaint attached to notice under S. 80 — Subsequently plaintiff's application for issue of notices under O. 1, R. 8, stating suit to be on behalf of Shia community allowed — Plaint held contained sufficient indication of suit being representative — Failure to specify suit to be representative in plaint annexed to notice under S. 80 held not fatal defect — Statement in plaint that plaintiffs were entitled to "hissas" and "rewards" held did not alter character of suit. (Vol 29) 1942 Cal 343 (348) : 1 I L R (1942) 1 Cal 211.

[3] Defendant not objecting to frame of representative suit — Suit supported by large number of persons of locality to the knowledge of defendant — Amendment of plaint is not necessary. (Vol 18) 1931 Oudh 375 (377).

13. Addition of parties. — [1] Only representatives appointed by Court are parties to suit — Suit compromised by such representatives and compromise given effect to by Court — Others are not entitled to appeal from such decree. (Vol 22) 1935 Lah 33 (34).

[2] Representative suit — Persons represented can apply to be made parties — But Court cannot compel plaintiff to add such persons as co-plaintiffs. (Vol 23) 1936 Bom 423 (431).

[3] A person claiming to be made a party to an administration suit under O. 1, R. 8 (2) must show that the conduct of the suit is not in proper hands, and that his interests shall be seriously affected to his prejudice. To state that he is coming in at his own risk, and that he is willing to bear all the costs does not cover the whole ground. (1910) 34 Bom 420 (421).

[4] Persons not among those appointed by Court to defend suit under O. 1, R. 8 nor impleaded as defendants under sub-r. (2) of R. 8 are not parties — Their

absence from record is immaterial. (Vol 26) 1939 Lah 572 (578) : 1 I L R (1940) Lah 199.

[5] Where in a suit under this rule the plaintiffs on record neglect to execute the decree in their favour, the Court may add other persons as parties to enable them to execute the decree. (Vol 10) 1923 Mad 472 (473).

14. Decree in representative suit. — [1] Decree against managing committee of school is binding on school and can be executed against assets of school — Members paying debt are entitled to be indemnified out of assets of school. (Vol 20) 1933 Cal 329 (331, 332) : 60 Cal 794.

[2] Execution of decree for injunction in representative suit — Decree can be executed against all defendants and not merely chosen representatives. (Vol 29) 1942 Lah 136 (137, 138).

[3] In a suit where the defendants are sued in a representative capacity all that the plaintiff is entitled to against them is a declaration of his right as against the class whom the named defendants represent. He is not entitled to a personal decree against them, but is only entitled to be paid out of the funds or the property and assets belonging to the class and in which all the members of the class are interested. (Vol 29) 1942 Bom 136 (138) : 1 I L R (1942) Bom 504.

[4] Section 70, Contract Act, applies where "person" is large caste and sued in representative action but it is unfair to make personal decree against members of caste and plaintiff should be directed to proceed against property of caste. (Vol 4) 1917 Bom 141 (147) : 42 Bom 556.

[5] A decree in a suit where one person is allowed to represent another or others as defendant in a representative capacity binds the other only with respect to their property which he represents in law although the parties on record may be made personally liable. An injunction in cases falling under O. 1, R. 8, does not bind persons not parties on record. (1913) 36 Mad 414 (417).

[6] Representative character of parties must be established before S. 11, Expl. VI can be applied. (Vol 19) 1932 Cal 271 (274) : 59 Cal 636.

[7] Official Receiver is not privy of creditor — Creditors are not bound by decision in suit to which official receiver was party. (Vol 6) 1919 Sind 42 (45) : 12 Sind L R 61.

[8] *Karnavan* of a Malabar *tarwad* sued for redemption and obtained a decree. Before he had obtained the decree, the junior members not knowing the previous suit, filed another suit for redemption of the same property with the permission of the Court under O. 1, R. 8, Civil P. C. In the first suit, however, the *Karnavan* did not implead junior members and even disputed their title as members of his *tarwad*. Held, that the second suit was not barred under S. 11. (1910) 8 Ind Cas 129 (130) (Mad).

[9] Suit to which O. 1, R. 8 applies conducted without complying with conditions imposed by the rule — Benefit of S. 11, Expl. VI cannot be extended to decree passed in such suit. (Vol 20) 1933 P C 183 (189) : 60 Ind App 278 : 56 Mad 657 (P C). ((Vol 15) 1928 Mad 77 : 51 Mad 128, overruled.) * (Vol 31) 1944 Sind 165 (167) : 1 I L R 1944 Kar 62.

[10] Certain persons of Vaniya Caste instituting suit for recovery of damages — Neither permission was taken nor notices as required under O. 1, R. 8 issued — Suit held to be inter partes and hence decision in it cannot bind community. (Vol 20) 1933 P C 183 (188) : 60 Ind App 278 : 56 Mad 657 (P C).

[11] Previous suit even though intended to be of representative nature will not bar subsequent suit if provisions of O. 1, R. 8 were not complied with. (Vol 25), 1938 All 523 (524).

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[12] Suit against association through one of its members without following procedure under O. 1, R. 8 — No personal relief claimed against that member — Decree cannot be converted into decree against member personally. (Vol 27) 1940 Oudh 129 (132); 15 Luck 253.

[13] If the alleged common right in a representative suit is negatived by the Court, the suit should be dismissed. In such a suit, a Court cannot declare the rights of individuals who are quite distinct in legal conception from the class of persons on whose behalf the suit is brought though it is open to pass a decree in favour of persons forming a small number out of a large class. (Vol 5) 1918 Mad 628 (631, 632).

[14] Suit under O. 1, R. 8 — All parties including defendant 3 agreeing to decree being passed against defendants 1, 2 and 4 in their representative capacity — Fact that Court allowed defendant 3 to drop out cannot affect decree passed as agreed. (Vol 30) 1943 Mad 161 (164) : 1 L R (1943) Mad 267.

[15] Representative suit under O. 1, R. 8 dismissed at instance of representative — Dismissal is not *res judicata* against representative not made party to suit. (Vol 28) 1941 Rang 24 (25, 26) : 1940 Rang L R 643.

[16] Order 1, R. 8, is merely an enabling rule and does not prevent a representative suit being brought in any other manner than the law permits. (Vol 13) 1936 Bom 179 (183) * (Vol 4) 1917 Mad 457 (459). (Explanation VI to S. 11 is not confined to cases in which permission to sue in representative character is obtained.) * (1880) 2 Mad 328 (331, 333).

[17] Suit relating to joint Hindu family — O. 1, R. 8 does not apply (Per *Teja Singh J.*). (Vol 31) 1944 Lah 220 (234) : 1 L R (1945) Lah 67 (F B).

[18] Suit against manager of Hindu joint family on allegation of trespass — Defendant claiming property for his family — Suit binds other members. (Vol 12) 1925 Mad 640 (644).

[19] A suit was brought against the *Karnavan* of a Malabar *Tarwad* in his representative capacity and the suit was decreed against the *Karnavan* after contest. Held, an *Anandran* cannot avoid the decree by means of a suit, in the absence of allegations of fraud. (1911) 8 Ind Cas 435 (436) (Mad). ((1897) 20 Mad 129, followed)

[20] Where a *karnavan* is not sued as such or there is nothing on face of record to show that it was intended to implead him in his representative character the decree does not bind the *tarwad*. (1887) 10 Mad 322 (329, 330) * (1887) 10 Mad 79 (84).

15. Costs in representative suit.—[1] Representative action—Caution is necessary in giving leave under R. 8 and drawing up orders for costs — It should be clearly specified as to who is to bear costs. (Vol 4) 1917 Bom 141 (148) : 42 Bom 556.

[2] Suit in representative capacity dismissed — Costs cannot be ordered to be paid by person on whose behalf it has been brought. (Vol 22) 1935 Oudh 369 (370) : 11 Luck 150.

[3] Where a minor legatee by her next friend brought a representative suit without obtaining the requisite leave under this rule and adduced no evidence to show that the suit was for the benefit of minor, the next friend was held liable for costs personally. (1885) 11 Cal 213 (219).

16. Compromise of representative suit.—[1] Persons suing in a representative capacity with the leave of the Court can compromise so as to bind those whom they represent, provided the compromise was not unreasonable, fraudulent or dishonest. (1912) 24 Mad L Jour 192 (194, 195) * (Vol 30) 1943 Mad 161 (164, 165) : 1 L R (1943) Mad 267.

[But see (Vol 2) 1915 Mad 561 (568) : 38 Mad 850. (Where a plaintiff is allowed to represent the public a judgment by consent will not bind the public.)]

17. Withdrawal of representative suits.—See O. 23 R. 1.

18. Abatement of suit or appeal.—[1] Where in a suit under O. 1, R. 8 of the Civil P. C. some of the parties other than those who obtained leave of the Court under O. 1, R. 8 die, their legal representatives are not necessary parties to the suit or appeal. (Vol 7) 1920 Lah 338 (340) : 1 Lah 582 * (Vol 27) 1940 Lah 272 (273). (Death pendente lite of some of represented defendants — Suit does not abate.) * (Vol 20) 1933 Lah 682 (684) * (Death of represented defendant — Appeal as against him does not abate) * (Vol 19) 1932 Lah 334 (337) : 13 Lah 92 * (Vol 24) 1937 Pat 149 (150). (To suits or appeals in representative capacity under O. 1 R. 8, provisions of O. 22 cannot be made applicable.)

[But see (Vol 12) 1925 Lah 598 (598).]

[2] Sanction to prosecute or defend suit given to individual persons — One of them dying — Suit does not abate. (Vol 18) 1931 Mad 452 (454) : 54 Mad 527 * (Vol 26) 1939 Lah 572 (575, 576) : 1 L R (1940) Lah 199. (Person appointed by Court on application under O. 1, R. 8 to be sued on behalf of class.) * (Vol 20) 1933 Lah 654 (655). (Suit by some landlords that certain tenancy had extinguished and for declaration that certain person had no occupancy right — Death of some plaintiffs pending suit — Legal representatives not brought on record — Suit is for benefit of all landlords and does not abate either wholly or in part.)

[3] Representative suit with leave of Court — Death of plaintiff — Others can proceed with suits after bringing it to notice of Court — No substitution is necessary. (Vol 22) 1935 Cal 413 (415, 416).

[4] Representative suit — Plaintiff dying — Any of those persons on whose behalf suit was filed can apply to be made plaintiff. (Vol 18) 1931 Mad 590 (591) : 54 Mad 770. (His application will be governed by Limitation Act (1908), Art. 181.)

[5] Suit in representative capacity under O. 1, R. 8 — Claim decreed — In appeal legal representatives of some dead respondents not brought on record — Appeal held not abated. (Vol 7) 1920 Lah 338 (340) : 1 Lah 582.

[6] Some of respondents allowed to represent all respondents not on record under O. 1, R. 8 — Death of some of respondents so representing during appeal — Plaintiff's failure to bring legal representatives on record does not abate appeal. (Vol 27) 1940 Pat 180 (184) : 18 Pat 723.

[7] A suit brought by a Hindu reversioner is really brought on behalf of the entire body of reversioners and if the plaintiff dies it is open to the next reversioner to come in and continue the conduct of the suit as he is already a party thereto. (Vol 6) 1919 Mad 479 (480).

[8] Religious Endowments Act (1868), S. 14 — Suit under S. 14 is representative suit — Death of any party does not cause abatement of suit. (Vol 5) 1918 Mad 560 (562) : 41 Mad 237.

[9] Suit defended representatively — Appeal by defendants — Some appellants dying and some withdrawing — Proper procedure is that Court should determine whether remaining appellants are competent to represent whole village — If yes, he should proceed — If not Court should order addition to existing number. (Vol 21) 1934 Mad 202 (203).

[10] Religious endowment — Representative suit by one community against trustees of temple — Claim of right of entry into temple — Death of trustees pending appeal — New trustee appointed should be brought on record. (Vol 14) 1927 Mad 1105 (1105).

9. No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

[1882—S. 31; 1877—S. 31; R. S. C., O. 16 R. 11. See S. 99; O. 1 R. 13; O. 2 R. 7.]

O. 1 R. 8 (contd.)

[11] Suit not representative — Some respondents in appeal allowed to represent others — Death of person represented — Appellants are not relieved of impleading respondents' legal representatives. (Vol 12) 1925 Lah 124 (125) : 5 Lah 429 * (Vol 13) 1926 Lah 31 (32).

[See also (Vol 6) 1919 Lah 147 (148) : 1919 Pun Re No 20. (Appeal)—Death of some respondents—No application to bring legal representatives on record — Order permitting one or more respondents to represent all others shown to have been passed—Sufficient cause for not applying within prescribed period exists and period should be extended.)

[But see (Vol 18) 1931 Lah 610 (610, 612) : 13 Lah 195.]

19. Arbitration proceedings.—[1] Private award — Signatories to reference professing to represent larger body—R. 8 does not apply—Representatives must have express authority and they must be capable of representing. (Vol 14) 1927 All 128 (130).

[2] Arbitration without intervention of Court in representative action — Application for filing award — Two separate notices under O. 1, R. 8 and Sch. II, Para. 20 (3) are not necessary. (Vol 21) 1934 Bom 6 (11).

[3] Provisions of O. 1 R. 8 apply to petitions which can be heard and tried as suit — Petition to set aside award under S. 14, Arbitration Act, 1899 is such petition. (Vol 23) 1936 Bom 250 (255) : 60 Bom 645.

20. Revision — [1] Refusal to entertain application under O. 1, R. 8 without proceeding in accordance with law comes within S. 115. (Vol 20) 1933 Pat 302 (303).

[2] Application under O. 1, R. 8 (2) made mala fide and hence dismissed — High Court will not interfere in revision. (Vol 20) 1933 All 154 (155).

[3] Application to be made party—Application granted — There is no case decided within S. 115. (Vol 29) 1942 Oudh 340 (342).

ORDER 1 RULE 9 — SYNOPSIS.

1. Applicability and scope.
2. Non-joinder of parties.
3. Mis-joinder of parties.
4. Mis-joinder of parties and causes of action — Multifariousness.
5. Mortgage suits—Non-joinder in—See O. 34, R. 1.
6. Arbitration proceedings.

1. Applicability and scope. — [1] Order 1, R. 9, has no application to a case where there is no party on one side present in Court at all. (Vol 15) 1928 Lah 375 (376) : 9 Lah 588.

[2] Rule does not apply to appeal before Board when defect of nonjoinder was pointed out in trial Court. (Vol 18) 1931 P C 229 (231) (P C).

[3] Rule 9 is confined to cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties actually before it. (Vol 6) 1919 All 322 (323) * (1912) 16 Cal W N 639 (640).

[4] Non-joinder of parties to appeal making it impossible to deal with matter equitably and sufficiently—Non-joinder cannot be condoned. (Vol 12) 1925 Oudh 606 (607) : 1 Luck 560.

[5] Non-joinder — Rule can be applied at any stage of proceeding—Equitable relief in favour of plaintiff should be refused only when plaintiff's conduct disen-

titles him to it and adding of party would unduly prejudice defendant. (Vol 24) 1937 Mad 520 (521, 522).

[6] Even though the Court has power to join, the Court cannot join a party, when the litigant, in whose interest the joinder is to be made, refuses to have the parties joined. (Vol 28) 1941 Nag 5 (8) : 1 L R (1941) Nag 615.

[7] Where plaintiffs refuse to implead a party necessary to the adjudication of the suit in spite of Court's direction to do so, the Court can rightly dismiss the suit. (Vol 8) 1921 All 411 (413) * (Vol 1) 1914 Lah 187 (192) : 1915 Pun Re No. 3 * (Vol 20) 1933 Mad 664 (667). (Non-joinder of necessary party in spite of objection taken from start—Suit should be dismissed.)

[8] Where no issue on the question of non-joinder was framed and the plaintiff had no opportunity of adducing evidence on the plea of non-joinder and was not shown to have been directed by the Court to bring the necessary parties on the record, held that the Court should not have dismissed the suit for non-joinder. (1910) 1910 Pun L R No. 217, p. 663.

[9] Suit should not be dismissed on ground of non-joinder without allowing parties opportunity of amending plaint. If the plea of non-joinder is raised and the Court dismisses the suit on that ground its action is contrary to the provisions of O. 1, R. 9. (Vol 17) 1930 Rang 295 (296).

[10] Order 1, R. 9 has no retrospective effect. (Vol 1) 1914 Cal 215 (216). (Section 31 of the 1882 Code did not apply to non-joinder.)

[11] Order 1, Rule 9, applies to cases where there may be multiplicity of suits. (Vol 11) 1924 Cal 1050 (1051).

[12] Suit instituted against trustee—All trustees not made parties under O. 31, R. 2—No decree can be passed against any trustee — Order 1, R. 9 has no application. (Vol 21) 1934 All 1 (3) : 55 All 887.

2. Non-joinder of parties. — [1] The rule applies to non-joinder and therefore a failure to join a party does not *per se* entail the dismissal of the suit. (Vol 16) 1929 All 439 (440) * (1930) 1930 All L Jour 247 (248) * (1912) 9 All L Jour 410 (419) * (1909) 3 Ind Cas 291 (293) (Cal) * (Vol 1) 1914 Lah 187 (192) : 1915 Pun Re No. 3 * (Vol 8) 1921 Oudh 148 (149).

[2] Whether suit should be dismissed for non-joinder, being barred against party not joined, depends upon facts of each case. (Vol 26) 1939 All 235 (236).

[3] In applying O. 1, R. 9 the distinction between a necessary party and a proper party must be borne in mind. (Vol 32) 1945 Pat 189 (190, 191) : 23 Pat 961.

[4] Where it is not possible to pass an effective decree in the case due to absence of necessary parties, who have not been impleaded, the suit must fail. The rule cannot be invoked to dispense with joinder of the necessary parties. (Vol 29) 1942 Oudh 16 (19) * (Vol 22) 1935 All 110 (115) : 57 All 445. (A Court will refrain from passing a decree which would be ineffective and infructuous.) * (Vol 8) 1921 Cal 622 (622) * (Vol 17) 1930 Mad 714 (718). (Rule does not enable Court to pass decree against a party behind his back.) * (Vol 1) 1914 Nag 31 (31) : 10 Nag L R 72. (Suit by Hindu on mortgage in father's name without impleading other brothers on ground of partition — Suit held liable to be dismissed not for non-joinder but because rights of parties could not be decided.)

[5] If a necessary party is not on record, the proper course is to apply to have him joined under O. 1, R. 10. If he is not brought on the record at all, or when he is

10. (1) Where a suit has been instituted in the name of the wrong person as plaintiff or *Suit in name of* where it is doubtful whether it has been instituted in the name of the right *wrong plaintiff.* plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the

O. 1 R. 9 (contd.)

brought on record, the suit is barred against him by limitation, the suit will be dismissed, especially when plaintiff has neglected to get the plaint amended, even after defendant's objection at the earliest moment. (Vol 23) 1936 Cal 193 (195) : 62 Cal 324* (Vol 1) 1914 Cal 132 (132)* (1913) 20 Ind Cas 262 (263) (Cal)* (Vol 3) 1916 Pat 411 (413, 414).

[6] Defendant sued by one only of two persons having joint cause of action against him, he has the right to have action dismissed unless other is joined—The defect is not merely technical. (Vol 10) 1923 Mad 337 (337).

[7] Idol to whom property is endowed is a necessary party in a suit for pre-emption against the endowed property, and unless it is impleaded as defendant, the suit must fail. (Vol 6) 1919 All 322 (323).

[8] To a suit for declaration of an easement right to dam up a stream in Malabar at a particular point, the Jenmis of the lands lying on either sides are necessary parties and in their absence the suit ought to be dismissed. (Vol 1) 1914 Mad 341 (349).

[9] If the non-joinder is only of a proper as contrasted with necessary party it can never be in itself fatal to the suit. (Vol 17) 1930 All 762 (764)* (1912) 34 All 572 (576) (FB). (Suit by manager of joint Hindu family — Omission to implead other members is not fatal.)* (Vol 18) 1931 Lah 559 (560) : 12 Lah 428. (Suit by manager and other members of joint family for recovery of money — Grandson not joined — Suit should not be dismissed for non-joinder.)* (Vol 5) 1918 Mad 1137 (1139). (Partition suit—Persons having no interest in property need not be made parties.)* (1898) 21 Mad 373 (382)* (Vol 26) 1939 Oudh 145 (148) : 14 Luck 595. (Suit against idol — Sarbarahkar managing property belonging to idol impleaded as defendant — It is not necessary to join trustees, if any, as parties — Case is covered by O. 1, R. 9.)* (Vol 11) 1924 Pat 303 (305). (Suit by some of the servient owners only should not be dismissed.)* (Vol 9) 1922 Pat 447 (447). (Land recorded as *Gairmaaruwa Am*— Suit for declaration of title to — General public are not necessary parties.)* (Vol 7) 1920 Pat 781 (783)* (Vol 17) 1930 Sind 147 (148). (Grandsons of deceased member of joint Hindu family are proper but not necessary parties— Their non-joinder in suit by stranger does not defeat suit.)

[10] If it is not a case of imperative necessity but only a matter of convenience or expediency, either the absent party may be added or the suit may be tried without him. (Vol 9) 1922 Mad 317 (320).

[11] If a proper party is not impleaded for some reason, the proper course for the Court is, as far as possible, to do justice between the parties who are before the Court. (Vol 24) 1937 All 502 (503)* (Vol 27) 1940 All 209 (211) : I L R (1940) All 147 (Suit against firm — Outgoing partners not impleaded — Suit is not bad for non-joinder as liability of partners is joint and several.)* (Vol 22) 1935 All 110 (116) : 57 All 445 (Interest of person not made party distinct from interest of persons who are parties — Rights and interest of parties actually before Court can be dealt with.)

[12] Suit against members of Court-martial for injunction restraining them from trying suit—Legality of Indian Army and Indian Air Force (Amendment) Ordinance (42 [XLII] of 1945) questioned by plaintiffs — Central Government not impleaded as defendant—Suit held was not properly constituted. (Vol 33) 1946 Lah 247 (255, 256) (SB).

[13] Suit for khas possession — Division of land not possible—Some respondents dead — Heirs not brought on record — Appeal should not be entertained despite R. 9. (Vol 14) 1927 Cal 238 (239).

[14] Where the defendant raises no objection to the frame of the suit on the ground of non-joinder of a lessor as co-plaintiff the Court should not dismiss the suit on that ground but should raise an issue for plaintiff to meet or to amend the plaint. (1913) 21 Ind Cas 182 (182) (Oudh).

[15] As to who are necessary and proper parties see O. 1, R. 10.

3. Mis-joinder of parties. [1] A mis-joinder of parties is not fatal to a suit. (Vol 17) 1930 All 180 (183)* (Vol 20) 1933 Cal 477 (479)* (Vol 5) 1918 Cal 870 (872, 874) (A Court should not dismiss a suit for non-joinder or mis-joinder where plaintiff by amendment can remedy the defect.)* (Vol 1) 1914 Cal 795 (796)* (Vol 24) 1937 Lah 116 (117). (The fact that there is a surplussage of plaintiffs will not make a suit incompetent)* (1921) 1921 Pun L R No. 30 p. 84 (85)* (1910) 7 Mad L Tim 364 (365).

[2] There is no mis-joinder of plaintiffs where one of the plaintiffs is entitled to all the estate sued for and the name of another is added as a co-plaintiff merely as a matter of extra caution. (1885) 9 Bom 536 (548)* (1898) 1 Oudh Cas 308 (312) (Pre-emption suit — Person having no right of pre-emption joined as a co-plaintiff.)

4. Mis-joinder of parties and causes of action — Multifariousness. — [1] The mere fact that there is a mis-joinder of parties and causes of action or non-joinder of parties does not justify a Court in rejecting a plaint. (1911) 1911 Pun L R No. 132 p. 493 (497).

[2] A suit bad for multifariousness should not be dismissed without allowing the plaintiff an opportunity to amend it. (1911) 7 Nag L R 43 (45, 46)* (Vol 17) 1930 All 180 (183). (Plea must be raised at earliest opportunity.)* (1913) 18 Ind Cas 181 (182) (Low Bur).

[3] The Court should call upon the plaintiff to make his election and confine the suit to one set of defendants only. (1932) 15 Nag L Jour 111 (116)* (Vol 29) 1942 Cal 69 (70) : I L R (1942) 1 Cal 235. (Defect is not fatal to suit unless plaintiff refuses to elect cause of action to be proceeded with.)

[4] Multifarious suit allowed to proceed and resulting in decree — Defect is considered to have been waived. (Vol 27) 1940 Pat 145 (147)

5. Mortgage suits—Non-joinder in. — See O. 34 R. 1.

6. Arbitration proceedings. — [1] Question of partition referred to arbitration — Some members of joint family not parties to reference — Award is invalid and cannot be filed under Sch. II, para. 21. (Vol 5) 1913 Pat 132 (135).

[2] Where an objection on the ground of misjoinder is made and ignored by the arbitrators, the objection may be made the basis of a charge of misconduct against the arbitrators. (1911) 11 Ind Cas 274 (276) (Sind).

ORDER 1 RULE 10 — SYNOPSIS.

1. Addition and substitution of parties.
2. Bona fide mistake.
3. Applicability and scope of sub-rule (2).
4. "Either upon or without the application of either party."

real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may at any stage of the proceedings, either upon or without the application of *Court may strike out* either party, and on such terms as may appear to the Court to be just, *or add parties.* order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be *Where defendant added,* amended in such manner as may be necessary, and amended copies of *plaint to be amended.* the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the ^aIndian Limitation Act, XV of 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

[1882—Ss. 27, 32, 33; 1877—Ss. 27, 32, 33; R. S. C., O. 16 Rr. 2, 11, 39; See O. 41 R. 20.]

[a] See now the Indian Limitation Act, 1908 (9 [IX] of 1908), S. 22.

O. 1 R. 10 (*contd.*)

5. Proper and necessary party.
6. Partnership suit.
7. Partition suits.
8. Pre-emption suits.
9. Suits for rent.
10. Suits on negotiable instruments.
11. Suits for specific performance.
12. Suits by co-owners.
- 12a. Suits relating to easements.
13. Government.
14. "Questions involved in the suit."
15. Parties when can be added.
16. Striking out name of party.
17. Transposition of party.
18. Transposition of defendant as plaintiff.
19. Transposition of plaintiff as defendant.
20. Misdescription of parties.
21. Consent of added party — Sub-rule (3).
22. Suit by or against a dead person.
23. Limitation Act, Section 22.
24. Appeal.
25. Revision.

1. Addition and substitution of plaintiff — Sub-rule (1).—[1] Where a suit is brought by a plaintiff who subsequently discovers that he cannot get all the reliefs he seeks, unless he joins other persons as co-plaintiffs or that some other person and not the original plaintiff is entitled to the relief, O. 1, R. 10 (1) permits the new party to be added or substituted. (1910) 12 Cal L Jour 537 (540, 541).

[2] To apply sub r. (1), it must be shown that there was mistake and that addition or substitution of new plaintiff is necessary. (Vol 14) 1927 Cal 340 (342). (Addition or substitution of plaintiff should not be made without consent of existing plaintiffs.)

[3] No person can be added as plaintiff unless his presence is necessary. (1911) 11 Ind Cas 223 (225) (All). [4] A Court cannot under O. 1, R. 10 add persons as parties who are indirectly interested. (1910) 6 Ind Cas 36 (37) (All).

[5] Party not personally interested in suit cannot be joined as co-plaintiff. (Vol 17) 1930 Sind 73 (74).

[See (1889) 11 All 104 (107, 108). (Relation of defamed person cannot sue for defamation.)]

[6] Rule should not be utilized to give good cause of action to plaintiff on record by joining a person who has good cause of action. (Vol 14) 1927 Bom 424 (426) ✕ (1911) 11 Ind Cas 223 (225) (All) ✕ (1881) 6 Cal 370 (371) ✕ (1876-78) 1 Mad 383 (384).

[7] Finding that plaintiff must fail — Court cannot import new co-plaintiff having different cause of action. (Vol 2) 1915 Low Bur 45 (46) : 8 Low Bur Rul 302.

[8] Substitute can only be added to enforce a single right pleaded in suit and not to bolster up suit by pleading his own individual right. (Vol 17) 1930 Sind 73 (74).

[9] Power to substitute plaintiff under O. 1 R. 10 is not excluded where person originally suing has no right to institute suit. (1907) 30 Mad 412 (420) ✕ (Vol 10) 1923 Mad 180 (180) ✕ (Vol 21) 1934 Nag 159 (160) : 31 Nag L R 9 ✕ (Vol 8) 1921 Sind 59 (60) : 16 Sind L R 71.

[10] Persons jointly interested suing in respect of joint property — Their right to sue challenged — Plaintiff can be amended by joining their co-contractors as plaintiffs. (Vol 26) 1939 P C 170 (173) : 66 Ind App 210 : I L R (1939) Bom 503 : I L R (1939) Kar P C 295 (P C) ✕ (1903) 27 Bom 157 (161).

[11] Suit for injunction and demolition of construction put by defendant — Plaintiff found to have no right to sue — Another person added as plaintiff — Discretion of Court held was properly exercised under O. 1, R. 10. (1912) 18 Ind Cas 350 (350, 351) (All).

[12] Plaintiff wrongly described as 'mandir' in plaint — Plaintiff held could be amended by striking out word 'mandir' and substituting word 'deity' for it. (Vol 24) 1937 Nag 173 (174) : I L R (1937) Nag 514

[13] Once all parties are before the Court, the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. (Vol 26) 1939 P C 170 (173) : 66 Ind App 210 : I L R (1939) Bom 503 : I L R (1939) Kar P C 295 (P C).

2. Bona fide mistake. — [1] Substitution will be permitted only if there was a *bona fide* mistake (Vol 11) 1924 Mad 883 (884) ✕ (1910) 12 Cal L Jour 537 (540, 541) ✕ (1913) 17 Cal W N 462 (465, 466). (No *bona fide* mistake — Relief under sub-r (1) cannot be given.) ✕ (Vol 10) 1923 Lah 652 (652) (Minor plaintiff dead on

O. 1 R. 10 (*contd.*)

date of suit — Amendment by substituting legal representative cannot be allowed at any rate, when there is no *bona fide* mistake.)* (Vol 6) 1919 Lah 263 (264)* (Vol 23) 1936 Mad 960 (960, 961)* (1907) 30 Mad 419 (420).

[2] *Bona fide* mistake may be of fact or law. (Vol 8) 1921 Sind 59 (61): 16 Sind L R 71* (1910) 12 Cal L Jour 537 (540, 541).

[3] When a mistake is not made deliberately and when it is honestly made, the mistake is *bona fide*. (Vol 3) 1916 Cal 837 (338)* (Vol 19) 1932 Nag 20 (20): 27 Nag L R 335.

[4] Different Courts taking different views as to plaintiff's act—Plaintiff's act must be taken to be *bona fide*. (Vol 10) 1923 Mad 180 (180)* (1910) 12 Cal L Jour 537 (540, 541).

[5] Major wrongly described as minor—Suit by next friend—O. 1, R. 10 covers case. (Vol 5) 1918 Mad 916 (917): 40 Mad 743* (Vol 28) 1941 Oudh 43 (44, 45): 16 Luck 256.

[6] Transfer contravening S. 186, T. P. Act—Transferee purchasing through *bona fide* mistake and instituting suit—Assignor can be substituted under O. 1, R. 10. (Vol 23) 1936 Oudh 275 (276, 277): 12 Luck 150.

[7] Suit by Official Liquidator of Bank — Bank's assets alleged to be sold—Assignee praying to be added as co-plaintiff—Mistake being genuine, assignees should have been added as co-plaintiffs. (Vol 7) 1920 Lah 488 (489).

[8] In the case of *benami* transfer, it is possible to have doubts as to the person entitled to sue. (Vol 6) 1919 Lah 263 (264).

3. Applicability and scope of sub-r. (2).—[1] Object of sub-r. (2) is to enable Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit and finally and effectually to put an end to litigation respecting them. (1882) 5 Mad 52 (53)* (1940) 21 Pat L Tim 329 (330).

[2] Power to add party is discretionary though such power is widely exercised. (Vol 6) 1919 Cal 189 (189): 46 Cal 48* (Vol 21) 1934 Pat 370 (372).

[3] Discretion must be exercised judicially and with proper consideration. (Vol 21) 1934 Pat 425 (425)* (Vol 8) 1921 Mad 557 (558): 44 Mad 43* (1910) 13 Oudh Cas 109 (111).

[4] Suit by trustee on behalf of trust property — Co-trustees not joined either as plaintiffs or defendants for 17 years in spite of objection regarding the same—Exercise of discretion in joining them as defendants after 17 years held not proper. (Vol 25) 1938 Mad 982 (990).

[5] Party can be added if he ought to have been joined or is necessary for complete decision. (Vol 12) 1925 Cal 26 (29). (Nature of suit cannot be altered by addition.)

[See (Vol 16) 1929 Cal 477 (477). 56 Cal 447. (Party cannot be added merely for watching proceedings).]

[6] Necessary parties not impleaded due to gross negligence — Amendment to add new parties cannot be allowed. (Vol 21) 1934 Lah 36 (36).

[7] Sub-rule (2) does not empower the Court to join a person as plaintiff, who could not have been originally joined. (1920) 57 Ind Cas 784 (785) (Nag) * (Vol 14) 1927 Mad 834 (835).

[8] Persons whose title was contradictory to that of original plaintiff cannot be added (Vol 9) 1922 Cal 459 (461) * (Vol 19) 1932 Mad 688 (689). (Ejectment suit—Suit on basis of lease deed — Persons claiming adverse rights should not be made parties, in the absence of special circumstances.)* (Vol 14) 1927 Mad 834 (835). (Question whether plaintiff or defendant is real purchaser

— Third party claiming adversely to both cannot be impleaded in the suit.)

[See however (Vol 28) 1941 Mad 710 (710, 711). Suit on mortgage — Person claiming part of mortgage applying for being added as party to suit — Person though claiming adversely is necessary party.)

[9] Order of joinder of person not traceable would not be proper. (Vol 1) 1914 Lah 500 (501): 1914 Pun Re No. 107.

[10] Court can add any person as plaintiff or defendant whether previously party or not. (Vol 7) 1920 Mad 732 (735).

[11] Addition of parties necessitating trial *de novo* cannot be allowed. (Vol 18) 1931 P C 229 (231) (P C).

[12] Order to add a party ought to be at a hearing—All facts must be before Court. (Vol 3) 1916 Cal 690 (690).

[13] Application under O. 1, R. 10 should be made to Judge hearing suit — But in his absence another Judge can entertain it. (Vol 18) 1931 Cal 580 (580): 58 Cal 301.

[14] For applying O. 1, R. 10 existence of valid plaint or appeal is necessary. (Vol 21) 1934 Nag 53 (56).

[15] Sub-rule (2) does not relate to the deletion of reliefs but only to the striking out of parties. (Vol 6) 1919 Mad 871 (873): 42 Mad 219.

[16] Sub-rule (2) covers an application to implead as parties to a suit the legal representatives of a deceased defendant in their individual capacity. (Vol 4) 1917 Mad 849 (849).

[See (Vol 27) 1940 P C 215 (218): 67 Ind App 406: I L R (1941) Bom 8: I L R (1940) Kar P C 410 (P C). (Judge can add as party to suit representative of person against whom suit has abated for giving effect to rights of parties.)]

[17] The rule applies to suits under S. 92. (Vol 5) 1918 Mad 1071 (1071)* (Vol 7) 1920 Mad 133 (133, 134): 43 Mad 707* (Vol 6) 1919 Mad 439 (439).

[18] Mortgage suit — O. 1, R. 10 (2) is applicable. (Vol 26) 1939 P C 170 (173): 66 Ind App 210: I L R (1939) Kar P C 295: I L R (1939) Bom 503 (P C)* (Vol 23) 1936 Pat 153 (154).

[19] Parties can be added or substituted even though O. 1, R. 10 does not apply. (Vol 21) 1934 All 4 (9): 55 All 825.

[20] Joinder of plaintiff or defendant for one stage of suit is joinder for all stages. (Vol 14) 1927 Mad 560 (561).

4. "Either upon or without the application of either party."—[1] Written statement requesting *inter alia* to add parties—No mention of names of proposed parties — Written statement is an application for purposes of O. 1, R. 10 though it does not bear the name 'application' — Non-mentioning of names of proposed parties is immaterial. (Vol 24) 1937 Rang 175 (178).

[2] A plaintiff impleading a person as a party must state the facts on which he imputes a liability to the person so cited. (1912) 15 Oudh Cas 304 (308, 309).

[3] Application of plaintiff to implead another defendant on allegation found in written statement of defendant — Held he should be impleaded. (Vol 21) 1934 Oudh 347 (348).

[4] A Court may, in the exercise of its discretion, add a party to a suit upon his own application. (1886) 13 Cal 90 (95).

[5] Where a person applies to be made a party to a suit what the Court ought to see is whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party. (Vol 16) 1929 Mad 291 (293).

[6] A Court cannot pass a decree against a person, against whom the plaintiff does not seek relief, and who is joined as a defendant on his own application. His

O. 1 R. 10 (*contd.*)

position and that of a person who is joined without any such application are very different, in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it. (Vol 7) 1920 Nag 216 (218) * (Vol 5) 1918 Cal 909 (909, 910).

[7] Application to be added as plaintiff—Court cannot dismiss suit first and then dismiss application on ground that there was nothing pending before it to which party could be added. (Vol 28) 1941 Mad 79 (81).

[8] Court can allow a party to be added on condition that he can only intervene at a particular stage in the suit and cannot question orders passed before he applied. (Vol 18) 1931 Cal 580 (580): 58 Cal 801.

[9] Prayer to be made co-plaintiff — On rejection applicant cannot ask the application to be treated as one under O. 22, R. 10. (Vol 4) 1917 Cal 627 (628).

5. Proper and necessary parties.—[1] A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. (Vol 28) 1941 F C 16 (28): 1940 F C R 110: ILR (1941) Kar F C 72 (FC) * (1912) 17 Cal W N 835 (838, 839) * (Vol 30) 1943 Lah 252 (253) * (Vol 28) 1941 Lah 120 (122): ILR (1940) Lah 745 * (Vol 21) 1934 Nag 228 (229).

[2] Necessary party not joined — Action cannot proceed. (Vol 21) 1934 Pat 106 (107).

[3] Necessary parties not on record — Decree passed in ignorance of the fact is void against them and wholly void if interests are inseparable. (Vol 13) 1926 Mad 991 (992) * (Vol 3) 1916 Mad 828 (829).

[4] A suing B for house rent—C, purchaser of house, applying for making him defendant — G is necessary party. (Vol 16) 1929 Oudh 148 (148).

[5] Suit by Hindu father in his own capacity for declaration of his title to certain land — Sons are necessary parties. (1913) 20 Ind Cas 262 (263) (Cal).

[6] Property in receiver's possession likely to be affected by result of litigation — Receiver is necessary party. (1911) 15 Cal W N 54 (56). * (Vol 19) 1932 All 382 (382): 54 All 532 (Judgment-debtor declared insolvent before date of decree — Official Receiver is necessary party to proceedings in appeal.) * (1909) 10 Cal L Jour 23 (24). * (Vol 13) 1926 Lah 696 (696). (Appeal by claimant of property sold by Receiver as belonging to insolvent — Receiver is a necessary party.) * (Vol 10) 1923 Mad 144 (146, 147): 47 Mad 47.

[7] The general rule is that, if several persons have a joint right of action all must join in suing. (Vol 9) 1922 Mad 317 (318). (Co-trustees.) * (Vol 3) 1916 Pat 44 (45): 1 Pat L Jour 437. (All members of endowment committee should sue for removal of trustee.)

[8] Receiver is not a necessary party where no attempt is made to interfere with his right to property entrusted to his care and he has no possession. (Vol 22) 1935 Cal 15 (16).

[9] A joint promisor is a necessary party in a suit by the co-promisor against promisee. (Vol 15) 1928 Sind 16 (16) * (1881) 6 Cal 815 (826) * (Vol 17) 1930 Mad 714 (716, 717). (Several persons simultaneously entering into contract with A and agreeing to work together and to divide profits in certain proportions—One of them suing A for account but not impleading others — Suit is bad because others also are necessary parties.)

[10] Other persons held to be necessary parties. (Vol 1) 1914 Mad 341 (349). (Suit for declaring right to dam stream in Malabar — Jenmis are necessary parties.) * (1912) 39 Cal 881 (883, 884). (Transferee of property sold in execution is a necessary party to reverse the sale if the proceedings have been commenced after the transfer.) * (1900) 27 Cal 493 (499). (Suit for declaration against attaching creditor that property is not liable to attachment — All attaching creditors are necessary

parties.) * (1886) 13 Cal 159 (162). (Suit to set aside order for rateable distribution — All persons interested in distribution are necessary parties.) * (1910) 11 Cal L Jour 461 (469). (Suit for construction of will — Representatives of all original trustees are necessary parties.) * (Vol 21) 1934 Lah 366 (368): 15 Lah 807. (Suit for declaration of rights in shamlat — All proprietors are necessary parties.) * (Vol 20) 1933 Lah 901 (904): 15 Lah 9. (Adjudication of joint family carrying on business as insolvent and property vesting in Official Assignee—Suit against Official Assignee by widow having right of maintenance challenging necessity for incurring debts — Creditors are also necessary parties.) * (Vol 4) 1917 Lah 402 (403). (Suit to declare marriage of Hindu minor invalid — Both parties to marriage are necessary parties.) * (Vol 20) 1933 Mad 664 (667). (Suit to eject defendant from site — Defendant pleading that permission was granted by Municipal Council — Latter is necessary party.) * (Vol 12) 1925 Mad 761 (761). (Malabar law — Maintenance suit on basis of *teer deed* — Karnavan is necessary party.) * (Vol 10) 1923 Mad 81 (82). (Registration suit — Executants though minors are necessary parties.) * (Vol 1) 1914 Mad 272 (273, 274): 38 Mad 837. (Madras Rent Recovery Act (8 [VIII] of 1865), S. 39 — Suit to set aside rent sale — Person at whose instance sale was brought about is not necessary party—Decree-holder is necessary party.) * (1884) 7 Mad 428 (429). (Plaintiff suing karnavan of his tarwad for increase in rate of maintenance — All members of tarwad must be joined.) * (1866-68) 3 Mad H C R 134 (135). (Suit to compel vendor to procure transfer to vendee's name of registration of property sold — Registering Officer must be made party.) * (Vol 12) 1925 Nag 288 (288, 289). (Creditor of manager of joint Hindu family suing after manager's death—All members must be impleaded in the suit if family property is to be bound by the decree.)

[11] Person remotely or indirectly interested is not necessary party. (1913) 17 Cal W N 835 (839) * (Vol 10) 1923 All 11 (12). (Occupancy holding—Rival claimants — Landlord is not necessary party.) * (Vol 11) 1924 Cal 977 (979). (In a suit for possession by one landlord against another the tenants in occupation of the land need not necessarily be joined as defendants.) * (Vol 7) 1920 Cal 525 (526). (Appeal by secured creditor — Receiver impleaded — Other creditors need not be joined.) * (1912) 15 Cal L Jour 225 (226). (Suit for damages for trespass — All persons aggrieved are not necessary parties.) * (1911) 15 Cal W N 244 (246). (Non-opposing creditor in lower Court not necessary party in appeal by insolvent.) * (Vol 15) 1928 Mad 978 (979). (Suit on mortgage — A claiming to be adopted son of plaintiff's husband and seeking to be joined as party — A is not a necessary party.) * (Vol 14) 1927 Mad 82 (83). (Alienation by mother — Suit to set it aside against some of the alienees compromised — Such alienees are not necessary parties.) * (Vol 11) 1924 Mad 830 (831). (Creditors opposing claim of another creditor before Official Receiver — Creditor on failure appealing — Official Receiver is not necessary party in appeal.) * (Vol 8) 1921 Mad 557 (558): 44 Mad 43. (Suit under S. 55, Ma ras Estates Land Act, to obtain *patta* from landlord — Landlord alleging to have already issued new *patta* to another, so that he was not bound to issue new *patta* to plaintiff unless latter took steps under S. 146 — Previous grantee of *patta* is not necessary party.) * (Vol 2) 1915 Mad 1203 (1203). (Suit on mortgage — Auction-purchaser of rights of mortgagor effectively representing mortgagor — Original mortgagor is not necessary party.) * (Vol 2) 1915 Mad 157 (168). (Minor not necessary party in suit for appointment of guardian.) * (Vol 15) 1928 Nag 65 (66). (Suit by unsuccessful objector under O. 21, R. 63 — Auction-purchaser in

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possession — Decree-holder is not a necessary party.) * (Vol 13) 1926 Oudh 422 (423). (Suit by one lessee against another for possession — Landlord is not necessary party.) * (Vol 9) 1922 Pat 9 (11). (Suit by lessee of zamindar against tenant — Suit about fishing right — Zamindar is not a necessary party.) * (1921) 59 Ind Cas 292 (295) (Pat). (Person in possession suing for declaration of title and confirmation of possession — Third person alleged to be interested in land in suit not impleaded — Defendant having no title or possession — Suit is not liable to be dismissed because of non-joinder.) * (Vol 26) 1939 Rang 185 (186). (Conveyance of immovable property in favour of sons — Father depositing conveyance to secure loan — Suit against father on loan — Sons are not necessary or proper parties.) * (Vol 4) 1917 Low Bur 41 (42). (Undeclared parties having no defence whatever — It is not absolutely necessary to join them by amending plaint.) * (1911) 10 Ind Cas 779 (779) (Low Bur). (Agent or benamidar for another — Not necessary party.)

[See also (Vol 5) 1918 P C 49 (50) (PC). (Practice of adding unnecessary parties condemned.)]

[12] Suit under S. 92 — Alienee from trustee is not necessary party. (1911) 5 Sind L R 103 (104) * (Vol 5) 1918 Cal 5 (7) (S B) * (Vol 19) 1932 Rang 132 (135) : 10 Rang 342.

[13] Suit by legatee against executor *de son tort* in possession of sufficient assets — Personal representatives are not necessary parties. (Vol 9) 1922 Mad 457 (462, 472) : 46 Mad 190.

[14] Defendants sued as trespassers stating that they act as per Village Panchayat's resolution — Plaintiff can continue suit and show that Panchayat's act is *ultra vires* — Without deciding question of *ultra vires*, Court cannot dismiss suit for not joining Panchayat as defendant. (Vol 31) 1944 Nag 130 (131) : I L R (1944) Nag 687.

[15] Suit under S. 77, Registration Act — Registering officer is not necessary party. (1884) 8 Bom 269 (271).

[16] A defendant who is not a necessary party and who has no interest in the subject-matter of the suit cannot contest it. (Vol 12) 1925 Lah 65 (66).

[17] A person would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication. (Vol 28) 1941 F C 16 (28) : (1940) F C R 110 : I L R (1941) Kar F C 72 (F C) * (Vol 14) 1927 All 315 (315). (Suit relating to immovable property — Persons not interested in suit property, but appearing in Record of Rights are proper parties.) * (Vol 30) 1943 Lah 252 (253) * (Vol 28) 1941 Lah 120 (122) : I L R (1940) Lah 745 * (Vol 24) 1937 Mad 200 (207).

[18] Person having interest in the result of suit and having right to ask Court's assistance is proper party. (Vol 12) 1925 Cal 1257 (1258).

[19] Addition of parties — A person may be added as party where his presence is necessary to enable Court effectually and completely to adjudicate upon and settle all questions involved in suit and not merely those between parties. (Vol 27) 1940 Mad 225 (227). (Person may be impleaded as defendant even if he counter-claims against plaintiff.)

[20] Full and final adjudication possible between existing parties of all questions involved in suit — Court has no jurisdiction to add parties in such case. (Vol 21) 1934 Nag 228 (229).

[21] It is not necessary that any relief should be asked against person to be added as party. (1890) 13 Mad 32 (33).

[22] Person having present interest in suit can alone be added as party. (Vol 22) 1935 Mad 394 (396).

[23] Fact that person financing litigation may be affected by result of suit is no reason for allowing him to be added as party. (Vol 22) 1935 Mad 394 (396).

[24] Persons held to be proper parties. (Vol 28) 1941 F C 16 (22, 28) : 1940 F C R 110 : I L R (1941) Kar F C 72 (F C). (Suit involving question of validity of statute affecting scope of executive authority of Province — Advocate-General is proper party.) * (Vol 20) 1933 Cal 477 (479). (Lease settled by plaintiff with two persons for definite period — Sale of jote for arrears of rent and purchase by son of one of lessees — Suit for khas possession after expiry of period resisted by person alleging to be lessee from original lessee on ground that lease granted to original person had not determined — Purchaser and original lessees are not necessary parties but only proper parties.) * (Vol 14) 1927 Cal 352 (353). (Subject of land acquisition, wakf property — Reference under S. 18, Land Acquisition Act, for determining valuation — Trustees can be added as parties.) * (Vol 4) 1917 Cal 330 (343). (The under-riyats of plaintiff in a suit for declaration of his status as tenant are proper though not necessary parties.) * (Vol 2) 1915 Cal 771 (773). (Transferee of property pending suit.) * (1912) 16 Cal L Jour 381 (382, 383). (Suit for declaration that plaintiff was not tenure-holder but raiyat — Court adding persons recorded as riyats, as defendants — Latter held were proper parties.) * (1910) 12 Cal L Jour 452 (456). (Appeal against order under S. 36, Provincial Insolvency Act — Receiver is proper party.) * (Vol 21) 1934 Lah 328 (328). (Pro-note in favour of liquidated Bank endorsed in favour of another — Suit by latter against original debtor — Bank under liquidation is proper party.) * (Vol 16) 1929 Lah 753 (759) : 11 Lah 325. (Suit by administrator against one heir who acted as executor *de son tort* for account of profits — Other heirs though not necessary are proper parties.) * (Vol 24) 1937 Mad 338 (339). (A attaching joint family property of minor in execution of money decree — Suit by grandmother of minor for maintenance claiming charge on same property — Pending suit, sale by minor's guardian of some property to A to avoid court sale — A held to be proper party.) * (Vol 22) 1935 Mad 358 (353). (Suit for possession by purchaser against vendor — Third party alleging that vendor is not entitled to whole property is proper party.) * (Vol 19) 1932 Mad 31 (32). (Application by Karanvan to withdraw appeal — Application not made *bona fide* — Junior members may be added as appellants.) * (Vol 16) 1929 Mad 443 (445, 447). (Meeting of Taluk Board convened for electing member but adjourned by majority — Minority declaring adjournment illegal and electing plaintiff — Government withholding notification of his election in Gazette — Plaintiff suing District Board and its President for declaration that he was duly elected member — Government is proper party.) * (Vol 16) 1929 Mad 268 (270). (Suit by benamidar — Real owner can be made party, if necessary.) * (Vol 10) 1923 Mad 521 (522). (Suit against Hindu widow — Adoption of plaintiff in question — Reversioner applying to be made a party — Application lies. The reversioners are proper parties.) * (Vol 2) 1915 Mad 517 (517, 518, 519). (Alienation of trust property — No decree for possession or for declaration can be passed against alienee — Alienee is a proper party, but is not necessary party.) * (Vol 31) 1944 Nag 313 (314) : I L R (1945) Nag 427 (Suit for amount due on rateable distribution — All decree-holders are proper parties.) * (Vol 28) 1941 Nag 178 (179). (Real owner can apply to be joined as party to suit instituted by benamidar after benamidar's death.) * (Vol 24) 1937 Nag 121 (121, 122) : I L R (1937) Nag 366. (Suit against father on mortgage of joint family property — Application by son to be joined as party — Son is not necessary party but proper party.) * (Vol 24) 1937 Oudh 229 (232). (Suit under S. 92, for framing of

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scheme—Close relation of person creating trust not only beneficiary but also entitled to some voice in management of trust property and also possessing necessary educational qualification to become trustee, applying to be made defendant to scheme suit—Such person is proper party.) * (Vol 23) 1936 Rang 241 (241). (Suit for recovery of possession of land—Defendant claiming possession as tenant of another person—Such person may be proper party to suit—His predecessor-in-title can never to be proper party.) * (Vol 14) 1927 Rang 192 (192) : 5 Rang 159. (Administration suit by heirs—Person claiming as an adopted son of the deceased can be joined as party.) * (Vol 12) 1925 Sind 195 (200) : 19 Sind L R 220. (Advocate-General is proper though not necessary party to suit to set aside trust.)

[25] Persons held to be not proper parties. (Vol 16) 1929 Bom 353 (354) : 53 Bom 598 (In suits for compelling registration third parties cannot be added as parties.) * (Vol 12) 1925 Cal 1257 (1257). (Suit under S. 77, Registration Act—Person claiming title under a prior sale in his favour by the alleged executant is not a proper party.) * (Vol 13) 1926 Nag 67 (68). (Attaching creditor intending to challenge the validity of mortgage should not be added.) * (Vol 20) 1933 Pat 259 (260). (Mukarrari tenure—Mukarrari granted by zamindar to plaintiff—Record of rights showing priest as holding under zamindar—Dispute as to right to nominate village priest between plaintiff and zamindar—Suit is not bad by non-joinder of general public.)

6. Partnership suits.—[1] All members of a partnership are necessary parties in a suit for dissolution of partnership. (Vol 30) 1943 Lah 252 (253) * (Vol 1) 1914 Cal 132 (132) * (Vol 25) 1938 Mad 151 (153) * (Vol 17) 1930 Mad 714 (716). (Suit for accounts.) * (Vol 22) 1935 Pat 456 (457) * (Vol 12) 1925 Sind 181 (182) : 17 Sind L R 324 * (Vol 9) 1922 Sind 13 (14) : 15 Sind L R 152.

[2] Suit for dissolution of partnership—All heirs of deceased partner must be joined. (Vol 14) 1927 Mad 491 (493) * (Vol 4) 1917 Mad 197 (198). (Suit for accounts of partnership.)

[See also (Vol 12) 1925 Mad 347 (347). (The application, to be impleaded, by a son of deceased defendant in suit for dissolution of partnership, if out of time on account of amendment of Limitation Act, must be allowed.)]

[3] Suit for account by partner against representatives of deceased partner—Receiver of deceased partner's estate is necessary party. (1910) 7 Ind Cas 75 (76) (Cal).

[4] Partnership—Suit for dissolution—Person who together with the firm forms a superior partnership is not a necessary party. (Vol 14) 1927 P C 70 (71) (PC).

[5] Suit for dissolution of partnership—Sub-partners are not necessary parties. (Vol 4) 1917 Mad 267 (268).

[6] Dormant partner is not necessary party to suit on contract with other partners. (Vol 3) 1916 Mad 926 (926).

[7] Suit for taking partnership amount—Sons of plaintiff who are members of joint family with their father are not necessary parties. (1910) 4 Sind L R 2 (8).

[8] Suit to recover debt due to partnership—All partners should be made parties. (Vol 10) 1923 Mad 85 (85).

[9] Administration suit and a suit for accounts of partnership between deceased and executor can be joined—Other partners are not necessary parties. (Vol 14) 1927 Bom 470 (472, 473) : 51 Bom 800.

[10] Suit by partner against other partner for dissolution of partnership and for damages for breach of contract against agent of firm—Plaintiff held was not entitled to sue in his own name in respect of breach of

contract in absence of allegation of collusion by agent with other partner. (1904) 27 Mad 80 (83).

[11] Suit on pro-note in favour of firm—All members of firm are proper parties. (1912) 11 Mad L Tim 246 (247).

[12] Suit for partnership accounts—Defendant 3 not recognised by plaintiff as partner but impleaded because in previous litigation defendant 1 alleged him (defendant 3) to be partner—Suit is not bad for misjoinder of parties. (Vol 11) 1924 Pat 65 (65, 67).

[13] In suit by third party against partnership whether receiver appointed in dissolution suit is necessary party depends upon whether receiver's possession or jurisdiction of Court appointing receiver is disputed. (Vol 7) 1920 Sind 58 (58) : 14 Sind L R 171.

[14] Refusal by partner to join in suit as plaintiff—He should be made a defendant. (Vol 12) 1925 Lah 504 (505).

7. Partition suits.—[1] Suit for partition—All persons interested are necessary parties. (Vol 27) 1940 All 399 (400) * (1911) 35 Bom 393 (395) * (Vol 13) 1926 Cal 741 (742). (Also in appeal.) * (Vol 30) 1943 Lah 252 (253). (All co-sharers are necessary parties.) * (Vol 14) 1927 Lah 189 (189). (Do.) * (Vol 7) 1920 Oudh 173 (175) : 23 Oudh Cas 62. (Interested parties should be joined either as plaintiffs or as defendants.)

[2] Suit for partition—Mortgagee of undivided share should be added as party if extent of mortgagor's share is in dispute. (Vol 27) 1940 Cal 284 (285) : I L R (1940) 2 Cal 87 * (Vol 4) 1917 Cal 184 (185) : 44 Cal 28.

[3] Suit for partition between two branches of Hindu family—Necessary parties are heads of each branch—All members of two branches need not be impleaded. (Vol 19) 1932 Lah 641 (642, 643) : 13 Lah 433.

[4] Partition suit—Alienees of joint family property can be added as defendants at the instance of a party other than alienor. (Vol 17) 1930 Mad 913 (913).

[5] Partition suit—Commission issued for taking accounts of family property—Worshippers of certain temple applying to be made parties, alleging that certain fund was held by family in trust for deity, should be added as parties. (Vol 18) 1931 Mad 357 (359, 361).

[6] Compromise in partition suit breaking down—Simple mortgagee subsequent to suit of share of party to partition suit is not necessary or proper party to partition suit. (Vol 21) 1934 Mad 485 (488, 489).

[7] Partition suit—Sale of property held and confirmed in execution of mortgage decree pending such suit—Purchaser should be allowed to come in as party. (Vol 18) 1931 Cal 594 (596).

[8] Suit for partition—Co-sharer vendor is not necessary party but is, proper party. (Vol 10) 1923 Pat 162 (162).

[9] Partition suit—Persons not having present right to share are not necessary parties. (Vol 10) 1923 Cal 221 (222, 223) : 49 Cal 1043.

[10] Suit for partition—Persons interested in some properties not impleaded—Decree in respect of other properties is not barred. (Vol 12) 1925 Cal 754 (758).

[11] Tenant under owner of half share of proprietary title suing for partition—Owner of other half share alone made defendant—Plaintiff landlord, though not necessary party is proper party. (1910) 7 Ind Cas 382 (384) (Cal).

8. Pre-emption suits.—[1] Suit for pre-emption—Vendor is not necessary party. (Vol 30) 1943 Lah 252 (253) * (1910) 32 All 14 (17) * (1904) 26 All 549 (553).

[2] Pre-emption suit—Vendor is necessary party if without his being impleaded point in dispute cannot be decided. (Vol 29) 1942 Oudh 366 (368).

[3] Subsequent vendee is a necessary party in pre-emption suit. (1913) 35 All 385 (386).

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[4] Vendee mortgaging property after sale — Mortgagee is not necessary party in suit for pre-emption. (1912) 13 Ind Cas 647 (647, 648) (Lah).

[5] Pre-emption — Landlords petitioning under S. 26 (f), Bengal Tenancy Act, are proper parties to proceedings for setting aside sale. (Vol 21) 1934 Cal 795 (795).

9. Suits for rent. — [1] A trustee of temple properties cannot sue singly for rent without making other co-trustees parties to the suit. (Vol 1) 1914 Mad 119 (119) & (Vol 4) 1917 Mad 698 (699). (Suit by two trustees — Others made defendants — Suit is not bad.)

[But see (Vol 11) 1924 Rang 201 (202). (Suit by one co-trustee for rents is tenable.)]

[2] Suit for profits of land — All co-sharers are necessary parties. (Vol 8) 1916 Pat 267 (268) : 1 Pat L Jour 573 (F B) & (Vol 9) 1922 Nag 164 (165) : 18 Nag L R 39.

[3] Rent suit — Tenant pleading title of third person — Latter is not necessary party. (Vol 8) 1916 Cal 484 (485) & (Vol 14) 1927 Cal 340 (342). (Rent suit — Addition should not be made so as to convert the suit into one of title.) & (1892) 8 Cal 238 (240).

[4] Rent suit — Tenant mentioning third party to whom he had paid rent with landlord's consent — Third person should be added as party. (1913) 19 Ind Cas 473 (474) (Lah).

[5] Rent suit — Person claiming to be landlord should be added. (1940) 21 Pat L Tim 329 (330).

[See also (Vol 6) 1919 Cal 589 (590). (In a suit between landlord and tenant for rent, a third person, who once claimed to be the rightful owner need not be made a party.)]

[6] Rent suit by landlord — Third party, alleging holding to have been transferred to him with landlord's consent, should be joined as party. (Vol 17) 1930 Pat 323 (323, 324) : 10 Pat 90.

[7] Rent suit — Claim by intervener alleging purchase of holding to be added as party — Statutory recognition taking effect after institution of suit — Court even then must add intervener as party. (Vol 24) 1937 Pat 49 (49).

[8] Cosharer landlord can sue to recover his share of rent when there has been separate collection in respect of that share. (Vol 4) 1917 Cal 80 (80) & (1892) 19 Cal 610 (614).

[9] A cosharer landlord who has no right to separate collection cannot maintain a suit for rent without joining his other cosharers in the suit. (Vol 4) 1917 Pat 506 (506) & (1883) 5 All 40 (41) & (1893) 20 Cal 107 (110) & (1879) 4 Cal 89 (90) & (1910) 12 Cal L Jour 267 (268).

[10] Rent suit — A person who alleges to be transferee from a co-sharer landlord, but who is not recognized as such by the plaintiffs-proprietors, cannot be joined in a rent suit against the wishes of the plaintiffs. (Vol 18) 1926 Pat 519 (520).

[11] Suit for enhanced rent against tenant for excess land — All cosharer landlords must join. (Vol 12) 1925 Bom 542 (543) & (1879) 4 Cal 96 (101, 103) (F B).

[12] In a suit for assessment of rent, the other cosharers are not ordinarily necessary parties. (Vol 16) 1929 Cal 90 (90).

[13] Rent suit — Some heirs of deceased tenant not joined — Suit is not bad for non-joinder and is maintainable. (Vol 12) 1925 Cal 1056 (1059) & 33 Cal 197 (FB).

[See (Vol 8) 1921 Cal 81 (1) (81) : 48 Cal 518. (Suit for rent against heirs of deceased tenant — Persons in actual possession made defendants — Claim relating to rent accrued due during their time — Non-inclusion of other heirs does not vitiate suit.) & (Vol 5) 1918 Cal 433 (433, 434). (Suit for recovery of rent against one heir of original tenant — Remaining heirs can be added as parties although not necessary parties.)]

[14] Suit for entire rent against heirs of one co-tenant — Other tenant is not necessary party. (Vol 10) 1923 Cal 615 (618).

[15] Suit for rent — Tenant's mortgagee is not necessary party. (Vol 8) 1916 Mad 967 (1) (967).

[16] If all the tenants of a holding are not made parties to a rent suit, the decree obtained will not be rent decree but will be a money decree. (Vol 7) 1920 Pat 206 (207).

10. Suits on negotiable instruments. — [1] Suit by manager of joint Hindu family on promissory note — Other members are not necessary parties. (Vol 9) 1922 Bom 281 (283) : 46 Bom 358.

[2] Promissory note executed in favour of M — Minor sons of M suing on note by their mother M as next friend — Suit held was not maintainable unless M herself was plaintiff. (1910) 33 Mad 115 (116).

[3] Promissory note — Suit on — Person becoming entitled to certain amount due under note — He should be joined either as plaintiff or as defendant — Suit by payee alone is not properly constituted. (Vol 29) 1942 Oudh 202 (203).

[4] Application by endorser to be joined as co-plaintiff in suit by endorsee on promissory note — Allegation that applicant endorsed it only for collection — Applicant is proper party. (Vol 21) 1934 Sind 182 (183).

11. Suits for specific performance. — [1] Suit for specific performance of contract — General rule is that a stranger to the contract cannot be sued upon it. Only the parties to the contract are necessary parties. (Vol 30) 1943 Bom 27 (29) & (Vol 5) 1918 Mad 681 (687) : 40 Mad 365.

[2] Under a single contract to convey land to several persons it is not open to some of the joint contractees to enforce specific performance of the contract. (1897) 24 Cal 832 (833).

[3] Suit for specific performance — Agreement by father to sell land held in jama — Father in conjunction with son selling part of jama in contravention of contract — Father dying pending suit — Son is necessary party. (Vol 16) 1929 Cal 667 (669).

[4] Suit for specific performance of agreement to sell — Persons in possession of property and claiming adversely to vendor and person attaching property are necessary parties. (Vol 50) 1943 Bom 27 (29).

[5] Suit for specific performance of agreement to sell — Subsequent purchaser in possession with notice of previous agreement is necessary party. (Vol 7) 1920 Mad 933 (934).

[6] Conveyance of land by B to A not registered nor A put into possession — Suit by A for possession on declaration of title or for specific performance of contract — C holding kabala from B is necessary party. (Vol 6) 1919 Cal 477 (478).

[7] Suit for specific performance of a contract to sell — Property agreed to be sold mortgaged to a third person — Vendor denying validity of mortgage — Mortgagee can be made a party defendant. (Vol 18) 1926 Mad 597 (599, 601).

[8] Contract for sale of immovable property — Tenants in possession are not necessary parties. (Vol 4) 1917 Mad 533 (534).

12. Suits by co-owners. — [1] Suit by member of Hindu joint family for debt due to family firm — Suit held not maintainable without joining other members of family. (1886) 8 All 264 (265).

[2] In a suit by a member of a joint Hindu family, for a declaration that certain properties are not liable to be attached in execution of a decree obtained by a third person against another stranger, the other members are proper but not necessary parties. (1909) 9 Cal L Jour 623 (630).

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[3] Suit by manager of joint Hindu family — Other members of family are not necessary parties. (1911) 83 All 272 (278); 38 Ind App 45 (P C) * (Vol 9) 1922 Bom 354 (355) : 46 Bom 1022 (Rent note to jagirdar—Junior members of family need not be made parties to suit by Jagirdar on the note.) * (Vol 5) 1918 Mad 1044 (1044) * (1912) 35 Mad 685 (690) * (1892) 15 Mad 19 (22) (Karnavan can sue alone for tarwad property.) (Vol 16) 1929 Pat 741 (742) : 8 Pat 788.

[4] A manager of a joint family can sue on a contract entered into by him, in his own name without impleading the other members as parties to the suit. (1912) 1912 Pun L R No. 30 p. 102 (108) : 1911 Pun Re No. 71.

[5] Member of joint Hindu family who is named as creditor in bond can sue alone — Other members even if necessary could be joined as defendants. (Vol 14) 1927 Lah 129 (1) (129).

[6] Plaintiff failing to join his co-sharer is not entitled to declaration of exclusive rights to property in suit. (Vol 1) 1914 Cal 215 (216).

[7] Suit by owner of one-half of village for declaration that principal defendant was neither superior nor inferior proprietor of village — Suit is not bad if mortgagee in possession of remaining half is impleaded as defendant. (Vol 2) 1915 Oudh 224 (226).

[8] Suit to eject tenant—All co-sharers must join in suit. (1879) 4 Cal 961 (962, 963) * (1911) 8 All L Jour 272 (274) (Ejectment suit by one of three co-sharers in a house, against the tenant of the house and together with the remaining two co-sharers as defendants is not bad for non-joinder).

[9] In suit for ejectment of trespasser, all joint owners are not necessary parties. (Vol 20) 1933 Lah 999 (999) * (Vol 17) 1930 Cal 113 (125) : 57 Cal 170 * (Vol 13) 1926 Lah 545 (1) (545) * (Vol 13) 1926 Mad 809 (809) * (Vol 12) 1925 Mad 63 (64) * (Vol 4) 1917 Mad 373 (373) (Suit against trespasser for injunction).

[10] Suit for ejectment—Co-trespassers are necessary parties. (Vol 16) 1929 Cal 669 (670).

[11] Plaintiffs suing defendants as trespassers — A alleging himself to be co-sharer with plaintiffs and sir holder of suit lands — Defendants alleging to hold as sub-tenants of sir of A — A held should be made defendant. (Vol 30) 1943 Oudh 315 (315).

[12] In a suit for possession of land, an assignee *pendente lite* is not a proper party as he would be bound by the decree in the suit. (1909) 36 Cal 675 (689).

[13] In a suit by one beneficiary against a trustee for breach of trust, other beneficiaries need not be joined as parties. (1909) 32 Mad 490 (506) (F B).

12a. Suits relating to easements. — [1] Suit by plaintiff, one of dominant owners, for removal of alleged obstruction to right of easement — Other dominant owners not aggrieved by such obstruction need not join with plaintiff in his suit as they are not necessary parties to it. (Vol 24) 1937 Cal 355 (358).

[2] Suit to establish easement — Owners of servient tenement not resisting plaintiff's right are not necessary parties. (Vol 13) 1926 Cal 1201 (1201) * (Vol 20) 1933 Cal 882 (883) : 60 Cal 1072 * (Vol 13) 1926 Cal 462 (463) * (Vol 13) 1926 Cal 92 (94) * (Vol 12) 1925 Cal 1138 (1138, 1139) * (Vol 11) 1924 Pat 303 (304).

[But see (1910) 14 Cal W N 15 (18). (A decree on easement suit, when all the servient owners are not parties to the suit, cannot be passed.)]

13. Government. — [1] Grant of fishery rights by Government to *gramattars* — Suit by mirasdars for declaration of their exclusive rights to fishery—Government is necessary party. (Vol 5) 1918 Mad 622 (623).

[2] Suit under S. 36, Bengal Public Demands Recovery Act—Secretary of State certificate holder — He

is necessary party. (Vol 30) 1943 Cal 114 (118) : I L R (1943) 1 Cal 22.

[3] Suit against Municipality for declaration that plaintiff is owner of vacant site — Municipality setting up title in Government—Site given to Municipality for Municipal purposes—Government is necessary party. (Vol 24) 1937 Mad 641 (642).

[4] Statute sought to be declared as *ultra vires* — Secretary of State is not necessary party in all cases. (Vol 13) 1926 Mad 836 (838) : 50 Mad 34.

[5] Suit for declaration that Collector's appointment of defendant as Karnam is wrongful—Collector is proper party. (Vol 21) 1934 Mad 293 (294).

[6] Suit by tenant of *ghatwali* land against *ghatwal* for declaration of occupancy rights in land — Secretary of State is not necessary party though he may be proper party. (Vol 3) 1916 Cal 825 (826).

[7] In a case of dispute about the right of irrigation from a private watercourse of a canal where no relief is asked against Government the latter is not a necessary party. (Vol 6) 1919 Lah 119 (120).

[8] In a suit under the Bengal Excise Act (7 [VII] of 1868) for setting aside the sale, the Secretary of State had been represented by the Collector in the lower Courts but the appellant did not join him as a party in appeal. *Held*, the Secretary of State was not a necessary respondent. (1898) 25 Cal 833 (844) : 25 Ind App 151 (P O).

[9] Certificate sale under Bihar and Orissa Public Demands Recovery Act—Secretary of State is not necessary party to suit by non-certificate debtor for recovery of property. (Vol 22) 1935 Pat 6 (9) : 14 Pat 242 * (1909) 1 Ind Cas 313 (314) (Cal).

[10] In a suit by plaintiff merely for declaration that his title and possession are not affected by the certificate sale, it is not necessary to make the Secretary of State a party to the suit when he does not seek to set aside the sale. (1910) 11 Cal L Jour 385 (386, 387).

[11] Suit to set aside sale held under S. 60, Excise Act—Secretary of State is not a necessary party to the suit. (1926) 96 Ind Cas 927 (927) (Lah).

[12] When a suit is brought by a purchaser against his vendor to compel mutation of names in the register, the collector of the district must be included as a necessary party to the suit. (1892) 15 Mad 350 (351).

[13] Suit to set aside revenue sale— Government not necessary party— But may be impleaded on its application. (1883) 9 Cal 271 (276, 277).

[14] Secretary of State is not a necessary party to a suit against defendant who holds under an order of a Government Officer. (1910) 8 Mad L Tim 248 (248).

[15] Suit by certain Hindus under O. 1, R. 8 against certain Mahomedans as representing the Muslims for declaration of suit property as Hindu Devasthan and for injunction restraining defendants from interfering with worship carried on by Hindus— Government is not necessary party. (Vol 32) 1945 Nag 106 (108) : I L R (1945) Nag 273.

14. "Questions involved in the suit".—[1] "All questions involved in suit" means questions between the parties to litigation. (Vol 22) 1935 Mad 394 (396) * (1880) 2 All 738 (743) * (Vol 13) 1926 Mad 836 (838) : 50 Mad 34.

[2] Questions involved in the suit are those questions which were involved in the suit as originally framed between the parties to the suit. (Vol 19) 1932 Cal 448 (449, 450) : 59 Cal 329.

[But see (Vol 27) 1940 Mad 69 (70).]

[3] The words "questions involved in the suit" do not mean all claims which may possibly be put forward by anybody to the property involved in the suit. (Vol 5) 1918 Mad 1137 (1139).

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[4] "Questions involved in suit" refer only to questions between parties to suit as plaintiff and defendant and not as between co-plaintiffs or co-defendants *inter se*. (Vol 22) 1935 Sind 194 (195)* (1887) 9 All 447 (449)* (Vol 9) 1922 Bom 454 (455).

15. Parties when can be added.—[1] Power to add parties can be exercised at any stage of suit. (Vol 24) 1937 Pat 49 (49)* (1905) 2 All L Jour 516 (518)* (1911) 35 Bom 393 (395)* (1905) 32 Cal 483 (491)* (Vol 28) 1941 Nag 178 (179)* (Vol 21) 1934 Pat 870 (872)* (Vol 7) 1920 Pat 781 (788).

[2] Party can be added even so late as time of decree. (Vol 16) 1929 Bom 337 (339).

[3] There is considerable doubt as to whether party can be added after final decree. (Vol 1) 1914 P C 129 (131) : 42 Cal 72 : 41 Ind App 251 (PC).

[4] Owing to mis-description decree in wrong name—Court can in execution bring real judgment-debtor on record. (Vol 20) 1933 Bom 200 (202).

[5] Suit compromised—Court cannot add party thereafter. (Vol 13) 1926 Mad 341 (341).

[6] A party even after the preliminary decree can re-open the decree so far as the added party is concerned. (Vol 11) 1924 Mad 648 (649)* (Vol 14) 1927 All 465 (466). (Matter is within discretion of Court)* (Vol 32) 1945 Pat 296 (296, 297)* (Vol 29) 1942 Pat 185 (187)* (Vol 20) 1933 Pesh 101 (103)* (Vol 13) 1926 Sind 26 (26)* (Vol 22) 1935 Rang 23 (23, 24).

[See (Vol 14) 1927 Nag 299 (299). (Mortgage suit—Preliminary decree passed—Lessee of mortgagor before final decree need not be joined.)]

[But see (Vol 22) 1935 Nag 64 (64)* (Vol 3) 1916 Nag 120 (121) : 13 Nag L R 69* (Vol 11) 1924 Oudh 33 (33, 34)].

[7] Representative suit—Addition of plaintiffs after decree though unusual is not improper especially in representative suit. (Vol 10) 1923 Mad 472 (472).

[8] Case remanded for fresh decision—Trial Court can add parties. (Vol 15) 1928 Pat 197 (198).

[9] Order 41, R. 20 does not exhaust Appellate Court's power to add parties. Even if R. 20 does not apply, the Court has power to do so under O. 1, R. 10 read with S. 107. (Vol 20) 1933 Mad 806 (810)* (Vol 2) 1915 Bom 273 (273, 274) : 40 Bom 461* (Vol 5) 1918 Cal 608 (609). (*H* and *J* claiming each to be sole landlord sued tenant for rent—Both suits tried together—*H* party defendant to *J*'s suit—No appeal preferred in *J*'s suit—*H* appealing—Decree in *J*'s suit is not *res-judicata* and *J* should be added as party to appeal.) * (Vol 25) 1938 Mad 829 (831)* (Vol 3) 1916 Mad 828 (829).

[10] A necessary party to an appeal should be added before deciding it. (Vol 3) 1916 Mad 828 (829).

[11] Appeal—Some of parties necessary to partition not impleaded—Appellate Court should remand case to Court of first instance for addition of parties and disposal. (Vol 27) 1940 All 399 (401).

[12] High Court cannot add parties after remanding a case to lower Court. (Vol 13) 1926 Rang 9 (10) : 3 Rang 474.

[13] Parties intervening in appeal are not to be joined as parties to appeal but as parties to suit. (1902) 12 Mad L Jour 355 (359).

[14] Person not party in trial Court either as plaintiff or defendant cannot be added in appeal. (Vol 2) 1915 Lah 176 (177)* (1896) 18 All 332 (333).

[But see (1910) 12 Cal L Jour 91 (101, 102)* (1911) 10 Ind Cas 776 (778) (Low Bur).]

[15] Person not party in lower appeal cannot be added in second appeal. (Vol 1) 1914 All 293 (293) : 37 All 57.

[16] Court should allow appellant to be added where

his name was omitted through mistake of advocate. (Vol 21) 1934 Bom 356 (359).

[17] Appellant becoming insolvent—Official Assignee not proceeding with appeal—Party claiming to be entitled to the property of appellant under mortgage applying for substitution though silent until then—Substitution cannot be allowed. (Vol 15) 1928 Cal 215 (215).

16. Striking out name of party improperly joined.—[1] It is the duty of Court to strike out name of party improperly impleaded—It is wrong to dismiss suit as against him. (Vol 17) 1930 Mad 817 (820) : 54 Mad 81 (FB)* (Vol 17) 1930 Cal 388 (389)* (Vol 24) 1937 Lah 67 (68)* (Vol 21) 1934 Lah 737 (738)* (Vol 20) 1933 Mad 435 (436)* (Vol 13) 1931 Mad 284 (286) : 54 Mad 793. (Party may be struck off against whom no relief is claimed.) * (1913) 1913 Mad W N 993 (994). (Court can order plaintiff to choose which of defendants he wishes to proceed against.)* (Vol 30) 1943 Nag 273 (275) : I L R (1943) Nag 462.

[2] One of several defendants died before the date of suit—Suit should not be dismissed but his name should be struck off. (Vol 15) 1928 Lah 359 (360) : 9 Lah 526* (Vol 13) 1926 Lah 153 (154).

[3] Person who ought not to have been made defendant but impleaded cannot figure as appellant and his name should be struck out. (Vol 4) 1917 Pat 585 (588).

[4] On striking out of names of persons on ground of misjoinder, they cease to be parties to suit and they must be treated as persons dismissed from suit and not as persons against whom suit had been dismissed. (Vol 20) 1933 Mad 435 (436).

[But see (Vol 21) 1934 Rang 154 (155). (Order striking out person's name from list of defendants is in effect order dismissing suit as against him.)]

[5] Suit dismissed against defendant for misjoinder—He does not remain party to suit, notwithstanding whether his name has or has not been removed from record. (Vol 17) 1930 Mad 817 (820) : 54 Mad 81 (FB).

[6] Claim abandoned as against particular defendant—His name should be struck out. (Vol 5) 1918 Mad 123 (125) : 41 Mad 418 (FB) * (Vol 20) 1933 Mad 435 (436).

[But see (Vol 21) 1934 Lah 737 (738). (Order should be of dismissal.)]

[7] Plaintiff abandoning claim as against defendant—Defendant is not person to whom O. 1, R. 10 applies—Suit is dismissed as against such defendant. (Vol 17) 1930 Mad 817 (820) : 54 Mad 81 (FB).

[8] Improper party against whom no relief was claimed when discharged ceases to be defendant. (Vol 13) 1926 Lah 202 (202, 203).

[9] One defendant given up but plaint not amended—That defendant must still be deemed to be party. (Vol 14) 1927 Mad 253 (254).

[10] Rule 10 refers to suits as framed—After trial, Court thinking that claim of one claimant should be dismissed—Such person's name should not be struck out. (Vol 25) 1938 Lah 799 (800).

[11] Court striking out names of parties but not directing terms on which order is made under O. 1, R. 10—If permission to bring fresh suit is not given under O. 23, R. 1, creditor cannot bring fresh suit, though debt is not discharged thereby. (Vol 26) 1939 P C 110 (112) : 1939 Rang L R 358 : 66 Ind App 193 (PC).

[12] Party joined as defendant by Appellate Court—Lower Court cannot strike off same on case being remanded. (Vol 17) 1930 All 303 (303).

17. Transposition of parties.—[1] A Court has power to transpose a party from one side to the other when it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. (Vol 18) 1931 P C 162 (165) : 58 Ind App 228 : 59 Cal 80 (PC) * (Vol 12) 1925 Cal 421 (422). * (Vol 7) 1920 Cal 428 (433) (The power of the Court

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depends on the question whether the case is *sub judice*.) * (Vol 3) 1916 Cal 80 (82) * (Vol 28) 1941 Mad 364 (365) * (Vol 3) 1916 Mad 310 (313).

[2] Transposition of parties—Power is discretionary and its use depends upon facts of each case. (Vol 26) 1939 Pat 397 (398).

[3] Appellate Court has power to transfer respondent to be appellant and pass decree in his favour if just and equitable. (Vol 17) 1930 All 786 (787) * (Vol 14) 1927 Cal 37 (38).

[4] Transposition should not be disallowed on ground that limitation would be affected. (Vol 20) 1933 Pat 239 (241) * (Vol 7) 1920 Cal 428 (438). (Transposition after expiry of period for appeal.) * (Vol 31) 1944 Nag 298 303: ILR (1944) Nag 855 * (Vol 19) 1932 Pat 346 (348, 349) : 11 Pat 616. (Suit on pro-note by real owner making benamidar defendant—Transposition of defendant does not affect limitation.)

[But see (Vol 15) 1928 Pat 24 (24). (Transposition of parties which deprives the defendant of the acquisition of a valuable right by virtue of the statute of limitation is not allowed.)]

[5] Transposition of parties can be made even after decree in partition suit. (Vol 14) 1927 Nag 32 (34) * (Vol 15) 1928 Nag 145 (146) : 24 Nag L R 119. (Preliminary decree in suit for foreclosure.) * (Vol 12) 1925 Nag 15 (16). (Subsequent mortgagee paying mortgage decree of prior mortgagee before final decree is passed, can apply for final decree.)

[6] Transposition of parties — Court need not expressly find that there was *bona fide* mistake. (Vol 6) 1919 Mad 30 (30).

[7] Plaintiff withdrawing part of claim — Still Court can order transposition of parties. (Vol 7) 1920 Mad 546 (546).

[8] Transfer of parties raising value of subject-matter higher than Court's jurisdiction — Court should add parties and return the plaint. (Vol 13) 1926 Pat 28 (29).

18. Transposition of defendant as plaintiff. —

[1] Circumstances under which party can be added as plaintiff are strictly limited. (Vol 6) 1919 Nag 150 (152) : 15 Nag L R 21. (Defendant cannot ask to be made plaintiff merely on ground that he would have brought suit if he had thought of doing so.)

[2] Transposition of defendant as plaintiff should always be adopted if necessary for complete adjudication and to avoid multiplicity of proceedings. (Vol 23) 1936 Pat 107 (107).

[3] A defendant will not be transposed as plaintiff where a valuable right acquired by defendant is likely to be taken away or defeated. (Vol 32) 1945 Bom 11 (14, 15).

[4] Transposition of *pro forma* defendant as plaintiff — Question as to maintainability of suit cannot be considered before passing of such order. (Vol 20) 1933 Pat 239 (241).

[5] Defendant can be transposed as plaintiff under Court's inherent powers though O. 1, R. 10 does not apply. (Vol 24) 1937 Mad 563 (565).

[6] Partnership suit for dissolution and accounts — Defendant can be transposed as plaintiff and *vice versa*. (Vol 29) 1942 Bom 35 (36) : 1 L R (1942) Bom 35 * (Vol 3) 1916 Cal 80 (81, 82).

[7] Suit under S. 92 — Plaintiff withdrawing not *bona fide* — Court can continue suit by making some defendants plaintiffs. (Vol 7) 1920 Mad 732 (735).

[8] Administration — Suit for — Court can make defendant plaintiff. (Vol 6) 1919 Mad 30 (30).

[9] Suit by widow — Preliminary decree touching corpus of estate — On death of plaintiff, reversioners defendants can be substituted as plaintiffs but not the co-

widow defendant without her consent. (Vol 21) 1934 Cal 136 (136).

[10] Pro-note in suit itself renewal of earlier pro-note based on prior dealings between parties — Pro-note in suit inadmissible as insufficiently stamped — Application by one of defendants to be transposed as plaintiff and to continue suit on original cause of action — Court has power to allow aforesaid application. (Vol 28) 1941 Mad 364 (365).

[11] Suit for partition — Court has power to transpose defendant as plaintiff. (Vol 7) 1920 Mad 546 (546) * (Vol 8) 1921 Bom 455 (456) : 45 Bom 983.

[12] Suit by one of several mortgagees — Other mortgagees made defendants — Latter can transpose themselves to category of plaintiffs. (Vol 1) 1914 Cal 788 (789).

[13] Suit for money — Person entitled to such money in the alternative joined as defendant to the suit at institution but subsequently made a plaintiff — Joinder as plaintiff is proper. (Vol 14) 1927 Oudh 484 (485) : 3 Luck 241.

[14] Transposition of parties will not be ordered if its effect is to change the character of the suit. (Vol 26) 1939 Mad 467 (468).

[15] Plaintiff without title suing two defendants — Defendant 2 applying for being made plaintiff and saying that he would adopt plaintiff's plaint — No amendment of pleadings held should be allowed and suit and application should be dismissed. (Vol 18) 1931 Cal 76 (78) : 58 Cal 561.

[16] A suing B for money due — C claiming money as against A also made defendant — C cannot be transposed as plaintiff. (Vol 8) 1921 All 184 (185).

19. Transposition of plaintiff as defendant. — [1] Court can transfer a party from the category of plaintiffs to that of defendants. (Vol 12) 1925 Cal 328 (328).

[2] Person purchasing right to recover certain amount instituting suit to recover it by adding seller as co-plaintiff — Seller claiming adversely to purchaser — Seller's name as co-plaintiff should be struck off and he should be transposed as defendant. (Vol 27) 1940 Mad 69 (70).

[3] Suit for partnership accounts — Preliminary decree passed — Plaintiff wishing to withdraw from the suit but defendant desiring to continue — Plaintiff should be transferred as defendants and defendants as plaintiffs. (Vol 13) 1926 All 532 (533).

20. Misdescription of parties. — [1] Where there is a misdescription of the defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time. (Vol 12) 1925 Pat 37 (38) : 3 Pat 230. (Of two persons if wrong one is sued and no question of representation arises the case is not one of misdescription.) * (Vol 20) 1933 Bom 304 (305) * (Vol 15) 1928 Cal 485 (487) * (Vol 4) 1917 Mad 471 (471).

[2] Misdescription — Name is not always true criterion of determining party really sued — Nature of allegations in plaint and of relief sought should be considered. (Vol 27) 1940 Cal 153 (155).

[3] Plaintiff wrongly described as minor — Immediately on discovering error counsel asking Court to correct it — Mistake *bona fide* — Court should order amendment and not dismiss suit — Section 22, Limitation Act, does not apply to such case. (Vol 28) 1941 Oudh 48 (44, 45) : 16 Luck 256 * (Vol 14) 1927 Cal 477 (477, 478).

[4] Plaintiff described as minor but actually major — Amendment of plaint ordered — Order not complied with — Court can strike off plaintiff's name. (Vol 11) 1924 Oudh 428 (429, 430).

[5] Sole proprietor filing suit in name of firm — Suit objected to as being incompetent — Application for

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amendment was granted subject to payment of costs and limitation. (Vol 18) 1931 Cal 770 (771)* (Vol 22) 1935 Rang 240 (242, 243).

[6] Suit brought in name of firm by its manager—On objection partner added as co-plaintiff—*Held* case was of misdescription and not of non-joinder. (1893) 17 Bom 413 (416, 417).

[7] Plaintiff suing in representative capacity—Fact not mentioned in cause title—Amendment so as to mention it does not amount to addition or substitution of new plaintiffs. (Vol 3) 1916 Cal 164 (166).

[8] Suit brought in the name of non-existing person—Suit is nullity and no amendment can cure it. (Vol 20) 1933 Bom 304 (305).

[9] Suit by shebait—Omission to describe plaintiff as shebait is merely misdescription and can be cured by amendment. (Vol 13) 1926 Cal 417 (419).

[See also (Vol 4) 1917 Cal 441 (442) (Suit by shebait on behalf of idol—Idol need not be joined).]

21. Consent of added party—Sub-r. (3).—[1] No person can be added as a plaintiff without his consent expressly given. (1881) 7 Cal 242 (244)* (1911) 1911 Pun L R No. 179, page 650 (659).

[2] Addition of defendants—Plaintiff has the option to add—No defendant should be added against plaintiff's will even when defendant asserts that his interests will be affected by plaintiff's suit. (Vol 12) 1925 Nag 373 (373)* (Vol 26) 1939 Bom 188 (193); 1 L R (1939) Bom 232* (Vol 6) 1919 Cal 189 (189): 46 Cal 48. (Person promising indemnity to defendant against plaintiff may be added as party if plaintiff does not object.) * (Vol 13) 1926 Mad 836 (837, 838): 50 Mad 34.

[But see (Vol 14) 1927 Bom 49 (50): 51 Bom 16. (Administratrix mortgaging properties without Court's sanction—Beneficiaries applying to be made parties in mortgagee's suit—Court should join them although mortgagee is unwilling.)* (Vol 16) 1929 Mad 443 (445)* (Vol 21) 1934 Pat 425 (425). (Court is not to be guided by wishes of party.)* (1889) 13 Bom 22 (24)].

22. Suit by or against a dead person.—[1] Plaintiff dead on date of suit—Amendment by substituting legal representative cannot be allowed. (Vol 10) 1923 Lah 652 (652)* (Vol 14) 1927 Cal 880 (880, 881)* (Vol 24) 1937 Sind 92 (92, 93): 31 Sind L R 406.

[2] Suit brought in name of two plaintiffs, one of whom is dead—Plaint can be amended. (Vol 14) 1927 Cal 880 (881).

[3] Suit filed against dead person—Application to bring legal representative does not lie. (Vol 20) 1933 Mad 454 (455)* (Vol 11) 1924 Mad 56 (57). (Respondent's death at the date of filing appeal—Representatives cannot be added.) * (Vol 3) 1916 Mad 440 (440, 441)* (Vol 5) 1918 Oudh 419 (423) * (Vol 38) 1946 Sind 20 (23): 1 L R (1945) Kar 321.

[4] Suit filed in name of dead plaintiff is suit filed in name of wrong plaintiff—Defect is capable of being cured under O. 1, R. 10. (Vol 25) 1938 Nag 458 (458, 459).

[But see (Vol 21) 1934 Nag 55 (56)].

[5] Suit instituted against person subsequently found to be dead—Person in whom property of deceased vested can be joined as party under O. 1, R. 10. (Vol 24) 1937 Sind 47 (48).

[6] Appeal against dead person through *bona fide* mistake—Memorandum of appeal can be allowed to be amended. (Vol 17) 1930 All 131 (131).

23. Limitation Act, S. 22.—[1] When parties are added under O. 1, R. 10, S. 22, Limitation Act provides that the date when they are added is to be deemed to be the date of the institution of the suit so far as they are concerned. (Vol 14) 1927 P C 252 (255): 55 Ind

App 7: 6 Rang 29 (PC) * (Vol 17) 1930 Lah 747 (748): 11 Lah 688 * (Vol 5) 1918 Mad 1122 (1123).

[2] It is not desirable to add or substitute as parties to an action persons whose right to sue has already become time-barred. (Vol 15) 1928 All 97 (97): 50 All 276.

[3] Substitution of right plaintiff for wrong one can be done only if suit is not barred under Limitation Act, S. 22. (Vol 21) 1934 Bom 385 (386): 58 Bom 536.

[But see (1913) 25 Mad L Jour 452 (455).]

[4] Persons impleaded as defendants—Only one impleaded within limitation—Impleading one within limitation does not warrant passing of decree against others. (Vol 23) 1936 All 94 (95): 58 All 594.

[5] Necessary party must be impleaded within period of limitation—If not so impleaded entire suit fails. (Vol 29) 1942 Oudh 197 (198): 17 Luck 482. (Suit against one heir of mortgagor of joint Hindu family not representing others—Other heirs impleaded after expiry of limitation—Suit should be dismissed in toto.) * (1904) 28 Bom 11 (17) * (Vol 16) 1929 Cal 591 (592) * (1881) 6 Cal 815 (826). (Suit to enforce promise—Some co-promisees joined as plaintiffs after expiry of limitation—Suit is barred against all plaintiffs.) * (Vol 15) 1928 Lah 33 (34).

[6] Proper party may be impleaded even after expiry of period of limitation—Rights of original parties are not affected thereby. (Vol 29) 1942 Oudh 197 (198): 17 Luck 482 * (Vol 16) 1929 All 941 (942): 52 All 134 * (Vol 30) 1943 Lah 252 (254, 255). (Formal defendants—Plaintiff claiming no relief against them—Appeal by contesting defendant—Failure to include them as respondents is not fatal—They can be added even after limitation has expired against them.) * (Vol 6) 1919 Mad 809 (809). (Joinder of additional trustees.)

[7] Suit by manager of Hindu joint family alone is valid though plaintiff not described as manager—Coparceners can however be added as parties afterwards after expiry of limitation. (Vol 21) 1934 Bom 178 (182, 183): 58 Bom 348 * (Vol 11) 1924 All 908 (908): 46 All 709 * (1911) 33 All 272 (273, 279).

[8] Suit for recovery of loan advanced from joint family funds—Suit by person not describing himself as manager—Other members joined as parties after period of limitation—Suit must be dismissed. (1909) 32 Mad 284 (289, 290).

[9] Suit to recover money from trust—All persons who could possibly have claim to trusteeship impleaded as defendants—Plaint amended so as to make it clear which of defendants should be considered to be proper trustee—Amendment made after expiry of period of limitation—Amendment held did not bring any new party on record and suit was not barred. (1910) 37 Cal 229 (234): 37 Ind App 27 (P C).

[10] Omission to add party due to mistake—Party may be added even after period of limitation. (1908) 8 Cal L Jour 135 (137).

[11] Correction of misdescription of party—No question of limitation arises. (Vol 13) 1926 Cal 722 (725). (Suit stayed and matter referred to arbitration—During arbitration mistake in plaintiff's name corrected by Court—Suit does not become new suit.) * (Vol 3) 1916 Cal 337 (339) * (Vol 28) 1941 Oudh 43 (45): 16 Luck 256. (Plaintiff major but described as minor.) * (Vol 12) 1925 Pat 37 (38): 3 Pat 230.

[12] Transposition of parties—No question of limitation arises. (Vol 14) 1927 Mad 204 (204) * (1894) 17 Mad 12 (13)* (1910) 34 Bom 91 (100).

[13] Amendment of plaint altering ground on which person already defendant is to be held liable—S. 22, Limitation Act, does not apply. (Vol 22) 1935 Mad 160 (161).

Conduct of suit. 11. The Court may give the conduct of the suit to such person as it deems proper.

[1882—S. 32; 1877—S. 32; R. S. C., O. 16 R. 39.]

12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

[1882—S. 35; 1877—S. 35; 1859—S. 115.]

Objections as to non-joinder or misjoinder.

13. All objections on the ground of nonjoinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where

O. 1 R. 10 (*contd.*)

[14] Party added by Court of its own motion — S. 22, Limitation Act, still applies. (1908) 35 Cal 519 (523) (F B) * (Vol 17) 1930 Lah 747 (748) : 11 Lah 688 * (Vol 12) 1925 Sind 181 (182, 183) : 17 Sind L R 324.

[15] Party discharged and reinstated again is a party only from date of reinstatement. (Vol 13) 1926 P C 88 (91) (P C).

[16] Party added on application—Addition will take effect from date of application. (Vol 14) 1927 Mad 468 (469) : 50 Mad 372.

[17] Under cl (5) of the Rule, proceedings against any person added as a defendant are to be deemed to have begun only on the service of the summons. (Vol 12) 1925 Pat 37 (37, 38) : 3 Pat 230.

[18] Suit is deemed to have been instituted from date on which party is added and not from date on which summons is served on him. (1911) 13 Bom L R 1014 (1016).

24. Appeal.—[1] Orders for addition of parties rest on discretion of Court and are not appealable. (Vol 4) 1917 Cal 627 (628) * (Vol 15) 1928 All 120 (123) * (Vol 9) 1922 Mad 332 (332) : 45 Mad 194 * (Vol 13) 1926 Nag 75 (75) * (Vol 26) 1939 Oudh 102 (103) : 14 Luck 447 * (Vol 5) 1918 Pat 488 (488).

[2] When Appellate Court impleads a person interested in the result of an appeal, a higher Court will not upset the order on the score of limitation. (Vol 1) 1914 Lah 187 (2) (193) : 1915 Pun Re No. 3.

[3] From an order striking out unnecessary parties, no appeal lies. (Vol 10) 1923 Mad 690 (691).

[4] No appeal lies from order awarding costs under R. 10 (2). (Vol 24) 1937 Lah 67 (68).

[5] Appellate Court will not interfere with trial Court's discretion in changing plaintiff to defendant or vice versa. (Vol 13) 1926 Nag 393 (396).

[6] Order under O. 1, R. 10 is not necessarily a decree—But where the effect of such order is to refuse to grant the relief to a party which he has prayed for, it becomes in substance, though not in form a decree and is appealable. (Vol 18) 1931 All 333 (336) : 53 All 466 * (Vol 28) 1941 Nag 166 (167). (Order discharging defendant on ground that plaint disclosed no cause of action against him.) * (Vol 28) 1941 Pat 385 (387) : 20 Pat 417 : 42 Cri L Jour 375 * (Vol 12) 1925 Pat 121 (122) : 3 Pat 859. (Order under, is not appealable but striking out defendant's name in partition suit, resulting in leaving defendant's right to share undecided, is appealable.)

[7] Application under O. 1, R. 10 to be impleaded as party — Court treating it also under O. 22, R. 10—Appeal lies against the order. (Vol 24) 1937 Mad 200 (206).

[8] Suit under S. 92—Order amounting to refusal to

join as parties is judgment within Cl. 13, Letters Patent, and is, therefore, appealable. (Vol 14) 1927 Rang 180 (181) : 5 Rang 253.

[9] Objection for being impleaded not raised in trial Court — It cannot be raised in appeal. (Vol 22) 1935 Rang 23 (23).

25. Revision. — [1] Ordinarily there should be no interference with an order passed under O. 1, R. 10. (Vol 29) 1942 Oudh 338 (338) * (1912) 14 Ind Cas 263 (264) (All). (No revision from order striking out name of defendant.) * (Vol 3) 1916 Cal 80 (82). (Dismissal of application for transposition of parties.) * (Vol 26) 1939 Oudh 102 (103) : 14 Luck 447. (Order adding person as party to suit.) * (Vol 21) 1934 Pat 425 (425).

[2] Where order passed under O. 1, R. 10 debars proper adjudication upon all questions involved in the suit interference in revision is necessary. (Vol 29) 1942 Oudh 338 (338).

[3] Order refusing to make certain persons parties to suit — High Court will interfere if there is refusal to exercise jurisdiction. (Vol 21) 1934 Pat 425 (425) * (Vol 22) 1935 P C 185 (186) : 62 Ind App 257 : 57 All 678 (P C). (Application to be added as parties — Judge summarily dismissing it acts with material irregularity.) * (Vol 24) 1937 Mad 338 (339) * (Vol 16) 1929 Mad 403 (403). (Trial Court refusing to make person party defendant—Likelihood of there being conflicting findings if that person not made defendant — High Court in revision should join him.) * (Vol 29) 1942 Oudh 366 (368). (Pre-emption suit — Application of vendor to be allowed to continue suit as defendant wrongly rejected—Chief Court can interfere in revision.) * (Vol 16) 1929 Oudh 148 (148).

• [4] Revision lies if addition of parties results in misjoinder. (Vol 13) 1926 Mad 135 (136) * (Vol 15) 1928 Pat 281 (282).

[5] Application to be added as party dismissed on ground that applicant had no *locus standi* — Presence of applicant necessary for final disposal of suit — Interference in revision is necessary. (Vol 29) 1942 Oudh 338 (338) * (1910) 12 Cal L Jour 545 (547).

Order 1, Rule 11 — Note 1.

[1] "Person," means a party to a suit and not a stranger. (Vol 15) 1928 Cal 143 (146).

[2] Permission to conduct a suit on behalf of absent party without special authorization cannot be granted. (Vol 15) 1928 Cal 143 (146).

[3] Suit by trustee impleading co-trustee as a party defendant—Plaintiff dying during suit—Co-trustee can conduct suit. (Vol 8) 1921 Mad 124 (124).

Order 1, Rule 13 — Note 1.

[1] Rule does not apply to objections on ground of want of cause of action or right of suit in the plaintiff. (1901) 25 Bom 438 (467).

issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

[1882—S. 34; 1877—S. 34; See O. 1 R. 9; O. 2 R. 7 and S. 99.]

ORDER II.

FRAME OF SUIT

1. Every suit shall as far as practicable be framed so as to afford ground for final decision *Frame of suit.* upon the subjects in dispute and to prevent further litigation concerning them.

[1882—S. 42; 1877, S. 42.]

O. 1 R. 13 (*contd.*)

[2] Objections as to non-joinder or misjoinder should be taken at the earliest opportunity. (Vol 9) 1922 Mad 317 (318) * (Vol 12) 1925 Oudh 369 (370). (Plea not raised in written statement is barred.) * (1912) 15 Ind Cas 744 (745) (Oudh).

[3] An objection as to non-joinder of parties should be taken before the settlement of issues. (Vol 5) 1918 Mad 535 (536) * (Vol 21) 1934 Lah 459 (460) * (Vol 2) 1915 Mad 319 (319) * (1910) 7 Mad L Tim 78 (79) * (Vol 20) 1933 Oudh 129 (130).

[4] Objection to want of parties not taken — Still Court can add any person as party or give plaintiff opportunity to do so, if it thinks it necessary. (1906) 3 All L Jour 474 (475).

[5] Objection as to non-joinder or misjoinder cannot be taken for first time in appeal. (1841-46) 3 Moo Ind App 229 (242) (P C) * (1909) 2 Ind Cas 848 (849) (All). (Second appeal.) * (1881-1882) 6 Bom 119 (122, 123) * (Vol 6) 1919 Cal 814 (815). (Second appeal.) * (Vol 17) 1930 Mad 683 (685). (Do.) * (Vol 8) 1921 Mad 243 (245) : 44 Mad 344. (Do.) * (1912) 17 Ind Cas 97 (99) (Mad) * (1887) 10 Mad 322 (334) * (Vol 5) 1918 Nag 233 (233). (Second appeal.) * (Vol 20) 1933 Pat 270 (271). (Do.) * (Vol 22) 1935 Rang 275 (275).

[6] Objection as to non-joinder of necessary party — Court neither adding party nor dismissing suit but proceeding with suit—Objection can be repeated on appeal. (Vol 9) 1922 Mad 317 (320).

[7] When objection of misjoinder is raised for first time in appeal, the Court should direct the parties necessary to be brought in, and not dismiss the case on that ground. (1911) 1 Mad W N 321 (322) : (1910) 5 Ind Cas 455 (456) (Mad).

[8] An objection as to non-joinder cannot be taken for the first time in revision. (Vol 6) 1919 Cal 919 (920, 921).

[9] Objection as to non-joinder or misjoinder if not taken at proper time must be deemed to have been waived. (1906) 3 All L Jour 474 (475) * (1910) 7 Ind Cas 102 (102) (All).

[10] Person impleaded as defendant not appearing or taking objection to his being impleaded as such—Person held waived his right to object. (Vol 24) 1937 All 251 (255)

[11] No objection taken to reference to arbitration for non-joinder—Reference is not invalid—Parties will be deemed to have waived their right to object. (Vol 1) 1914 Cal 497 (498).

[12] Minor is not bound by waiver on part of his guardian. (Vol 19) 1932 Mad 583 (586).

[13] Though an objection as to non-joinder of parties does not exist at or before the first hearing and is made at the earliest possible opportunity after it comes into existence, it cannot be held as waived. (1909) 4 Ind Cas 488 (489) (All).

[14] Where the objection as to non-joinder of necessary parties is taken at the very outset, and the plaintiffs do not implead them, the suit must be dismissed. (Vol 20) 1933 Lah 93 (94).

[15] Party alleging non-joinder must show which of the parties are absent. (Vol 21) 1934 Pat 44 (45) * (Vol 24) 1937 Pat 414 (416).

[16] Plea of non-joinder of others of plaintiffs can be raised only by the defendants who have an interest in the subject-matter of the suit and not by those found subsequently not to have any interest therein. (Vol 1) 1914 Oudh 109 (111).

[17] An objection, which did not exist at or before the first hearing, can be taken if it is taken at the earliest opportunity after it came into existence. (1880-1881) 5 Bom 609 (613).

ORDER 2, RULE 1 — SYNOPSIS.

1. Scope.
2. "Subjects in dispute."
3. "As far as practicable."

1. Scope. — [1] Rule 1 refers to joinder of causes of action and relief and of parties. (Vol 1) 1914 Lah 187 (192) : 1915 Pun Re No 3.

[2] The object of the rule is that all matters in dispute between parties relating to the same transaction must be disposed of in the same suit. (1898) 25 Cal 371 (389) (F B) * (Vol 19) 1932 Bom 175 (176) * (1903) 26 Mad 760 (763).

[3] Where essential fact is suppressed and suit is not framed so as to afford ground for final decision later suit on same cause of action is repugnant to O. 2, R. 1. (Vol 18) 1931 Bom 114 (116).

[4] Plaintiff cannot set up one plea and on its failure set up another — If in doubt he should plead alternative cases. (Vol 7) 1920 Mad 900 (900).

[5] For the effect of non-compliance with this rule see S. 11, Expl. IV and O. 2, R. 2.

2. "Subjects in dispute." — [1] Expression "subjects in dispute" means the right which one party claims against the other and not only the cause of action. (Vol 13) 1926 Mad 234 (235) * (1903) 26 Mad 760 (766).

[See (1908) 31 Mad 385 (396). (Suit to establish claim as reversioner — That claim should be held as subject in dispute.)]

[2] It is not necessary that all the causes of action should be joined in the same suit, but the suit should include the whole claim arising out of the same cause of action, that is the cause of action for which the suit is brought. (1921) 59 Ind Cas 517 (519) (Cal) * (1883) 9 Cal 919 (920). (Overruled in (1888) 15 Cal 145 (F B) on another point.) * (1865) 2 Mad H C R 131 (142).

[3] Holder of the two mortgages on same property—Mortgages give rise to separate causes of action — Suit in respect of each mortgage can be separately brought. (Vol 22) 1935 Nag 226 (228, 229) (F B). ((1912) 8 Nag L R 123, overruled.)

[4] Pending suit under S. 9, Specific Relief Act, plaintiff filing suit for cancellation of gift deed under which defendant claimed title — Held this was not splitting up of claim and second suit was not barred. (1904) 26 All 236 (237, 238).

2. (1) Every suit shall include the whole of the claim² which the plaintiff is entitled to make in respect of the cause of action;⁵ but a plaintiff may relinquish²⁰ any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim,⁸ he shall not afterwards sue³³ in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court,²⁷ to sue for all such reliefs,²¹ he shall not afterwards sue³³ for any reliefs so omitted.

Explanation. — For the purposes of this rule an obligation and a collateral security⁶ for its performance and successive claims arising under the same obligation⁷ shall be deemed respectively to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

[1882 — S. 43; 1877 — S. 43; 1859 — S. 7; See Ss. 11 and 12.]

O. 2 R. 1 (*contd.*)

[5] A plaintiff can ordinarily only sue to establish his own rights. When suing for himself only, he has no right to obtain an adjudication as to the claims of others. (1905) 9 Cal W N 498 (499).

[6] A suit for partition should embrace the whole partible property belonging to the parties. (1909) 4 Ind Cas 812 (813, 814) (Upp Bur) (Vol 13) 1926 Cal 1076 (1077) & (1902) 25 Mad 367 (378, 379) : 29 Ind App 76 (P C).

[7] Suit for declaration of a charge for maintenance — Suit must be so framed as to enable ascertainment of actual extent of right (Vol 13) 1926 Sind 18 (19).

[8] Suit on mortgage — Mortgagee also acting as managing agent of mortgagor's business — Mortgagor cannot in mortgage suit claim account of the agency — If mortgagee however received lump sum of money mortgagor can claim credit for that sum. (Vol 17) 1930 Cal 85 (85, 86).

3. "As far as practicable." — [1] It will not be practicable to join in one suit different grounds when evidence in support of one ground will be destructive of the other. (1908) 31 Mad 385 (396).

ORDER 2, RULE 2 — SYNOPSIS.

1. Scope and object.
2. Whole claim to be included in suit.
 3. Plaintiff must have been aware of the claim.
 4. Court to have jurisdiction to try the claim.
5. Cause of action.
 6. Obligation and collateral security.
 7. Successive claims under the same obligation.
8. Portion of claim omitted from suit.
 9. Suits for breaches of contract.
 10. Suits relating to different properties.
 11. Suit for rent.
 12. Suit for damages for tort.
 13. Suit for demurrage.
 14. Suit for accounts.
 15. Suits on mortgages.
 16. Suits for rent and principal by mortgagee-lessor against mortgagor-lessee.
 17. Separate suit for instalments.
 18. Partition suits.
 19. Suits by minors.
20. Intentional relinquishment.

21. Omission to sue for all reliefs.

22. Suits for possession and rent.
23. Suits for specific performance and other reliefs.
24. Partition suits.
25. Mortgage suits.
26. Other examples.
27. Leave of Court.
28. Identity of the parties in both the suits.
29. The previous decision should be on merits.
30. Different causes of action — Rule inapplicable.
31. Suit for possession and another for mesne profits.
32. Other examples.
33. "Shall not afterwards sue."
34. Set-off.
35. Plea in defence not barred.
36. Insolvency proceedings not suits.
37. Application to sue in forma pauperis.
38. Amendment of plaint.
39. Revenue and village Courts.

1. Scope and object.—[1] The defendant should not be twice vexed for one and the same cause. (Vol 18) 1931 P C 229 (230) (P C) & (1897) 19 All 379 (383) (F B).

[2] This rule does not vest any right in the defendants. (Vol 20) 1933 All 228 (229).

[3] The rule bars the splitting of claims and the splitting of remedies. (1901) 25 Bom 161 (167) & (Vol 2) 1915 Cal 126 (126) : 41 Cal 825 & (1910) 7 All L Jour 627 (629) & (Vol 8) 1921 Lah 309 (310).

[4] The rule has reference to the subject-matter of the claim and not to the persons against whom it may be made. (1884) 10 Cal 924 (927).

[5] Parties by agreement cannot override this rule. (Vol 1) 1914 Lah 121 (122) : 1914 Pun Re No. 4.

[6] The rule should be construed strictly. (Vol 2) 1915 Cal 126 (126) : 41 Cal 825 & (1886) 12 Cal 339 (345).

[7] Omission to object under this rule in the previous suit is not a bar to an objection in respect of the later suit. (Vol 29) 1942 Pesh 9 (10). (No estoppel against a statute.)

[8] This rule does not apply to an application for restitution. (Vol 22) 1935 All 195 (197) & (Vol 8) 1921 Nag 112 (113) : 17 Nag L R 62 & (Vol 5) 1918 Pat 396 (397, 398) : 8 Pat L Jour 367 & (Vol 4) 1917 Mad 185 (186) : 40 Mad 780 & (Vol 22) 1935 Cal 206 (208) : 62

O. 2 R. 2 (*contd.*)

Cal 217. (Application for restoration of possession by way of restitution — No bar to second application for mesne profits.)

[8a] The rule does not apply after suit is filed. (Vol 30) 1943 Nag 293 (295) : I L R (1943) Nag 608.

[9] Rule 2 framed under Madras Agriculturists' Relief Act (4 [IV] of 1938) is not *ultra vires* of O. 2, R. 2. (Vol 29) 1942 Mad 362 (363) : I L R (1942) Mad 647.

[10] For certain limitations to this rule, see O. 2, Rules 3, 4 and 5; for an exception to this rule, see O. 34, Rule 14.

2. Whole claim to be included in suit. — [1] Under sub-r. (1) every suit shall include the whole of the claim in respect of the cause of action. (1901) 25 Bom 161 (164, 165, 166, 167, 168) * (Vol 4) 1917 Cal 841 (843, 844) : 43 Cal 95 * (1906) 30 Bom 156 (163) * (Vol 28) 1936 Lah 379 (380).

[2] Under sub-r. (3) the plaintiff may sue for one or more reliefs, with the leave of the Court to sue later on for the other reliefs. (1881) 5 Bom 463 (465).

3. Plaintiff must have been aware of the claim. —

[1] The plaintiff must have been aware, at the time of his first suit, of his right to the portion omitted by him or of the facts which would have entitled him to sue for it. (1896) 19 Mad 145 (148) * (Vol 10) 1923 All 230 (230, 231) * (1888) : 15 Cal 800 (808) : 15 Ind App 106 (P C).

[2] Actual knowledge, and not merely constructive knowledge, is necessary to bar a subsequent suit. (Vol 5) 1918 Nag 158 (159).

[3] The fact that the omission was due to oversight or accidental is no reason for allowing subsequent suit. (1867) 11 Moo Ind App 551 (605, 606) (P C) * (Vol 28) 1941 Pat 37 (38) * (1944) 1944 Oudh W N (H C) 23 (24, 25).

4. Court to have jurisdiction to try the claim. —

[1] In order that this rule may apply the Court which tried the former suit must have had jurisdiction to try the claim omitted. (Vol 27) 1940 P C 70 (74) : 67 Ind App 179 : I L R (1940) Kar P C 149 : I L R (1940) Lah 330 (P C).

[2-3] In respect of a claim not triable by the Revenue Court, but decided by it a later suit is not barred. (Vol 29) 1942 Oudh 325 (327) : 17 Luck 712 * (1887) 9 All 23 (25) * (1898) 1898 Pun Re No. 30, p. 99 (100).

[4] Addition of claim offending against O. 2, Rr. 4 and 5 — Claim may be omitted. (1902) 24 All 553 (554, 555).

[5] Where the sanction of Government was necessary and suit was instituted without it, there is no bar. (1870) 5 Mad H C R 419 (422).

[6] Certificate under the Pensions Act necessary but wanting — Subsequent suit is not barred. (Vol 16) 1929 P C 166 (169) : 56 Ind App 267 : 51 All 439 (P C) * (1882) 1882 Pun Re No. 64, page 181 (186).

[7] Addition of relief depriving the Court of jurisdiction does not affect the applicability of the rule. (Vol 9) 1916 Low Bur 43 (44) * (Vol 18) 1931 Mad 705 (706, 707).

5. Cause of action. — [1] Cause of action means the facts which entitle the plaintiff to sue with reference to the subject-matter of the suit. (Vol 24) 1937 Rang 324 (329) * (Vol 29) 1942 All 410 (417) : I L R (1942) All 624 * (Vol 29) 1942 Cal 407 (410) * (Vol 27) 1940 Pat 76 (77) : 18 Pat 789 * (Vol 24) 1937 Rang 324 (329) * (Vol 22) 1935 All 81 (82).

[2] "Cause of action" in this rule means the cause of action for which the suit was brought. (1885) 8 Mad 520 (524) : 12 Ind App 116 (P C).

[3] Where the same evidence will sustain both suits, the cause of action is one. (Vol 27) 1940 Bom 20 (21) : I L R (1939) Bom 721 * (Vol 3) 1916 Bom 810 (810,

311) : 40 Bom 351 * (Vol 12) 1925 Oudh 524 (524, 525) : 28 Oudh Cas 82 * (1886) 9 Mad 279 (281).

[See also (1911) 38 Cal 629 (638) : 38 Ind App 140 : 6 Low Bur Rul 18 (P C).]

[But see (1893) 16 All 165 (173) (F B).]

[4] The allegations in the two suits and not the facts found by the Court in the former suit decide whether the cause of action is the same. (Vol 29) 1942 Cal 407 (410) * (1882) 8 Cal 819 (823, 824) * (Vol 11) 1924 Bom 141 (142) * (Vol 2) 1915 Lah 127 (128) * (Vol 2) 1915 Mad 888 (888) : 38 Mad 247 * (1910) 34 Mad 97 (107). (Overruled on another point in (Vol 5) 1918 Mad 143 : 41 Mad 286 (F B).) * (Vol 4) 1917 Low Bur 28 (29, 30) : 9 Low Bur Rul 37.

[But see (1910) 8 Ind Cas 9 (12) (All).]

[5] The causes in the two suits may be the same though the facts alleged may not be exactly identical in the two cases the difference being only a matter of form. (1892) 19 Cal 372 (379) (F B) * (Vol 29) 1942 All 122 (125, 126) : I L R (1942) All 103 * (Vol 29) 1942 Cal 407 (411) * (Vol 31) 1944 Mad 435 (436) * (Vol 2) 1915 Mad 732 (734, 735).

[See (1937) 1937 Oudh W N 1146 (1146). (Repeated interferences with the same property — Each interference not a distinct cause.)]

[See also (1888) 15 Cal 422 (431) : 15 Ind App 66 (P C).]

[6] Plaintiff cannot split up the parts constituting the same cause of action and file different suits in respect of them. (Vol 12) 1925 Oudh 53 (54) * (Vol 20) 1933 Pat 715 (717).

[See however (Vol 12) 1925 Nag 366 (368). (Even one different fact makes causes of action different.)]

6. Obligation and collateral security. — [1] An obligation and a collateral security for its performance constitute one cause of action. (1880) 2 All 838 (839).

[2] Except for the Explanation, the two would constitute distinct causes of action as they are under the English law. (1914) 41 Ind App 142 (148) (P C). (Case under Ceylon C. P. Code, S. 34, corresponding to O. 2, R. 2) * (Vol 9) 1922 P C 412 (413) : 4 Lah 32 : 50 Ind App 115 (P C).

7. Successive claims under the same obligation. —

[1] Successive claims arising under the same obligation constitute a single cause of action. (1873) 20 Suth W R 358 (361) * (1906) 8 Bom L R 547 (549).

[2] In the following cases it was held that the suit should include the whole claim : —

(a) Arrears of instalments under instalment bond. (1886) 9 Mad 279 (280, 281).

(b) Arrears of rent for successive years. (Vol 12) 1925 All 795 (796, 797) * (Vol 9) 1922 Bom 152 (153) : 46 Bom 229 * (1884) 8 Bom 164 (167) * (1895) 22 Cal 680 (691) * (1885) 12 Cal 50 (51). (Omission of rent for later years.) * (1910) 33 Mad 317 (318) * (1904) 27 Mad 116 (117, 118).

(c) Suits for royalty. (Vol 4) 1917 Cal 841 (843, 844) : 43 Cal 95.

(d) Suits for profits. (1885) 7 All 761 (762, 763).

(e) Suits for annuity. (Vol 9) 1922 All 379 (380, 381) : 44 All 663.

[3] The rule does not prevent the plaintiff from taking any other remedy which he may have for recovery. (1898) 21 Mad 236 (237).

8. Portion of claim omitted from suit. — [1]

Omission to sue for the whole claim will bar a fresh suit in respect of the portion so omitted. (Vol 8) 1921 Lah 309 (310) * (1901) 25 Bom 161 (167) * (1905) 2 Cal L Jour 480 (484) * (Vol 20) 1933 Lah 412 (415).

[See also (Vol 18) 1931 Bom 114 (116).]

[2] The bar cannot be avoided even by express reservation in the plaint of the right to sue for the omitted portion. (Vol 4) 1917 Cal 568 (570) * (1893) 20 Cal 322

O. 2 R. 2 (*contd.*)

[323, 324 325]* (Vol 25) 1938 Rang 76 (79): 1937 Rang L R 447.

[3] The only leave that the Court can grant is to sue for one of several *reliefs* under sub-r. (3). (1909) 11 Bom L R 46 (49, 50).

[4] The rule applies only where a suit has been filed omitting a portion of the claim. (Vol 6) 1919 Cal 904 (907): 45 Cal 305.

[5] Where a plaintiff who is entitled to a larger interest claims only a smaller interest, the bar will apply. (Vol 24) 1937 Rang 324 (330). (Plaintiff entitled to property as sole heir claiming only the interest of co-heir.)

[6] Plaints in suits for arrears of rent for different periods presented to Revenue Court on the same day—Held, all the plaintiffs formed one document and there was no omission to sue or relinquishment of any portion of claim though no prayer was before the Court to treat them as one suit. (Vol 26) 1939 Mad 724 (729).

9. Suits for breaches of contract.—[1] A portion of the damages due omitted in a suit for damages for breach of contract cannot be subsequently sued for. (1883) 9 Cal 143 (145)* (1907) 3 NagLR 80 (80). (Though omitted portion relates to a different stipulation in the contract.)* (1909) 11 Bom L R 46 (49, 50) * (Vol 1) 1914 Lah 26 (28) * (Vol 7) 1920 Low Bur 50 (51): 10 Low Bur Rul 111.

[But see (1904) 1908 All W N 199 (200). (*Quære.*)]

[2] Where the covenants contained in the same contract create distinct obligations, the breach of each will give a distinct cause of action. (Vol 27) 1940 Pat 76 (80): 18 Pat 789. (*Obiter* — Per *Rowland, J.*) * (Vol 1) 1914 Lah 26 (29)* (1897) 21 Bom 267 (271)* (Vol 2) 1915 Cal 126 (128): 41 Cal 825 * (Vol 10) 1923 Cal 615 (619) * (Vol 7) 1920 Nag 232 (233): 16 Nag L R 136.

[3] An action for breach of contract of sale of goods for non-acceptance of a portion of goods and refusal to pay for goods accepted should not be split up into a suit for price of goods and another for damages for non-acceptance. (1892) 19 Cal 372 (376) (FB).

[4] *Prima facie* each separate order and delivery of goods constitute separate cause of action. (Vol 11) 1924 Rang 145 (146): 1 Rang 694 * (Vol 3) 1916 Mad 544 (545).

[5] All the goods to be delivered under a single contract constitute only one cause of action. (Vol 11) 1924 Rang 249 (252): 2 Rang 66 * (Vol 11) 1924 Rang 145 (146): 1 Rang 694.

[6] Where the indent provides that each monthly shipment will be a separate contract, a separate cause of action will arise in respect of each monthly shipment. (1896) 19 Mad 304 (306)* (Vol 2) 1915 Cal 126 (127): 41 Cal 825.

10. Suits relating to different properties.—[1] Where the facts complained of are the same, there is only one cause of action though the reliefs sought may relate to different properties or different portions of a property. (Vol 29) 1942 All 122 (125, 126): 1 L R (1942) All 103* (Vol 29) 1942 Cal 407 (411)* (1867) 11 Moo Ind App 551 (605) (PC). (Defendant misappropriating jewels and Government papers.)* (Vol 2) 1915 Mad 732 (735)* (Vol 18) 1931 Bom 114 (116).

[2] Though properties are claimed under different titles whether by plaintiff or defendant, the same rule applies. (1888) 15 Cal 422 (431): 15 Ind App 66 (P C). (Plaintiff asking relief under different title.)* (1876) 2 Cal 152 (173) (FB). (Do.)

[But see (1890) 14 Bom 31 (55, 56)* (1894) 16 All 165 (171) (FB). (Defendant claiming under different title—Overruling 1886 All W N 113.)]

11. Suit for rent. — [1] A suit for rent must include the whole amount due to the plaintiff as rent.

(Vol 17) 1930 All 527 (528) * (Vol 20) 1933 Cal 831 (832).

[2] Though rent may be due under a particular *muchiika* where there are more than one, yet, non-payment of rent at a particular time is one cause of action. (1904) 27 Mad 116 (118).

12. Suit for damages for tort.—[1] In a suit for damages for tort the entire amount of damages has to be recovered in one suit. (Vol 18) 1931 All 670 (672).

13. Suit for demurrage. — [1] In a suit for demurrage omission to claim a portion of the relief will prevent a subsequent suit in respect of it. (1870) 14 Suth W R 253 (253).

14. Suit for accounts. — [1] A suit for accounts should include all items claimed. (Vol 4) 1917 Cal 568 (570) * (Vol 22) 1935 Lah 321 (322).

[2] Several transactions, if they form one continuous course of dealing or form parts of one transaction, constitute one cause of action. (Vol 2) 1915 Cal 126 (127): 41 Cal 825. (Different contracts but forming one transaction.)

[3] Non-payment of court-fees or omission to mention the specific amount, defendant will be entitled to on taking of account, will not amount to a waiver of such amount. (Vol 20) 1933 Sind 247 (249).

15. Suits on mortgages.—[1] Mortgagor's suit for redemption must include the whole property of which recovery is sought. (1905) 28 Mad 406 (407, 408) * (Vol 10) 1923 Bom 63 (64).

[But see (1886) 9 Mad 92 (95)]

[2] A puisne mortgagee who pays off a prior mortgage must include any further claim he may have by reason of such payment. (1910) 37 Cal 539 (597)* (1911) 10 Ind Cas 336 (337) (All).

[3] A separate money bond against the mortgagor need not be enforced along with the mortgage. (Vol 12) 1925 Mad 991 (992).

Separate suits for interest and principal.

[4] Where obligation to pay the interest and the principal is one, suit for interest alone, when the principal also has become due, will bar a subsequent suit for the principal. (Vol 9) 1922 P C 412 (414): 4 Lah 32: 50 Ind App 115 (P C) * (Vol 9) 1922 P C 23 (25, 26): 49 Ind App 9: 44 All 121 (P C).

[5] Where there is an independent obligation to pay interest, a prior suit for interest is no bar although the principal sum had become due. (Vol 9) 1922 P C 412 (414): 4 Lah 32: 50 Ind App 115 (P C) * (Vol 9) 1922 P C 23 (26): 49 Ind App 9: 44 All 121 (P C) * (Vol 27) 1940 Lah 498 (500) * (Vol 12) 1925 Mad 1120 (1122): 48 Mad 703 * (Vol 21) 1934 Rang 159 (160) * (Vol 17) 1930 All 286 (287): 51 All 974 * (1897) 21 Bom 261 (271).

[6] Where the principal sum had not become due, a subsequent suit for the principal will not be barred. (Vol 14) 1927 Mad 580 (581, 582) * (1923) 26 All L Jour 57 (59)* (Vol 16) 1929 Rang 71 (72): 6 Rang 771 * (Vol 9) 1922 Upp Bur 1 (2): 4 Upp Bur Rul 62.

Separate suit for unpaid instalments of interest and the balance of mortgage money where whole amount becomes due under default clause.

[7] A proviso of the nature of a default clause is inserted in the mortgage deed wholly for the benefit of mortgagees and the mortgagees have an option either to enforce their security at once, or if the security is ample to stand by their investment for the full term of the mortgage. (Vol 18) 1926 P C 85 (87): 53 Ind App 187: 48 All 457 (P C).

[8] Money becomes due in such cases on default only if the mortgagee exercises his option reserved to him. (Vol 19) 1932 P C 207 (211): 7 Luok 442: 59 Ind App 376 (P C) * (Vol 20) 1933 Lah 463 (464). (Subsequent suit not barred.)* (Vol 24) 1937 Lah 767 (769). (Do.)

O. 2 R. 2 (*contd.*)

[9] Default clause entitling sale out of Court of property for principal and interest—Suit for interest alone does not bar suit for mortgage money. (Vol 16) 1929 Rang 71 (72) : 6 Rang 771.

First suit for interest under a mortgage, second suit for possession. — [10] Where on the first default the mortgagee is entitled to sue both for possession and interest he cannot maintain separate suits in respect of them. (1910) 1910 Pun L R No. 31, p. 68 (70)* (Vol 1) 1914 Lah 121 (123) : 1914 Pun Re No. 4.

[See however (Vol 3) 1916 Lah 298 (298).]

[But see (1886) 1886 Pun Re No. 79, p. 165 (165).]

[11] If mortgagee is entitled on default to sue either for interest or possession, separate suits are not barred. (Vol 7) 1920 Lah 1 (3, 4) : 1 Lah 457 (F B) * (Vol 26) 1989 Lah 112 (113).

16. Suits for rent and principal by mortgagee-
lessor against mortgagor-lessee. — [1] Where the lease forms in reality only an arrangement for the payment of interest, separate suits for rent and principal will not lie after principal has become due. (Vol 13) 1926 Lah 559 (560, 561) * (Vol 8) 1921 Lah 225 (225).

[2] Separate suits will lie where the lease and the mortgage constitute distinct and separate transactions. (Vol 15) 1928 Lah 732 (733) * (Vol 10) 1923 Lah 203 (204) : 4 Lah 52 * (Vol 19) 1932 Mad 466 (468, 469, 470) * (1893) 16 Mad 335 (338).

17. Separate suits for instalments — [1] When option exists under the bond, separate suits are maintainable. (Vol 32) 1945 All 119 (120) : I L R (1945) All 105 * (Vol 22) 1935 All 461 (462) : 57 All 838 * (Vol 29) 1942 Nag 138 (140) : I L R (1943) Nag 630.

[But see (Vol 26) 1939 Rang 251 (252) : 1939 Rang L R 180.]

18. Partition suits. — [1] Suit for partition of joint property must include the whole of the properties jointly held by the parties. (Vol 20) 1933 Lah 780 (781)* (1931) 32 Pun L R 289 (290)* (1886) 12 Cal 566 (569) * (Vol 14) 1927 Mad 213 (214).

[2] Where some properties are omitted in the suit, the penalty is not the dismissal of the suit but the bar of a fresh suit for the partition of the omitted items. (1883) 7 Bom 182 (184) * (1911) 9 Ind Cas 424 (425) (Oudh).

In the following cases a subsequent suit was entertained. [3] (1871) 8 Bom H C R A C 205 (209)* (Vol 15) 1928 Cal 459 (461) * (Vol 2) 1915 Lah 416 (417) : 1915 Pun Re No. 87 * (Vol 15) 1928 Rang 73 (75) : 5 Rang 735.

[a] Where the omitted portion was not available for partition at the time of previous suit for partition, separate suit for such portion will lie. (1900) 23 Mad 608 (612) * (1875) 12 Bom H C R 148 (155).

[b] Where the omitted properties were in a different district. (Vol 3) 1916 All 172 (173) : 38 All 217* (1912) 23 Mad L Jour 64 (70) * (Vol 10) 1923 Mad 584 (584, 585). (No objection where a single suit is brought.)

[c] Where the omission was due to ignorance of existence of the omitted items. (Vol 14) 1927 Mad 213 (215) * (Vol 19) 1932 Nag 92 (93). (Omission due to inadvertence.) * (Vol 18) 1931 Sind 27 (27).

[4] Suit for partition of property held jointly by a Hindu family does not bar a suit for partition of property held by the family jointly with strangers. (1899) 23 Bom 597 (598, 601, 602) * (Vol 11) 1924 Nag 89 (91) : 20 Nag L R 28 * (1912) 15 Oudh Cas 81 (88, 89)* (Vol 18) 1931 Sind 143 (144).

[5] Alienee of a share of joint family property must sue for general partition. (1899) 24 Bom 128 (134).

[6] Failure to sue for general partition by an alienee by itself is no ground for dismissing the suit. (1912) 23 Mad L Jour 64 (70).

[7] In a suit by alienee of a share of joint family

property, the defendant can always insist on its being for general partition. (1899) 24 Bom 128 (130, 134).

[8] There is no bar to suits for partial partition based on distinct causes of action. (Vol 17) 1930 All 371 (372) * (Vol 20) 1933 P C 106 (108) (P C)* (1913) 1913 Pun L Re No. 255, p. 867 (869)* (Vol 4) 1917 Oudh 403 (404).

[9] The rule against a suit for partial partition is not applicable to tenants-in-common. (1913) 17 Cal W N 521 (522)* (1908) 12 Cal W N 640 (641) * (Vol 11) 1924 Mad 124 (124) : 46 Mad 844* (1898) 21 Mad 153 (158)* (Vol 16) 1929 Bom 323 (325)* (Vol 16) 1929 Oudh 1 (5).

[10] Though omission by the heir to sue for the whole estate was due to the mistaken impression as to the rights of another person holding it, a subsequent suit is not barred. (Vol 24) 1937 Rang 324 (333).

[11] Where the Court itself omits to give the income from certain property in a final decree in a suit for partition, subsequent suit for such profits is not barred. (Vol 22) 1935 Nag 137 (138).

Following cases are other instances where subsequent suits were held barred: — [12] Subsequent suit for declaration and possession in respect of properties omitted in previous suit for declaration. (Vol 28) 1941 Pat 37 (38).

[13] Suit to recover portion of dower debt omitted from the previous suit. (Vol 10) 1923 All 331 (332) : 45 All 384.

[14] Separate suits for redemption against co-mortgagees. (Vol 6) 1919 Mad 653 (654).

[15] Where a new contract of sale of mortgaged property with a condition for payment of mortgage loan and cash payment in case sale was cancelled was entered into superseding mortgage, omission to sue for both bars fresh suit in respect of portion omitted. (Vol 24) 1937 Cal 57 (58).

19. Suits by minors. — [1] Minor cannot on attaining majority sue on the same cause of action in respect of any portion of claim omitted by his next friend. (Vol 29) 1942 Bom 338 (338) : I L R (1943) Bom 49* (1899) 22 Mad 309 (310).

[2] Where the omission by next friend was due to gross negligence, the minor can sue. (1895) 22 Cal 8 (13, 14).

[3] Fraudulent omission by next friend gives the minor right to sue on the same cause of action. (1912) 14 Ind Cas 95 (97) (Cal).

[4] Where there are glaring laches caused by the physical incapacity, the minor can sue. (1909) 1 Ind Cas 400 (402) : 1909 Pun L R No. 25.

[5] Unreasonable or improper conduct of the suit by next friend will entitle minor to sue subsequently. (1899) 22 Mad 309 (310).

[6] Where minor's rights were not properly safeguarded in the suit he can sue. (Vol 8) 1921 Bom 434 (434) : 45 Bom 805.

20. Intentional relinquishment. — [1] Plaintiff may relinquish any portion of his claim in order to bring his suit within the jurisdiction of a particular Court. But suit once instituted cannot be allowed to be amended by relinquishment of a portion of the claim to bring it within the jurisdiction of that Court and the plaintiff should be returned. (Vol 8) 1921 Mad 696 (698, 700). (Per Sadasiva Aiyar J.; Counts-Trotter, J., *contra.*) * (Vol 7) 1920 Nag 47 (49).

[2] Any portion of claim intentionally relinquished cannot be the subject-matter of a fresh suit. (1913) 20 Ind Cas 173 (174) (All).

[3] Where defendant nominally values his relief in the written statement in a suit for accounts and offers to pay additional court-fees on settlement of accounts cannot be deemed to have relinquished his remaining claim. (Vol 20) 1933 Sind 247 (249).

O. 2 R. 2 (*contd.*)

21. Omission to sue for all reliefs. — [1] Omission of any relief to which a person is entitled without the leave of the Court will bar a subsequent suit in respect of it. (Vol 18) 1931 P C 229 (230) (PC) (Vol 18) 1931 Mad 705 (706, 707). (Though first Court had no jurisdiction to grant the omitted relief.)

[2] The rule applies even though the reliefs may be claimed in the alternative. (Vol 19) 1932 Lah 523 (525).

[3] Where the relief sought in the subsequent suit did not exist at the date of the former suit, the rule does not apply. (1881) 3 All 857 (858, 859) (1909) 11 Bom L R 46 (50) (1879) 5 Cal 597 (602) (1871) 16 Suth W R 5 (9) (P C). (Suing for a new accretion.) (Vol 9) 1922 Mad 413 (414, 415) (1898) 8 Mad L Jour 273 (276) (Vol 14) 1927 Oudh 498 (499) (Vol 12) 1925 Oudh 303 (304) : 28 Oudh Cas 2 (Vol 25) 1938 Rang 290 (291). (*Obiter.*) (Vol 24) 1934 Pat 515 (518) (Vol 12) 1925 Sind 242 (243).

[4] Where a mortgagee has asked for and obtained only a personal decree under O. 34, R. 14, for the mortgage amount, he may subsequently institute a suit for sale of the mortgaged property. (Vol 27) 1940 Pat 233 (235, 236).

[5] Plaintiff who sues for a relief to which he is not entitled is not debarred from suing for a relief to which he is entitled. (Vol 12) 1925 Lah 459 (460) : 6 Lah 384.

22. Suits for possession and rent. — [1] Default clause in lease providing delivery of possession to lessor on failure to pay rent at stated periods — Separate suits for possession and rent are not maintainable. (Vol 1) 1914 Bom 130 (130, 131) : 38 Bom 444.

[See also (Vol 24) 1937 Sind 300 (302) : 32 Sind L R 80. (Option under default clause unless exercised does not operate and separate suits for rent for different periods can be filed.)]

[But see (1913) 35 All 512 (516) (FB) (Vol 9) 1922 Lah 118 (119) (1909) 42 Mad 330 (332, 333) (Vol 20) 1933 Rang 107 (109).]

[2] Where under a contract of lease with a default clause the lessor first sues for rent, and subsequently for ejectment, the latter suit is barred. (Vol 20) 1933 All 84 (85).

23. Suits for specific performance and other reliefs. — [1] First suit for specific performance alone of an agreement to sell bars a subsequent suit for possession on the same basis. (Vol 11) 1924 Mad 360 (361, 363) : 47 Mad 150 (1894) 18 Bom 537 (542) (Vol 7) 1920 Pat 89 (91) : 5 Pat L Jour 314.

[But see (Vol 28) 1941 Bom 247 (249, 250) : I L R (1941) Bom 361.]

[2] Subsequent suit based on the conveyance obtained in pursuance of the decree in the first suit for specific performance to sell, is not barred. (Vol 11) 1924 Mad 360 (363) : 47 Mad 150 (1894) 18 Bom 537 (542) (Vol 1) 1914 Mad 465 (466) : 38 Mad 698 (Vol 5) 1918 Nag 221 (223) : 14 Nag L R 176 (1904) 4 Nag L R 14 (18) (Vol 13) 1926 Rang 197 (198).

[3] Suit for possession first and for specific performance later — The latter is barred. (1901) 24 Mad 491 (503) : 28 Ind App 221 (P C).

[4] In a case where the plaintiff is not entitled to more than one relief in respect of the same cause of action and the first suit fails on the ground that such a suit does not lie, a second suit for proper relief is not barred. (Vol 12) 1925 Lah 459 (460) : 6 Lah 384.

24. Partition suits. — [1] A partition suit should include the entire divisible property of the parties and all the reliefs that could be claimed in a partition suit. (Vol 9) 1922 Bom 119 (120) : 46 Bom 327 (Vol 9) 1922 Bom 9 (9) : 46 Bom 823. (Subsequent suit for accounts for a period prior to partition suit is barred.) (Vol 22) 1935 Pat 80 (82) (Do.)

[2] Suit for damages for use and occupation during the pendency of the partition suit is based on a different cause of action. (Vol 7) 1920 Cal 537 (538) (Vol 28) 1939 Sind 367 (368) : I L R (1940) Kar 36. (Partition suit — Party's failure to ask for mesne profits from date of suit till delivery of possession does not bar suit for the same.)

[3] Suit on a promissory note executed by one member of a joint Hindu family in favour of another is not based on the same cause of action as for a partition suit. (1912) 36 Mad 151 (157).

[4] The rule does not apply when plaintiff does not omit to claim a relief but the final decree fails to grant such relief. (Vol 22) 1935 Nag 137 (138) : 31 Nag LR 304.

25. Mortgage suits. — [1] In a suit on mortgage neither the mortgage-money nor the security can be split up without the consent of the parties or permission of the Court. (Vol 18) 1931 Cal 806 (807).

[2] In a suit for redemption the mortgagor should include all claims including that for excess profits received by the mortgagee accruing after the institution of the suit. (1908) 30 All 225 (227) (1908) 30 All 36 (37) (1907) 31 Bom 527 (533, 534) (Vol 14) 1927 Nag 302 (303) (1909) 12 Oudh Cas 152 (153). (Deposit of mortgage money in Court preceding suit — Suit to include claim for subsequent mesne profits.) (1907) 34 Cal 223 (232, 233). (Do.) (Vol 12) 1925 Rang 13 (14) : 2 Rang 382 (Vol 7) 1920 Mad 531 (532) (Vol 1) 1914 Mad 120 (120) (Vol 23) 1936 Cal 200 (202).

[3] Separate suit is maintainable for the mesne profits accruing after the date of payment under the preliminary decree. (Vol 7) 1920 Pat 106 (106) : 5 Pat L Jour 595 (Vol 13) 1926 Cal 173 (178) (Vol 5) 1918 Mad 284 (284) (Vol 3) 1916 Oudh 230 (231) : 19 Oudh Cas 161.

[See also (1910) 12 Cal L Jour 620 (622).]

[See however (Vol 11) 1924 All 909 (910).]

[4] Usufructuary mortgagee bringing suit for possession alone, which is dismissed cannot again sue for the mortgage money. (Vol 8) 1921 Lah 309 (310) (Vol 19) 1932 Lah 523 (524, 525) (Vol 13) 1926 Pat 87 (88, 89) (Vol 12) 1925 Oudh 524 (525) : 28 Oudh Cas 82 (Vol 11) 1924 Oudh 147 (149) (Vol 23) 1936 Pesh 86 (87).

[5] Where the two suits are based on distinct causes of action, the second suit will not be barred although the claim to relief may arise out of the same mortgage. (Vol 14) 1927 All 713 (713) (1904) 27 Mad 102 (105) (1913) 6 Sind L R 140 (142).

[But see contra (Vol 5) 1918 Lah 289 (290) : 1918 Pun Re No. 119.]

26. Other examples. — [1] Suit for personal decree for maintenance — Subsequent suit for declaring a charge on property barred. (1888) 11 Mad 127 (129) (Vol 18) 1931 Mad 705 (707) (Vol 24) 1937 All 56 (57) : I L R 1937 All 269.

[2] Suit for exclusive possession — Second suit for joint possession is barred. (1911) 11 Ind Cas 87 (88) (All).

[3] Suit for possession alone bars a suit for declaration of title. (1907) 10 Oudh Cas 44 (48) (1905) 8 Oudh Cas 389 (392, 393).

[4] Agreement to pay debt partly in cash and partly by executing a mortgage; both the reliefs must be claimed in one suit. (1901) 25 Bom 161 (166).

[5] Former suit for damages for dismantling a building on the ground of wrongful deprivation of possession and appropriation of materials — Second suit for declaration of title and partition by metes and bounds of the land is barred. (Vol 7) 1920 Cal 978 (979) : 46 Cal 640.

[6] Suit for loss of income by lessee evicted before expiry of lease — Subsequent suit for damages for breach of covenant for quiet enjoyment barred. (1892) 2 Mad L Jour 190 (199).

O. 2 R. 2 (*contd.*)

[7] Beneficiary entitled to charge on trustees' properties for unaccounted money — Suing for personal decree alone deprives claim for the charge. (Vol 20) 1933 Bom 437 (438) : 58 Bom 67.

[8] Suit for damages on dispossession — Subsequent suit for possession is barred. (1910) 5 Ind Cas 126 (127) (All).

[9] Suit for possession of land — Subsequent suit for the trees standing on land is barred. (1893) 20 Cal 322 (325).

[10-11] Separate suits for declaratory decree to build drain on a piece of land and for damages by the defendant's refusal to allow it are barred. (1907) 1907 Pun L R No. 28, p. 54 (55).

[12] Only one suit lies in respect of all claims arising out of same partnership. (Vol 7) 1920 Mad 680 (685).

[13] Declaration obtained by a co-sharer that a certain gift of plots does not affect his rights is no bar to a subsequent suit on the ground that the choice of allotment should not be affected by the gift. (Vol 11) 1924 Oudh 129 (131) : 26 Oudh Cas 98.

[14] Suit for specific performance to reconvey land bars a separate suit for mesne profits on account of delay in reconveyance. (1909) 13 Cal W N 669 (671).

[15] Damages refused in suit — Subsequent suit for mesne profits in respect of which the damages were refused is barred. (1935) 18 Nag L Jour 76 (79).

[16] Suit for possession by lessee and decree obtained — Decree for ejectment obtained in second suit — Third suit for demolition of buildings on the lease hold — *Held*, separate suit did not lie. (Vol 22) 1935 Pat 222 (224).

27. Leave of Court. — [1] Where the omission of some reliefs has been with the permission of the Court, they can be sued for again. (Vol 8) 1921 Pat 193 (195) : 6 Pat L Jour 373 (F B) * (Vol 25) 1933 Rang 76 (79) : 1937 Rang L R 447.

[2] The leave may be express or inferred from the circumstances of the case. (Vol 8) 1921 Pat 193 (195) : 6 Pat L Jour 373 (F B) * (Vol 14) 1927 Rang 237 (238). (It is sufficient if it can be implied from the order.) * (Vol 25) 1938 Mad 865 (876, 877).

[3] Value of the relief to be omitted does not affect Court's power to grant the leave. (1910) 33 All 244 (246) * (Vol 3) 1916 Low Bur 43 (44).

[4] Power to grant leave does not extend to allowing a splitting up of claims. (Vol 4) 1917 Cal 841 (843, 844) : 43 Cal 95.

[5] The application for leave need not precede or accompany the plaint in the suit. (Vol 25) 1938 Mad 979 (982) : I L R (1939) Mad 817.

28. Identity of the parties in both the suits. —

[1] The two suits must be between the same parties or between persons claiming through the same parties. (1910) 7 All L Jour 627 (631) * (Vol 16) 1929 Mad 96 (103) * (1912) 1912 Mad W N 1071 (1073) * (1912) 15 Ind Cas 833 (835) (Oudh) * (1895) 22 Cal 692 (705, 707) * (Vol 7) 1920 Cal 537 (538) * (Vol 6) 1919 All 270 (271) : 41 All 583 * (Vol 7) 1920 Bom 90 (93) : 44 Bom 352 * (Vol 3) 1916 Bom 310 (312) : 40 Bom 351 * (1890) 14 Bom 408 (415, 416). (Nominal defendant in former suit — Latter suit against him as real defendant — Not barred.) * (Vol 1) 1914 Cal 263 (267) * (1902) 25 Mad 736 (740) * (Vol 17) 1930 Nag 119 (120) * (Vol 5) 1918 Nag 241 (241) * (Vol 12) 1925 Oudh 53 (54) * (Vol 11) 1924 Oudh 129 (131) : 26 Oudh Cas 98.

[2] The rule does not apply where same persons sue or are sued in different capacities in the two suits, though the fact that some of the original plaintiffs or defendants are not parties to the subsequent suit does not make this rule inapplicable. (Vol 29) 1942 All 122 (128) : I L R (1942) All 103.

[3] A suit against the person resisting execution is not barred under this rule (1893) 16 Mad 449 (450) * (1866) 1886 All W N 269 (269, 272). (Mortgagee obtaining decree against mortgagor — Execution of decree resisted by another — Suit against latter not barred.) * (1881) 6 Cal 142 (146, 147).

[4] Prior mortgages suing without making the puisne mortgagee a party can separately sue for sale against the puisne mortgagee. (1910) 32 All 119 (123).

[5] A suit by the puisne mortgagee for sale without impleading the prior mortgagee does not bar a suit for redemption of the prior mortgage. (1897) 19 All 379 (380, 381, 383, 384, 385) (F B).

[But see (1907) 10 Oudh Cas 145 (149) (S B).]

[6] A suit for redemption against a mortgagee is no bar to suit for contribution against a co-mortgagor. (Vol 16) 1929 All 696 (697).

[7] A suit for accounts and profits against a cosharer does not bar a suit for profits against the same person as lambardar. (1910) 7 All L Jour 526 (528).

[8] Separate suits are maintainable against each of joint promisors. (1910) 33 Mad 317 (322) * (1884) 10 Cal 924 (927, 928) * (1880) 5 Cal 291 (294).

[9] A suit for profits by plaintiff in respect of his own share is no bar to a suit by him as the assignee of the profits due to another cosharer. (1912) 10 All L Jour 469 (471).

[10] Suit against a mother in her personal capacity on a mortgage executed by her on behalf of her son is no bar to a suit against the son on the basis of the mortgage. (Vol 3) 1916 Mad 459 (460, 461) * (1883) 1883 Pun Re No. 41, page 125 (127).

[11] A suit for specific performance of a contract of sale against A is no bar to a suit for possession against A and B in whose favour A had executed a conveyance. (1902) 6 Cal W N 314 (318).

[12] Auction-purchaser may sue separately different persons in possession of the property. (1903) 27 Bom 379 (388, 389).

29. The previous decision should be on merits. — [1] Where the Judge in the previous suit has refused to adjudicate on a certain matter, a fresh suit in respect of it is not barred. (Vol 5) 1918 All 412 (413) : 40 All 292 * (Vol 12) 1925 Rang 313 (314) * (Vol 11) 1924 Lah 21 (23) : 4 Lah 76 * (Vol 2) 1915 Lah 303 (305) * (Vol 18) 1931 Mad 830 (832) * (1928) 108 Ind Cas 406 (406) (Mad).

[2] Where a previous suit has been dismissed on the ground of technical defect, the bar of this rule does not apply. (Vol 2) 1915 Lah 416 (417) : 1915 Pun Re No. 87 * (Vol 17) 1930 Lah 684 (635).

[But see (Vol 24) 1937 Rang 324 (330).]

30. Different causes of action — Rule inapplicable. —

[1] The rule does not operate as a bar when the subsequent suit is based on a cause of action different from that on which the first suit was based. (Vol 27) 1940 Pat 76 (78) : 18 Pat 789 * (Vol 2) 1915 Mad 888 (888) : 38 Mad 247 * (Vol 20) 1933 Bom 398 (400) : 57 Bom 456 * (1911) 10 Ind Cas 26 (27) (All) * (Vol 16) 1929 All 696 (697) * (Vol 16) 1929 Cal 93 (96) * (Vol 8) 1921 Cal 277 (279, 280) * (Vol 2) 1915 Cal 126 (126, 128) : 41 Cal 825 * (1914) 41 Ind App 142 (148) : 1914 App Cas 618 (P C) * (1888) 15 Cal 800 (808) : 15 Ind App 106 (P C) * (1867) 11 Moo Ind App 551 (605) (P C) * (Vol 17) 1930 Mad 264 (267) * (Vol 15) 1928 Mad 840 (842) * (1903) 26 Mad 760 (766) * (1898) 21 Mad 153 (156, 158) * (1885) 8 Mad 520 (524) : 12 Ind App 116 (P C) * (1890) 14 Bom 31 (55, 56) * (1937) I L R (1937) 2 Cal 651 (660) * (Vol 22) 1935 Lah 672 (676) : 16 Lah 640 (F B) * (Vol 33) 1946 Nag 277 (297) : I L R (1946) Nag 159.

O. 2 R. 2 (contd.)

[2] A cause of action may arise from the same transaction as the cause of action in the previous suit. (1914) 41 Ind App 142 (148) : 1914 App Cas 618 (P O) * (Vol 24) 1937 All 401 (405) : I L R 1937 All 489 * (Vol 28) 1941 Lah 139 (142).

[3] Test is to see whether the claim in the subsequent suit could have been made in respect of the cause of action in the previous suit. (Vol 29) 1942 Cal 407 (409, 410).

[4] A cause of action arising after the original presentation of the plaint which was returned for presentation to proper Court should be deemed to have arisen subsequent to the previous suit. (Vol 27) 1940 P C 70 (78) : 67 Ind App 179 : I L R 1940 Kar P C 149 : I L R (1940) Lah 330 (P C).

31. Suit for possession and another for mesne profits. — [1] A suit for possession does not bar a subsequent suit for mesne profits accrued before the first suit. (Vol 29) 1942 Cal 40 (41) * (Vol 27) 1940 Mad 934 (935) * (Vol 7) 1920 All 302 (302) * (1902) 24 All 501 (503) * (Vol 11) 1924 Bom 368 (368) * (1892) 19 Cal 615 (617) * (Vol 2) 1915 Mad 912 (913) : 38 Mad 829 (FB) * (Vol 8) 1921 Nag 112 (113) : 17 Nag L R 62 * (Vol 13) 1926 Rang 137 (138) : 4 Rang 108 * (1910) 8 Ind Cas 445 (447, 448 (Low Bur) * (1900-02) 1 Low Bur Rul 13 (14).

[But see (Vol 29) 1942 Bom 338 (339) : I L R (1943) Bom 49 * (1895) 17 All 533 (535, 536) * (1881) 3 All 660 (662) (FB). (Suit by usufructuary mortgagee.) * (1906) 9 Oudh Cas 224 (227).]

[2] A separate suit for mesne profits accruing after the institution of a prior suit for possession is maintainable. (1890) 17 Cal 968 (971) * (Vol 18) 1931 Cal 788 (789) : 58 Cal 1040 (Decree in previous suit for possession silent as to future mesne profits — Second suit for such mesne profits is not barred.) * (Vol 19) 1932 All 510 (511) : 54 All 65 (68) * (Vol 18) 1931 All 429 (432) : 53 All 951 (SB) * (Vol 19) 1932 Bom 222 (223, 224) : 56 Bom 292 * (Vol 19) 1932 Lah 448 (449) * (Vol 13) 1926 Mad 1015 (1016) * (Vol 15) 1928 Nag 65 (65). (Partition suit — Subsequent suit for subsequent mesne profits.) * (Vol 12) 1925 Pat 145 (147) * (Vol 18) 1931 Oudh 131 (132) : 6 Luck 243 * (Vol 3) 1916 Low Bur 35 (35) * (Vol 5) 1918 Nag 28 (29) : 15 Nag L R 101 * (Vol 22) 1935 Bom 306 (308) : 59 Bom 454 * (Vol 24) 1937 Mad 849 (851).

[But see (Vol 14) 1927 All 716 (716, 717) : 49 All 597 * (Vol 4) 1917 All 479 (480) : 36 All 61.]

[3] Where both the claims are based on the same allegations of facts, the reliefs cannot be split up. (1881) 3 All 660 (661, 662) (FB).

[4] A claim for mesne profits cannot be split up and the whole of the mesne profits accrued due at the time of the suit should be included. (1886) 12 Cal 482 (484) (PC).

[But see (Vol 10) 1923 Cal 371 (372, 373).]

[5] First suit for mesne profits alone is no bar to a second suit for possession. (1883) 9 Cal 283 (287, 288) * (1909) 1 Ind Cas 644 (645) (Mad).

[But see (Vol 29) 1942 Pesh 9 (10) * (Vol 27) 1940 All 524 (524) : I L R (1940) All 781 * (Vol 26) 1939 All 52 (54) * (1906) 9 Oudh Cas 322 (325) * (Vol 2) 1915 Sind 35 (36) : 9 Sind L R 23.]

[6] Cause of action for possession and for mesne profits though different can be combined in one suit. (Vol 30) 1943 Cal 1 (4) : I L R (1942) 2 Cal 268.

32. Other examples. — [1] Suit for declaration of title and injunction on interference with possession does not bar a suit for declaration and possession. (Vol 17) 1930 Sind 87 (88, 89) * (1912) 34 All 172 (183) * (Vol 6) 1919 Mad 45 (45).

[But see (1910) 8 Ind Cas 9 (16) (All).]

[2] Suit for declaration of right to land dismissed for not claiming possession also — Suit for possession is not barred. (Vol 2) 1915 Mad 888 (888) : 38 Mad 247 * (Vol 16) 1929 All 306 (307) * (1888) 5 All 345 (354) (FB). (NOTE.—In this case the declaration was granted in the first suit; yet it was held it made no difference in principle.) * (1882) 4 All 261 (267) (FB) * (1879) 2 All 356 (357) (FB) * (1886) 12 Cal 291 (293, 294) * (1883) 9 Cal 43 (47) * (1910) 6 Nag L R 81 (82) * (Vol 13) 1926 Rang 123 (123, 124) * (Vol 4) 1917 Low Bur 28 (29) : 9 Low Bur Rul 37 * (1893-1900) 1893-1900 Low Bur Rul 410.

[But see (Vol 9) 1922 Nag 129 (134) : 21 Nag L R 124 * (Vol 10) 1923 All 554 (555).]

[3] Suit for specific performance of agreement to transfer land dismissed — Suit for the return of the consideration money not barred. (1904) 27 Mad 390 (381) * (Vol 10) 1923 All 321 (321) : 45 All 378.

[But see (1898) 8 Mad L Jour 61 (62).]

[4] Dismissal of suit for sale as on a simple mortgage does not bar a suit for possession as on a usufructuary mortgage. (1904) 27 Mad 102 (105).

[5] Where a suit is compromised, a second suit based on the compromise is not barred. (1905) 2 All L Jour 680 (681) * (1898) 2 Cal W N 663 (664) * (Vol 7) 1920 Lah 184 (186).

[6] Distinct trespasses committed at different times give rise to different causes of action. (1900) 10 Mad L Jour 136 (138) * (1884) 6 All 616 (617) * (Vol 11) 1924 Nag 214 (214).

[7] A person whose property had been wrongfully attached in execution, sued for and obtained a decree that the attached property was not liable to attachment and sale under decree—Suit for damages for wrongful attachment is maintainable. (Vol 14) 1927 Oudh 48 (48) * (Vol 6) 1919 Oudh 31 (32).

[8] Suit for declaration of reversionary rights—Subsequent suit for possession is not barred. (Vol 7) 1920 Cal 755 (757) * (Vol 2) 1915 Lah 127 (128).

[9] Suit by a Mahomedan widow for dower—Suit for declaration to possess husband's estate for life according to custom not barred. (1894) 21 Cal 157 (163) : 20 Ind App 155 (PC).

[10] Reversioner's suit for injunction restraining alienations by Hindu widow—Suit for declaration that an alienation by widow is inoperative is not barred. (1889) 16 Cal 98 (102) : 15 Ind App 156 (PC).

[11] A suit for possession of land held under a will, wrongfully deprived of is no bar to a suit for personal property under the will. (1885) 8 Mad 520 (524) : 12 Ind App 116 (PC).

[12] Suit for the wrongful conversion of goods given in a will—Later suit to obtain payment of the legacies without any claim in respect of any of goods to which the former suit related is maintainable. (Vol 12) 1925 P O 105 (108) : 48 Mad 312 : 52 Ind App 214 (P O).

[13] Several alienations of different portions of husband's estate by widow—The reversioner suing for possession after her lifetime can separately sue in respect of each alienation. (Vol 9) 1922 Oudh 171 (175) * (1873) 10 Beng L R 1 (11) : 14 Moo Ind App 176 (PC).

[14] Suit by reversioner to declare alienation by widow not binding — Suit for possession after death of widow not barred. (1910) 32 All 189 (193).

[15] Suit for declaration that property is not liable to attachment and sale is no bar to a suit for possession. (1891) 14 Mad 23 (24, 25) * (Vol 24) 1937 Rang 133 (134) * (Vol 24) 1937 Rang 249 (250).

[16] Suit by Hindu daughter to establish her title to her father's estate in reversion on her mother's death — A suit for possession of specific portion of estate not barred. (Vol 16) 1929 P O 166 (169) : 56 Ind App 267 : 51 All 439 (PC).

O. 2 R. 2 (*contd.*)

[17] A suit to eject the defendant on the basis of a lease is no bar to a suit based on title. (Vol 6) 1919 Mad 743 (745)* (1903) 13 Mad L Jour 475 (476).

[18] Suit of vendee or other transferee of property for possession dismissed—Suit for the return of the consideration money not barred. (1901) 24 Mad 27 (31)* (Vol 20) 1933 Lah 1017 (1017)* (Vol 14) 1927 Mad 273 (275, 276)* (Vol 11) 1924 Cal 553 (562)* (1888) 15 Cal 51 (53)* (Vol 13) 1926 Nag 109 (114); 22 Nag L R 49* (Vol 16) 1929 Pat 241 (241). (Suit by lessor to recover possession of land is no bar to a subsequent suit for refund of rent.)

[See also (Vol 13) 1926 P C 118 (119) (PC).]

[19] Suit for redemption on the basis of one mortgage dismissed—A suit on the basis of another mortgage not barred. (1911) 33 All 302 (305)* (1903) 26 Mad 760 (775)* (1906) 29 Mad 153 (154) (F B).

[20] Suit dismissed for want of cause of action—Second suit on the true cause of action is not barred. (1904) 26 All 501 (503, 504)* (Vol 12) 1925 Lah 459 (460) : 6 Lah 384* (Vol 5) 1918 Mad 78 (81)* (1915) 29 Ind Cas 678 (679) (U P B R) * (Vol 2) 1915 All 404 (405) : 37 All 646.

[21] Suit for redemption and a suit for ejectment on the ground of title are on distinct causes of action. (Vol 27) 1940 Cal 550 (552) : I L R (1940) 1 Cal 544* (1888) 15 Cal 800 (808) : 15 Ind App 106 (PC).

[But see (1896) 6 Mad L Jour 51 (52).]

[22] Suit for enhancement of rent dismissed—Suit for recovery of rent at the original rate not barred. (1888) 15 Cal 145 (149, 150) (F B). (Overruling 9 Cal 919.)

[23] Decree for rent at the original rate—Suit to recover the difference between the rent at the old rate and that at the enhanced rate for the same period not barred. (Vol 15) 1928 Cal 684 (685).

[But see (Vol 12) 1925 Cal 463 (464).]

[24] A promissory note creates a distinct cause of action from the original debt for which the instrument was given. (1914) 41 Ind App 142 (148) : 1914 App Cas 618 (P C).]

[But see (Vol 4) 1917 Lah 220 (222) : 1917 Pun Re No. 68.]

[25] Where several promissory notes are given for portions of the same debt, each promissory note can be sued on separately. (1912) 36 Mad 151 (155, 156)* (1883) 7 Bom 134 (136, 137).

[See also (Vol 22) 1935 Rang 365 (366, 367).]

[But see (1907) 29 All 256 (259).]

[26] Suit for cancellation of a deed of transfer does not preclude suit for possession of the property. (Vol 15) 1928 Oudh 359 (362) : 3 Luck 487.

[But see (Vol 3) 1916 Low Bur 43 (44)]

[27] Where judicial separation has been once obtained on the ground of cruelty and adultery, a new petition on the same facts for annulment of marriage is barred. (Vol 15) 1928 Cal 806 (808) : 56 Cal 166.

[28] Cause of action in respect of claim for arrears of royalty is separate from cause of action for khas possession and mesne profits. (Vol 29) 1942 Cal 40 (40).

[29] First suit for recovery of specific sum—Second suit for rendition of accounts—Causes of action are different. (Vol 28) 1941 All 217 (218).

[30] Separate sale deeds for different considerations provide distinct causes of action. (Vol 27) 1940 Pat 76 (78) : 18 Pat 789.

[31] Suit for share inherited from sister no bar to suit for share inherited from father. (1909) 31 All 557 (571) : 36 Ind App 210 : 13 Oudh Cas 183 (P C).

[32] Separate contracts contained in the same document give rise to distinct causes of action. (1897) 21 Bom 267 (271).

[33] Suit for partition by younger brother of zamin-

dar dismissed as property was impartible—Suit for maintenance not barred. (1901) 24 Mad 147 (157) : 27 Ind App 151 (P C).

[34] Cause of action in a suit for enforcing a mortgage against a person as the absolute owner of the hypotheca is different from that in a suit against him and his coparceners as co-owners of the property. (Vol 31) 1944 Mad 98 (102).

33. "Shall not afterwards sue."—[1] Omission to include any claim or ask for relief does not affect the suit but bars only subsequent proceedings in respect of them. (Vol 25) 1938 Mad 979 (981, 982) : I L R (1939) Mad 317.

[2] There is a difference of opinion where two suits are filed simultaneously as to which of the two suits is barred :

(a) Suit which bears the latter number is barred. (1894) 16 All 165 (172, 173) (F B). (1 All 650, doubted; decision in 1888 All W N 147, held to be wrong.)

(b) The plaintiff should be given the choice to elect. (Vol 13) 1926 Mad 934 (936) : 49 Mad 869.

(c) The two suits should be consolidated and not one of them dismissed. (Vol 30) 1943 Bom 12 (17, 18) : I L R (1943) Bom 104.

[3] The rule does not bar other remedies open to the plaintiff. (Vol 6) 1919 Sind 79 (79) : 13 Sind L R 153* (1898) 21 Mad 286 (287)* (1905) 7 Bom L R 138 (141).

[4] Bar under the rule must be established by the defendant. (Vol 14) 1927 Lah 840 (840, 841)* (Vol 20) 1933 All 852 (853)* (1909) 2 Ind Cas 115 (116) (All)* (1893) 20 Cal 716 (719)* (Vol 5) 1918 Lah 388 (389).

[5] Court will not take up the objection on its own motion. (Vol 2) 1915 Lah 285 (286).

[6] Objection under this rule cannot be taken for the first time in appeal unless the other party is indemnified for the omission to take it as a preliminary point in suit. (1911) 38 Cal 629 : 6 Low Bur Rule 18 : 38 Ind App 140 (PC).

[But see (Vol 19) 1932 All 510 (511) : 54 All 65 (68).]

34. Set-off.—[1] Omission of any portion of set-off claimable under O. 8, R. 2 will bar a subsequent suit in respect of it. (Vol 29) 1942 Mad 530 (531) : I L R (1942) Mad 336 * (1905) 32 Cal 654 (657).

35. Plea in defence not barred.—[1] The rule does not bar a plea in defence. (Vol 27) 1940 Lah 166 (168, 169) * (Vol 20) 1933 Bom 51 (55) : 57 Bom 346 * (1909) 32 All 33 (44)* (Vol 13) 1926 Lah 494 (494) : 7 Lah 297 * (Vol 23) 1936 Mad 473 (476) * (Vol 27) 1940 Rang 29 (31, 32).

36. Insolvency proceedings not suits.—[1] The rule does not enable the Official Assignee to apply to the Insolvency Court for a declaration that the right of a certain creditor of the insolvent to sue for a certain debt is barred. (Vol 12) 1925 Mad 1120 (1120, 1121) : 48 Mad 703.

37. Application to sue in forma pauperis.—[1] Where an application to sue in *forma pauperis* has been rejected it does not amount to a suit and the provisions of this rule do not apply to it. (1899) 21 All 359 (360, 361).

38. Amendment of plaint.—[1] The rule does not preclude the amendment of plaint by the addition of the omitted claim. (Vol 27) 1940 P C 70 (73) : 67 Ind App 179 : I L R (1940) Kar P C 149 : I L R (1940) Lah 330 (PC).

39. Revenue and village Courts.—[1] The rule applies to proceedings in the Revenue Court for the recovery of the rent. (Vol 9) 1922 Cal 101 (103) : 49 Cal 1026* (1883) 5 All 406 (413) (F B). (Rule applies to suits under N. W. P. Rent Act, 12 [XII] of 1881.)

[But see (Vol 3) 1916 All 83 (84) : 38 All 302 (F B).]

[2] The rule does not apply to proceedings in revenue Court for partition. (Vol 3) 1916 All 83 (84) : 38 All 302 (F B) * (Vol 14) 1927 Oudh 493 (499).

3. (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes¹⁰ of Joinder of causes action against the same defendant⁷, or the same defendants jointly⁸; and any of action. plaintiffs having causes of action in which they are jointly interested against the same defendant¹ or the same defendants jointly¹² may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction⁴ of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

[1882—S. 45, paras. 1 and 3; 1877—S. 45; R. S. C. O. 18, R. 1. See S. 99 and Rr. 4 to 6 below.]

O. 2 R. 2 (contd.)

[3] The provisions of the Civil Procedure Code are not applicable to Village Munsif's Courts and hence this rule does not apply to a suit brought in such Courts. (Vol 3) 1916 Mad 544 (546)* (Vol 21) 1934 Mad 99 (100). (But a similar provision is enacted in Madras Village Courts Act in Section 18).

ORDER 2, RULE 3 — SYNOPSIS.

1. Addition of unnecessary parties.
2. Alternative reliefs.
3. Applicability of the Rule.
4. Jurisdiction.
5. Misjoinder of defendants and causes of action.
6. Misjoinder of plaintiffs and causes of action.
7. One plaintiff, one defendant, several causes of action.
8. One plaintiff—Two or more defendants—Causes of action joint against all.
9. Procedure in cases of misjoinder.
- 9a. Revision.
10. Rule presupposes several causes of action.
11. Two or more plaintiffs—One defendant—Plaintiffs jointly interested in the cause of action.
12. Two or more plaintiffs — Two or more defendants.

1. Addition of unnecessary parties. — [1] Suit for pre-emption of several plots sold by different vendors—Vendee same—Joinder of vendors as defendants will not make suit bad for misjoinder as vendor is not necessary party to suit. (Vol 11) 1924 Lah 156 (157) * (1910) 32 All 14 (18). (6 All 106, dissented from.)

2. Alternative reliefs. — [1] A plaintiff can join two reliefs in one suit and claim them alternatively. (1912) 8 Nag L R 7 (10) (Claim on an original contract and a claim on a substituted contract.) * (Vol 5) 1918 Cal 813 (814). (Suit for rent — Alternative claim for money decree against plaintiff's cosharer.) * (1906) 4 Cal L Jour 367 (368). (A claim for easement can be joined in the alternative with a claim on proprietary right.) * (1941) 22 Pat L Tim 196 (199). (Suit for enforcement of the mortgage bond—Prayer in the alternative against the assignor of the bond — There are no distinct causes of action against the mortgagor and the assignor.)

[2] A party may join two or more alternative claims for relief based on inconsistent allegations but is not bound to do so unless such joinder is possible without confusion or embarrassment and without impleading others as parties. (1912) 17 Ind Cas 334 (337) (Oudh)* (Vol 11) 1924 Pat 280 (281). (Inconsistent reliefs are not necessarily to be rejected — Rescission and specific performance of contract in alternative can be claimed.)

[3] Suit by vendee of mortgagee rights against mortgagors—Vendee can implead his vendor as well and ask for relief in the alternative — Suit not barred by O. 1, R. 3—Nor can relief against vendor be said to be premature — Applicability of O. 2, R. 3, is doubtful. (Vol 28) 1941 Oudh 56 (58) : 16 Luck 113.

3. Applicability of the Rule.—[1] Order 2, R. 3, which permits of joinder of causes of action must be so interpreted as not to clash with O. 1, R. 3. (1911) 7 Nag L R 130 (131).

[2] Order 2 R. 3 is subject to the provisions of O. 2 R. 6. (Vol 29) 1942 All 387 (389).

[3] Different causes of action against different defendants also can be joined if case can be brought within O. 1, R. 3. (Vol 13) 1926 Sind 66 (68) : 19 Sind L R 395.

[4] Joinder of parties and causes of action—Joint interest or same transaction is necessary. (Vol 6) 1919 Low Bur 121 (122).

[5] Misjoinder of causes of action and parties—Test is whether common question to be tried between parties is disclosed in plaint. (Vol 6) 1919 Pat 381 (382)* (1905) 7 Bom L R 925 (927).

[6] Order 2 R. 3 applies to notice under S. 163, U. P. Tenancy Act. (1946) 1946 All W R (Rev) 25 (26).

[7] Order 2, R. 3 is not applicable to a suit for arrears of rent under Agra Tenancy Act. A separate suit should be brought for the arrears of rent of separate holdings, though held by the same defendant. (1907) 29 All 18 (19).

4. Jurisdiction.—[1] Suit on different pro-notes by same defendant—Value of suit for purposes of jurisdiction is aggregate value of all causes of action comprised therein. (Vol 3) 1916 Lah 363 (363) : 1915 Pun Ra No. 100.

[2] Rule 3 is subject also to condition that Court has jurisdiction as to all causes of action involved. (Vol 29) 1942 All 387 (389) : I L R (1942) All 862.

5. Misjoinder of defendants and causes of action.—[1] Under O. 2, R. 3, a plaintiff cannot join in the same suit several causes of action against several defendants unless they are all jointly interested in each separate cause of action. (Vol 6) 1919 Low Bur 121 (122) * (1883) 5 All 163 (172) (F B) (Mahmood J. dissenting) * (1911) 35 Bom 297 (301)* (Vol 14) 1927 Cal 93 (95) : 27 Cri L Jour 1195*(Vol 27) 1940 Mad 903 (904). (Suit for injunction restraining mortgagee from selling mortgaged property and for scaling down mortgaged debt under Madras Agriculturists' Relief Act—Mortgaged property improperly sold — Purchaser cannot be impleaded on ground of fraud—Cause of action against him is entirely different.) (Vol 5) 1918 Mad 681 (692) : 40 Mad 365 (F B)* (Vol 6) 1919 Low Bur 51 (52).

[2] Mortgages of same property to same mortgagee.—Mortgagors different — One mortgage suit against both does not lie — Such mortgagors cannot be joined in one suit under O. 1 R. 3 or O. 2 R. 3. (Vol 24) 1937 Nag 99 (100) : I L R (1937) Nag 349.

[3] Suit for specific performance of contract by member of Hindu undivided family to sell his share—Joinder of other members as defendants amounts to misjoinder. (Vol 5) 1918 Mad 681 (687) : 40 Mad 365 (F B).

[4] One joint suit against cashier for accounts and against Sadar Naib for negligence is bad. (Vol 11) 1924 Cal 511 (511).

[5] Suit for declaration that sale of partnership is fraudulent and null and void as against plaintiff and for recovery of assets from purchasers and for account of partnership from other partners is bad for misjoinder. (Vol 1) 1914 Sind 70 (72) : 8 Sind L R 69.

[6] Suit for recovery of money from a person and for removal of trustee and for accounts is bad for misjoinder of causes of action. (1910) 4 Sind L R 152 (158).

O. 2 R. 3 (*contd.*)

[7] A suit seeking possession by redemption against one set of defendants and possession by ejectment against other defendants could not be allowed. (Vol 2) 1915 All 106 (106, 107).

[8] A right to the partition of a residuary *mahal*, and a right to the division of a part of a *taluq*, which was formerly incapable of partition, are different causes of action and where the parties concerned in a claim under the first right are less numerous than those concerned in the second one, a suit against them is bad for misjoinder of parties and causes of action. (1913) 17 Cal W N 128 (129).

[9] Where landlord sued to eject several tenants in possession of different parcels of land, making them all defendants in one and the same suit, and the litigation was conducted as though the defendants were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the defendants. (Vol 7) 1920 P C 67 (70) : 47 Ind App 76 : 43 Mad 567 (P C).

[10] Suit for possession against one set of defendants and for damages for dispossession against another set is not bad for misjoinder of causes of action. (Vol 6) 1919 Lah 280 (282) : 1919 Pun Re No 10.

6. Misjoinder of plaintiffs and causes of action.

[1] Two plaintiffs — Two causes of action — Defendants same — Joinder cannot be allowed. (Vol 10) 1923 Pat 411 (412, 413) * (Vol 12) 1925 Bom 342 (342). (Five persons making five contracts with the same defendant — One suit by all five on the contract is not maintainable.)

7. One plaintiff, one defendant, several causes of action. — [1] Under O. 2, R. 3 a plaintiff can combine in one suit against a defendant several causes of action. (Vol 3) 1916 Lah 363 (363) : 1915 Pun Re No. 100 * (Vol 6) 1919 All 79 (80) : 42 All 64. (Claim for declaration to half share in cultivated holding — Claim for mesne profits can be joined and decreed.) * (Vol 20) 1923 Cal 165 (168). (Claims for work done and reimbursement for expenses incurred for being ready for other promised work are maintainable.) * (Vol 6) 1919 Cal 343 (344). (Two causes of action against same defendant.) * (Vol 28) 1941 Mad 786 (788).

[2] A plaintiff can join a claim for a share of profits as co-sharer with a claim for arrears of revenue, etc., as lambardar in one suit. S. 108 of the Oudh Rent Act does not contain anything which would make this improper or unlawful and under O. 2, R. 3, read with S. 136 of the Oudh Rent Act, the plaintiff can unite in the same suit the two causes of action. (Vol 6) 1919 Oudh 181 (182) : 22 Oudh Cas 183.

[3] Person sued in different capacities is not same defendant. (Vol 6) 1919 Low Bur 51 (52) * (Vol 15) 1928 Cal 199 (200, 202) : 55 Cal 164. (Plaint should be treated as comprising two suits and they should be tried separately.) * (Vol 15) 1928 Mad 764 (769).

[4] Cause of action for personal decree upon promissory note is incompatible with cause of action upon mortgage. (Vol 22) 1935 Rang 315 (315).

[5] Different claims in one suit — More than one period of limitation can be applied. (Vol 28) 1941 Mad 786 (787).

8. One plaintiff — Two or more defendants — Causes of action joint against all. — [1] Order 2 R. 3 allows a plaintiff to join several causes of action and subsequent causes of action arising therefrom against the same defendants. (1907) 17 Mad L Jour 515 (515, 516) * (Vol 10) 1923 All 306 (310).

[2] The word 'jointly' in O. 2, R. 3 shows that all the defendants in a suit must be jointly liable in respect

of each and all of the causes of action, united against them by the plaintiff in the same suit. (1910) 34 Bom 358 (366).

[3] Question of multifariousness can only be decided on allegations made in plaint — Test is to see whether there is a common question to be tried between the parties on the facts disclosed in the plaint. (Vol 6) 1919 Pat 381 (382, 383) * (1884) 6 All 106 (108).

[4] Suit for recovery of money against several persons alleged to have been benefited by loan — Suit is not bad for multifariousness. (Vol 6) 1919 Pat 381 (383).

[5] Single suit by the sons on the death of their father for recovery of different pieces of property from different defendants claiming under different titles is not bad. (1907) 29 All 267 (272).

[6] One suit for contribution for satisfaction of two tent decrees satisfied at different times giving two separate causes of action can be brought. (Vol 6) 1919 Cal 343 (344).

[7] Suit for declaration against mortgagor that plaintiff is entitled to mortgage money, and against other parties for declaration that plaintiff and not the other parties are entitled to mortgage moneys — Separate suits are not necessary. (Vol 8) 1921 Cal 653 (655).

[8] Claims in one suit for possession of land in tenant's holding and also those encroached upon, are sustainable. (1910) 7 Ind Cas 86 (88) (Cal).

[9] Where an alienor alienates property to various alienees on different occasions a suit to set aside these alienations can be brought against any such alienee or all the alienees may be made co-defendants. (Vol 8) 1916 Bom 310 (311) : 40 Bom 351 * (Vol 28) 1941 All 209 (211) : 1 L R (1941) All 370.

[10] Suit by one co-owner against tenants, impleading the other co-owners as party defendants on the ground that they had collected the entire rent is not bad for multifariousness. (1909) 19 Mad L Jour 399 (400).

[11] The plaintiff is entitled to claim recovery of possession of the land as a whole, and all persons who oppose him, whatever be their rights, are proper parties to the suit. (1913) 18 Ind Cas 852 (858) (Cal) * (1902) 29 Cal 871 (880, 881).

[12] In a suit brought to set aside an order under O. 21, R. 51, all parties to the distribution ought to be made parties to the suit. (1886) 13 Cal 159 (161, 162).

[13] Suit for possession of immovable property — Part of property usufructually mortgaged by defendant 1 to defendant 2 — Plaintiff alleging that defendant 1 had no right to make such mortgage — Both defendants maintaining such title — Suit held was not bad for misjoinder. (1899) 11 All 33 (35).

[14] Hindu boy dying leaving as his heirs his mother and brothers — Property situate in several districts — Mother suing for declaration of title to her share in property impleading her sons and lessee of one of them — Allegation that plaintiff's right was prejudiced by lease of property — Held there was no misjoinder. (1913) 21 Ind Cas 438 (441, 442) (Cal).

9. Procedure in cases of misjoinder. — [1] The mere fact of misjoinder is not by itself sufficient to entitle the defendant to have the suit set aside. (Vol 24) 1937 P C 42 (45) : 16 Pat 149 (PC) * (Vol 4) 1917 Mad 517 (517).

[2] Misjoinder — Amendment of plaint should be allowed. (Vol 5) 1918 Mad 681 (684) : 40 Mad 365 (FB).

[3] Plaintiff joining in one suit two independent claims — Court should not try suit in that form — It should ask plaintiff to elect to proceed with one of the claims. (Vol 23) 1936 Pat 142 (143) * (1906) 4 Cal L Jour 367 (368).

[4] Merits of case satisfactorily disposed of by trial Court — No objection to misjoinder can be given effect to in appeal. (Vol 24) 1937 P C 42 (45) : 16 Pat 149 (PC).

Only certain claims to be joined for recovery of immoveable property.

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except —

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

[1882 — S. 44; Rule (a); 1877 — S. 44A; 1859 — S. 10: R. S. C., O. 18, R. 2.]

O. 2 R. 3 (contd.)

[5] Suit should not be dismissed for misjoinder in second appeal—Case should be remanded with direction that plaint be returned for amendment. (1909) 3 Sind L R 108 (113).

9a. Revision. — [1] Powers of revision can be exercised in cases where the lower Court passes orders as to misjoinder of causes of action. (Vol 9) 1922 Mad 174 (175) & (Vol 9) 1922 Mad 436 (436). (High Court can reverse an order directing the plaintiff to elect whether he will proceed with one or the other of the two causes of action joined in his plaint.) & (Vol 9) 1922 Mad 332 (333, 334): 45 Mad 194.

10. Rule pre-supposes several causes of action.—

[1] Though suit can be brought with respect to separate holdings consequent decrees must be moulded so as to apply distributively to separate holdings. (Vol 16) 1929 P C 171 (174): 56 Ind App 238 (PC).

[2] A suit by a Malabar stanom whose right to the office of stani arose in 1903, for a declaration that previous stani was not validly appointed in 1895, and for possession of the property is not bad for misjoinder of causes of action as the former relief is only ancillary to the latter main relief. (Vol 2) 1915 Mad 217 (219, 220).

[3] In a suit for redemption the mortgagor can join to his claim, a claim for rent paid by him to mortgagee's use. (Vol 27) 1940 Pat 579 (579).

[4] Suit for accounts by one partner against others—Against one defendant, plaintiff asking relief only as regards sum thrown into business and got from previous business carried on by plaintiff and that defendant—Suit is not bad for misjoinder of causes of action. (Vol 11) 1924 Pat 65 (66).

[5] Where each of three distinct agreements between the same parties and relating, to all intents and purposes, to one transaction contained a provision to refer to arbitration, the plaintiff may ask the Court in one application to take action with respect to all the agreements. (1911) 1911 Pun L R No. 85, page 352 (355): 1911 Pun Re No. 35.

[6] Where a Hindu brought suit for partition against his father, brother and others to whom it was alleged that father had improperly alienated a number of parcels of the said property at different times, held the proper order under O. 2, R. 3 would be to have separate trial for every alienation. (1885) 8 Mad 75 (76, 77).

[7] Joinder of several reliefs arising out of same cause of action is not joinder of several causes of action. (Vol 16) 1929 Bom 51 (53).

11. Two or more plaintiffs — One defendant — Plaintiffs jointly interested in the cause of action. —

[1] A plaint presented by two or more plaintiffs claiming different reliefs against the defendant is not improperly framed nor is it bad for misjoinder of causes of action. (Vol 1) 1914 Mad 256 (258).

[2] A single suit for maintenance brought by a patricide, his mother and brother is not bad for misjoinder of parties and causes of action. (1913) 18 Ind Cas 764 (765) (Cal).

[3] In a suit for possession on the ground that the defendant wrongfully encroached upon the disputed land, if a purchaser from a co-sharer joins the others as plaintiff the suit is not open to the objection of misjoinder of parties or of causes of action. (1912) 16 Ind Cas 623 (624) (Cal).

[4] Persons seeking individual reliefs — They can join in same suit if investigation is likely to be identical to a great extent if separate suits are brought. (Vol 15) 1928 Cal 92 (93).

[5] In a suit for declaration by several tenants against one landlord, that their holdings were fixed rate and that the decrees obtained by the landlord against them for rent were inoperative, there are as many causes of action as there are holdings and decrees. (Vol 6) 1919 Pat 479 (480): 4 Pat L Jour 297.

[6] One of two widows of a Hindu and her adopted son suing as co-plaintiffs to recover whole family estate if adoption is held valid or in alternative one half of share for herself alone — Suit held not maintainable. (1883) 6 Mad 239 (242).

12. Two or more plaintiffs—Two or more defendants. — [1] Several plaintiffs deriving titles from different sources, some by purchase and some by inheritance, and having between them, the entire sixteen annas share in the property of which they were possessed by defendants and against whom they are jointly interested may bring one suit against defendants for possession of property. (1912) 16 Cal L Jour 1 (2).

[2] Where plaintiffs as heirs claimed possession of different portions of property in possession of different persons, who had also created mortgages over them, held it was proper to bring a separate suit against each usurper joining his mortgagee. (1901) 1901 All W N 115 (115).

ORDER 2, RULE 4 — SYNOPSIS.

1. Scope of rule.
2. Suit must be for recovery of immovable property.
3. Leave of Court.
4. Clause (a).
5. Clause (c).

1. Scope of rule. — [1] O. 2, R. 4 prohibits not the joinder of several causes of action entitling a plaintiff to the recovery of immovable property, but a joinder with such causes of action of causes of action of a different character except as excepted in the Rule. (1882) 5 Mad 161 (162, 163) & (1895) 17 All 274 (277) & (Vol 22) 1935 Pesh 161 (163). (Mortgagee of share in property purchasing share in execution of his decree—Suit by him for possession of share by partition—He can also claim rendition of account.)

[See also (Vol 12) 1925 Pat 674 (675). (A plaintiff may join as many causes of action as he pleases subject to provisions of O. 2, R. 4.)]

[2] Rule 4 is only permissive. (Vol 6) 1919 Nag 25 (26): 16 Nag L R 91.

5. No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

[1882—S. 44, Rule (b); R. S. C., O. 18 R. 5.]

O. 2 R. 4 (contd.)

[3] Rule 4 has to be read with R. 3 of O. 2. (Vol 33) 1946 Cal 357 (364).

[4] Clause 14, Letters Patent (Bombay), should be construed consistently with the provisions of Rr. 3 and 4 of O. 2. (Vol 16) 1929 Bom 100 (103) : 53 Bom 25. (Two or more causes of action arising within the jurisdiction of High Court can be joined together without any leave of Court.)

2. Suit must be for recovery of immovable property. — [1] In order that R. 4 may apply, suit must be one for recovery of immovable property. (1903) 30 Cal 369 (384) (S B).

[2] Where one of the properties claimed in the suit is a mortgage-deed, the suit is not one to recover immovable property. (1912) 15 Cal L Jour 258 (262).

[3] Suit upon mortgage for recovery of money and claim for arrears of rent on lease of mortgaged property executed by mortgagor — Suit is not one for recovery of immovable property. (1891) 14 Mad 284 (286).

[4] Suit for recovery of land with claim for declaration of plaintiff's right of way — Right of way may be considered as immovable property. (1909) 9 Cal L Jour 336 (338, 339).

3. Leave of Court. — [1] Absence of leave under O. 2, R. 4 is not a ground on which a decree can be reversed or varied. (Vol 28) 1941 Bom 247 (250) : I L R (1941) Bom 361.

[2] Leave of the Court may not be express and no express application therefor is necessary. (Vol 11) 1924 Pat 613 (615) : 3 Pat 244.

4. Clause (a). — [1] Rule 4 distinctly recognizes that cause of action for ejectment is distinct from cause of action for mesne profits. (Vol 18) 1931 Pat 233 (233) : 10 Pat 329.

[2] Rule 4 only permits a claim for rent or mesne profits being joined to a suit for recovery of land. (Vol 6) 1919 Nag 25 (26) : 16 Nag L R 91.

[3] Claim for mesne profits is maintainable in absence of claim for recovery of possession. (Vol 18) 1931 Pat 233 (233) : 10 Pat 329.

5. Clause (c). — [1] The new clause (c) has been inserted in order to avoid the possibility of mistake and to make it clear that there is nothing irregular in seeking to recover in one suit immovable and moveable property if the cause of action is the same in both. (Vol 1) 1914 Lah 121 (123) : 1914 Pun Re No 4.

[2] Suit for possession and rents of immovable properties owing to dispossession by defendants—Case falls under cl. (c). (Vol 19) 1932 P C 216 (227) : 59 Ind App 331 : 59 Cal 1399 (P C).

[3] Administration suit—Claim to movable property as well as immovable property based on same cause of action — Two claims can be joined. (Vol 14) 1927 Bom 470 (471) : 51 Bom 800.

[4] Claim for administration and partition based on same cause of action — O. 2, R. 4 is not contravened. (Vol 32) 1945 Sind 11 (20) : I L R (1944) Kar 325.

[5] Suit for possession — Different claims made in consequence of separate orders in respect of different parcels of land — But all claims based on same cause of action — Suit is permissible without leave of Court. (Vol 22) 1935 Sind 129 (131).

[6] Suit to recover possession and mesne profits — Receiver taking possession of property in suit — Plaintiff

amended so as to include claim for damages for period after Receiver took possession — Claim held fell within cl. (c) of R. 4. (Vol 33) 1946 Cal 357 (364).

[7] Claim for damages cannot be combined with suit for recovery of immovable property. (1907) 17 Mad L Jour 135 (139).

[8] Suit for specific performance of contract for sale of immovable property with prayer for recovery of possession — Strictly speaking, leave of Court is necessary, though in practice, such leave has not been insisted upon. (Vol 28) 1941 Bom 247 (250) : I L R (1941) Bom 361.

[See also (Vol 5) 1918 Mad 681 (692) : 40 Mad 365 (FB). (Two causes of action, one for specific performance, other for partition and possession — Question of joinder depends upon O. 1, Rr. 3 and 5 and also O. 2, Rr. 3 and 4) * (Vol 7) 1920 Pat 89 (90) : 5 Pat L Jour 314. (Suit for specific performance of contract of sale — Possession can also be claimed if agreed upon.)]

[9] Issue as to paramount title of persons other than mortgagees may be raised and tried in a redemption suit. (Vol 11) 1924 Pat 613 (615) : 3 Pat 244.

Order 2, Rule 5—Note 1.

[1] The executors, administrators and heirs mentioned in this rule, while acquiring title from the deceased in the same manner as legatees and next-of-kin, they, in addition, represent him. This view is sanctioned by the concluding words of the rule. (1907) 31 Bom 105 (110, 111).

[2] It is contrary to the principles of O. 2, R. 5 to attach money in the hands of an executor, administrator or heir as such, in execution of a decree against them personally, though the executor is a legatee and the money in his hands is due to him personally as legatee. (Vol 4) 1917 Low Bur 17 (18).

[3] Promissory note in favour of A — Suit by only son for sum as surviving coparcener or in alternative as sole heir and legal representative of his father—Two claims cannot be joined. (Vol 22) 1935 Bom 343 (344) : 59 Bom 573.

[4] The word "heir" in this rule means an heir suing or being sued in a representative capacity who, represents the estate of a deceased person. (1896) 18 All 256 (259).

[5] Where A sued the executors of B for the property in their possession on the ground that A inherited the property from B, it was held that the claim of A is not as an heir but in his own and personal right. (1907) 31 Bom 105 (110, 111).

[6] The word "estate" in the rule means not only the "estate" rightly and properly held by executors but also the "estate" in its physical sense, so that a claim against an executor as such can be joined with a claim against him personally when both the claims arise in reference to the same estate. (Vol 5) 1918 Cal 870 (873).

[7] The claim of a Hindu widow of a deceased undivided coparcener for maintenance against surviving coparceners is not against the estate of the deceased husband. (Vol 1) 1914 Bom 193 (195) : 38 Bom 120.

[8] Suit for construction of will and letters of administration—Claim for certain ornaments not belonging to the estate of the testator but of which possession was obtained by executors as such — Plaintiff need not be asked to elect. (Vol 4) 1917 Cal 662 (663).

6. Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

[1882—S. 45, para. 2 and Ss. 46, 47; R. C. S., O. 18 R. 1.]

7. All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

[See S. 99, O. 1 Rr. 9 and 13.]

Provincial Amendments.

Rule 8—LAHORE

Add the following rule to Order 2 :—

"8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in R. 18 of O. 6 and as required by the provisions of the Court-fees Act." [12-5-1909]

N.W.F.P. (Peshawar)

Same as that of the Lahore High Court.

O. 2 R. 5 (contd.)

[9] Suit for dissolution of partnership and for accounts during the period of the existence of plaintiff's father's interest and his own and for a decree for amount found due — That is for two accounts one for the transactions of the partnership or partnerships between his father and defendants to which he was entitled as administrator of the father's estate, another for the transactions of the partnership of which he also claimed the dissolution between himself and the defendant to which he was personally entitled—*Held* joinder of claims did not offend against O. 2, R. 5. (Vol 9) 1922 Mad 436 (436).

[10] Administration suit and a suit for accounts of partnership between deceased and executor can be joined — Other partners are not necessary parties. (Vol 14) 1927 Bom 470 (472, 473) : 61 Bom 800.

Order 2 Rule 6 — Note 1.

[1] Order 2, R. 6 does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been properly joined in one suit and the causes of action so joined cannot be conveniently tried together. (Vol 25) 1938 Rang 420 (422) : 1938 Rang L R 397 & (Vol 11) 1924 All 720 (721). (Under Agra Tenancy Act different suits must be filed in respect of different holdings.)

[But see (Vol 1) 1914 Cal 795 (795). (The rule as to separate trials applied as to a case of mis-joinder.)]

[2] The provisions of O. 2, R. 6 are meant to apply to cases in which questions arise as to the joinder or severance of several causes of action against the same defendant. ('84) 8 Bom 616 (618) & (1904) 27 Mad 80 (83).

[3] Rule 6 is an enabling rule. (Vol 28) 1941 Oudh 56 (58) : 16 Luck 113.

[4] Rule 6 is a rule of expediency and convenience. (Vol 26) 1939 Nag 256 (257) : I L R (1940) Nag 63.

[5] Where it appears to the Court that any causes of action cannot be conveniently tried or disposed of together, the Court may order separate trials. (Vol 15) 1928 Mad 764 (767) & (Vol 25) 1938 All 86 (87, 88) : I L R (1938) All 153. (Suit for possession, mesne profits and debt pending at date of Collector's orders under S. 6, U. P. Encumbered Estates Act — Suit regarding possession and mesne profits should not be stayed — With regard to claim for debt separate trial should be ordered and stayed.) & (Vol 25) 1938 Lah 658 (671).

(Proceedings under S. 235, Companies Act, against certain persons—Matters alleged against some of them entirely different from those alleged against others — Claims against all cannot be tried jointly on principles underlying O. 2, R. 6.) & (1885) 8 Mad 75 (76). (Suit against several alienees.)

[6] Whether a trial would be convenient or not is a matter which has to be determined on the facts of each case and no hard and fast rule of an absolute character can be laid down. (Vol 26) 1939 Nag 256 (257) : I L R (1940) Nag 63.

[7] If facts alleged in the plaint arise out of facts that are common to both the causes of action joined in the suit, the Court should not exclude one of them on the ground that it would not be convenient to try those two causes of action together. (Vol 3) 1916 Cal 49 (50) & (Vol 15) 1928 Cal 514 (516). (Plaintiff suing several defendants—Defendant 1 was sued for removal from office of shebait — Suit against others for possession of debutter property separately purchased—Plaintiff should not be compelled to bring separate suits.)

[8] In cases where the Court orders separate trials, it should deal with separate causes of action as sub-suits under the title and number of the principal suit from which they spring. (1884) 8 Bom 616 (619).

[See (Vol 28) 1941 All 209 (211); ILR (1941) All 370. (Under O. 2, R. 6, the plaintiff should be given an opportunity to amend his plaint, so that allegations against each set of defendants may be separately set out and issues as to each transaction may be framed, thus enabling the Court to try the suit in sections, each section forming part of the same proceeding.)]

[9] Order 2, R. 6, does not contemplate the filing of separate plaints by the plaintiff. (Vol 28) 1941 All 209 (211) : I L R (1941) All 370.

[10] Rule 6 is enabling rule — Fact that Court did not choose to avail of R. 6 is no ground for interference in second appeal. (Vol 28) 1914 Oudh 56 (58) : 16 Luck 113.

Order 2, Rule 7—Note 1

[1] Objection as to misjoinder must be taken in Court of first instance and cannot be taken for the first time in appeal. (Vol 8) 1921 Cal 368 (371) & (Vol 19) 1932 Bom 595 (595, 596) & (1903) 5 Bom L R 185 (186) & (Vol 5) 1918 Cal 685 (686) & (1910) 11 Cri L Jour 320 (324) (Cal). (Case under Legal Practitioners Act — Objection as to mult

ORDER III.

RECOGNIZED AGENTS AND PLEADERS

1. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader^{[appearing, applying or acting, as the case may be], on his behalf :}

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

[1882—S. 36; 1877—Ss. 36, 49, 50, 417, 418, 435; 1859—Ss. 26, 16.]

[a] *Substituted* by the Code of Civil Procedure (Second Amendment) Act, 1926 (22 [XXII] of 1926), Section 2 for "duly appointed to act".

O. 2 R. 7 (*contd.*)

farioussness will not be allowed for the first time in appeal or revision.) * (1869) 2 Beng L R 341 (343) * (Vol 1) 1914 Lah 56 (59) : 1915 Pun Re No. 18.

[2] Misjoinder of causes of action and parties—Want of jurisdiction—Pleas not raised in trial Court—Decree is not to be reversed. (Vol 2) 1915 Mad 320 (320) * (Vol 5) 1918 Cal 685 (686).

[3] Suit bad for misjoinder — Defect is not fatal to suit unless plaintiff refuses to elect cause of action to be proceeded with. (Vol 29) 1942 Cal 69 (70) : I L R (1942) I Cal 235.

[4] An objection on the ground of misjoinder of causes of action being of a dilatory character and quite beside the merits will be deemed to have been waived if not taken at the proper time. (Vol 18) 1931 Pat 64 (68) : 10 Pat 234 * (Vol 15) 1928 Mad 764 (771). (Misjoinder noticed at a late stage—Even Court should not strike out issues.)

[5] Objection raised but not pressed will be deemed to have been waived. (Vol 14) 1927 Bom 470 (471) : 51 Bom 800 * (Vol 15) 1928 Lah 289 (290).

Order 3, Rule 1 — Note 1.

[1] Act in Court must be either by party himself or by authorized agent or by pleader authorized by proper vakalatnama. (Vol 21) 1934 Pat 290 (291).

[2] Application for stay of proceedings — Party can apply through pleader unless otherwise directed. (Vol 28) 1941 Nag 205 (206) : I L R (1942) Nag 258.

[3] A lunatic who has not been so adjudged may appear either in person or through vakil. (1881) 7 Cal 242 (243, 244).

[4] Order 6, Rr. 14 and 15 are exceptions to O. 3 R. 1 — Applicability of O. 6, R. 14—Absence of principals of firm temporary—Munim gumashta, orally authorised and instructed to do everything necessary in connexion with business and expressly authorised orally to take necessary steps in regard to pending arbitration to which firm was party — Application to set aside award signed and verified by Munim held competent. (Vol 30) 1943 Cal 18 (15).

[5] Presentation of every document in Court must be governed by O. 3, R. 1 — O. 41, R. 1 is combination of S. 26 and O. 3, R. 1 — Presentation of plaint, memo of appeal or application to Munsarim of Court is "act in any Court" within meaning of O. 3, R. 1 — Application under Sch. 2, Para. 20 presented by party's counsel — Counsel's certificate of practice expiring before date of presentation and renewed only after aforesaid date — Presentation of application is invalid. (Vol 28) 1941 Oudh 169 (17, 172).

[6] Attorney cannot appear for client for limited purpose only — Nor does O. 3, R. 1 authorise so doing (Vol 21) 1934 Bom 450 (451, 452).

[7] Party present — Pleader reporting no instructions — Party taking no further part in proceedings—Dismissal is decree *ex parte*. (Vol 13) 1926 Mad 971 (971, 973) * (Vol 15) 1928 Mad 234 (234).

[8] Defendant's pleader on date of final hearing praying for adjournment — Adjournment refused—Pleader reporting "no instructions"—Defendant held was absent and *ex parte* decree under O. 9, R. 6 could be passed. (Vol 24) 1937 All 347 (348) * (Vol 18) 1931 All 703 (704).

[9] A decree dismissing a suit in the presence of the pleaders of a party is not within O. 9, R. 9 as there is no default of appearance. The personal appearance of the party is not necessary. (Vol 5) 1918 Pat 259 (259) * (Vol 14) 1927 Pat 291 (292) : 6 Pat 383.

[10] Pleader not duly instructed is deemed to be absent, even though the pleader is present in Court. (Vol 11) 1924 Bom 139 (139).

[11] Pleader present but only applying for an adjournment only which is refused — There is no appearance within the Code. (Vol 14) 1927 Rang 46 (47, 48) : 4 Rang 408 * (Vol 2) 1915 Mad 16 (17) * (1913) 24 Mad I Jour 235 (238) * (1909) 3 Sind L R 208 (211, 213) (F B) (Hearing begins when application for adjournment is disposed of.)

[See (Vol 13) 1926 All 729 (730).]

[12] For appearance by party it is enough if party is present in Court — Plaintiff appearing by pleader as well as in person — Pleader withdrawing on refusal of adjournment—Party must be deemed to have appeared. (Vol 22) 1935 Rang 123 (125, 126).

[13] A Court has power to direct a party in person under O. 3, R. 1 and on his failure to appear he may be declared *ex parte* under O. 9, R. 12 though his vakil may be present in Court. (Vol 5) 1918 Mad 1256 (1257) : 41 Mad 256.

[14] Except for very good reasons party should not be ordered to appear on application of other party under O. 3, R. 1—The fact that one party desires the presence of the opposite party for the purpose of examining him as a witness is no good reason — Proper procedure is under O. 16. (Vol 20) 1933 Mad 821 (822).

[15] Party though minor or of unsound mind can be ordered to appear in person — Order to appear served on guardian is good and on failure order under O. 9, R. 12, can be passed. (Vol 7) 1920 Mad 213 (214).

[16] One of several plaintiffs ordered to appear in person — Such plaintiff failing to appear — Dismissal of whole suit is not justified. (Vol 6) 1919 Pat 36 (37) : 4 Pat I Jour 152.

[17] Code empowering party to act through recognized agent — Court not requiring party to do same in person — Court cannot arbitrarily reject that act and mulct party in costs — High Court can interfere under S. 115 (c). (Vol 28) 1941 Nag 205 (207) : I L R (1942) Nag 258.

2. The recognized agents of parties by whom such appearances, applications and acts may *Recognized agents.* be made or done are—

- (a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

[1882—S. 37; 1877—S. 37, 1859—S. 17B.]

Provincial Amendment

BOMBAY

Clause (a) shall be read as follows :

“Persons holding on behalf of such parties either (i) a general power-of-attorney, or (ii) in the case of proceedings in the High Court of Bombay an Attorney of such High Court or an Advocate, and in the case of proceedings in any district, any such attorney or any Advocate, or a Pleader to whom a sanad for that district has been issued, holding the requisite special power of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them or him to make and do such appearances, applications and acts on behalf of such parties.” [27-11-1936]

3. (1) Processes served on the recognized agent of a party shall be as effectual as if the same *Service of process* had been served on the party in person, unless the Court otherwise *on recognized agent.* directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

[1882 — S. 38 ; 1877 — S. 38 ; 1859 — S. 17.]

Order 3, Rule 2—Note 1.

[1] Person holding power-of-attorney is a recognised agent, and can make an application for execution. (Vol 16) 1929 Lah 759 (760)* (1886) 12 Bom 68 (71).

[2] Rules framed under S. 46A of Punjab Courts Act cannot in any way abrogate, modify, or alter the rules contained in O. 3 Rr. 1 and 2. (Vol 23) 1936 Lah 894 (895).

[3] Order 6, R. 14 is to be utilised only when an absence is temporary or for some good cause, and not when circumstances arise as indicated in this rule, namely that the person by whom suit is brought is resident permanently outside the jurisdiction of the Court. (Vol 30) 1943 Cal 13 (15).

[4] Agent authorized to conduct judicial proceedings has no right of audience. (Vol 24) 1937 Mad 937 (938): 1 L R (1938) Mad 12 (F B)* (Vol 21) 1934 Cal 563 (563): 61 Cal 324* (Vol 3) 1916 Cal 181 (181)* (Vol 23) 1936 Oudh 261 (261): 12 Luck 123.

[5] When an agent files a suit with the knowledge and by the authority of the plaintiff, it is unimportant as to how the plaint was filed or signed. (Vol 14) 1927 All 514 (515).

[6] Filing of a plaint by one who is not a recognised agent, being purely a matter of technical objection not affecting the merits of the case or the jurisdiction of the Court does not entitle a dismissal of the suit. (1871) 15 Suth W R 245 (245)* (Vol 26) 1939 Rang 162 (164).

[7] Plaint signed and verified by agent — Leave to sign and verify granted only subsequently — Defect is not fatal. (Vol 12) 1925 Mad 660 (668, 669).

[8] A *Mukhtearnamah* in which the name of the *Mukhtear* is omitted by mistake may be amended by Court and it takes effect from the date the *Mukhtearnamah* was originally filed. An application for execution made by the *Mukhtear* is valid from its inception. (1910) 37 Cal 399 (405).

[9] A Munim engaged in the affairs of winding up of a firm is a recognised agent of the owner of that firm, and can maintain and defend a suit on behalf of the firm. (1872) 9 Bom H C R 427 (429).

[10] A gumasta of a firm whose business has ceased before the institution of the suit is not a recognised agent of the owner of the firm. (1870) 5 Beng L R App 11 (12).

[11] Person looking after the properties of judgment-debtor within the jurisdiction of the Court is not a recognised agent and deposit made by him does not comply with O. 21, R. 89. (Vol 18) 1931 All 449 (450).

[12] A Political Agent appointed by the Government to manage the estate of a minor chief is not a ‘recognised agent’ within the meaning of this section. (1887) 11 Bom 53 (56).

[13] Where agent’s authorisation extends not to any class of business but is restricted to the doing of all necessary acts in the accomplishment of one particular purpose, it is a ‘special power of attorney’. (Vol 3) 1916 Bom 155 (156): 41 Bom 40.

[14] Pardanashin lady executing power-of-attorney in favour of her husband — Powers relating to management of property and litigation but without explicit power to sell, mortgage or lease — Husband contracting to sell property — Purchaser suing for specific performance — Husband held not to have power to contract. (Vol 17) 1930 Pat 181 (186).

[15] Objection as to validity of power-of-attorney must be taken to have been waived if not raised in the trial Court. It cannot be raised in appeal. (Vol 11) 1924 Lah 296 (296, 297).

[16] Agent authorised to prosecute claim has authority to file appeal. (Vol 21) 1934 Lah 973 (973).

[17] Application presented by son without power-of-attorney — Judgment-debtor not objecting — Power subsequently put in within limitation — Judgment-debtor objecting — Application was held proper. (Vol 16) 1929 Lah 478 (479).

[18] The term ‘resident’ in S. 37 of the old Code was construed liberally. And the term ‘non-resident’ was construed as covering every absence whether temporary or not. (1906) 28 All 135 (137) * (1904) 14 Mad L Jour 223 (225).

^a[4. (1) No pleader⁵ shall act for any person in any Court, unless he has been appointed² for the purpose by such persons by a document in writing signed by such person or of pleader. by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court¹⁷ by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended¹⁶ so far as regards the client.

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating —

(a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear :

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.]

[1882 — S. 39 ; 1877 — S. 39 ; 1859 — S. 18.]

[a] Substituted by the Code of Civil Procedure (Second Amendment) Act, 1926 (22 [XXII] of 1926), Section 2, for the original Rule 4.

Provincial Amendments

BOMBAY

In sub-rule (3) the words "or any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act". [21-12-1927.]

MADRAS

Insert the following as clause 6 :—

"(6) No Government or other pleader appearing on behalf of the Crown, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act." (As amended on 2-3-1942).

ORDER 3, RULE 4.—SYNOPSIS.

1. Applicability and scope.
2. Appointment of pleaders.
3. Acceptance of engagement.
4. Bombay Pleadings Act, 1920.
5. Pleader.
6. Authority to abandon issue or claim.
7. Power to make admissions.
8. Power to withdraw suits.
9. Power to compromise suit.
10. Power to refer to arbitration.
- 10a. Power to file petition for offering special oath.
11. Delegation of authority.
12. Control and conduct of case.
13. Liability of pleaders for misconduct.
14. Privileges and rights of pleaders.
15. Duties.
16. "Until all proceedings in suit are ended."
17. "Until determined with the leave of Court."

1. Applicability and scope. — Right of audience is not created by R. 4 — R. 4 enables pleader, after accepting and filing power to conduct proceedings until client's death or end of proceedings. (Vol 12) 1925 Mad

1201 (1202) : 48 Mad 676 * (Vol 19) 1932 Cal 1 (2) : 59 Cal 370. (O. 3, R. 4, (5), being contrary to rules under S. 37, Letters Patent (Calcutta) latter prevails.) * (Vol 1) 1914 Upp Bur 27 (28). (An unqualified person cannot practise as an advocate.)

[2] The proviso to R. 23 of the Appellate Side Rules of the Madras High Court is *intra vires* and does not conflict with anything that is contained in the Code. (Vol 15) 1928 Mad 472 (473).

2. Appointment of pleaders. — [1] Appointment should be in writing signed by the party or his authorised agent. (Vol 14) 1927 Lah 398 (398). (Telegram instructing filing of appeal is no authority). (Vol 33) 1946 Bom 174 (175, 177). (Advocate (O. S.) presenting plaint in mofussil—Vakalatnama must be filed. Decision in (Vol 27) 1940 Bom 272 : 1 L R (1940) Bom 510 held *obiter*.) * (Vol 12) 1925 Lah 331 (332). (Power-of-attorney is enough authority.) * (Vol 15) 1928 Mad 175 (176) : 51 Mad 242. (Vakalats, affidavits and pleadings. — No difference exists in respect of being "signed.") [See (Vol 13) 1926 Pat 73 (74) : 4 Pat 766. (Advocate can be verbally appointed.) * (Vol 12) 1925 Pat 614 (615). (Advocate of Patna High Court need not present document empowering him to act on behalf of his client).]

[2] Power-of-attorney granted before Act — Appeal

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filed after it—Power to be interpreted according to law on appeal date. (Vol 17) 1930 Lah 68 (70).

[3] Mere technical and formal defects do not invalidate the pleader's authority. (Vol 23) 1936 All 636 (636) : 58 All 912* (1937) 1937 All W R 80 (80)* (Vol 24) 1937 Lah 719 (719, 720). (One person signing for another with knowledge and acquiescence of the latter—Defect only formal.)* (Vol 21) 1934 Lah 1011 (1011, 1012). (Power not containing names of parties—Defect should be condoned—Time at least should be extended.)* (Vol 17) 1930 Lah 101 (102). (Vakalat signed by one of several defendants.)* (Vol 14) 1927 Lah 522 (523)* (Vol 14) 1927 Lah 382 (383). (No proof that one appellant was authorized to sign on their behalf—Power must be signed by all.)* (Vol 7) 1920 Lah 212 (213). (Vakalat not signed by party or his agent by inadvertence but subsequently done so.)* (1903) 26 Mad 197 (199). (Vakalat not dated.)* (Vol 13) 1926 Nag 40 (44). (Omission to sign a power-of-attorney by a minor's guardian can be cured by the minor subsequently giving a fresh power.)* (Vol 11) 1924 Nag 159 (160). (Mark by a person able to write but belonging to an illiterate caste was held to be a valid signature.)* (Vol 11) 1924 Pat 114 (117). (Vakalatnama signed by a person orally authorised to sign—Irregularity is curable under S. 99).

[4] Where a vakalatnama is signed and accepted by pleader the mere fact that his name does not appear in the body does not invalidate the appointment. (Vol 8) 1921 All 210 (211) : 43 All 392* (Vol 5) 1918 Cal 482 (482). (Inadvertant omission of pleader's name in vakalatnama can be rectified.)* (Vol 10) 1923 Nag 281 (281). (Want of proper name.)* (Vol 10) 1923 Nag 182 (184) : 19 Nag L R 36* (Vol 7) 1920 Nag 110 (111). (Omission of pleader's name—Pleader has implied authority to fill in details.)* (Vol 19) 1932 Pat 3 (4). (Endorsement of acceptance and signature appearing on back side).

[But see (Vol 18) 1931 All 767 (768). (Defect cannot be cured either by oral evidence which is inadmissible or by circumstance that pleader has endorsed his acceptance in writing on back of vakalatnama.)* (Vol 14) 1927 All 816 (816)* (Vol 13) 1926 All 252 (253). (Neither name of vakil nor of party inserted in vakalat—Defective.)* (Vol 1) 1914 All 536 (537) : 36 All 46. (Appeal not properly presented.)* (Vol 3) 1916 Nag 10 (11) : 12 Nag L R 189. (*Obiter.*)]

[5] Appointment is not valid if the vakalatnama does not contain the name of the pleader nor his signature. (Vol 22) 1935 All 727 (728) : 57 All 965.

[6] A pleader who acts on behalf of a litigant must be appointed in writing. (Vol 25) 1938 Lah 698 (700) : I L R (1938) Lah 417. (Pleader filing application on behalf of client acts for him.)* (1936) 63 Cal 733 (735). (Execution petition filed without vakalatnama—Subsequent filing of vakalatnama with leave of Court—Petition held duly presented.)* (Vol 24) 1937 Nag 65 (66, 67) : I L R (1937) Nag 494. (General agent appointed to conduct litigation with all powers for conduct of case—Pleader appointed by agent by a vakalatnama—Pleader appointing another pleader by vakalatnama and filing appeal—*Held*, the pleader appointed by the other pleader was duly authorised and therefore the appeal was validly constituted.)

[7] "Applying" in R. 1, is included in the word "acting." Therefore to apply, a pleader must have proper authority. (Vol 25) 1938 Lah 698 (700) : I L R (1938) Lah 417.

[8] An act done by a pleader not duly appointed by a document in writing as required by this rule has no legal effect. (Vol 24) 1937 Mad 239 (240) : I L R (1937) Mad 320. (Presentation of execution application by pleader who holds no vakalat from the decree-holder is a nullity.)* (1935) 62 Cal L Jour 277 (281, 282). (Pre-

sentation of plaint with a printed vakalatnama not signed by plaintiff but accepted by pleader is irregular—Presentation can only be regularised by Court by order of condonation.)* (Vol 21) 1934 Lah 444 (445). (Presentation of appeal without written authority—*Held*, time could be extended under S. 5, Limitation Act.)* (Vol 24) 1937 Nag 65 (65) : I L R (1937) Nag 494. (Still Court should give litigant chance to set the matter on foot again as far as possible. Time can be extended under S. 5, Limitation Act.)

[9] Pleader appearing for another pleader engaged by party—Document required by O. 3, R. 4 not executed in his favour—Such pleader can only plead and not 'act' on behalf of party—Presentation of appeal amounts to acting—Appeal presented by such pleader is not properly presented. (Vol 23) 1936 Lah 500 (501) : 17 Lah 610.

[See (Vol 31) 1944 Lah 131 (132, 134) : I L R (1945) Lah 274. (Presentation of appeal by another pleader on verbal instruction from pleader actually engaged—Authorised pleader appearing on subsequent hearings—*Held*, there was no irregularity.)]

[10] A pleader appointed for the purpose of pleading only has to file only a memorandum of appearance. (Vol 27) 1940 Bom 272 (272); I L R (1940) Bom 510* (1932) 33 Pun L R 389 (390). (A pleader could only plead and not act for another when he has no signed authority from the other or the party—Referring pending suit to arbitration amounts to acting.)* (Vol 22) 1935 Pesh 2 (3). (Where the memorandum has been filed and the pleader is present but the party is absent no separate authority to appear on behalf of the party is necessary.)

[See (Vol 19) 1932 Cal 1 (2) : 59 Cal 370. (Under rules framed by Calcutta High Court under Cl. 37, Letters Patent, a pleader cannot plead in High Court by merely putting in memorandum of appearance unless the party or the pleader engaged to act on his behalf makes his appearance.)* (Vol 13) 1926 Rang 215 (216) : 4 Rang 249. (Advocate acts when filing memorandum of appeal or cross-objections or any other document other than memorandum of appearance under R. 4 (5)—Power of attorney is necessary.)]

[11] No memorandum is necessary in case of pleader engaged to plead by pleader appointed to act for the party. (Vol 19) 1932 Cal 1 (3) : 59 Cal 370.

[12] Delivery of vakalatnamah by gumastha is sufficient authority. (Vol 16) 1929 Cal 11 (13).

[13] Pleader not duly appointed—Objection not taken till late stage—Proceeding is not validated. (Vol 3) 1916 Nag 10 (10) : 12 Nag L R 189.

3. Acceptance of engagement.—[1] Acceptance need not be in writing. It can be inferred from the circumstances. (1935) 62 Cal 642 (643). (Pleader not accepting vakalatnama in writing allowed to appear and conduct case. *Held* there was acceptance.)

[2] Vakalatnama containing name of pleader can be accepted by him after it is filed in Court. (Vol 9) 1922 Pat 504 (507).

[3] Acceptance of vakalatnama need not be in writing. Appearance of pleader when allowed by Court is acceptance. (Vol 3) 1916 Cal 979 (980, 981) : 43 Cal 854* (Vol 13) 1926 Lah 32 (32) : 6 Lah 461* (Vol 10) 1923 Lah 402 (403).

[But see (Vol 3) 1916 Cal 411 (412) : 17 Cri L Jour 191. (Verbal acceptance not sufficient.)]

[4] It was held under the old Code that the acceptance of a vakalatnamah by a pleader should in all cases be unconditional. (1870) 14 Suth W R 7 (8).

[See (1893) 16 Mad 285 (286). (One of two vakils mentioned in the vakalat can accept.)]

4. Bombay Pleaders Act, 1920.—[1] Section 10 as also Form C of the Second Schedule of the Bombay Plea-

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der's Act have been repealed by the Code of Civil Procedure Second Amendment Act of 1926.

5. Pleader. — [1] "Pleader" signifies all persons who are entitled to appear and plead. (Vol 27) 1940 Bom 272 (272); I L R (1940) Bom 510. (Pleader includes advocate enrolled on original side of High Court.) * (1887) 9 All 617 (621, 622). (A High Court advocate is entitled to do all that may be done by a pleader.) * (Vol 28) 1941 Oudh 169 (171, 172). (Presentation of an application by pleader whose sanad has expired—Renewal of sanad subsequently—Presentation not valid.) * (Vol 18) 1926 Rang 215 (216); 4 Rang 249. (Pleader includes advocate).

6. Authority to abandon issue or claim. — [1] A counsel appearing in a case has an implied authority to press or withdraw an issue in the case. (Vol 26) 1939 Oudh 257 (262); 14 Luck 723* (1899) 22 Mad 538 (543, 544). (The act of the counsel will be binding upon the party).

[2] Vakil under ordinary vakalatnama cannot abandon a claim without special authority from his client. (1869) 3 Beng L R App 15 (16)* (1869) 12 Suth W R 279 (280).

[3] A counsel cannot admit the claim and consent to a decree unless he is expressly or impliedly authorised to do so by his client. (Vol 17) 1930 Cal 477 (479). (It is duty of counsel to consult client before consenting to decree).

7. Power to make admissions. — [1] A counsel appearing in a case has implied authority to admit or deny document. (Vol 26) 1939 Oudh 257 (262); 14 Luck 723.

[2] Verbal admissions made by a pleader should be received with caution. (1907) 29 All 29 (32, 33)* (1871) 6 Mad H C R 127 (130). (Where statements are out of the ordinary scope of the vakil's authority).

[3] An admission by pleader on a question of fact will always bind the party. (Vol 22) 1935 Lah 71 (73); 16 Lah 328. (Statement as to intention of party as regards a document is a statement of fact.) * (1841) 2 Moo Ind App 253 (259, 260) (P C). (Client need not be present at the time of admission.) * (Vol 18) 1931 All 415 (416). (Pleader's statement of fact cannot be contradicted by party's mere allegation to contrary.) * (Vol 21) 1934 Bom 186 (187). (Provided such admissions are made during the actual progress of litigation.) * (1868) 9 Suth W R 485 (486)* (Vol 3) 1916 Sind 45 (45); 9 Sind L R 220.

[4] Following are cases where admission by pleader will not bind the party:—

(a) Where the pleader has been mistaken or misled into making a statement. (Vol 9) 1922 Bom 238 (234).

(b) Admission on misapprehension of facts. (Vol 3) 1916 Lah 301 (302).

(c) Admissions against instructions. (Vol 14) 1927 Mad 1031 (1032); 50 Mad 941.

(d) Admission made at a time when not engaged by client. (1832) 4 B & Ad 339 (340, 341); 110 E R 483.

(e) Admission of what is beyond the scope of the suit. (1865) 2 Mad H C R 423 (426).

(f) An erroneous admission by a pleader on a question of law. (Vol 16) 1929 Rang 55 (58); 6 Rang 691* (1900) 24 Bom 360 (363)* (1871) 16 Suth W R 246 (247)* (Vol 32) 1945 Lah 336 (336). (Question as to special custom is at least mixed question of law and fact).

[5] Party repudiating the admission by the pleader must do so at the earliest opportunity. (Vol 12) 1925 Mad 1031 (1032).

[6] Admission by pleader on question of law can be withdrawn in appeal. (Vol 31) 1944 Cal 391 (393).

8. Power to withdraw suits. — [1] Vakalatnama in general terms *prima facie* gives authority to a pleader to withdraw suit. (1912) 16 Cal W N 932 (933).

9. Power to compromise. — [1] Authority to compromise must be expressly given before a pleader can compromise on behalf of his client. (Vol 10) 1923 P C 98 (99) (P C) * (Vol 10) 1923 P C 13 (15) (P C) * (Vol 27) 1940 All 143 (144); I L R (1940) All 182. (Pleader given wide powers in vakalatnama in conducting suit on behalf of minor and authorised to compromise: *Held*, he was competent to compromise.) * (Vol 31) 1944 Bom 46 (48). (Counsel having power to compromise—He cannot compromise matter not subject of suit.) * (Vol 14) 1927 Cal 714 (716, 717); 55 Cal 113. (Suit involving only a point as to whether a property was joint or debuttar—Counsel compromising suit appointing attorneys for parties as receivers of one property and commissioners at partition—Receiver's appointment was a collateral matter and client's consent should be obtained.) * (1900) 27 Cal 420 (448, 449) (S B). (Compromise outside the scope of the particular case—Special authority from the client must be shown.) * (Vol 14) 1927 Mad 852 (858, 859); 50 Mad 786. (Matters outside the scope of suit cannot be compromised without express authority. But the suit in which there is instruction to appear can be compromised.) * (Vol 16) 1929 Oudh 211 (212). (Court passing consent decree—Presumption is that it was satisfied as to the authority of pleader to compromise—Party attacking must rebut the presumption.) * (Vol 14) 1927 Oudh 222 (223). (Pleader deriving authority from agent who has no power to confess judgment on behalf of principal has no power to compromise.) * (Vol 14) 1927 Pat 199 (200); 6 Pat 217; 28 Cri L Jour 529. (Counsel should not prepare and sign a petition of compromise in which he was not engaged from the beginning and there were other lawyers.) * (Vol 6) 1919 Pat 454 (461). (Pleader's authority to compromise extends only to subject-matter of suit.) * (Vol 28) 1941 Sind 28 (29); I L R (1940) Kar 467. (Vakalatnama in Form IV, Sind Civil Courts Circulars authorising advocate to appear and act does not empower him to compromise.) * (Vol 23) 1936 Sind 59 (61); 29 Sind L R 437. (Mere written statement by pleaders that they have special power to compromise is not sufficient.) * (Vol 1) 1914 Sind 139 (139); 8 Sind L R 91. (Under Sind Civil Courts Circulars pleaders cannot compromise.)

[2] A compromise by pleader without authority becomes binding on the party if he rectifies it or acquiesces in it. (Vol 3) 1916 Sind 64 (64); 9 Sind L R 218.

[3] The terms authorising pleader to compromise should be strictly interpreted. (Vol 5) 1918 Mad 656 (657); 41 Mad 233. (Does not give power to negotiate without reference to client.) * (Vol 26) 1939 Bom 490 (491) (Do.) * (Vol 6) 1919 Cal 169 (170) (Compromise acted upon and adopted cannot be questioned) * (1935) 62 Cal 642 (653, 654). (Authority to sign compromise petition includes authority to compromise.) * (Vol 17) 1930 Oudh 112 (113). Power to file compromise does not give power to make a compromise or sign it.) * (Vol 20) 1933 Pat 306 (328); 12 Pat 359 (Do.)

[4] Compromise entered into by pleader duly authorised binds the party unless there is fraud, collusion, mistake or misapprehension on the part of pleader. (1881) 6 Cal 687 (707).

10. Power to refer to arbitration. — [1] Pleader cannot refer matter to arbitration unless authorized specially in that behalf. (Vol 4) 1917 Pat 186 (187, 188.) * (Vol 6) 1919 Cal 232 (233) * (Vol 16) 1929 Lah 171 (172) * (Vol 11) 1924 Nag 338 (342).

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[But see (Vol 17) 1930 Sind 190 (191) : 25 Sind L R 20. (Pleader can refer on strength of vakalatnama alone.) * (Vol 8) 1916 Sind 79 (81) : 9 Sind L R 183.]

[2] Pleader appearing for advocate of party has no power to refer suit to arbitration unless duly authorized as required by R. 4. (Vol 19) 1932 Lah 373 (374) : 13 Lah 775. * (Vol 13) 1926 Lah 563 (564). (One pleader appearing for another—Reference by him to arbitration without vakalatnama is invalid.)

[3] Pleader can apply for making reference. (Vol 3) 1916 Sind 79 (81) : 9 Sind L R 183.

[4] By vakalatnama pleader was authorized to appoint a panch or sarpanch or referee. He was also given the power to conduct the case in all sorts of ways with a power to compromise or withdraw the suit. *Held*, that the pleader had also the power to refer to arbitration. (Vol 30) 1948 Oudh 128 (129).

10a. Power-to file petition for offering special oath. — [1] Pleader cannot bring suit to close by offering to be bound by oath of opposite party — But Court can draw inference from circumstances of case that there was authority on his part. (Vol 17) 1930 Cal 463 (465) * (1890) 14 Bom 455 (457).

[2] Vakalatnama empowering pleader to do some particular acts and amongst other things to take whatever steps he thought necessary in the suit :—*Held*, that the powers included a power to file petition for a special oath also. (Vol 26) 1939 Pat 222 (224).

11. Delegation of authority. — [1] Under the new proviso to the rule, a pleader can delegate his authority to another pleader and request him to appear on his behalf. (Vol 19) 1932 Lah 373 (374) : 13 Lah 775 * (1887) 9 All 613 (616, 617). (Case decided before amendment of 1926.) * (Vol 16) 1929 Nag 109 (109). (Amended rule does not enable second grade pleader, appointed to conduct suit, to appoint another to file appeal in High Court.)

[But see (1896) 20 Bom 293 (295). (Not good law in view of the amendment of 1926).]

[2] Mechanical act of handing over appeal to clerk of Court is only ministerial work and does not amount to "acting" under O. 3, R. 4—Another counsel can present appeal on behalf of counsel appearing in case without written authority. (Vol 28) 1941 Pesh 1 (3) * (Vol 26) 1939 Rang 1 (5) : 1939 Rang L R 108. (Plaint or memorandum of appeal drawn up and signed by authorized pleader presented by another pleader delegated to do so — Plaint or appeal must be deemed to have been presented by pleader signing it.)

[3] Suit valued above Rs. 5000 — Power-of-attorney expressly authorising pleader P appearing in trial Court to file appeal or engage other lawyer for that purpose—P having no right to appear in High Court— Power-of-attorney held authorised filing of appeal in High Court — P held could appoint other lawyer to file appeal and appear in High Court. (Vol 35) 1946 Lah 263 (264).

[4] Pleader cannot completely delegate to his clerk the duties he owes to his client without being responsible for his defaults. (1912) 22 Mad L Jour 284 (294).

[5] Counsel's clerk — Presence of a counsel's clerk does not mean presence of the counsel. (Vol 15) 1928 Lah 841 (842).

12. Control and conduct of case.—[1] A counsel appearing in a case has implied authority to examine a witness or call no witness and do such other acts which are required for the proper management and conduct of the suit. (Vol 26) 1939 Oudh 257 (262) : 14 Luck 723.

[2] Any act in exercise of authority to do which is best for the client will bind the party unless such an

authority is excluded specifically and the limitation is made known to the other party. (1891) 13 All 272 (275) (F B).

[3] *Bona fide* acts of pleaders acting within the scope of their authority will bind the parties. A mere error of judgment on their part affords no grounds for avoiding such acts. (Vol 16) 1929 P C 33 (34) (PC) * (Vol 20) 1933 Mad 410 (411). (Advocate receiving costs under an order for amendment without realizing consequences of such acceptance.) * (Vol 1) 1914 Mad 222 (222). (Vakalat to execute decree gives implied authority to receive from judgment-debtor money out of Court — Entry of satisfaction to extent of money received therefore is legal).

[4] A vakil is not entitled to audience on the original side of the High Court. (1903) 30 Cal 986 (989).

13. Liability of pleaders for misconduct. — [1] For liability of pleader for misconduct, *see* Ss. 10 and 13, Legal Practitioners Act, 18 [XVIII] of 1879; Cls. 9 and 10, Letters Patent (Calcutta, Madras and Bombay), and Clauses 7 and 8 of Letters Patent (Allahabad, Lahore, Nagpur and Patna), and S. 10 of the Indian Bar Councils Act, 38 [XXXVIII] of 1926.

14. Privileges and rights of pleaders. — [1] A pleader cannot refuse a case where proper fee is paid, adequate instructions are given and the case is of a class which the lawyer is accustomed to take up. (Vol 17) 1930 All 262 (263) : 30 Cri L Jour 522 * (Vol 12) 1925 Oudh 672 (672) : 26 Cri L Jour 1272. (Grounds of partisanship with a party to the litigation is no excuse for rejecting brief.)

[See however (1908) 35 Cal 317 (319). (Cause for rejecting brief need not be given.)]

[2] In the conduct of the suit he is entitled to examine witnesses in his chamber before examining them in Court. (1912) 14 Ind Cas 763 (763) (Low Bur).

[3] A pleader is not liable for slander or libel in respect of words used by him in the course of a judicial enquiry. (Vol 14) 1927 Mad 379 (380) : 50 Mad 667 : 28 Cri L Jour 313.

[4] Court has no power to cut short the arguments of a pleader unless they are irrelevant or involve repetitions. (Vol 15) 1928 Lah 319 (319) : 29 Cri L Jour 279.

[5] Where the client discharges the solicitor the latter can hold the papers till his costs are paid or an undertaking is given that costs would be paid. (1902) 29 Cal 63 (65).

[6] Where the attorney himself withdraws expressly or by implication he has no such rights and he has to make over the papers to the attorney to whom the client wishes to go retaining his usual lien on such papers. (1902) 29 Cal 63 (66).

[7] Court will not grant party leave to change attorney until his costs are paid. (Vol 21) 1934 Cal 58 (59) : 60 Cal 1273.

[See however (Vol 20) 1933 Bom 182 (183). (The attorney is not entitled to say that the client shall continue him till his costs are paid.)]

[8] The lien is an equitable one and can be claimed only against the client and not against third parties. (1898) 25 Cal 887 (889, 890). (Defendant cannot pay under compromise with plaintiff to the detriment of plaintiff's attorney's claim.) * (1881) 7 Cal 140 (144). (Defending counsel of minor can recover it from minor as necessities.)

[9] Fee can be recovered by way of quantum meruit under S. 70 of Contract Act. (Vol 17) 1930 Mad 132 (135) : 53 Mad 309 * (1866) 6 Suth W R 108 (109). (Pleader engaged by several defendants in same interest can recover only reasonable fee and not separate fee from each.) * (1871) 6 Mad H C R 265 (266). (Cause of action arises only after complete discharge of duties).

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[10] Where a pleader receives a fee to conduct a case, he is not bound to refund any portion of it if the case is compromised. (Vol 17) 1930 Bom 22 (23) : 54 Bom 1.

15. Duties.—[1] When a pleader accepts a brief it is his bounden duty to attend to his client's interest throughout the proceeding in the case. (Vol 9) 1922 Oudh 75 (75) : 25 Oudh Cas 40 * (Vol 10) 1923 Lah 97 (97). (If a pleader cannot appear to argue the case he must arrange for another to appear for him.)

[2] Having once undertaken the conduct of the case an attorney is bound to proceed with due diligence and honesty in prosecuting the claim of his client. (1902) 29 Cal 63 (67) * (Vol 8) 1921 Mad 320 (320) : 44 Mad 978. (Cannot refuse to take steps because his whole-fee is not paid.)

[3] Where the pleader is unable to attend when the case is called on, the brief should be returned in good time. (Vol 19) 1932 Bom 634 (635).

[4] It is the duty of the pleader to make due enquiries of the clients and to act with such care and prudence that his good faith cannot be successfully questioned. (Vol 12) 1925 All 247 (249) : 26 Cri L Jour 776 : 47 All 377 (F B) * (Vol 20) 1933 Nag 219 (220, 221) : 29 Nag L R 295. (Pleader with defective power under O. 3, R. 4 acts without due care and caution.)

[5] Pleader should not make reckless charges of fraud and criminality or indulge in abuse; nor should he attack witness's honour unless he believes in them on reasonable grounds. (Vol 12) 1925 All 641 (641, 642) : 47 All 729 : 26 Cri L Jour 1091 (F B) * (Vol 22) 1935 Mad 578 (580) : 36 Cri L Jour 1842. (Reckless charges of fraud even on instructions is prohibited.)

[6] Counsels should help and not hinder administration of justice. (Vol 22) 1935 All 117 (119) : 57 All 573. (Counsel sending threatening letter to defendant to withdraw a certain plea : *Held*, it amounted to contempt.)

[7] A pleader having once appeared for a client should not appear against him in another litigation arising out of the same dispute. (Vol 4) 1917 P C 80 (84) (P C) * (Vol 15) 1928 Mad 592 (593). (He is not debarred unless his services were sought and refused on insufficient grounds.)

[8] Pleader cannot use information received formerly by him in another suit, against the client in a subsequent suit. (1902) 26 Bom 423 (430) (F B) * (1888) 12 Bom 85 (88 to 91). (Possession of knowledge by pleader which might prejudice the client must be shown to exist to restrain him from appearing) * (Vol 12) 1925 Mad 1201 (1205) : 48 Mad 676. (Even the suspicion that the information might be used should be avoided.)

[9] Pleaders owe a duty also to the Court and should co-operate with the Court in the orderly and pure administration of justice. (Vol 10) 1923 Cal 212 (215).

[10] Unwarranted or unfounded attacks against the Judge amounts to misconduct. (1907) 29 All 95 (108, 109) : 34 Ind App 41 (P C) * (Vol 11) 1924 All 253 (254) : 25 Cri L Jour 689 : 46 All 121 (F B).

[11] It is against professional etiquette that a counsel should hold a brief and conduct a case in which he is himself a witness and is personally interested. (Vol 12) 1925 Mad 1153 (1155) : 27 Cri L Jour 33.

16. "Until all proceedings in the suit are ended."

—[1] Vakalatnama filed in a suit remains in force in all the different stages of the case. (Vol 17) 1930 Cal 721 (724) : 32 Cri L Jour 377 : 53 Cal 374 * (Vol 5) 1918 Mad 545 (547). (Appointment of pleader by *guardian-ad-litem* of minor—Minor's majority does not determine pleader's authority.)

[2] An appeal is a proceeding in a suit and the prosecution of a suit includes the prosecution of all the proceedings till a final decree is passed. (Vol 21) 1934

Lah 973 (973) * (Vol 17) 1930 Lah 68 (69) * (Vol 15) 1928 Lah 733 (734). (Word "appeal" in para. 3, R. 4, O. 3 is not confined to first appeal, but it covers all appeals.) * (Vol 13) 1926 Lah 32 (32) : 6 Lah 461. (Power to prosecute all litigation implies power to lodge and conduct appeal and fresh power is not necessary for appeal.) * (Vol 20) 1933 Nag 219 (220) : 29 Nag L R 295. (Same vakalat not enough where vakalat expressly states that fresh vakalat would be necessary for appeal.) * (Vol 20) 1933 Pesh 67 (68). (Power not revoked and not limited to trial Court—Counsel can appear in appeal.)

[3] Where a pleader appears in a regular appeal before the High Court, he is competent under that vakalatnama, unless it is revoked, to appear for the client in the subsequent stages of that case and in the appeal, if preferred to the Privy Council. (1867) 8 Suth W R 92 (92).

[4] Pleader appointed in suit continues to represent decree-holder in execution proceedings unless vakalatnama is cancelled. (Vol 27) 1940 Bom 210 (212) : 1 L R (1940) Bom 370. (Decree-holder in course of execution assigning his rights to his pleader — No implied revocation of authority.) * (Vol 31) 1944 All 238 (239) : 1 L R (1944) All 592 * (1896) 20 Bom 198 (199). (Applications for execution of the decree are proceedings in the suit.) * (1868-69) 5 Bom H C R (AC) 83 (83). (Where claim or objection is preferred in execution.) * (1938) 1938 Nag L Jour 122 (122) * (Vol 12) 1925 Pat 692 (693).

[5] Vakalatnama filed with application for execution — Fresh vakalatnama is unnecessary for subsequent execution. (Vol 8) 1916 Pat 56 (56).

[6] Power in suit — Pleader can act in miscellaneous proceedings arising therefrom. (Vol 4) 1917 Pat 211 (212, 213) : 2 Pat L Jour 259 : 18 Cri L Jour 808.

[7] Application to set aside *ex parte* decree or dismissal order is part of proceeding in suit — To oppose or consent to such application is also part of proceeding in suit — Counsel need not have fresh authority for aforesaid purpose. (Vol 28) 1941 Rang 314 (315) : 1941 Rang L R 254 * (Vol 31) 1944 All 238 (239) : 1 L R (1944) All 592 * (1893) 15 All 55 (56). (Appeal dismissed in default—Pleader properly authorised by vakalatnama can apply for its restoration — He need not file a fresh vakalatnama.) * (1869) 12 Suth W R 465 (466) * (Vol 16) 1929 Lah 96 (98) : 10 Lah 570. (In absence of such authority in the power of attorney general practice is good indication of implied authority.) * (Vol 25) 1938 Nag 272 (272) : 1 L R (1939) Nag 157. (Restoration of suit dismissed for default.)

[8] Plaint returned and filed in another Court — Vakalatnama remains in force. (Vol 10) 1923 Nag 182 (187) : 19 Nag L R 36 * (Vol 9) 1922 Nag 125 (126).

[9] Vakalat for pauper petition on petition being converted into suit becomes vakalat in suit. (Vol 21) 1934 Mad 690 (690) : 58 Mad 176.

17. "Until determined with the leave of Court". — [1] A pleader once engaged cannot divest himself of his duty to appear, without leave of the Court and notice to the client. (Vol 9) 1922 Cal 515 (521, 525, 530, 532) : 49 Cal 732 (SB) * (Vol 17) 1930 Pat 403 (404) : 9 Pat 865. (Client applying for determination of pleader's appointment—Sufficient ground not shown for giving leave of Court which is necessary for determination of such appointment—Appointment continues till all proceedings in suit are ended.) * (Vol 22) 1935 Pesh 145 (145). ("Court" includes not only Court where original power of attorney is filed but also Court to which case is subsequently transferred).

[2] After a pleader has once been appointed by a party, his employment cannot be determined except (1) by a writing signed by the client or the pleader and

5. Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

[1882 — S. 40; 1877 — S. 40, 1859 — S. 18.]

Provincial Amendments

MADRAS

Insert the following at the end :

Explanation.—Service on a pleader who does not act for his client, shall not raise the presumption under this rule. [R. O. C. No. 1810 of 1926.]

NAGPUR

Substitute the words "on a pleader who has been appointed to act for any party" for the words "on the pleader of any party." [29-6-1943.]

N.-W. F. P.

Add the following at the end :

"Provided that the pleader is acting and not merely pleading for the party."

ODDH

For "on the pleader of any party" read "on a pleader who has been appointed to act for any party."

Rule 5B—PATNA

Add the following rule :

"5B. Notwithstanding anything contained in O. 3, sub-r. (2) and (3) of R. 4 of the First Schedule of the Code of Civil Procedure, 1908, no pleader shall act for any person in the High Court unless he has been appointed for the purpose in the manner prescribed by sub-r. (1) and the appointment has been filed in the High Court."

6. (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

[1882 — S. 41; 1877 — S. 41; 1859 — Ss. 50, 51.]

Provincial Amendment

SIND

Add the following as sub-rule (3) :

"(3) The Court may at any stage of a suit and whether upon application made to it, or of its own motion, direct any party to the suit, not having a recognised agent residing within the jurisdiction of the Court, to appoint within a time to be specified an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under this sub-rule the provisions of sub-r. (2) shall be applicable."

O. 3 R. 4 (contd.)

filed in Court with the leave of the Court or (2) by the termination of the proceedings in the suit. (Vol 4) 1917 Pat 211 (212, 213); 2 Pat L Jour 259; 18 Cri L Jour 808* (Vol 33) 1946 Lah 266 (267)* (Vol 17) 1930 Lah 134 (135). (Termination of appointment of pleader by mutual consent is not noticed by O. 3, R. 4 unless leave is obtained from Court under R. 4.)

[3] Death of client terminates the appointment. (Vol 21) 1934 Nag 274 (276); 31 Nag L R 57. (Presentation of appeal by pleader on behalf of dead appellant is nullity.)

[4] There is no specified form for written withdrawal by pleader. An endorsement on the back of plaint that the pleader has no instructions is sufficient. (Vol 12) 1925 Mad 21 (22); 47 Mad 819 (FB). (Whether such report is made before an adjournment is asked for and refused or not.)

[5] The next friend of an infant plaintiff is as much entitled to change his solicitor as any other plaintiff who is *sui juris*. (1901) 28 Cal 264 (270).

[6] Leave of Court can be assumed from its attitude and other circumstances. (Vol 12) 1925 Mad 21 (22); 47 Mad 819 (FB).

Order 3, Rule 5 — Note 1.

[1] The word "pleader" includes an attorney, vakil and an advocate. (Vol 33) 1946 Bom 174 (175)* (1904) 7 Oudh Cas 303 (305).

[2] Where notice is served on the pleader, an irrebuttable presumption of communication to client arises unless pleader's power is determined in writing under O. 3, R. 4 (2). (Vol 21) 1934 Pat 592 (592)* (Vol 15) 1928 Lah 426 (426)* (1904) 7 Oudh Cas 303 (305). (Mere endorsement by the advocate on the back of notice that he has withdrawn from the case will not make the notice ineffective.)

[See (1909) 13 Cal W N 142 (143). (Notice of date of hearing given to pleader but not informed by him to the party. *Held*, notice not sufficient.)* (Vol 3) 1916 Lah 169 (170). (Summons to defendant given to his pleader returned—*Held*, service was not sufficient.)* (Vol 14) 1927 Pat 135 (139). (Materiality of service consists in the party being made aware of it.))

[3] Pleader may waive the correct formalities in effecting service. Initialing by pleader of order sheet amounts to waiver of formal notice. (Vol 14) 1927 Pat 135 (139)* (Vol 14) 1927 Cal 619 (621). (Notice of filing award under Sch. II, para. 10, not given to a party, but filing made known to his pleader and admitted by the pleader.)

ORDER IV.

INSTITUTION OF SUITS

Suit to be commenced by plaintiff.

1. (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf:

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

[1882—S. 48; 1877—S. 48; 1859—S. 25. See S. 26.]

Provincial Amendments

ALLAHABAD

For sub-rule (1), substitute the following :

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for good cause shown allows time for filing such copies.

(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

Re-number the present sub-rule (2) as sub-rule (3). [24-7-1926].

NAGPUR

Substitute the following for sub-rule (1) :

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with as many true copies on plain paper of the plaint as there are defendants, for service with the summons upon each defendant, unless the Court, for good cause shown allows time for filing such copies."

Add the following as sub-rule (2) and re-number the present sub-r. (2) as sub-r. (3) :

"(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for." [29-6-1943].

OUDH

To sub-r. (2) add the following words :

"and except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court."

O. 3 R. 4 (contd.)

[4] Order 41A (Madras) is a special provision and prevails over the general provisions contained in O. 3, R. 5. Service of notice of appeal by merely leaving it in the office of the advocate is not service on party or his pleader. (Vol 29) 1942 Mad 403 (403).

[5] Statement in power-of-attorney as to vakil being engaged only for a particular place—Transfer of the case to another place—After transfer notice served on vakil is sufficient notice to client. (Vol 14) 1927 Lah 428 (429). (Endorsement that notice may be served on party is immaterial.)

[6] Notice of date of pronouncing judgment to counsel is sufficient—Judgment recorded and dated by predecessor of Court—Judgment pronounced second time by successor is without jurisdiction. (Vol 7) 1920 Lah 288 (288).

ORDER 4, RULE 1—SYNOPSIS.

1. Mode of presentation of plaint.
2. Place of presentation of plaint.
3. Plaint, meaning of.
4. Plaint to whom to be presented.
5. Presentation of plaint.
6. Time of presentation.

1. Mode of presentation of plaint. — [1] Presentation by a pleader or authorised agent is also proper presentation. (Vol 26) 1939 Nag 242 (244) : I L R (1939) Nag 515.

[2] Plaint not signed either by plaintiff or by person holding general power and not special power of attorney is not proper. (Vol 19) 1932 Bom 367 (368).

[3] Omission to comply with provisions regarding presentation of plaint is irregularity which can be cured if plaintiff has acted in good faith. (Vol 18) 1931 All 507 (511) : 54 All 57 (S B). (20 All 90 ; (Vol 11) 1924 All 54 : 45 All 701, overruled.)

[4] Plaint presented by party without written au-

thority to present but only oral authority — Presentation held irregular and could be cured only by an order of condonation passed by the Court — Party could not correct or alter the record himself without reference to Court. (1935) 62 Cal L Jour 277 (281). (39 Cal 399, followed.)

2. Place of presentation of plaint. — [1] Plaint to be filed in Subordinate Judge's Court presented to District Court on the ground that the former Court was closed is not valid presentation. (1873) 10 Bom H C R 495 (496).

[2] High Court has no jurisdiction to receive a plaint receivable by a lower Court on the ground that such a Court is closed for summer vacation. (Vol 16) 1929 Mad 29 (30, 31) : 52 Mad 52.

3. Plaint, meaning of. — [1] Substantial compliance with O. 6 and O. 7 is enough to make a document a plaint. (Vol 8) 1921 Sind 166 (168) : 17 Sind L R 223.

4. Plaint to whom to be presented. — [1] Presentation of plaint to the Head Ministerial Officer of the Court is legal and proper, where such officers are authorised to receive plaints. (Vol 5) 1918 Mad 1152 (1153).

[2] Following are cases where there was no valid presentation:— (1910) 5 Ind Cas 330 (331) (All). (Handing over the plaint to the suits clerk or to the *Munsarim*.) * (1869) 6 Bom H C R (A C) 254 (256). (Plaint presented to a clerk left in charge of Court but not authorised to receive plaints.) * (1872) 18 Suth W R 172 (173). (Presentation of plaint to the Nazir of a Court.) * (Vol 21) 1934 Lah 622 (622) : 15 Lah 308. (Judge temporarily absent, and no one authorized or no arrangement made to receive plaints — Plaint filed in time during Judge's absence with Naib Sheriff but barred when placed before Judge — Plaint held not properly presented.) * (Vol 1) 1914 Mad 376 (376). (Presentation out of office hours to a person authorised to receive only within office hours.) * (1912) 14 Ind Cas

2. The Court shall cause the particulars of every suit to be entered in a book to be kept for *Register of suits*. the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

[1882—S. 58; 1877—S. 58; 1859—S. 38.]

Provincial Amendment

CALCUTTA

Insert the following words after the words "particulars of every suit" :

"Except suits triable by a Court invested with the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887."

[1-1-1939.]

ORDER V.

ISSUE AND SERVICE OF SUMMONS

ISSUE OF SUMMONS

1. (1) When a suit has been duly instituted a summons may be issued to the defendant to *Summons.* appear and answer the claim on a day to be therein specified :

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear —

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

[1882—S. 64; 1877—Ss. 64, 68; 1859—S. 41. See Ss. 27 to 29 and 133.]

Provincial Amendment.

ODDH

Add a new sub-rule (1A) as follows :

"(1A) A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting; provided that —

(a) if the party to be served is a European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English; and

(b) the presiding officer may, in his discretion, direct that such forms in general or that any particular such form be filled up entirely in the office of the Court."

O. 4 R. 1 (contd.)

221 (224) (Oudh). (The presentation of a petition to the clerk of the Deputy Commissioner's Court, Oudh.)

[3] Mere registration of a plaint subject to objection does not cure the defect of improper presentation. (1910) 5 Ind Cas 380 (381) (All).

[4] Where the same person is the presiding Judge for two different Courts presentation to him of a plaint coming within the jurisdiction of one Court when he is at the other Court is proper and valid presentation. (1939) 1939 Nag L Jour 503 (503, 504).

5. Presentation of plaint.—[1] Plaint is presented when it is handed over to proper officer appointed in that behalf. (Vol 21) 1934 Bom 91 (93).

[2] Placing of a petition on a table when the officer is not present is not presentation. (1871) 3 N W P C R 341 (342).

[3] Where a clerk authorised to receive plaints merely receives plaint when presented and accepts it after reference to the Judge he cannot be said to have accepted it when presented. (Vol 24) 1937 Bom 25 (26): I L R (1937) Bom 136.

[4] Plaint presented to District Judge according to the rules of Lahore High Court sent to subordinate Court for disposal—Real date of presentation of plaint is that

on which it is presented to District Judge. (Vol 22) 1935 Sind 225 (226).

[5] A suit commences with the presentation of a plaint. (Vol 16) 1929 Mad 480 (480) * (1935) 62 Cal 1115 (1117). (Date of presentation of the plaint to the proper officer is the date on which the suit is instituted even though it was not actually admitted owing to the deficiency of court-fee paid.) * (Vol 8) 1921 Sind 166 (169): 17 Sind L R 223. (Suit is instituted on date of filing plaint though plaint is imperfect.)

6. Time of presentation.—[1] A Judge may receive plaint on a Sunday or other holiday. (1871) 16 Suth W R 230 (231).

[2] Where a plaint is presented to a Judge outside Court and after Court hours and is accepted by the Judge the presentation is valid. (Vol 9) 1922 Nag 167 (167): 19 Nag L R 23. * (1912) 34 All 482 (486) (FB). ((1875) N W P H C R 5 (9), overruled.) * (Vol 12) 1925 Mad 201 (201). (Plaint presented out of office hours not accepted—Presentation does not constitute filing.)

[3] Order 4, Rule 1 does not prohibit presentation of plaint to a clerk out of office hours and outside office buildings. (Vol 24) 1937 Bom 25 (25, 26): I L R (1937) Bom 136 * (Vol 11) 1924 Mad 448 (448): 47 Mad 312 (FB).

Copy or statement annexed to summons.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

[1882—S. 65; 1877—S. 65.]

Provincial Amendments

ALLAHABAD

Omit the words "or, if so permitted, by a concise statement". [24-7-1926.]

UDH

Omit the words "or, if so permitted, by a concise statement".

Court may order defendant or plaintiff to appear in person.

3. (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

[1882—S. 66; 1877—Ss. 66, 67; 1859—S. 42, See O. 9 R. 12.]

No party to be ordered to appear in person unless resident within certain limits.

4. No party shall be ordered to appear in person unless he resides —

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

[1882—S. 67; 1877—S. 67; 1859—S. 42.]

Provincial Amendment.

R. 4A—ALLAHABAD

Add the following Rule 4A:—

"4A. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

[24-7-1926.]

Summons to be either to settle issues or for final disposal.

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

[1882—S. 68; 1877—S. 68; 1859—S. 41.]

Order 5, Rule 1—Note 1

[1] The duty of the Court, on receiving the plaint, is to issue a summons on the defendant. (1887) 14 Cal 204 (217).

[2] Active part in not having summons served is necessary to be proved in order to constitute fraud in suppression of summons. (Vol 9) 1922 Pat 291 (292).

[3] Though O. 5, R. 1 (2) refers in terms only to a defendant the same rule applies also to the plaintiff. If the pleader who appears in Court for a plaintiff says he has no instructions he should be held not to have appeared. (Vol 11) 1924 Mad 842 (843).

[4] Onus of proving the service of summons on the defendant is on the plaintiff. (Vol 12) 1925 Cal 801 (802): 52 Cal 453.

[5] There is no time limit within which a summons to appear has to be issued. Time is, however, fixed by the rules of the Court. (1880) 5 Cal 126 (127).

[6] A second summons ought not to be ordered to issue after the lapse of the period of limitation prescribed for a suit since the previous summons, unless the plaintiff has, in the meantime, done what he can to prosecute his suit with proper diligence. Equal strictness ought to be observed to the issue of first summons. (1880) 5 Cal 126 (127).

[7] For the meaning of "appearance", see O. 3, R. 1.

Order 5, Rule 3—Note 1

[1] Personal appearance of plaintiff can be compelled only under O. 5, R. 3 and O. 10, R. 4. (Vol 19) 1932 Nag 135 (186): 28 Nag L R 146.

[2] Even under O. 5, R. 3 pardanashin lady cannot be compelled to attend Court. (Vol 20) 1933 All 551 (553): 55 All 666 (FB).

[3] On date of hearing case adjourned without order for plaintiff's personal appearance — Suit dismissed for plaintiff's failure to appear personally—Order is without jurisdiction. (Vol 4) 1917 All 95 (96): 39 All 476.

Order 5, Rule 5—Note 1

[1] In a mortgage suit summons was issued for final disposal and not for settlement of issues. On the date of hearing the defendant appeared and denied execution of mortgage deed and receipt of consideration. As the plaintiff was not ready with his witnesses the Court dismissed the suit: Held that in such cases Court should issue summons for settlement of issues and give the parties an opportunity to produce evidence on the issues settled. (Vol 1) 1914 Bom 46 (47): 38 Bom 377.

PROVINCIAL AMENDMENTS.

CALCUTTA

Insert the words "for the ascertainment whether the suit will be contested" after the words "issues only".

[25-8-1927.]

MADRAS

Delete the first paragraph and *substitute* the following in lieu thereof :

"R. 5. The Court shall determine, at the time of issuing the summons, whether it shall be —

(1) for the settlement of issues only, or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once; or (3) for the final disposal of the suit; and the summons shall contain a direction accordingly".
[P. Dis. No. 7 of 1927.]

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons, and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

[1882—S. 69 ; 1877—S. 69 ; 1859—S. 43.]

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

Summons to order defendant to produce documents relied on by him.

[1882—S. 70 ; 1877—S. 70 ; 1859—S. 48.]

PROVINCIAL AMENDMENT.

LAHORE

Substitute for Rule 7 the following :

"The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he bases his defence or any claim for set-off and shall further order that where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement". [24-7-1936.]

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

8. Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

[1882—S. 71 ; 1877—S. 71.]

SERVICE OF SUMMONS

9. (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

Delivery or transmission of summons for service.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

[1882—S. 72 ; 1877—S. 72 ; 1859—S. 47.]

Order 5, Rule 6 — Note 1

[1] A defendant is entitled to sufficient time to enable him to appear and answer in person or by pleader. (1866-68) 3 Mad H C B 167 (168). (Where time allowed is manifestly insufficient appellate Court will interfere.) * (1870) 7 Bom H C R 138 (139). (Where summons was not served upon the defendant in sufficient time to enable him to appear and answer the Appellate Court set aside the *ex parte* decree passed against the defendant and ordered a new trial.)

Order 5, Rule 9 — Note 1

[1] Service of summons is irregular if not made by proper officer or his subordinate. (Vol 12) 1925 Rang 325 (326) : 3 Rang 239.

[2] Residence for purpose of summons is not synonymous with ownership of property within the territorial limits of the Court. (1911) 38 Cal 394 (397).

[3] Process-server is not entitled to enter house without permission. (Vol 3) 1916 Mad 408 (410) : 39 Mad 561 : 16 Cri L Jour 477.

[4] Court has discretion to serve public servant either personally under O. 5, R. 9 or through head of office in which he is employed. Discretion is not taken away by R. 138, Oudh Civil Rules, providing for service through the head of the office. (Vol 19) 1932 Oudh 326 (327).

[5] Service of summons outside the jurisdiction of Court issuing it—No order of the Court having jurisdiction—Service is irregular. (Vol 12) 1925 Rang 325 (326) : 3 Rang 239.

[6] Delivery or tender of summons made to defendant personally—Subsequent irregularity in not getting signature of defendant is not material. (Vol 4) 1917 Nag 49 (50).

10. Service of the summons shall be made by delivering or tendering a copy thereof signed *Modes of service.* by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

[1882—S. 73 ; 1877—S. 73 , 1859—S. 48.]

PROVINCIAL AMENDMENTS.

LAHORE

Add the following proviso :

"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule."

[As amended on 24-11-1927.]

N.-W. F. P.

Add the following proviso :

"Provided that in any case the Court in its discretion may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule : and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this order."

PATNA

Add the following :

"Provided that in any case the Court may, of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service."

Service on several defendants.

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

[1882—S. 74, Para. 1; 1877—S. 74 ; 1859—S. 48.]

Service to be on defendant in person when practicable, or on his agent.

12. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

[1882—S. 75 ; 1877—S. 75 ; 1859—S. 49.]

ORDER 5, RULE 10 — SYNOPSIS.

1. Mode of service.

2. Service by post.

1. Mode of service.— [1] There are three modes of serving a summons on a defendant (1) by delivery of a copy of the summons to defendant personally or to an agent and obtaining his signature in acknowledgment of service ; (2) by affixing a copy of the summons on the door of defendant's residence or place of business ; (3) and by effecting substituted service as laid down in O. 5, R. 20. Mere delivery of summons to a person who refused to accept it is not by itself sufficient. (Vol 5) 1918 Lah 59 (60) ; 1918 Pun Re No. 99.

2. Service by post.— [1] Service by registered post—Slight evidence will displace presumption of service raised by it. (Vol 15) 1928 Pat 568 (571) (Vol 9) 1922 Bom 377 (377) ; 46 Bom 130. (Defendant alleging non-service is entitled to re-trial.)

[2] Where summons sent by post was returned as "refused" by a person who was not shown to have been the defendant it was held that it was not a good service. (1894) 18 Bom 606 (607).

[3] Summons sent by registered post—Cover tendered by postal peon to right person—Acceptance refused—Inference is that there was sufficient service. (Vol 27) 1940 Cal 538 (537, 538) (Vol 22) 1935 Lah 171 (172). (Person refusing to accept service—Proceedings can be taken *ex parte* without effecting substituted service) (Vol 17) 1930 Lah 439 (440). (Sending registered letter which party refuses to receive amounts to service.)

[4] Registered letter sent by post—Letter refused—Ignorance of its contents cannot be pleaded. (1871) 16 Suth W R 223 (223).

[5] Proviso by the Lahore High Court—Service by registered post—Defendant acknowledging such service but not appearing—*Ex parte* proceedings should not be taken but summons should be directed to be served

by ordinary process. (Vol 13) 1926 Lah 379 (580) (Vol 14) 1927 Lah 376 (377).

[6] Proviso by Peshawar Court similar to that of Lahore High Court—Summons to defendant by registered post—Defendant absent—He should not be proceeded against *ex parte*—Order 9, R. 13 has no application to such *ex parte* decrees. (Vol 23) 1936 Pesh 199 (200).

[7] Proviso added by Lahore High Court—Court cannot compel plaintiff to deposit both process fee and postal charges and cannot dismiss suit for non-payment thereof. The mode of service is optional with plaintiff. (Vol 14) 1927 Lah 157 (158).

[8] Before the new proviso added by the Lahore High Court it was held that refusal of a party to receive summons sent by registered post was not due service under the law then in force. (Vol 16) 1929 Lah 233 (236).

Order 5, Rule 12—Note 1.

[1] As a general rule whenever practicable summons should be served on defendant personally unless he has an agent empowered to accept service in which case it would be enough if it is served upon him. (Vol 3) 1916 Cal 181 (184) ; 43 Cal 447 (FB).

[2] Bailiff going to defendant's place of business with partners on three separate days—On each occasion bailiff told that defendant was not there—Bailiff eventually posting writ of summons upon premises—*Held* there was no sufficient service. (Vol 3) 1916 Cal 181 (182) ; 43 Cal 447 (FB).

[3] Case remanded—Notice of date fixed for hearing served on counsel and not on defendant personally—Defendant absent on date and suit dismissed—Counsel not informing defendant—Absence held not intentional but *bona fide*. (Vol 20) 1933 Lah 114 (115).

[4] Service of notice upon chela is not sufficient. (Vol 7) 1920 Oudh 220 (220) ; 23 Oudh Cas 104.

13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

[1882—S. 76 ; 1877—S. 76.]

14. Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

[1882—S. 77 ; 1877—S. 77 ; 1859—S. 61.]

15. Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation. — A servant is not a member of the family within the meaning of this rule.

[1882—S. 78 ; 1877—S. 78 ; 1859—S. 53.]

O. 5 R. 12 (contd.)

[5] In the case of pardanashin lady personal service is not possible and if she has no agent empowered to accept service, no adult member in her family, affixing a copy of the summons to the outer door would be sufficient service. (Vol 10) 1923 Pat 433 (433)* (Vol 3) 1916 Cal 600 (602)* (Vol 7) 1920 Oudh 221 (222).

[But see (Vol 22) 1935 All 660 (661, 662). (Order 5, Rule 15 (Allahabad)—Pardanashin lady is not person who cannot be personally served—Lady present in house — Merely serving summons intended for pardanashin lady on male member is not sufficient requirement of law.]

[6] Summons against defendant served upon his guardian—Guardian refusing to take summons—It cannot be taken to have been served properly upon defendant. (Vol 24) 1937 Pat 17 (19).

[7] Summons addressed to B can be refused by A—But if A poses as B and knows that it is intended for him, then it is sufficient notice if the summons is served on A. (Vol 13) 1926 Rang 73 (74) : 3 Rang 515.

[8] Suit to enforce mortgage of property belonging to firm consisting of minors and other persons carrying on business within jurisdiction of Court—Minors residing outside jurisdiction—Summons neither served upon minors nor upon their guardians personally but affixed on house in which business was carried on—*Held* that there was no service either personal or substituted upon minors. (1899) 26 Cal 267 (272).

[9] Service of summons—Proper inquiry and substantial effort to find out defendant should be made. (Vol 3) 1916 Cal 181 (183) : 43 Cal 447 (FB)* (Vol 9) 1922 Cal 128 (128). (Sufficient attempt not made to serve defendant personally—Service on cousin).

[10] Suit against certain minors and other persons constituting a firm for enforcing equitable mortgage—Minors residing outside Court's jurisdiction—Summons affixed on house where business carried on and not served upon minors nor upon guardians—*Held* no service either personal or substituted was effected. (1899) 26 Cal 267 (273).

[11] Defendant living away from his brother—Summons served on brother without any attempt to serve it on defendant—Service is bad—*Ex parte* decree set aside. (1911) (1911) 1 Mad W N 186 (186).

Order 5, Rule 13—Note 1.

[1] Order 5, R. 13 applies only to suits against firms

and not to suits brought against a person in individual capacity. (Vol 9) 1922 Pat 376 (377) : 1 Pat 48.

[2] Business carried on in name of principal by agent—Service on agent is sufficient whether principal resides within local jurisdiction or not. (Vol 18) 1931 Pat 282 (284) : 10 Pat 441.

[3] To constitute service on an agent, there must be some person without the local jurisdiction who is carrying on business within the jurisdiction by an agent or the manager, and is sued on account of transaction in which such agent or manager has actually transacted business. (1879-80) 4 Bom 416 (423).

[4] Service on an agent of a foreign company carrying on business in India is service on the company if the agent has authority to enter into contracts. (Vol 18) 1926 Cal 1030 (1030).

Order 5, Rule 15—Note 1.

[1] 'Adult' under Bengal Public Demands Recovery Act (Bengal Act 1 [I] of 1895) means any person who is of such an age as to be capable and responsible for due communication of notice to the other members for whom it is intended. (1907) 34 Cal 787 (789).

[2] An officer employed in the Indian Marine Service is subject to the same rules regarding service of summons as any other person under O. 5, Rr. 27 and 28 and a notice served under the provisions of Rr. 15 and 16 is a sufficient service. (Vol 1) 1914 Cal 845 (845, 846) : 42 Cal 67.

[3] Defendant prisoner of war in enemy occupied territory—R. 20 cannot be invoked—Court should see whether R. 15 can be applicable otherwise Soldiers Litigation Act (4 [IV] of 1925), Ss. 6 and 7 should be applied. (Vol 30) 1943 Lah 327 (329).

[4] Order 5, R. 15 should be strictly complied with—Enquiry as to defendant's whereabouts should not be confined to his son or relation but should also be made from the neighbours. (Vol 8) 1921 Cal 638 (639).

[5] Service effected on son in father's absence—Son not residing with father—Summons is not duly served on father. (Vol 20) 1933 Lah 797 (798).

[6] In defendant's absence his father took the summons and made the endorsement that he had gone to another place. *Held*, that summons was not served, no attempt being made to make personal service nor it being shown that the defendant was avoiding service. (1911) 1911 Pun L R No. 136 page 509 (509).

PROVINCIAL AMENDMENTS.

ALLAHABAD

For the words "Where in any suit the defendant cannot be found," read "When the defendant is absent or cannot be personally served." [24-7-1926.]

CALCUTTA

Substitute the following :

"Rule 15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

Explanation. — A servant is not a member of the family within the meaning of this rule."

[25-7-1928.]

LAHORE

After the words "where in any suit the defendant cannot be found," insert the following words "or is absent from his residence." [24-11-1927.]

MADRAS

Delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent." [R. O. C. No. 1810 of 1926.]

NAGPUR

Substitute the words "when the defendant is absent or cannot be personally served" for the words "where in any suit the defendant cannot be found." [29-6-1948.]

N.-W. F. P.

For the words "where in any suit the defendant cannot be found," substitute "where the defendant is absent from his usual place of residence."

OUDH

For the words "where in . . . found," substitute "where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."

16. Where the serving officer delivers or tenders a copy of the summons to the defendant personal.

Person served to sign ly, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

[1882—S. 79; 1877—Ss. 79, 80; 1859—S. 54.]

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment², or where the serving officer, after using all due and reasonable diligence⁴, cannot find the defendant³, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix⁵ a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain⁶, and shall then return⁸ the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Procedure when defendant refuses to accept service, or cannot be found. accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix⁵ a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain⁶, and shall then return⁸ the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

[1882—S. 80; 1877—S. 80; 1859—S. 55.]

O. 5 R. 15 (contd.)

[7] A service of summons on the paternal uncle of a defendant living with him is not sufficient unless it is proved to the Court's satisfaction that the defendant could not be found, since service must as far as possible be personal. (1913) 35 All 556 (557).

[8] Service on the brother of the defendant who is living separately is not service. (1911) 9 I C 763 (763) (Mad).

[9] Notice on plaintiff and his counsel to appear in Court — Munim of plaintiff's firm served — Service on party's munim held insufficient and dismissal of suit held wrong. (Vol 5) 1918 Lah 295 (296).

[10] Service on one tenant living in one village is not service on another living in another village. (1933) 17 R D 608 (609).

[11] Order 5, R. 15 (Calcutta)—Notice under O. 21, R. 22 issued on heirs of deceased judgment-debtor — Eldest son accepting only notice in his name — Notices

in names of others affixed on door — Service held good. (Vol 26) 1939 Cal 369 (376) : I L R (1939) 1 Cal 530.

[12] Service to servant is not sufficient. (Vol 14) 1927 Lah 200 (215) : 8 Lah 54.

Order 5, Rule 16—Note 1—"Shall require signature"—See Note 2 on O. 5, R. 17.

ORDER 5, RULE 17—SYNOPSIS.

1. Scope.
2. Refusal to sign acknowledgment.
3. Defendant cannot be found.
4. "Due and reasonable diligence."
5. Affixture.
6. "Ordinarily resides or carries on business or personally works for gain."
7. Temporary residence of defendant — See Notes 3 and 4.
8. Return of service.
9. Pardanashin lady — See O. 5, R. 12.

PROVINCIAL AMENDMENTS.

CALCUTTA

Substitute the following :

"17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed." [25-7-1928.]

NAGPUR

The following proviso shall be added at the end of the rule :

"Provided that where a special service has been issued and the defendant refuses to sign the acknowledgment, it shall not be necessary to affix a copy as directed hereinbefore." [29-6-1943.]

O. 5 R. 17 (contd.)

1. Scope. — [1] The Rule being of a highly penal nature must be strictly complied with in order to give validity to the service purporting to be effected thereunder. (Vol 12) 1925 Pat 441 (441, 442) : 4 Pat 135 * (Vol 3) 1916 Cal 181 (182) : 43 Cal 447 * (Vol 4) 1917 Nag 49 (50).

[2] Provisions of O. 5, R. 17 are not strictly applicable to the service of notices after the first hearing in the case. (1939) 1939 Oudh W N 787 (790).

[3] Scheduled Districts Act, (1874)—Agency Rules under R. 50—Notice of appeal to respondents by affixing—Before accepting service Court must satisfy itself that conditions of O. 5, R. 17, Civil P. C. were satisfied. (Vol 31) 1944 Pat 297 (298) : 23 Pat 442.

[4] Court is competent to direct service by registered post or other manner even after service under R. 17. (Vol 3) 1916 Cal 600 (602).

2. Refusal to sign acknowledgment. — [1] Service of summons is complete when it is tendered to the witness, and his refusal to sign the original makes no difference. (Vol 3) 1916 Mad 408 (410) : 39 Mad 561 : 16 Cri L Jour 477.

[2] Where copy of summons is delivered to defendant but the latter refuses to sign the acknowledgment of service and the process-server does not affix the copy as per O. 5, R. 17, the defendant cannot be taken to have been validly served. (Vol 20) 1933 All 165 (166) * (1872) 8 Bom L R 584 : (586) * (1896) 18 Bom 117 (119) * (Vol 5) 1918 Lah 59 (61) : 1913 Pun Re No. 99 * (Vol 19) 1932 Pat 150 (151).

[3] Defendant refusing to accept service of summons — Summons affixed to outer door of his dwelling—Service is good. (Vol 5) 1918 Lah 166 (168, 169).

[4] Defendant was tendered a copy of summons by a process-server, but instead of accepting it he went and shut himself up in his house — Copy affixed to door — Summons held duly served. (Vol 3) 1916 Nag 29 (31) : 13 Nag L R 46.

[5] No personal refusal — Peon not refused access to person to be served — Some servant refusing — Servant not shown to be authorised to receive notice — Servant held not agent and service by affixing held insufficient. (Vol 31) 1944 Pat 41 (47) : 23 Pat 31 (F B).

[6] Condition that defendant refused to sign acknowledgment not satisfied—Stage for affixing copy on outer door does not arrive. (Vol 27) 1940 Pat 563 (564).

[7] Mere refusal to sign a receipt for a summons does not constitute an offence under S. 173 or S. 180, Penal Code. (1893) 20 Cal 358 (359).

[8] Defendant pleader practising at another place — His adult brother tendered copy of notice at joint family dwelling house and on his refusal to accept it notice affixed on outer door — Service of notice held to be sufficient. (Vol 18) 1931 Cal 546 (549).

3. Defendant cannot be found. — [1] Service by affixture will be good if the defendant is keeping out of the way to avoid service. (1905) 7 Bom L R 159 (160). * (1873) 10 Bom 202 (206).

[2] A person cannot be said to be "not found" within the meaning of this rule merely by reason of his temporary absence from his usual place of residence. (Vol 4) 1917 All 368 (368) (Respondent absent for two or three days—Affixture is not proper.) * (Vol 3) 1916 All 337 (337). (Fixation of summons on door when person to be served is temporarily away and is traceable — Service is not good.) * (1897) 21 Bom 223 (226). * (Vol 17) 1930 Lah 192 (192). (Mere temporary absence will not justify affixture even though the defendant had previously refused to accept service.) * (Vol 1) 1914 Mad 159 (159). (Mere absence does not justify affixture.) * (1898) 21 Mad 419 (421). (Temporary absence of person to be served does not justify the process-server affixing the summons to the door. Peon must take pains to find out the person concerned.) * (Vol 11) 1924 Oudh 237 (238). * (1910) 13 Oudh Cas 54 (55). (Process-server knowing that person sought to be served has gone to particular place and will return home—Affixture is not proper.) * (1915) 29 Ind Cas 564 (565) (U P B R). (Temporary absence does not justify affixture.)

[3] The affixing of a copy of the summons on the outer door is sufficient service if the defendant is absent and it is not known when he would return. The serving officer is not bound to wait for the defendant indefinitely in such a case. (1911) 21 Mad L Jour 978 (980) * (Vol 13) 1926 Mad 31 (32) * (Vol 2) 1915 Mad 342 (343). (Defendant going from place to place.) * (Vol 2) 1915 Mad 338 (339). (Defendant absent from house having gone to other village — Process-server not having any reason to expect defendant's return within short period Process-server is not bound to wait till defendant returns or pursue him to the other village — Service by affixture is good service.)

[4] Where the adult members on whom the notice was to be served were not to be found in the house and the servants refused to accept notice, held that it was good service to affix it on the outer thatch of the house. (1910) 14 Cal W N 372 (374).

[5] Affixing of summons to a defendant on the outer door of his house in his absence without any attempt to effect service on the defendant at the place to which he had gone, is not sufficient service. The mere fact that a third person unconnected with the suit enquired of the defendant as to what had been done with the suit, is not sufficient to declare that the defendant had notice of suit. (Vol 3) 1916 Mad 761 (762).

[6] As to service on pardanashin ladies : see O. 5, R. 12.

4. "Due and reasonable diligence." — [1] Serving officer must use due and reasonable diligence to find

O. 5 R. 17 (*contd.*)

defendant. He must make proper inquiries and if necessary follow defendant. It is not enough to go to defendant's house in perfunctory way and to affix copy of summons. (Vol 6) 1919 Upp Bur 20 (21) : 3 Upp Bur Rul 123*(Vol 12) 1925 Cal 627 (630) : 52 Cal 179. (All available steps to effect personal service must be made.) *(Vol 3) 1916 Cal 511 (513). (A service of notice by affixing a copy on the entrance door of the judgment-debtor without any diligent search, is not service according to law.) *(Vol 8) 1916 Cal 181 (183) : 48 Cal 447. (For serving summons upon the defendant proper enquiries, and real and substantial effort and not perfunctory efforts should be made as to when and where the defendant is likely to be found.)*(1892)19 Cal 201 (203). (To go to defendant's house in perfunctory way and to affix if he could not be found is not proper.)*(1913) 16 Oudh Cas 83 (85). (In the temporary absence of the person to be served with notice, the server must take every step to effect personal service. If without doing so the process-server affixes the summons to the outer door of the house, a Court is not justified in treating this as due service.)*(Vol 21) 1934 Pat 274 (276) : 13 Pat 467. (Affixing without effort to find out defendant.)

[2] Amount of due and reasonable diligence to be exercised by serving officer depends on facts of each case. (Vol 2) 1915 Mad 338 (339). *(Vol 13) 1926 Cal 327 (330).

[3] Peon affixing notice at entrance of party's house on being told that party was at his own "bari" some two or three miles off — Service is not valid. (Vol 11) 1924 Cal 1004 (1005).

[4] Defendant being temporarily absent and there being time to serve him personally mere affixture held not sufficient. (Vol 18) 1931 Nag 119 (119) : 27 Nag L R 53.

[5] Service of summons personally not possible as defendants not found — No agent or other person to receive or such person refuses to receive — Then only summons may be affixed if defendant is not found after "due and reasonable diligence." (Vol 9) 1922 Nag 105 (108).

[6] Where a process-server visits the village no fewer than five times to serve the summons on the defendant it may be reasonably held that every effort was made to effect service upon the defendant and that he was evading service and it should be held that the process-server used all possible diligence. Fixing of summons to the house in such a case will be good service. (Vol 18) 1931 Nag 122 (123) : 27 Nag L R 50.

[7] A process-server, attempting on three different occasions to serve the summons personally on the defendant and having failed, is right in effecting substituted service. (1910) 7 All L Jour 286 (289).

[8] Process-server should take reasonable steps to discover whereabouts of defendant—Process-server going to defendant's house on several days and not finding defendant nor his agent or adult member of his family, posting summons on house—Summons held not duly served. (Vol 24) 1937 Rang 475 (476).

[9] Defendant temporarily away from home—Serving officer knowing it and yet doing nothing more than fixing summons to the outer door — Held no good service. (1902) 24 All 302 (304) *(1906) 2 Nag L R 63 (64).

[10] Process-server affixing copy of summons to door of defendant's house merely upon being told that he had gone out and was expected to return in the evening — Summons cannot be said to be properly served. (Vol 26) 1939 All 180 (181).

[11] Defendant having two residences — Plaintiff must enquire for defendant at both. (Vol 12) 1925 Cal 801 (802) : 52 Cal 453.

[12] Service of notice of appeal — Copy of notice attached to outer door—Officer not shown to have carried out the requirements of the Code — Service held to be not proper in spite of the fact that officer's report contained following statement "the respondent not found; his adult undivided son having refused to receive copy of the notice, it was affixed to the front door." (1906) 30 Bom 623 (624).

[13] Madras Estates Land Act (1 [1] of 1908), S. 112 —Service of notice under S. 112 is proper only when requirements laid down in O. 5, R. 17, Civil P. C., are shown to have been satisfied. (Vol 26) 1939 Mad 502 (502, 503.)

5. Affixture.— [1] On the refusal of a defendant to accept summons attempted to be served upon him at a place where he does not ordinarily reside, the summons must be served in the house in which he ordinarily resides. (Vol 5) 1918 Cal 179 (180).

[2] Defendant refusing to accept service—Affixing of summons on outer door of premises in which defendant is found but which is not his residence or place of business, is not enough. (Vol 12) 1925 Cal 801 (802) : 52 Cal 453.

[3] Affixing copy on outer door of firm's place of business under R. 17 is good against partner. (Vol 2) 1915 Cal 238 (242).

[4] Execution of decree — Defendant absent from village—Notice of application for execution, affixed to the wall of his residence — Service held sufficient. (1869-70) 5 Mad H C R 101 (101).

[5] Where affixing is made impossible by defendant by retaining copy of summons — Omission to affix does not vitiate due service. (Vol 11) 1924 Pat 446 (448) : 3 Pat 236*(Vol 30) 1943 Bom 340 (341). (Defendant running away with summons—Serving officer hence not affixing summons to defendant's residence—Service is good.)

[6] Person refusing summons — That summons was not affixed to outer door of house is only irregularity and does not affect validity of service. (Vol 22) 1935 Lah 171 (172).

[7] Leaving duplicate on teapoy at defendant's residence is not sufficient. (Vol 16) 1929 Bom 257 (257).

6. "Ordinarily resides or carries on business or personally works for gain." — [1] Where a peon who went to serve a defendant with summons was informed that the defendant had gone to another Presidency and affixed the summons to the outer door, it was held that this was sufficient compliance with the provisions of O. 5, R. 17 because a mere temporary absence from a house will not make the house, one in which the defendant did not ordinarily reside. (1913) 17 Cal W N 999 (1001).

[2] If the defendants do not ordinarily reside in the house on the outer door of which the summons was affixed, the rule has no application. (1909) 13 Cal W N 490 (491).

[3] See also Notes on S. 20.

7. Temporary residence of defendant. — See Notes 3 and 4.

8. Return of service. — [1] Report of process-server not containing name of any witness — Service is not according to law. (Vol 15) 1928 Nag 80 (80, 81) : 23 Nag L R 166.

[2] The service of a summons or of a notice upon a person is a very important step and the law requires that the action of the person charged with the service should be set out in full and be supported by an affidavit. Until this is done, the summons cannot be taken to have been sufficiently served. (1913) 11 All L Jour 540 (541).

[3] The affidavit of service of summons must disclose firstly that proper steps were adopted to find out

18. The serving officer shall, in all cases in which the summons has been served under Rule 16, *Endorsement of time and manner of service.* endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

[1892—S. 81; 1877—S. 81; 1859—S. 56.]

PROVINCIAL AMENDMENT.

Rule 18A—MADRAS.

Insert the following :

"18A. A District Judge within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial Officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice Board."

[P. Dis. No. 777 of 1929.]

19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule *Examination of serving officer.* has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

[1892—S. 82; 1877—S. 82; 1859—S. 57.]

PROVINCIAL AMENDMENT.

CALCUTTA

Substitute the following :

"19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

[25-7-1928.]

Rule 19A—CALCUTTA

Insert the following :

"19A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons."

[25-7-1928.]

O. 5 R. 17 (contd.)

the person and secondly that a copy of the summons was affixed to the door of his house. (1899) 26 Cal 102 (102). (Case under old law.)

9. Pardanashin lady.—See O. 5 R. 12.

Order 5, Rule 18 — Note 1.

[1] Presumption as to service is that summons is served as stated in the peon's report. (Vol 10) 1923 Pat 327 (329).

[2] It is not incumbent on a party to provide an identifier for the purpose of identifying the person served. The identifier can be a person in the village knowing the defendant. (Vol 10) 1923 Pat 114 (115).

[3] It had been held by the Calcutta High Court in the undermentioned cases that the report of the serving officer that a summons was served on a person was not evidence as to service unless the serving officer was examined and the service proved. However, R. 19A now added by the same High Court provides that the report of the serving officer is evidence. (1869) 12 Suth W R 365 (366)* (1868) 10 Suth W R 3 (4).

Order 5, Rule 19 — Note 1

[1] Under O. 5, R. 19 an express declaration of due service is necessary. (Vol 20) 1933 Mad 466 (470)* (Vol 5) 1918 All 331 (331, 332)* (Vol 24) 1937 Mad 84 (87). (Order passed without declaration of due service does not constitute *res judicata*.) * (Vol 23) 1936 Mad 812 (813). (Substituted service—Declaration under O. 5, R. 19, is essential)* (Vol 22) 1935 Mad 438 (439). (Provisions of O. 5, R. 19 are imperative — In absence of declaration that service is due service, service cannot

be held to be effected.)* (Vol 20) 1933 Mad 406 (406) (Unless there is declaration by Court as to due service of notice, constructive *res judicata* as to service does not arise.)* (Vol 14) 1927 Mad 813 (815). (Omission to declare proper service is not mere irregularity.)* (Vol 9) 1922 Mad 417 (417). (Ex parte decree passed without express declaration of due service is liable to be set aside.)

[But see (Vol 21) 1934 Ish 985 (985). (Failure to pass formal order declaring due service under O. 5, R. 19 not being material irregularity — Sale is not vitiated.)* (Vol 30) 1943 Mad 55 (56). (Absence of express declaration of due service does not involve as a necessary consequence a finding that summons has not been duly served.)* (Vol 27) 1940 Mad 213 (213, 214)* (1909) 19 Mad L Jour 31 (32)* (Vol 19) 1932 Oudh 326 (327).]

[2] If the return is not verified by the affidavit of the serving officer, the Court is bound to examine him before deciding as to sufficiency of service. (1915) 31 Ind Cas 479 (479) (U P B R.)

[3] Verification of return by affidavit of serving officer—Examination of serving officer is matter of discretion with Court. (Vol 19) 1932 Oudh 326 (327).

[4] Summons affixed to door of defendant's house because he was not in village is not duly served. (Vol 1) 1914 Mad 159 (159).

[5] When summonses are returned unserved, the Court should pass subsequent orders not vaguely but very clearly, stating the cause of non-service. (1912) 1912 Mad W N 174 (175).

20 (1) Where the Court is satisfied² that there is reason to believe that the defendant is *Substituted service.* keeping out of the way for the purpose of avoiding service,³ or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Effect of substituted service.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted, time for appearance to be fixed.

(3) Where service is substituted by order of the Court, the Court shall fix such time⁶ for the appearance of the defendant as the case may require.

[1882—S. 82, para. 2 and Ss. 83, 84; 1877—Ss. 82, 83, 84; 1859—Ss. 57, 58, 85.]

PROVINCIAL AMENDMENT.

RULE 20A—OUDH

Insert the following:

"20A. (1) Where the defendant resides in British India outside the province of Oudh or within the limits of a headquarters town of a district in the province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served.

(2) Where the registered address of the defendant or opposite party, as defined in O. 8, R. 11, is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served."

ORDER 5, RULE 20 — SYNOPSIS.

1. Scope.
2. "Court is satisfied."
3. Evasion of service.
4. Mode of effecting substituted service.
5. Return of substituted service.
6. "Shall fix such time."
7. Substituted service as effective as personal service.

1. Scope. — [1] One of the modes of service of summons is that known as substituted service as laid down in R. 20 of O. 5. (Vol 5) 1918 Lah 59 (60) : 1918 Pun Be No. 99.

[2] Unless all reasonable steps have been adopted, and the ordinary means of service have been tried, substituted service cannot be resorted to. (1929) 120 Ind Cas 594 (595) (Lah) * (1911) 38 Cal 394 (400) * (Vol 7) 1920 Lah 472 (472).

[3] Substituted service — Unbusinesslike and ridiculous use is prohibited, e.g. where service is made by affixing to the door of the Court-house by way of serving defendant admitted on all hands to be in Natal, South Africa. (Vol 16) 1929 Cal 553 (557) : 57 Cal 538.

[4] Defendant prisoner of war in enemy occupied territory — Rule 20 cannot be invoked. (Vol 30) 1943 Lah 327 (329).

[5] Substituted service to show cause why one should not be appointed guardian is improper — Service should be by ordinary notice. (Vol 17) 1930 All 609 (609, 610).

[6] Substituted service under this rule unlike the two other modes of service can only be taken by order of the Court to that effect. (Vol 7) 1920 Lah 69 (70).

2. "Court is satisfied". — [1] The advisability of effecting service by substituted service is a matter primarily for trial Court and the Appellate Court has no jurisdiction to consider whether order of trial Court is based on sufficient grounds. It has only to see that order issued is according to law and whether trial Court was satisfied that conditions of O. 5, R. 20 were fulfilled. (Vol 14) 1927 Mad 507 (507) * (Vol 20) 1933 Lah 288 (289) * (Vol 18) 1931 Lah 118 (118). (Appellate Court has only to see that rules of law are observed.)

[But see (Vol 22) 1935 Lah 169 (170). (Question as to advisability of effecting substituted service — Order on such point—Appellate Court can examine legality of such order.)]

[2] Party cognizant of proceeding against him is duly served when after failure to effect personal service, proclamation is published in newspapers. (Vol 17) 1930 Lah 397 (399).

[3] Plaintiff knowing whereabouts of defendant getting order for substituted service by practising fraud — There is no proper service. (Vol 22) 1935 Lah 129 (129).

[4] Person refusing to accept service — Court is not bound to order substituted service — Proceedings can be taken *ex parte*. (Vol 22) 1935 Lah 171 (172).

[5] Suit should not be dismissed for non-service of summons unless plaintiff is given opportunity of having recourse to substituted service. (Vol 18) 1931 Pat 420 (421).

[6] Substituted service cannot be invalidated by showing, that the Court's belief as to its necessity was erroneous. (Vol 19) 1932 Mad 472 (473).

3. Evasion of service. — [1] Where the plaintiff knew all along that the defendant had left certain place two or three years before suit and he further knew that the defendant had left his brother in that place and was in communication with him it cannot be said that there has been an evasion of service by the defendant. (Vol 11) 1924 Lah 191 (191).

[2] Mere temporary absence on the part of the defendant does not amount to evasion. (1906) 29 Mad 324 (324).

4. Mode of effecting substituted service. — [1] Copy attached to tree near house — Service is sufficient. (Vol 10) 1923 Nag 13 (15).

[2] Copy of plaint not affixed — Service is bad. (Vol 14) 1927 Lah 376 (377).

5. Return of substituted service. — [1] Statement of process server that substituted service has been made — *Ex parte* decree passed — Presumption that substituted service has been actually effected can be rebutted. (Vol 22) 1935 Pesh 112 (113).

Service of summons where defendant resides within jurisdiction of another Court.

21. A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

[1882—S. 85; 1877—S. 85; 1859—S. 59.]

PROVINCIAL AMENDMENTS

RULE 21A—BOMBAY

The following shall be inserted:

"R. 21A. The Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post pre-paid for acknowledgment provided that at such place there is a regular daily postal service. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and declare the summons to have been duly served or order such further service as may in its opinion be necessary."

[9-8-1940.]

RULE 21A—SIND

Insert the following:

"21A. *Service of summons by pre-paid post wherever the defendant may be residing, if plaintiff so desires.* — Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post pre-paid for acknowledgment, provided that such place is at a town or village in British India which is the headquarters of a district or a recognised sub-division of a district, such as a taluka, or to which the provisions of this rule may, from time to time, be extended by a notification by the Court of Judicial Commissioner of Sind, published in the *Sind Official Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

22. Where a summons issued by any Court established beyond the limits of the towns of

Service, within Presidency-towns, of summons issued by Courts outside.

Calcutta, Madras [and Bombay] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

[1882—S. 86; 1877—S. 86.]

[a] Substituted by A. O. for "Bombay and Rangoon."

PROVINCIAL AMENDMENT

BOMBAY

Add the following proviso:

"Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the

O. 5 R. 20 (contd.)

6. "Shall fix such time" — [1] Under this rule Court is bound to fix a time for the appearance of the defendant and it should see that ample and reasonable time should be allowed for the notice to come to the knowledge of the person concerned. (Vol 15) 1928 Rang 185 (186) : 6 Rang 218 * (1878) 2 Bom 449 (451, 452) * (Vol 19) 1932 Lah 248 (249). (One day between date of substituted service under O. 5, R. 17, and hearing of appeal is inadequate except in special circumstances.)

[2] Notice in newspaper published at place distant from party's residence without giving sufficient time is not valid substituted service. (Vol 16) 1929 Lah 235 (236).

7. Substituted service as effective as personal service. — [1] Substituted service is as effectual as personal service. (Vol 15) 1928 Mad 1052 (1054) * (Vol 18) 1931 Mad 813 (816) : 55 Mad 223.

[2] Substituted service does not preclude defendants from subsequently showing that it was improperly ordered or was defective. (Vol 27) 1940 Oudh 81 (82) : 15 Luck 150 * (Vol 21) 1934 Cal 745 (747). (Defendants served under O. 5, R. 20, on representation that they resided at particular place where really they never resided—Service is not due service.) * (Vol 18) 1931 Mad 813 (815) : 55 Mad 223 * (18) 9 Nag L R 35 (37) * (Vol 26) 1939 Rang 436 (440) : 1939 Rang L R

606. (Defendant should be given opportunity of contesting that the summons has been served in a way which did not in effect bring proceedings to his notice—Word "effectual" does not mean due service.)

[3] Substituted service is due service within Art. 164, Limitation Act, even where as a matter of fact the defendant has been ignorant of the suit. (Vol 14) 1927 Mad 487 (488) * (Vol 19) 1932 Mad 472 (472) * (Vol 15) 1928 Mad 815 (816) : 51 Mad 860 * (Vol 18) 1931 Oudh 369 (369).

[But see (Vol 18) 1931 All 727 (729) : 54 All 154 (F B) * (Vol 18) 1931 Mad 813 (816) : 55 Mad 223. (Substituted service is not due service within Art. 164, Limitation Act, where it has not been effective, i. e., where it has not achieved the object of bringing to the knowledge of the defendant the claim against him.) * (Vol 15) 1928 Mad 655 (657) * (Vol 25) 1938 Oudh 11 (12).]

[4] Defendant deliberately keeping out of way to avoid service — Substituted service is due service irrespective of question of actual knowledge of suit on his part. (Vol 18) 1931 Mad 812 (813) : 55 Mad 240.

Order 5, Rule 21 — Note 1.

[1] Service of summons outside the jurisdiction of the Court issuing it and without any order of the Court having jurisdiction is irregular. (Vol 12) 1925 Rang 325 (326) : 3 Rang 239.

Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary." [9-9-1910.]

23. The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, *Duty of Court to which summons is sent.* proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

[1882—S. 85; 1877—S. 85; 1859—S. 59.]

24. Where the defendant is confined in a prison, the summons shall be delivered or sent by *Service on defendant in prison.* post or otherwise to the officer in charge of the prison for service on the defendant.

[1882—Ss. 87, 88; 1877—Ss. 87, 88.]

25. Where the defendant resides out of British India and has no agent in British India *Service where defendant resides out of British India and has no agent.* empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

[1882—S. 89, 1877—S. 89; 1859—S. 60.]

PROVINCIAL AMENDMENTS

ALLAHABAD

For the word "shall" read the word "may". [24-7-1926.]

MADRAS

Substitute the following for Rule 25 :

"Where the defendant resides out of British India and has no agent in British India empowered to accept *Service where defendant resides out of British India and has no agent.* service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate :

Provided that if, by any arrangement between the Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon."

[As amended on 2-3-1942.]

NAGPUR

Substitute "may" for "shall". [29-6-1943.]

OUDH

Substitute the word "may" in place of the word "shall".

RULE 25A—ALLAHABAD

Add the following :

"25A. When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to, or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or on endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service." [24-7-1926.]

RULE 25A—NAGPUR

Add the following rule :

"25A. Where the defendant resides in British India but outside the limits of the Central Provinces, *Service where defendant resides in British India but outside the Central Provinces.* the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service". [29-6-1943.]

Order 5, Rule 23 — Note 1.

[1] Defendant residing outside jurisdiction—Summons transmitted to Court having jurisdiction—Court serving summons can make declaration as to sufficiency of service. (1911) 33 All 649 (652) ✕ (Vol 11) 1924 Oudh 237 (238). (Serving Court not satisfying itself as to sufficiency of service.)

Order 5, Rule 25 — Note 1.

[1] Defendant residing outside British India—Summons sent by post—No evidence to establish that defendant was at that time, residing at that place—Evidence of the summons having been received is necessary. (1901) 23 All 99 (105).

[2] It is a proper service of summons where the same is sent by registered post to the defendant's address and the cover is returned to the Court with the endorsement 'refused.' (1911) 35 Bom 218 (215).

[3] It is advisable to send the summons under this rule in a registered cover rather than in the form of a registered post card. (1871) 15 Suth W R 31 (31).

[4] Defendant residing outside British India in Aminidivi Island—Service of summons should be effected by affixing summons to last known place of residence in British India and by registered post. (Vol 4) 1917 Mad 415 (415).

26, Where —

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in ^a[the Central Government or the Crown Representative], a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

^b(b) ^a[the Provincial Government] has, by notification in the ^c[Official Gazette], declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons ^d[issued under this Code by a Court of the Province] shall be deemed to be valid service.]

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

[1882—S. 90; 1877—Ss. 90, 92; 1859—S. 66.]

[a] Substituted by A. O. for "the Governor-General in Council". [b] Sub-rule (b) was substituted by the Second Repealing and Amending Act, 1914, Section 2 and Schedule I for the original sub-rule. [c] Substituted by A. O. for "Gazette of India". [d] Substituted by *ibid* for "issued by a Court under this Code".

PROVINCIAL AMENDMENTS**ALLAHABAD**

After the words "the summons may" insert the words "in addition to, or in substitution for the method permitted by Rule 25." [24-7-1926.]

MADRAS

Substitute the following :

"Where —

Service in foreign territory through Political Agent or Court or by special arrangement.

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Central Government or the Crown Representative, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons or process issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Provincial Government has, by notification in the Official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons or process issued under this Code by a Court of the Province shall be deemed to be valid service, or

(c) by any arrangement between the Government of the Province in which the Court issuing the summons or process is situate and the Government of the foreign territory in which the defendant resides the summons or process can be served by an officer of the Government of such territory ; the summons or process may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant ; and, if the summons or process is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons or process has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service". [As amended on 2-8-1942.]

NAGPUR

Insert the words, "in addition to, or in substitution for the method permitted by Rule 25," between the words "may" and "be sent". [29-6-1943.]

ODDH

In sub-rule (b), after the words "the summons may," insert the words "in addition to, or in substitution for the method permitted by Rule 25".

27. Where the defendant is a public officer (not belonging to His Majesty's military, ^a[naval

Service on civil public officer or on servant of railway company or local authority.

or air] forces ^{b****}), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be

retained by the defendant.

[1882—S. 422; 1877—Ss. 422, 468; 1859—Ss. 62, 68.]

[a] Substituted by the Repealing and Amending Act, 1927 (10 [X] 1927), S. 2 and Sch. I for "or naval". [b] The words "or His Majesty's Indian Marine Service" were repealed by the Amending Act, 1934 (35 [XXXV] of 1934), Section 2 and Schedule.

Order 5, Rule 27 — Note 1.

[1] Service under R. 27 is discretionary — Discretion is not taken away by Oudh Civil Rules, R. 188. (Vol 19) 1932 Oudh 326 (327).

[2] *Ex parte* decree cannot be set aside merely on ground of non-compliance with O. 5, R. 27. (Vol 3) 1916 Pat 25 (26).

PROVINCIAL AMENDMENTS

ALLAHABAD

Add the following note :

"*Note to Order 5, Rule 27.*—(1) A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in Appendix II of the General Rules (Civil).

(2) In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order 16, simultaneously with the issue of summons, notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such persons.

Illustration.

If the Court sees fit to issue a summons to a *Kanungo* or *Patwari* it shall inform the Collector of the district, and if to a Sub-Registrar it shall inform the District Registrar to whom the Sub-Registrar is subordinate".

MADRAS

After the words "send it" insert the words "by registered post pre-paid for acknowledgment".

[Dis. No. 209 of 1912.]

28. Where the defendant is a soldier, ^a[sailor] ^b[or airman], the Court shall send the summons

Service on soldiers, for service to his commanding officer together with a copy to be retained by
sailors or airmen. the defendant.

[1882—S. 468 ; 1877—S. 468 ; 1859—S. 62.]

[a] Inserted by the Amending Act, 1934 (35 [XXXV] of 1934), Section 2 and Schedule. [b] Inserted by the Repealing and Amending Act, 1927 (10 [X] of 1927), Section 2 and Schedule I.

PROVINCIAL AMENDMENTS

ALLAHABAD

The present Rule 28 shall be numbered 28 (1).

Add the following as Rules 28 (2), (3), (4) and (5) :

"(2) Where the address of such Commanding Officer is not known, the Court may apply to the Officer commanding the station in which the defendant was serving when the cause of action arose to supply such address, in the manner prescribed in sub-rule (4) of this rule.

(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable, service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the Officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the Officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post."

MADRAS

After the words "shall send" insert the words "by registered post pre-paid for acknowledgment."

[Dis. No. 209 of 1912.]

OUDH

Add the following as 28 (a) and re-number the present rule as (b) :

"28. (a) Where the defendant is an officer in His Majesty's Military, naval or air forces, the Court shall send the summons direct to him for service together with a copy to be retained by him".

29. (1) Where a summons is delivered or sent to any person for service under rule 24,

Duty of person to whom summons is delivered or sent for service. rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

[1882—Ss. 87, 88, 468 ; 1877—S. 468 ; 1859—S. 62.]

PROVINCIAL AMENDMENTS

ALLAHABAD

In sub-rule (1), line 3, for the word and figures "Rule 28" read "Rule 28 (1)."

Rule 29A — MADRAS

Insert as Rule 29A :

"29A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval Forces or His Majesty's Indian Marine service) sued in his official

Order 5, Rule 28 — Note 1.

[1] Where a notice was served upon a sepoy directly and accepted by the sepoy he cannot afterwards raise, in an application to set aside an *ex parte* decree, the objection that the notice was not served through the

Commanding Officer. (1912) 1912 Pun WR 181 p. 352(353).

[2] A mechanic serving in the Indian marine is subject exactly to the same rules as every other person under the Code as regards service. (Vol 1) 1914 Cal 845 (845, 846) : 42 Cal 47.

capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post pre-paid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons." [Dis. No. 209 of 1912.]

30. (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a *Substitution of letter for summons.* summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

[1882—Ss. 91, 92; 1877—Ss. 91, 92; 1859—Ss. 64, 65.]

PROVINCIAL AMENDMENTS

Rules 31 and 32 — ALLAHABAD

Insert the following as Rules 31 and 32 :—

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court."

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court Vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

Rule 31 — SIND

Add the following as Rule 31 :—

"31. If a summons issued to a defendant residing in British India is returned unserved, the Court may, while issuing a fresh summons for personal service or ordering substituted service of summons, also order that a copy of the summons addressed to the defendant at the place where he is residing be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

ORDER VI.

"[The Committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England which is generally admitted to be the best form of pleading in civil suits. In this country outside the Presidency towns the pleadings are seldom artistically drawn. They are neither concise nor precise but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties. The sole object of pleadings is thus frequently defeated, the issue is enlarged, the trial is delayed and much unnecessary expense is incurred by the parties who are also liable to be taken by surprise. They have further provided that the forms in the Schedule shall, when applicable, be used for all pleadings and when they are not applicable, forms of the like character shall be used. The rules prescribed by us will not prevent the pleader from exercising his discretion; for the amount of detail must necessarily vary with the nature of each suit. It is, however, made clear that there must be particularity sufficient to appraise the Court and the other party of the exact nature of the questions to be tried.

The Committee have also given a party who considers that his opponent's pleading does not give him the information to which he is entitled, the right to apply for further particulars so as to enable him to know what case he has to meet at the trial.

They have, however, endeavoured to modify the rigour of the rules by providing in accordance with Section 55 of the Indian Evidence Act that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it". — S. O. R.]

PLEADINGS GENERALLY.

Pleading. 1. "Pleading" shall mean plaint or written statement.

[Cf. Supreme Court of Judicature (Consolidation) Act, 1925, S. 225.]

Order 6, Rule 1 — Note 1.

[1] The provisions of O. 6 relating to amendment of pleadings apply to applications in *forma pauperis* under O. 33. (Vol 19) 1932 Lah 548 (549).

[2] Pauper application is not plaint within O. 6, R. 1 until admitted under O. 33, R. 8. (Vol 1) 1914 Mad 256 (258).

[3] Where pleadings in Courts raise an issue with

reasonable clearness, the fact that party does not put the plea forward in a particular form is immaterial. (Vol 2)-1915 Mad 519 (526).

[4] Pleader's statement which is the basis of the trial must be considered to be explanatory of and supplementary to the pleadings of the plaintiff. (Vol 16) 1929 Oudh 204 (206, 207).

2. Every pleading shall contain, and contain only, a statement in a concise form of the *Pleading to state material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.*

[R. S. C., O. 19, R. 4. Cf. 1882—S. 114.]

ORDER 6, RULE 2 — SYNOPSIS.

1. Object of pleadings.
2. Pleadings must state facts and not law.
- 2a. Facts stated must be material facts.
3. Alternative and inconsistent allegations.
4. Pleadings should not state evidence.
5. Variance between pleading and proof.
6. Construction of pleadings. — See Note 1.

1. Object of pleading. — [1] Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued, in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issue. (1895) 22 Cal 324 (331) : 22 Ind App 4(P.C.) * (Vol 25) 1938 P C 121 (123) : 32 Sind L R 462 (P C) * (Vol 33) 1946 Cal 249 (257) : I L R (1944) 2 Cal 487. (Object of pleadings is to give fair notice to each party of what the opponent's case is.)

[2] The object of pleadings is to bring the parties to an issue and they must be looked at, only for the purpose of being informed of the allegations and contentions of the parties. They do not prove that those allegations and contentions are true. (1913) 25 Mad L Jour 329 (341) * (Vol 32) 1945 Cal 218 (232).

[3] A party who is purposely vague in his pleadings ought to be carefully examined and tied down to definite pleadings. (Vol 17) 1930 All 321 (322) * (Vol 28) 1941 Oudh 457 (464) : 16 Luck 832. (Practice of introducing obscure pleading with view to take adversary by surprise deprecated.)

[4] Pleadings in Indian Courts must not be construed with the same strictness as those in English Courts. Allowance must be made for a very inaccurate mode of setting forth the claims of persons, and the answers of defences to them. A defendant should not be held to have admitted every allegation in the plaint which he has failed to traverse. (1884) 6 All 406 (413) * (1907) 5 Cal L Jour 25 (26).

2. Pleadings must state facts and not law. — [1] A pleading must state only facts and not law. (Vol 20) 1933 Sind 103 (108, 109) * (Vol 30) 1943 P C 147 (151) : I L R (1944) Kar P C 85 (P C). (Legal inferences to be drawn from facts need not be stated.) * (Vol 17) 1930 Bom 511 (512).

[2] Pleas should be definitely taken and the facts constituting them should be expressly stated. (Vol 12) 1925 Pat 168 (172).

[3] It is for the Court to find and examine all pleas of law that apply to facts of the case. (Vol 15) 1928 Nag 206 (207) * (Vol 13) 1926 Nag 265 (265).

[4] Plea of law can be urged at any time before Court pronounces judgment. (Vol 13) 1926 Nag 265 (265).

2a. Facts stated must be material facts. — [1] It is absolutely essential that a pleading, not to be embarrassing to the opposite party should state all material facts which will put the opposite party on his guard and tell him what he will have to meet when the case comes on for trial. (Vol 3) 1916 Cal 658 (659) * (Vol 4) 1917 Oudh 197 (198) * (Vol 26) 1939 Rang 189 (192) : 1939 Rang L R 1.

[2] Suit for recovery of deposit — Plaintiff's case *prima facie* within time — Defendant must plead that

particular demand was made and refused beyond period of limitation. (Vol 21) 1934 All 11 (13).

[3] Alternative reliefs prayed — Facts entitling plaintiff to such reliefs must be stated. (Vol 18) 1931 Cal 25 (25) : 57 Cal 796.

[4] Only where a right that could be decreed exists and is taken away by act of State, plea of act of State need be put forward. (Vol 11) 1924 P C 216 (217) : 48 Bom 613 : 51 Ind App 357 (P C).

[5] Suit for declaration and injunction — Allegation of disturbance of plaintiff's title should be stated. (1907) 17 Mad L Jour 421 (422).

[6] Matters in aggravation of damages must be specifically pleaded. (Vol 20) 1933 Nag 29 (31) : 28 Nag L R 320.

[7] Plaintiff suing on his title is bound to state the nature of deeds on which he relies in deducing his title. (Vol 3) 1916 Cal 658 (659).

[8] It is absolutely necessary to plead estoppel if it is intended to rely upon it. (Vol 5) 1918 Cal 917 (920) * (Vol 13) 1926 Mad 1052 (1052).

[9] Plaintiff should not be allowed to adduce any proof in support of an alleged fact which was neither mentioned in the plaint nor made the basis of claim. (Vol 1) 1914 Lah 102 (104) * (Vol 22) 1935 Pesh 132 (133). (Promissory note payable at specified place — Plaintiff not alleging presentment in plaint — He cannot be allowed to prove it.)

[10] Party need not plead that, which law presumes in his favour. (1943) 1943 Nag L Jour 148 (149). (Plaintiff claiming damages for use and occupation of place by defendant of which plaintiff claimed to be owner — Plaintiff need not state that defendant occupied place with his permission.)

[11] Particulars of claim given with reasonable precision — Suit should not fail by reason of incorrect description of any particular. (Vol 15) 1928 Mad 940 (941).

3. Alternative and inconsistent allegations. —

[1] Inconsistent pleas can be taken. (Vol 12) 1925 Oudh 120 (122) : 27 Oudh Cas 175 * (1912) 1912 Mad W N 413 (413) * (Vol 13) 1926 Nag 265 (266) * (1909) 5 Nag L R 189 (192). (A defence cannot be ruled out merely because it is inconsistent with another defence.)

[But see (1891) 14 Mad 172 (174).]

[2] Parties litigants cannot assume inconsistent positions in Court to the detriment of opponents; where they elect to adopt a certain course of action they will be confined to the course they have deliberately adopted. (1912) 16 Cal L Jour 404 (411) * (Vol 3) 1916 Cal 658 (660). (Inconsistent rights claimed alternatively may be permitted except when they are destructive of each other.) * (Vol 18) 1931 Nag 57 (60) : 26 Nag L R 367. (Two absolutely inconsistent facts, each of which is destructive of the other cannot be made.)

[3] If a person makes an alternative case, then, he must make all the necessary assertions to carry the relief and prove them. (Vol 18) 1931 Cal 25 (25) : 57 Cal 796 * (Vol 1) 1914 All 271 (272) : 36 All 476.

[4] Whenever alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts such alternative relief is claimed. (Vol 7) 1920 Cal 98 (95).

3. The forms in Appendix A when applicable, and where they are not applicable forms of the *Forms of pleading*, like character, as nearly as may be, shall be used for all pleadings.

[R. S. C., O. 19, R. 5.]

4. In all cases in which the party pleading relies on any misrepresentation, fraud,¹ breach of *Particulars to be given* trust,² wilful default,³ or undue influence,⁴ and in all other cases in which *where necessary*, particulars may be necessary⁵ beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

[R. S. C., O. 19, R. 6.]

O. 6 R. 2 (contd.)

[5] Suit for right of way—Relief based on ownership or, in the alternative, user—Defendant claiming ownership—Relief on the ground of user can be given. (Vol 9) 1922 Bom 199 (200) : 46 Bom 200.

[6] Alternative reliefs to file award or to proceed on merits of case can be joined. (Vol 4) 1917 Lah 65 (67) : 1917 Pun Re No. 12.

[7] Claim for maintenance by wife married in Gandharva form—Alternative plea, that even if marriage is invalid it has created right of maintenance in favour of plaintiffs, is tenable. (Vol 33) 1946 Pat 316 (325) : 25 Pat 58.

[8] Plaintiff alleged certain entry in survey record to be wrong—Plaintiff accepting it and claiming enhancement of rent on basis of entry—Plaint is not rendered invalid. (Vol 4) 1917 Pat 580 (582).

[9] A suit may be dismissed on the plaint, only when disrespect of the Court or obvious embarrassment to defendant will be caused by inconsistent allegations made in the course of the suit and not when they occur in the plaint only. (Vol 4) 1917 Pat 580 (580).

[10] Pleas of gift and of adverse possession in the alternative against donor, cannot be allowed. The party must stick to one. (1910) 12 Bom L R 169 (172).

[11] Alternative claims on ground of ownership and prescriptive right held not to offend against rules of pleadings. (Vol 5) 1918 Oudh 463 (464) : 20 Oudh Cas 192.

[12] Rescission and specific performance of contract in alternative could be claimed. (Vol 11) 1924 Pat 280 (281).

[13] In a suit by a member of a joint Hindu family, that an alienation by father does not affect his share, the purchaser may plead not only according to the recital of the sale-deed, that the property was the self-acquisition of the vendor but also in the alternative, that the sale was for purposes binding on the family. (Vol 4) 1917 Mad 954 (955).

4. Pleadings should not state evidence. — [1] Pleadings should not lack in conciseness and they should state only material facts and not the evidence. (Vol 18) 1931 Cal 458 (460, 461) : 58 Cal 418 * (Vol 3) 1916 Cal 658 (659) * (Vol 12) 1925 Pat 410 (412). (Evidence has no place in pleading.)

[2] Estoppel cannot be properly set out in plaint as it is rule of evidence. (Vol 8) 1921 Sind 159 (162) : 16 Sind L R 207 (F B).

5. Variance between pleading and proof. — [1] No plaintiff should obtain a decision on facts which he has not pleaded and which have not been put in issue at all. (Vol 17) 1930 P C 57 (57) : 24 Sind L R 138 (P C) * (Vol 33) 1946 Cal 249 (257) : I L R (1944) 2 Cal 487. (Suit to recover damages against Railway Company—Facts alleging misconduct, suggesting that the company could not avail itself of the terms of the risk-note—No facts stated to suggest that the claim was made irrespective of the risk note—Held, that the plaint did not give a fair or any notice to the company of the plea that the claim was made irrespective of the risk-note, and, hence, plaintiff could not avail of such a plea.) * (Vol 7) 1930 Cal 290 (290) * (1888) 15 Cal 684 (692) : 15 Ind App 81 (P C). (Claim to set aside document as

forgery—Claim to set it aside on ground of undue influence cannot be allowed.) * (Vol 20) 1933 Lah 61 (62) : 14 Lah 187. (Plea of accounts being mutual, open and current, if not pleaded, cannot be argued.) * (Vol 27) 1940 Nag 125 (126) : I L R (1940) Nag 48.

[2] Although parties should be kept to their pleadings, it is not every variance between pleading and proof that is fatal (Vol 27) 1940 Nag 125 (126) : I L R (1940) Nag 48 * (Vol 11) 1924 All 831 (831) * (Vol 10) 1923 Cal 142 (145) : 50 Cal 292 * (Vol 19) 1932 Lah 370 (371) * (1912) 17 Ind Cas 296 (298) (Oudh) * (Vol 20) 1933 Pesh 37 (37).

[3] Variance between plaintiff's agreement and case alleged at trial—Court must look to plaint, issues and manner in which case was fought to determine if there was variance. (Vol 17) 1930 P C 205 (208) (P C) * (Vol 23) 1936 Cal 382 (384).

[4] Finding in plaintiff's favour based on defendant's admission is competent even if it is at variance with case set up in pleadings. (Vol 17) 1930 Nag 8 (9) : 26 Nag L R 130 * (Vol 8) 1921 Bom 307 (309) : 45 Bom 535 * (Vol 17) 1930 Nag 273 (278) : 26 Nag L R 277.

[5] Courts can give a finding that a contract is made for illegal consideration, when such illegality was brought to its notice, though the pleadings raise no such plea and the contract on the face of it appears to be a good one. (1905) 27 All 266 (270, 271).

[6] Suit for title to tank—Plaint not expressly setting up title by adverse possession but plea included in statement of facts on which claim based—Defendant pleading that plaintiff was never in possession—Issue of title by adverse possession though not distinctly framed fought out on merits—Court finding plaintiff to be in possession for generations—Plaintiff is entitled to decree declaring title by adverse possession. (Vol 5) 1918 Cal 144 (144, 145).

[7] A claim of redemption in a suit against two persons on a particular mortgage does not entitle the plaintiff on failure in the suit, to redeem property in the suit on the basis of other prior mortgages to the defendants separately (Vol 3) 1916 Pat 28 (29).

6. Construction of pleadings.—See Note 1.

ORDER 6, RULE 4 — SYNOPSIS.

1. Fraud.
2. Breach of trust.
3. Wilful default.
4. Undue influence and coercion.
5. Other cases in which particulars are necessary.

1. Fraud.—[1] In case of fraud all the necessary facts which constitute fraud must be stated. (Vol 10) 1923 P C 73 (76) (P C) * (Vol 13) 1926 P C 109 (109) (P C) * (Vol 14) 1927 All 437 (439) * (Vol 11) 1924 All 17 (19) : 45 All 624. (Particulars of fraud alleged should be insisted on) * (Vol 6) 1919 All 440 (442, 443, 444) : 41 All 635. (Suit by firm against dismissed agent who had settled accounts with firm's representative—Appellate Court allowing reopening on ground that fraud exists—In absence of specific allegation of instances of fraud finding held improper.) * (Vol 3) 1916 All 226 (227) * (Vol 3) 1916 All 128 (129). (Plaintiff not alleging fraud in suit for accounts. will not be allowed to let in evidence of fraud.) * (Vol 17) 1930 Cal 22 (28) : 56

O. 6 R. 4 (*contd.*)

Cal 868 * (Vol 9) 1922 Cal 208 (215) * (Vol 13) 1926 Lah 96 (98) : 6 Lah 512 * (Vol 15) 1928 Mad 759 (760) * (1941) 1941 Nag L Jour 230 (231, 232) * (Vol 8) 1921 Pat 145 (147) : 6 Pat L Jour 319. (Application to set aside execution sale on ground of fraud.) * (Vol 7) 1920 Pat 768 (769) * (Vol 6) 1919 Upp Bur 33 (34) : 3 Upp Bur Rul 69 * (Vol 20) 1933 Rang 153 (153). (Allegations as to fraud should be definite.) * (Vol 12) 1925 Rang 275 (277) : 3 Rang 275 * (Vol 17) 1930 Sind 298 (298) : 24 Sind L R 232. (Facts must be distinctly and accurately stated.)]

[See also (Vol 6) 1919 Lah 126 (126). (The plea of want of consideration is distinguishable from a plea of fraud.)]

[2] General allegations, however strong, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. (Vol 2) 1915 P C 7 (13) : 39 Bom 441 : 42 Ind App 135 (PC) * (1909) 36 Cal 134 (139) * (Vol 30) 1943 Oudh 192 (196) * (Vol 8) 1921 Pat 193 (200) : 6 Pat L Jour 373 (FB) * (Vol 20) 1933 Rang 169 (172).

[But see (Vol 4) 1917 Nag 139. (140). (A Court is bound to consider a plea of fraud distinctly raised, though the allegations on which it is based are not set out in detail.)]

[3] Suit to set aside decree on ground of fraud—Fraud alleged must be clearly and specifically set out in plaint. (Vol 20) 1933 Rang 123 (124) * (Vol 17) 1930 All 427 (428) * (Vol 10) 1923 All 566 (567) * (Vol 8) 1916 Cal 876 (878) * (Vol 1) 1914 Cal 232 (232, 233) : 41 Cal 990 * (Vol 6) 1919 Oudh 317 (319, 320) : 22 Oudh Cas 171 * (Vol 18) 1931 Rang 212 (213) : 9 Rang 135.

[4] Where the transactions speak for themselves and furnish internal proof of a well thought-out design, omission to set out particulars leading to fraud does not contravene this rule. (Vol 22) 1935 Oudh-16 (18).

[5] To call a deed both fraudulent and bogus is not a clear piece of pleading. Fraud would nearly always be committed in executing a bogus deed but a deed may be fraudulent without being bogus and so it is better to keep the positions separate. (Vol 25) 1938 Nag 546 (547) : 1 L R (1940) Nag 293.

[6] When it is alleged that a certain document was not executed, it may amount to an allegation of forgery but it excludes the idea that the document was executed by fraud. (Vol 16) 1929 Cal 77 (78).

[7] Allegations of fraud must be substantially proved by the party making the same. (Vol 10) 1923 P C 73 (76) (P C) * (Vol 7) 1920 Cal 26 (32) * (Vol 4) 1917 Cal 399 (401) * (Vol 2) 1915 Cal 5 (6) * (Vol 22) 1935 Rang 73 (76) : 13 Rang 175.

[See also (Vol 5) 1918 Cal 453 (456).]

[8] Where the plaintiff proves fraud defendant must show that the plaintiff had knowledge of fraud earlier than the date of alleged discovery. (Vol 3) 1916 Cal 120 (123).

[9] On failure to prove one kind of fraud, party cannot set up another kind of fraud. (Vol 16) 1919 Bom 1 (5) : 53 Bom 75 * (Vol 3) 1916 Cal 876 (878) * (Vol 3) 1916 Cal 120 (123) * (Vol 22) 1935 Lah 222 (224).

[10] Issue not raised—Court should not go into the question of fraud. (Vol 14) 1927 Mad 533 (542) : 50 Mad 357.

[11] Plaintiff seeking to avoid statute of limitation must state time when fraud was committed. (Vol 3) 1916 Cal 120 (123).

[12] A party who is not aware of fraud and does not set up the plea in pleadings, can do so as soon as he becomes aware of the fraud. (Vol 3) 1916 Oudh 148 (150) : 19 Oudh Cas 334.

[13] If party fails to ask for particulars at the proper time, he cannot afterwards be heard to say that he was taken by surprise. (Vol 17) 1930 Cal 621 (621, 622).

[14] When plea of fraud was raised for the first time

in appeal, it was held that the Court would not consider it, as it had neither been alleged nor proved on an issue. (1900) 23 Mad 227 (237) : 27 Ind App 17 (P C).

2. Breach of trust. — [1] Allegations of breach of trust ought to be particularized to a point at which trustee knows not merely generally, but in detail, what he has to meet. (Vol 17) 1930 Mad 78 (79).

3. Wilful default. — [1] The general rule is that in every case an order charging wilful default must be based upon a charge of wilful default in the pleadings. But the case of a mortgagee in possession has always been an exception to that rule. (Vol 28) 1941 Bom 28 (29).

4. Undue influence and coercion. — [1] Detailed particulars of undue influence must be given in the pleadings. (Vol 15) 1928 Oudh 330 (332) * (Vol 6) 1919 Cal 1033 (1033). (Undue influence not pleaded—Question should not be gone into.) * (1908) 8 Cal L Jour 135 (142) * (Vol 8) 1921 Pat 48 (49) : 5 Pat L Jour 744.

[2] If there are facts on the record to justify the inference of undue influence, the Court has power to administer relief notwithstanding in artistic pleadings. All that the Court has to see is that the adversary of the party pleading undue influence is not taken by surprise (Vol 18) 1931 Nag 63 (64) : 27 Nag L R 19.

[3] Specific allegation of undue influence is unnecessary if there is already an allegation of fraud in the plaint. (Vol 3) 1916 Bom 275 (276, 277) * (Vol 22) 1935 Mad 726 (729) : 58 Mad 454.

[4] For establishing undue influence it must be proved that one person was in a position to dominate the will of and exercise his influence over another, and that the former did influence the latter. (Vol 11) 1924 Bom 457 (458).

[5] A mere suspicion or probability is not sufficient to prove coercion. (Vol 2) 1915 Bom 68 (70, 71) : 39 Bom 149.

5. Other cases in which particulars are necessary.—[1] A plea of a special nature must be distinctly pleaded and made the subject of a distinct issue. (Vol 1) 1914 Cal 863 (865).

[2] When a customary right is claimed, it should be specifically pleaded and all the essential requisites to its validity and binding effect must be averred. (Vol 8) 1921 Cal 569 (571).

[3] Suit based on one custom—Different custom cannot be set up at trial. (Vol 16) 1929 Oudh 204 (208).

[4] If the plaintiff relies on special damage in a suit to establish a public right, he must allege special damage in the plaint, giving particulars and details of special damage accrued to him. (Vol 13) 1926 Cal 549 (550).

[5] Immemorial user or lost grant must be pleaded to obtain relief—Inference of lost grant may be drawn by long user. (Vol 20) 1933 Cal 215 (217).

[6] Accounts between principal and agent settled wholly on agent's accounts—No accounts with principal—Particulars of misconduct should not be insisted upon from principal prior to inspection. (Vol 19) 1932 Mad 284 (285, 286) : 55 Mad 704.

[7] Pleading must specifically mention all particulars of negligence alleged. (Vol 9) 1922 Pat 17 (18).

[8] Plea under S. 53, T. P. Act, not specifically pleaded in written statement but raised in course of argument—Plea held could not be allowed. (Vol 28) 1941 Oudh 457 (464) : 16 Luck 832.

[9] Suit for damages by purchaser for breach of contract of sale—It is not necessary for plaintiff to allege and prove that he was ready to perform his part of contract unless defendant puts him to its proof. (Vol 17) 1930 Lah 553 (553).

[10] In an action for "malicious prosecution", the plaintiff must aver in the plaint the charges made against him by the defendant. (1873) 10 Bom H C R 182 (185).

5. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

Further and better statement, or particulars.

[R. S. C., O. 19, R. 7.]

6. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Condition precedent.

[R. S. C., O. 19, R. 14.]

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure.

[R. S. C., O. 19 R. 16. See Ss. 33, 100; O. 3 Rr. S, 9; O. 41 R. 2.]

O. 6 R. 4 (contd.)

[11] In an action for malicious arrest it is immaterial under what section the arrest was made, if in fact the circumstances were such as to justify an arrest. (1913) 40 Cal 898 (924).

[12] Alternate claim should be specifically set forth. (Vol 4) 1917 Cal 367 (368). (Suit for rent by cosharer landlord and in alternative for refund of excess collected by other cosharers is competent.)

[13] Plea of waiver must be specifically raised. (Vol 20) 1933 Bom 46 (48).

[14] Collision between motor and motor cycle—The plaintiff in framing his statement of claim should state out the circumstances of collision, so far as they are known to him with clearness and accuracy to enable his adversary to know the case he has to meet. (Vol 8) 1921 Cal 543 (544).

[15] Defamation—Plaint must set out specific time, place and individuals to whom the words were spoken. (Vol 13) 1926 All 672 (673).

[16] Illegal consideration must be specifically pleaded. (Vol 12) 1925 Lah 345 (346).

[17] In a suit for accounts against administrator filed on behalf of minors, the plaintiff should specify one or more acts of misconduct or should state some reasonable ground for supposing that the administrator is about to waste the estate of minor. (1873) 10 Bom H C R 414 (415).

Order 6, Rule 5—Note 1.

[1] The object of obtaining particulars is to enable the other party to know the case he has to meet and to prevent surprise at the trial. (Vol 17) 1930 Mad 473 (476); 53 Mad 645.

[2] The particulars ordered to be furnished should be provided and there is no discretion in the matter. (Vol 2) 1915 Mad 984 (986, 988).

[See (Vol 27) 1940 Nag 261 (262); I L R (1940) Nag 20. (Person bringing claim must be able to give necessary particulars without fishing about in his opponent's evidence).]

[3] Court should also see that the pleadings are clear so that each party may know the case he has to meet with. (Vol 28) 1941 Oudh 457 (464); 16 Luck 832 (Vol 1) 1914 Oudh 52 (92). (Vague pleadings should be asked to be made specific).

[4] Plaint not specifying particulars — Defendant should ask for them—Suit should not be dismissed—But plaint should be allowed to be amended. (Vol 18) 1931 Pat 135 (135).

[5] Rule 5 does not permit submission of new material altogether based on entirely different cause of action. (Vol 24) 1937 Lah 795 (796).

[6] Better statement can be put in when it is ordered by the Court. (Vol 26) 1939 Lah 386 (388).

[7] Replication rejected by Court though cannot be treated as pleading can be placed on record and used to contradict statements by petitioner under S. 145, Evidence Act. (Vol 26) 1939 Lah 529 (530); 41 Cri L Jour 204.

[8] Objection to plaint on the ground of vagueness cannot be raised at appellate stage. (Vol 24) 1937 Cal 51 (54) : I L R (1937) 1 Cal 491 * (Vol 7) 1920 Pat 678 (680).

[9] Court offering defendant opportunity to make detailed statement under O. 6, R 5 on payment of adjournment costs — Defendant refusing conditional offer — Formal amendment of plaint subsequently allowed—On such amendment held no case for further pleadings arose and Court rightly refused to accept defendant's belated statement. (Vol 24) 1937 Nag 376 (376); I L R (1937) Nag 498.

[10] Plaintiff after several chances failing to produce necessary particulars within time granted — Court can dismiss his suit—Appellate Court should be very slow to interfere with discretion of trial Court. (Vol 27) 1940 Nag 261 (262); I L R (1942) Nag 20.

Order 6, Rule 6 — Note 1.

[1] Order 6, R. 6 must be read with O. 8 R. 2. (Vol 31) 1944 Pat 77 (86); 22 Pat 513.

[2] A condition precedent must be specifically pleaded by defendant; otherwise its performance will be presumed. (Vol 11) 1924 Pat 205 (206)* (Vol 13) 1926 Lah 318 (319); 7 Lah 442. (Suit for damages for breach of contract—An averment that plaintiff was ready and willing to perform his part of the contract must be implied.) (Vol 31) 1944 Pat 77 (86); 22 Pat 513. (Landlord need not allege notice — Defendant tenant must plead want of notice.)

[But see (Vol 20) 1933 Cal 632 (635) : 60 Cal 793. (Notice under S. 54, Bengal Cess Act, 1880, is condition precedent to pay cess—Defendant failing to raise want of notice in written statement but raising it in course of argument—Plaintiff should prove notice).]

[3] Defence of non-registration of partnership not raised in pleadings—Question cannot be raised for first time in second appeal. (Vol 32) 1945 Pat 286 (287).

[4] Suit by seller against buyer for failure to take delivery of goods — Objection that plaint did not contain averment as to readiness and willingness — Objection held not fatal in the circumstances of the case. (Vol 24) 1937 Nag 345 (350) : I L R (1938) Nag 308.

ORDER 6, RULE 7 — SYNOPSIS.

1. Applicability and scope.
2. Inconsistent allegations.
3. New ground of claim.

1. Applicability and scope.—[1] Statement made by party on being questioned by Court before framing

8. Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

[R. S. C., O. 19, R. 20.]

9. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

[R. S. C., O. 19, R. 21.]

10. Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

[R. S. C., O. 19, R. 22; See Rr. 2 and 4 above.]

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

[R. S. C., O. 19, R. 23; See S. 80.]

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

[R. S. C., O. 19, R. 24.]

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless

O. 6 R. 7 (contd.)

issues is in nature of supplementary pleading for purposes of this rule. (Vol 16) 1929 Lah 165 (166). (No plea inconsistent with even oral statement can be raised at later stage except by amendment.)* (Vol 16) 1929 Oudh 204 (206, 207).

[2] Provisions of O. 6, R. 7 apply to minors also. (Vol 24) 1937 Pat 625 (626). (Guardian ad litem filing written statement — Minor attaining majority during pendency of suit cannot claim to file fresh written statement superseding the first filed by the guardian).

[3] Order 6, R. 7 does not contain a rule that inconsistent pleas can be permitted to be advanced. (Vol 30) 1943 Lah 159 (161, 162).

[4] The rules for the exercise of discretion in regard to amendments falling under O. 6, R. 7 may not be applicable when there is an application before the Court for permission to amend, still less when the Court has to consider whether it should of its own motion order amendment. (Vol 2) 1915 Mad 984 (988).

2. Inconsistent allegations. — [1] Inconsistent case cannot be set up for first time in replication unless it is allowable by way of amendment. (Vol 30) 1943 Lah 159 (161)* (Vol 23) 1936 Cal 465 (468)* (Vol 19) 1932 Pat 332 (333). (Payment alleged at stage of making mortgage decree final).

[2] Pleadings contravening O. 6 R. 7 — Court should ignore them — Formal order rejecting such pleadings is not essential. (Vol 7) 1920 Nag 147 (148).

[3] Though alternative case may be allowed in a plaint a new case for the plaintiff cannot be made out for the plaintiff by the Court. (Vol 7) 1920 Lah 105 (105).

3. New ground of claim. — [1] It is *permissi exempli* to admit a new head of claim without a proper amendment of pleadings. (Vol 23) 1936 PC 27 (29) (PC).

Order 6, Rule 8 — Note 1.

[1] Suit on unconditional acknowledgment — Plea of limitation or want of consideration should be specifically pleaded. (Vol 19) 1932 All 199 (202, 203) : 53 All 963.

[2] Suit on mortgage — Defendant denying consideration for mortgage — Plea of want of due attestation cannot be taken up during trial. (Vol 10) 1923 Bom 90 (92) : 47 Bom 137.

[3] From evidence Court noticing that consideration for suit transaction illegal — No objection raised by defendant — Still Court should look into facts and give proper decision. (Vol 20) 1933 Mad 187 (189).

[4] Plea of want of consideration can be raised even when execution of the document is denied. (1911) 9 I C 469 (469) (Low Bur).

Order 6, Rule 10 — Note 1.

[1] Plea of insanity — Circumstances need not be pleaded — Evidence as to general insanity may be led to prove unfit mental condition at time of execution of deed. (Vol 25) 1938 Nag 204 (208).

[2] Mistaken *bona fide* belief and good faith must be alleged in pleading — They are not to be presumed. (Vol 18) 1931 Mad 110 (113).

[3] Suit for damages against Election Officer for refusal to receive nomination paper — Malice must be alleged. (1907) 31 Bom 37 (45).

Order 6, R. 11 — Note 1.

[1] Notice under S. 107 of the Contract Act is to be pleaded and proved by plaintiff vendor. (Vol 11) 1924 Nag 162 (163).

Order 6, R. 13 — Note 1.

[1] Where it is incumbent upon a person to prove his title it is not necessary that the objection to sale deed by such person in favour of another should be

the same has first been specifically denied (*e. g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim.)

[R. S. C., O. 19, R. 25.]

14. Every pleading shall be signed by the party and his pleader (if any): Provided that *Pleading to be signed.* where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

[1882—Ss. 51, 115; 1877—S. 51; 1859—S. 27. R. S. C., O. 19 R. 4; See S. 2, cl. 20.]

PROVINCIAL AMENDMENT

Rule 14A—CALCUTTA

Insert the following :

"14A.—Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat."

[25-7-1928.]

O. 6 R. 13 (*contd.*)

raised by the opposite party who does not know of the existence of the conveyance until that fact is disclosed by the prior person. (Vol 16) 1929 P C 303 (304) (PC).

[2] Suit for damages for use and occupation of land — Plaintiff need not plead that defendant was in occupation with plaintiff's permission. (1943) 1943 Nag L Jour 148 (149).

ORDER 6, RULE 14—SYNOPSIS.

1. Omission to sign pleadings—Effect.
2. Pleadings to be signed.
3. Signature by person duly authorised.

1. Omission to sign pleadings — Effect. — [1] The proper signing of the plaint is a matter of practice only and any mistake or omission therein may be amended at any time. (Vol 12) 1925 Sind 159 (162) : 19 Sind L R 286* (Vol 14) 1927 All 514 (514, 515)* (Vol 5) 1918 All 275 (276) : 40 All 147 : 19 Cri L Jour 865. (Plaint signed by prisoner in contravention of jail regulations is as good as any other plaint.) * (1900) 22 All 55 (64)* (Vol 15) 1928 Pat 51 (53, 54). (The agent's signing the plaint and subsequent ratification by the principal, who is exempted from personal appearance in Court, is sufficient verification under O. 6, R. 14.)* (Vol 12) 1925 Sind 275 (278).

[2] Absence of signature, verification or presentation on part of some of plaintiffs does not affect jurisdiction of Court. (Vol 18) 1931 All 507 (512) : 54 All 57 (SB).

[3] An omission by the plaintiff to sign the plaint is no ground for rejecting it; the plaintiff ought to be returned for amendment. (1911) 1911 Pun L R No. 254, page 944 (945) * (Vol 2) 1915 Cal 444 (448) * (1896) 6 Mad L Jour 213 (213).

[See also (Vol 11) 1924 All 804 (805). (Courts should allow parties to supply by way of amendment signature to application.)]

[4] Several persons filing suit — Signature on plaint by one plaintiff is sufficient — Signature of co-plaintiffs is not imperative. (Vol 19) 1932 Sind 9 (10) : 26 Sind L R 167 * (1890) 17 Cal 580 (582) (PC) * (Vol 11) 1924 Pat 104 (106) : 3 Pat 67 * (Vol 24) 1937 Pesh 17 (18).

[5] Want of signature of plaintiff on plaint may be waived by defendant. (1900) 22 All 55 (63).

[6] An objection under the rule cannot be allowed to be taken in appeal for the first time. (Vol 16) 1929 Mad 790 (791) * (1911) 7 Nag L R 33 (35).

2. Pleadings to be signed. — [1] Object of the signature to the plaint is to prevent as far as possible

disputes as to whether a suit was instituted with the plaintiff's knowledge or authority. (Vol 12) 1925 Sind 275 (278).

[2] Vakalat, affidavits and pleadings — No difference exists in respect of their being 'signed.' (Vol 15) 1928 Mad 175 (176) : 51 Mad 242.

[3] Judges are bound to see that pleadings are signed properly. (Vol 1) 1914 Low Bur 193 (199).

3. Signature by person duly authorised. — [1] A plaint signed by the authorised agent of the plaintiff is valid in law, unless the suit has been instituted without the approval of the plaintiff. (1915) 31 Ind Cas 859 (859) (U P B R) * (1879) 4 Bom 468 (470) (F B).

[2] Plaint is properly signed when it is signed by a person specially authorised to do so by a company, which is incorporated in a foreign country. (1911) 1911 Pun L R No. 150 p. 562 (563) : 1912 Pun Re No. 8.

[3] Agent of firm orally instructed and authorised by the partners to do everything necessary during their absence — *Held* he was duly authorised to sign and verify. (Vol 30) 1943 Cal 13 (15).

[4] Plaint is valid if signed by person instructed by plaintiff to sign. (Vol 12) 1925 Lah 144 (144).

[5] Plaint for dissolution of partnership cannot be signed by person holding power-of-attorney and carrying on firm's business — Principal must sign. (Vol 1) 1914 Low Bur 191 (199).

[6] A written statement as also a plaint may be presented or tendered by *mukhtear*, but he cannot sign such documents. (1912) 16 Cal L Jour 578 (579).

[7] Plaintiff's servant signing and presenting plaint — *Vakilpatra* also signed by servant — Proof of authority wanting — Plaint is not properly presented. (Vol 9) 1922 Bom 113 (113) : 46 Bom 150.

[8] Provisions of O. 6, R. 14 will not govern proceedings coming under O. XXIX. (1894) 21 Cal 60 (65) : 20 Ind App 139 (P C).

[9] Plain terms of O. 6, R. 14 apply to a company — Words "or for other good cause" apply in the case of a company which can therefore authorise some person to sign on its behalf. (Vol 17) 1930 Bom 566 (567) : 55 Bom 151. ((1894) 21 Cal 60 : 20 Ind App 139 (P C) distinguished on the ground that that decision must be taken to apply to particular facts of that case.) * (Vol 26) 1939 Bom 347 (349) : I L R (1939) Bom 295. ((Vol 17) 1930 Bom 566 : 55 Bom 151, followed.) * (Vol 23) 1936 Bom 418 (420) : I L R (1937) Bom 85. (O. 29 R. 1 does not exclude operation of O. 6, R. 14. (Vol 17) 1936 Bom 566 : 55 Bom 151, followed.) * (1931)

15. (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the fact of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

[1882—Ss. 51, 52, 115; 1877—Ss. 51, 52; 1859—S. 27.]

O. 6 R. 14 (contd.)

32 Pun L R 655 (656). ((Vol 17) 1930 Bom 566 : 55 Bom 151, followed). (Vol 18) 1931 Sind 178 (179) : 26 Sind L R 58. ((Vol 17) 1930 Bom 566 : 55 Bom 151, followed.) (Vol 12) 1925 Lah 338 (339). ((1894) 21 Cal 60: 20 Ind App 139 (P C), not referred.)

ORDER 6, RULE 15—SYNOPSIS

1. Scope and object.
2. Who can verify.
3. Mode of verification.
4. Effect of defective verification.
5. Omission to verify.
6. Objection to verification.
7. Effect of false verification.

1. Scope and object.—[1] The object of verification is to fix on the party verifying the responsibility for the statements which it contains and to afford a guarantee of his good faith. (Vol 4) 1917 Cal 269 (274): 43 Cal 1001 (Vol 18) 1931 Mad 679 (680). (Plaintiff is responsible for statements in plaint.)

[2] Verification is merely a form of giving authenticity to the pleadings. (Vol 4) 1917 Cal 269 (274): 43 Cal 1001.

[3] Court must see that plaints are properly verified. (Vol 1) 1914 Low Bur 198 (199).

[4] Verified plaint is not necessarily legal evidence of facts contained in it—Verification although coming within definition of "false evidence" is not evidence on which decree can be founded. (Vol 4) 1917 Cal 269 (272, 274): 43 Cal 1001.

[5] In the case of pardanshin ladies, their pleadings will not be accepted as satisfactory proof of the contents unless and until it be affirmatively proved that the contents were fully understood by them. (Vol 3) 1916 P C 27 (34): 38 All 627: 43 Ind App 212: 19 Oudh Cas 192 (PC).

[6] Patna High Court Rules 3, 13 and 16—Word 'affidavit' includes both statements sworn to, and affirmed. There is nothing in the rules to show that O. 6, R. 15 has been made applicable to applications filed in the High Court. (Vol 28) 1941 Pat 172 (173): 19 Pat 263: 42 Cri L Jour 399.

[7] Objections to petition for letters of administration should be verified. (Vol 11) 1924 Rang 273 (274).

2. Who can verify.—[1] Plaint verified by a person other than the plaintiff or his agent—His authority to verify must be proved by affidavit. (Vol 14) 1927 Cal 773 (774).

[2] Plaint signed and verified by a person holding a general power of attorney was held to meet the requirements. (1880) 4 Bom 468 (470).

[3] In a suit by a manager of a Bank verification of plaint by manager, on behalf of Bank is valid in law. (1887) 9 All 188 (191).

[4] Where the Munim Gumasta of a firm was orally authorized to take all steps necessary in regard to arbitration then pending, it was held that proceedings signed and verified by him were valid. (Vol 80) 1943 Cal 13 (15).

[5] Verification of sale statement by karpardaz of decree-holder is sufficient. (Vol 7) 1920 Pat 636 (637).

[6] Signature of the Administrator-General to a petition for letters of administration containing valuation of the assets and praying for remission of court-fee, is sufficient verification under the Administrator-General's Act (2 [II] of 1874). (1893) 20 Cal 879 (880).

[7] In a case where the plaintiff sets up gross fraud, it is imperative on the plaintiff to verify the plaint himself. (1882) 8 Cal 885 (888) (1887) 9 All 505 (507).

3. Mode of verification.—[1] In order to constitute proper verification, it is necessary for the person verifying, if all the facts are within his knowledge, to state distinctly that they are true to his knowledge, and if he has knowledge as to some and only information and belief as to others, to state to which he speaks from his knowledge and to which from his information and belief. (1893) 15 All 59 (61).

[2] Verification of paragraphs raising law points is not necessary. (Vol 19) 1932 Lah 328 (329).

[3] Mere omission to disclose source of information does not vitiate verification. (Vol 21) 1934 Cal 632 (632).

4. Effect of defective verification.—[1] Defective verification does not affect the merits of the case or the jurisdiction of the Court. (1896) 18 All 396 (400) (F B).

[2] Suit is not to be dismissed if the verification is defective—Opportunity must be given to amend it. (1898) 20 All 442 (445) (Vol 23) 1936 Bom 418 (420): I L R (1937) Bom 85 (Vol 27) 1940 Cal 385 (388).

[3] Verification of plaint amended being defective—Plaint will be deemed to be filed on the day of first presentation and not when verification was amended. (Vol 14) 1927 Cal 376 (377): 54 Cal 380.

[4] Defect in verification is not a ground of interference in appeal under the provisions of S. 99—Appellate Court may return plaint to trial Court if it was not properly verified. (1896) 18 All 396 (399, 400) (SB).

[5] Application in *forma pauperis*—Under O. 33, R. 5, Court shall reject application if it is not framed and verified properly. (1912) 6 Low Bur Ral 117 (118).

5. Omission to verify.—[1] Omission to verify is a mere irregularity curable at later stage. (Vol 12) 1925 All 79 (80): 46 All 637.

[2] Want of verification is only an irregularity not affecting the merits of the case. (Vol 19) 1932 Lah 28 (29).

[3] Absence of signature, verification or presentation on part of some of plaintiffs does not affect jurisdiction of Court. (Vol 18) 1931 All 507 (512): 54 All 57 (S B).

[4] Unverified written statement taken on file—Objection cannot be entertained in appeal. (1907) 11 Cal W N 871 (872).

6. Objection to verification.—[1] Objection to verification should be taken at the earliest possible opportunity and if not so taken will be deemed to have been waived. (1875) 24 Suth W R 71 (71).

[2] It is not competent to a Court to raise any objection to the verification of the plaint by an agent

16. The Court may at any stage of the proceedings³ order to be struck out or amended any *Striking out pleadings.* matter in any pleading which may be unnecessary or scandalous⁴ or which may tend to prejudice, embarrass or delay the fair trial⁵ of the suit.

[R. S. C., O. 19 R. 27; Cf. 1882, S. 116; See O. 6 Rr. 2 and 17.]

17. The Court may at any stage of the proceedings¹³ allow either party to alter or amend his *Amendment of pleadings.* pleadings in such manner and on such terms as may be just,¹⁵ and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy¹¹ between the parties.

[Cf. 1882 and 1877—S. 53; 1859—S. 29; R. S. C., O. 28, R. 1. See Ss. 152, 153, O. 1, R. 10; O. 6, Rr. 2, 7, 16 and 18.]

O. 6 R. 15 (contd.)

when such verification has been expressly sanctioned by it at the commencement of the suit. (1869) 12 Suth W R 465 (466).

7. Effect of false verification — [1] Verification is matter of great importance — If declaration be false, offence of giving false evidence is committed. (Vol 1) 1914 Cal 192 (194): 41 Cal 113: 14 Cri L Jour 305 (S B) & (Vol 1) 1914 Low Bur 272 (273): 7 Low Bur Rul 257.

[But see (Vol 17) 1930 Cal 639 (640): 32 Cri L Jour 238. (Putting in the written statement which is not true, and omission to state something which ought to have been there, does not amount to an offence under S. 193 of the Penal Code.)

ORDER 6, RULE 16 — SYNOPSIS.

1. Appeal.
2. Applicability and scope.
3. "At any stage of the proceeding."
4. Pleas unnecessary or scandalous.
5. Power of Appellate Court to expunge.
6. Tending to prejudice, embarrass, or delay the fair trial.

1. Appeal. — [1] Order refusing to strike off pleadings is not appealable. (Vol 13) 1926 Mad 64 (64).

2. Applicability and scope — [1] Jurisdiction should be exercised with great caution—Written statement should not be struck out unless it is clear beyond all reasonable doubt that allegations therein cannot be a defence to the action. (Vol 12) 1925 Cal 860 (861).

[2] Court should not strike out pleadings unless it is necessary for the ends of justice. (Vol 12) 1925 Oudh 604 (605).

3. "At any stage of the proceeding." — [1] If trial Court is not moved under this rule at trial the party cannot contest in second appeal that trial was vitiated. (Vol 17) 1930 Mad 814 (816).

[2] Valuation of relief can be allowed to be amended as it does not change the nature of the suit. (Vol 29) 1942 Bom 161 (174): I L R (1942) Bom 357.

4. Pleas unnecessary or scandalous. — [1] Test for expunging statement from pleadings is to see whether the allegations are necessary for the formulation of the plaintiff's case either in the way of establishing a cause of action or relevant for the purposes of the decision of any of the issues, and also the question whether it is relevant to any issue or supports the cause of action, the test would be whether the statement could form part of the evidence-in-chief which the plaintiff would be bound to lead for obtaining the relief asked for. (Vol 31) 1944 Bom 197 (198).

[2] Passage in describing plaintiff's agent as "awara" held ought to have been struck out as unnecessary and scandalous. (Vol 33) 1946 All 204 (206): I L R (1945) All 685.

[3] Allegations of dishonest conduct are scandalous and should never be made in pleadings if no relief is sought on that ground. (1909) 10 Cal L Jour 414 (419).

5. Power of Appellate Court to expunge.—[1]

High Court has power to expunge passages in lower Court's judgment — Power should be exercised only in extraordinary cases. (Vol 4) 1917 Mad 223 (224). (Observation that "he did not care a brass farthing for Devasthanam" was not interfered with.)

[2] Memorandum of appeal containing allegations of partiality against the Judge whose decree was in question—Per *Subramanna Ayyar J.* — Appellate Court should order objectionable matter to be expunged and then admit appeal — Per *Moore J.* — Appellate Court should return memorandum of appeal and refuse to receive it until objectionable matters have been expunged. (1899) 22 Mad 155 (158, 161). (Appellate Court returning memorandum of appeal — Memorandum represented without amendment — Appeal rejected under S. 543 of 1882 Code — Objectionable portion separable from rest — Appeal against order rejecting appeal held lay to the High Court.)

6. Tending to prejudice, embarrass, or delay the fair trial. — [1] Court cannot indicate to parties how they should frame cases — Court has only to see that parties do not offend against rights of pleadings. (Vol 5) 1918 Oudh 463 (464): 20 Oudh Cas 192.

[2] Failure to deliver particulars of defence attracts consequences of this rule. (Vol 17) 1930 Mad 473 (478): 53 Mad 645.

[3] Part of plaint within jurisdiction and part outside—Court should ask plaintiff to delete part beyond jurisdiction or should dismiss it at once under O. 6, R. 16 and proceed with suit — It is incorrect to return plaint for presentation to proper Court. (Vol 29) 1942 All 130 (134): I L R 1942 All 129.

[4] Suit for possession — Wakf set up in defence — Plaintiff denying genuineness of deed and pleading fraud and undue influence — *Held* Court could take action under this rule. (Vol 4) 1917 Oudh 389 (390).

[5] General charge of immorality cannot be permitted in a pleading. No Judge should allow a paragraph of such a nature to remain in record, e. g. that the father was extravagant or dissolute. (Vol 19) 1932 All 467 (467).

ORDER 6, RULE 17 — SYNOPSIS.

1. Scope.
2. Discretion of Court.
 3. Introducing new case in the plaint.
 4. Introducing new case in written statement.
 5. Taking away right accrued by lapse of time.
 6. Amendment not to be allowed when the disadvantage or injury caused cannot be compensated by costs.
 7. Application not in good faith should be refused.
 8. Addition or substitution of a new plea of fraud.
 9. Addition of new reliefs or claims.
 10. New ground of relief.

O. 6 R. 17 (contd.)

11. "As may be necessary for the purpose of determining the real questions in controversy."
12. Introduction of new cause of action.
13. "At any stage of the proceedings."
14. Opportunity to be given to the opposite party to amend his pleading.
15. "On such terms as may be just."
16. How amendments should be made.
17. Court not having jurisdiction over suit, if can allow amendment of plaint.
18. Extent of amendment.
19. Effect of amendment and limitation.
20. Appeal.
21. Revision.

1. Scope.—[1] The duty of the Court to make necessary amendments is only a *rule of conduct*, which is subject to the inherent power of the Court to prevent injustice and abuse of process of the Court. (Vol 1) 1914 Sind 40 (41) : 8 Sind L R 28.

[2] The provisions of this rule also apply to the trial of cases before the Sikh Gurdwara Tribunal under the Sikh Gurdwaras Act, 8 [VIII] of 1925. (Vol 15) 1928 Lah 325 (327) : 9 Lah 649.

[3] This rule applies to cases before a Subordinate Judge deciding a dispute under the Madras District Municipal Election Rules. (Vol 13) 1926 Mad 1043 (1043) (S B).

[4] Though the rule only refers to *pleadings*, the Court has also power to allow the amendment of *applications*, as this rule is not exhaustive of the powers of amendment. (Vol 25) 1938 Pat 209 (210).

[5] A petition in insolvency can be amended under this rule. (Vol 25) 1938 Mad 53 (55) (Vol 22) 1935 Mad 202 (203).

[6] Where the suit itself is not validly instituted the defect cannot be cured by an amendment. (Vol 31) 1944 Bom 201 (202, 203) : I L R (1944) Bom 66.

[7] The rule has nothing to do with jurisdiction. It merely provides the modes in which the Court should exercise that jurisdiction. (Vol 33) 1946 Bom 361 (362, 363).

2. Discretion of Court.—[1] The amendment of pleadings is in the discretion of the Court. Party is not entitled as of right to amendment. (Vol 29) 1942 Pat 309 (309) (Vol 28) 1941 Oudh 498 (502) : 16 Luck 812.

[2] This rule confers a very wide discretion on the Courts. (Vol 28) 1941 Mad 811 (812) (Vol 13) 1926 All 672 (672) (1910) 37 Cal 399 (404) (Vol 17) 1930 Nag 295 (296) : 27 Nag L R 226 (Vol 3) 1916 Low Bur 71 (72) : 8 Low Bur 418 (Vol 25) 1938 Lah 270 (272) (Vol 24) 1937 Oudh 484 (487) : 13 Luck 584.

[3] The discretion must not be used in an unjust or arbitrary manner. (1885) 7 All 79 (83) (F B) (Vol 27) 1940 Oudh 367 (369) : 16 Luck 65 (Vol 28) 1941 All 298 (300) : I L R (1941) All 558.

[4] In exercising the discretion it must be remembered that the rules of procedure are meant to facilitate administration of justice. (Vol 15) 1928 Oudh 305 (306) (Vol 20) 1933 Cal 271 (273, 274) (Vol 23) 1936 Pat 140 (142).

[5] Discretion should be used for avoiding multiplicity of suits. (Vol 5) 1918 Mad 316 (316) (1898) 25 Cal 371 (390) (S B) (1886) 11 Moo Ind App 468 (486) (P C) (Vol 6) 1919 Cal 904 (907) : 45 Cal 305 (Vol 24) 1937 Oudh 484 (487) : 13 Luck 584.

[6] Discretion should be used to further substantial

justice. (Vol 5) 1918 Mad 316 (316) (1857) 6 Moo Ind App 393 (411) (P C) (Vol 24) 1937 Oudh 484 (487) : 13 Luck 584.

[7] For illustrations of cases fit for exercising discretion, see the following decisions: (Vol 28) 1941 Nag 181 (183) : I L R (1942) Nag 92. (Suit instituted wrongly in the name of deity when it should be in the name of the temple—Amendment should be allowed.) (Vol 28) 1941 Pat 276 (279). (Plaintiff under misapprehension as to his legal right to proceed against some of the properties by the right of subrogation.) (Vol 28) 1941 Rang 37 (42) : 1940 Rang L R 603. (Party having complete cause of action alleging it imperfectly—Party may be helped by amendment—But premature suit is incurable.) (Vol 27) 1940 Lah 256 (261) : I L R (1941) Lah 39. (Joint Hindu family partnership—Pro-note executed in favour of one member only—Suit by all members jointly—Amendment striking of names of members.) (Vol 10) 1923 Nag 182 (186) : 19 Nag L R 36. (Vakalatnama not bearing pleader's name.) (Vol 12) 1925 All 538 (539). (Wrong provision of law quoted in the plaint.) (Vol 19) 1932 Bom 367 (370). (Unauthorized munim signing plaint—Plaintiff allowed to sign later.) (Vol 18) 1931 Cal 770 (771). (Sole proprietor filing suit in firm name—Objection to form of suit—Amendment to remedy the defect allowed.) (1874) 21 Suth W R 208 (209) (F B). (Omission of an alternative claim by mistake.) (Vol 6) 1919 Lah 317 (318). (Mistaken identity as to lands claimed in a pre-emption suit.) (Vol 5) 1918 Lah 6 (8). (Pleader making wrong statement as a result of mis-information.) (Vol 1) 1914 Lah 56 (59) : 1915 Pun Re No. 13. (Non-inclusion of certain property in the plaint.) (Vol 15) 1928 Nag 203 (205). (Bona fide mistake whether of law or fact—Following (Vol 11) 1924 Rang 249 : 2 Rang 66.) (Vol 28) 1941 Pat 399 (400). (Mortgage by cosharer—Partition and allotment of different property to mortgagor—Mortgages proceeding against property originally mortgaged—Amendment.)

[8] The Court cannot amend the plaint itself; it can only *allow* an amendment. (Vol 28) 1941 Pat 44 (44) (Vol 26) 1939 Lah 172 (173).

[9] The Court cannot compel party to change the character of a suit. (Vol 17) 1930 Cal 42 (46) : 57 Cal 349 (Vol 26) 1939 Lah 172 (173) (Vol 25) 1938 Mad 645 (646).

3. Introducing new case in the plaint.—[1] Order 6, R. 17 places no restriction upon the exercise of discretion by Court in allowing amendment of plaint provided it is judicially exercised. (Vol 10) 1923 Nag 241 (242) (1910) 13 Oudh Cas 152 (154) (Vol 32) 1945 Sind 128 (129, 130) : I L R (1945) Kar 84. (Discretion should be liberally exercised in favour of the plaintiff.)

[1a] The discretion should be exercised with due regard to the circumstances of each individual case and after careful study of its effect upon the position of the plaintiff and the defendant. (Vol 15) 1928 P C 208 (218, 219) : 52 Bom 597 : 55 Ind App 380 (P C).

[2] As a general rule the Court will not, in the exercise of such discretion, allow an amendment converting a suit of one character into a suit of another character. (Vol 30) 1943 Pat 206 (210) : 22 Pat 411 (423) (F B) (Vol 14) 1927 P C 18 (20) : 54 Ind App 55 : 6 Pat 323 (P C) (Vol 31) 1944 Cal 4 (8). (Plaint faintly disclosing suit as one for compensation for false and malicious prosecution. Held amendment did not change the character.)

[3] The Court cannot, by way of amendment, substitute one distinct cause of action for another, or change the subject-matter of the suit. (Vol 9) 1922 P C 249 (250, 251) : 48 Ind App 214 : 4 Upp Bur 30 : 48 Cal 832 (P C).

O. 6 R. 17 (contd.)

[4] Where the nature of the suit is not altered, and no prejudice or surprise is caused to the opposite party amendment will be allowed. (Vol 24) 1937 P C 42 (45, 46) : 16 Pat 149 (PC) * (Vol 24) 1937 Cal 485 (487) * (Vol 28) 1941 Nag 289 (291) : I L R (1942) Nag 478 * (Vol 28) 1941 Rang 37 (39) : 1940 Rang L R 603 * (Vol 27) 1940 Lah 256 (261) : I L R (1941) Lah 39.

[5] Amendment introducing new ground of claim or allegations inconsistent with facts found in the original plaint may be allowed where just and necessary. (Vol 28) 1941 Nag 289 (292) : I L R (1942) Nag 478 * (1911) 11 Ind Cas 827 (828) (Low Bur) * (Vol 22) 1935 Mad 137 (138, 139) * (Vol 22) 1935 Mad 158 (159, 160) * (Vol 13) 1926 Lah 460 (460) * (Vol 13) 1926 Nag 265 (265, 266) * (Vol 11) 1924 Pat 280 (281, 282) * (Vol 25) 1938 Lah 244 (245). ((Vol 24) 1937 Lah 146, reversed.)

[6] In the following cases the amendments were not allowed on the ground that they would totally change the character of the suit :

[a] Suit for possession ; amendment into a suit for redemption. (Vol 7) 1920 Bom 64 (66) : 44 Bom 515.

[b] Suit for possession — Amendment into suit to enforce mortgage. (Vol 7) 1920 Cal 678 (674).

[c] Suit for rent ; amendment into one for damages for use and occupation. (Vol 27) 1940 Pat 555 (557) * (1913) 17 Cal W N 311 (313) * (Vol 14) 1927 Mad 182 (183) * (Vol 23) 1936 Lah 26 (28).

[See however (1913) 7 Sind L R 23 (24) * (Vol 15) 1928 Nag 27 (29) : 23 Nag L R 152 * (Vol 2) 1915 Low Bur 47 (49) : 8 Low Bur Bul 270 * (Vol 20) 1933 Pat 485 (487).]

[d] Suit for dissolution of partnership and accounts — Amendment to convert it into one for remuneration for services. (Vol 5) 1918 Cal 294 (297, 299) * (Vol 21) 1934 Lah 38 (39).

[e] Suit against the defendant as carrier ; amendment to base suit on his liability as bailee. (Vol 5) 1918 Sind 58 (60) : 11 Sind L R 103.

[f] Suit against defendant as tenant ; conversion treating him as a trespasser and claiming ejection. (Vol 12) 1925 All 705 (706, 707).

[g] Suit for redemption ; amendment to make it a suit for avoidance of sale on payment of portion of consideration money. (1912) 14 Ind Cas 743 (744) (All).

[h] Suit to set aside a decree on the ground of fraud ; amendment for rectification on the ground of mistake. (Vol 3) 1916 Cal 100 (101).

[i] Suit for declaration of right to easement ; amendment into one for declaration of title to the property in respect of which the easement was claimed. (Vol 4) 1917 Mad 806 (806) (F B).

[j] Suit framed against manager of an idol ; amendment so as to implead idol as a party. (Vol 17) 1930 Oudh 43 (45).

[k] Suit against firm — Amendment seeking to alter as one against a partner in his individual capacity. (Vol 29) 1942 Sind 93 (95) : I L R (1942) Kar 210.

[l] Suit for declaration that certain lands were settled at a particular rate cannot be tried as a suit for declaration that land was assessable to land revenue. (Vol 28) 1941 Pat 371 (371).

[m] Suit by a reversioner to declare a certain mortgage not binding on him cannot be converted into a suit for joint possession. (1940) 42 Pun L R 479 (482).

[n] Suit for accounts from a receiver cannot be converted into one for damages for conversion. (Vol 17) 1930 Cal 721 (721).

[o] Suit on pro-note against a person who established plea of minority at the time of execution — Suit cannot be changed to one under S. 68, Contract Act at revisional stage. (Vol 28) 1941 Mad 569 (571).

[p] Suit for ejectment cannot be converted into a suit for partition. (Vol 33) 1946 Mad 105 (106, 107).

4. Introducing new case in written statement.

— [1] An amendment of a written statement setting up a totally inconsistent case with the original case will not be allowed if it is unjust to the opposite side to allow it. (Vol 28) 1941 Mad 811 (812) * (1909) 11 Bom L R 926 (936) * (Vol 22) 1935 Pat 463 (465) * (Vol 26) 1939 Oudh 245 (246) : 14 Luck 701 * (Vol 32) 1945 All 197 (200, 201) : I L R (1945) All 109.

[2] Where the proposed amendment will have the effect of displacing plaintiff's suit, Court will refuse the application to amend. (Vol 29) 1942 Cal 153 (163) : I L R (1942) 1 Cal 326 * (Vol 17) 1930 Lah 278 (279) * (Vol 21) 1934 All 11 (12).

[3] Plea of privilege sought to be introduced by amendment of written statement at the time of trial in a suit for libel was disallowed as unfair to the plaintiff. (1909) 36 Cal 888 (891).

[4] An amendment as a general rule should be refused when the plaintiff has called all his evidence and closed his case. (Vol 17) 1930 Rang 140 (142) : 7 Rang 800.

[5] Where amendment is allowed after plaintiff has closed his evidence and his case further evidence should be allowed to be called to meet the new case. (Vol 1) 1914 Mad 59 (61).

[6] Deliberate admission of a material fact will not be allowed to be denied by an amendment of the statement at a later stage. (Vol 12) 1925 Mad 950 (960).

[7] Where the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for a relief amendment could be allowed. (1909) 13 Cal W N 805 (813).

[8] Where on the facts appearing in the plaintiff's evidence a new defence of *law* arises, it could be taken by way of amendment, even after the plaintiff has closed his case on the facts. (Vol 17) 1930 Rang 140 (142) : 7 Rang 800.

[9] The improbability or the unconvincing nature of the new defence raised is not a ground for refusing to allow the amendment by the inclusion of such defence. (Vol 22) 1935 Pat 463 (465).

[10] New defence which cuts at the root of the case should not be allowed without amendment of pleadings. (Vol 26) 1939 Sind 137 (142) : I L R (1939) Kar 330.

5. Taking away right accrued by lapse of time.

— [1] However negligent or careless the first omission may have been, and however late the proposed amendment, the amendment should be allowed if *it can be made without injustice to the other side*. (1883) 32 W R (Eng) 262 (263) * (1910) 12 Cal L Jour 423 (426) * (Vol 1) 1914 Mad 322 (323) * (Vol 14) 1927 Nag 310 (311) : 23 Nag L R 81 * (Vol 13) 1926 Oudh 508 (509) * (Vol 12) 1925 Sind 241 (241) : 19 Sind L R 12 * (Vol 24) 1937 Cal 485 (487).

[2] An amendment will work injustice to the opposite party where it takes away a right accrued by lapse of time. (Vol 28) 1941 All 49 (49) : I L R (1941) All 74 * (Vol 22) 1935 Mad 202 (203) * (Vol 25) 1938 Mad 669 (672) * (Vol 22) 1935 Pat 86 (88).

[3] A plaintiff will not be allowed to amend his plaint by introducing a new cause of action, barred by the statute of limitation. (Vol 29) 1942 All 442 (443) * (Vol 28) 1941 Pat 276 (279) * (Vol 28) 1941 Rang 37 (44) : 1940 Rang L R 603 * (Vol 1) 1914 All 302 (303) * (1909) 11 Bom L R 926 (936) * (1887) 19 Q B D 394 (395, 396) * (Vol 13) 1926 Cal 189 (189) * (Vol 5) 1918 Cal 294 (297, 299) * (Vol 18) 1931 Mad 542 (547) * (Vol 15) 1928 Mad 828 (829) * (Vol 12) 1925 Nag 127 (128) * (Vol 12) 1925 Rang 49 (54) : 2 Rang 414 * (Vol 7) 1920 Low Bur 92 (93) * (Vol 1) 1914

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Sind 70 (72, 73) : 8 Sind L R 69* (Vol 25) 1938 Nag 388 (389) : I L R (1939) Nag 194.

[4] No amendment should be allowed as will deny a valid defence under the law of limitation. (Vol 29) 1942 Sind 104 (105, 106) : I L R (1942) Kar 207* (Vol 13) 1926 Mad 827 (828)* (Vol 20) 1933 Bom 450 (451) : 58 Bom 200* (Vol 20) 1933 Lah 774 (774) : 14 Lah 807* (Vol 19) 1932 Rang 26 (26) : 10 Rang 74* (Vol 18) 1931 All 160 (162)* (Vol 18) 1931 Bom 590 (591)* (Vol 14) 1927 Cal 733 (736)* (Vol 4) 1917 Cal 841 (841) : 43 Cal 95* (1895) 18 Mad 33 (38)* (Vol 18) 1931 Nag 74 (79, 80) : 27 Nag L R 291* (Vol 17) 1930 Nag 295 (296) : 27 Nag L R 226* (Vol 25) 1938 Pat 44 (47) : 17 Pat 168* (Vol 25) 1938 Pat 205 (207) : 17 Pat 268* (Vol 24) 1937 Rang 413 (416)* (Vol 22) 1935 Sind 26 (26).

[5] Where out of the alternative reliefs open only one is sued for an amendment in the plaint to enforce other reliefs time-barred at the date of amendment should not be allowed. (Vol 1) 1914 All 80 (83) : 36 All 370.

[6] Under peculiar or special circumstances, an amendment may be allowed even where it has the effect of depriving the defendant of his right to plead limitation. (Vol 30) 1943 Bom 407 (409)* (Vol 8) 1921 P C 50 (51, 52) : 43 Cal 110 : 47 Ind App 255 (P C) * (1943) 1943 Nag L Jour 148 (149)* (Vol 23) 1936 Mad 785 (787) (F B).

[7] Plaint framed with due diligence and care—Mistake as to appropriate remedy in the plaint due to the existence of conflicting judicial opinions or subsequent change in law—Amendment justified though fresh suit may be incompetent as barred by limitation. (1911) 21 Mad L Jour 475 (478)* (1894) 17 Mad 67 (68, 69).

[8] Existing right refers to a legal right which has accrued to the defendant and not a bare right to plead limitation. Therefore where no new cause of action is introduced or new relief is claimed the rule does not apply. (Vol 29) 1942 Oudh. 161 (163) : 17 Luck 226* (Vol 22) 1935 Mad 158 (159)* (Vol 22) 1935 Mad 202 (203)* (Vol 26) 1939 Nag 23 (25)* (Vol 21) 1934 Lah 412 (412).

6. Amendment not to be allowed when the disadvantage or injury caused cannot be compensated by costs. — [1] There is no injustice in allowing an amendment if the other side can be compensated with costs. (1883) 32 W R (Rang) 262 (263).

[2] The test before allowing an amendment is to see whether it will place the other party at a disadvantage or cause injury and whether that can be compensated by costs. (Vol 14) 1927 Mad 182 (183) * (1912) 16 Ind Cas 785 (786) (Cal) * (Vol 33) 1946 Mad 324 (325).

[3] Where the disadvantage can be compensated by costs the amendment may be allowed. (1912) 15 Cal L Jour 439 (442) * (1909) 33 Bom 644 (649) * (Vol 7) 1920 Cal 805 (806) * (Vol 20) 1933 Lah 245 (245) * (Vol 6) 1919 Lah 198 (199) : 1919 Pun Re No 84 * (Vol 2) 1915 Oudh 31 (55) * (Vol 24) 1937 Rang 413 (416) * (Vol 25) 1938 Nag 388 (390) : I L R (1939) Nag 194.

[4] The amendment should be refused where costs cannot compensate the disadvantage or injury. (Vol 29) 1942 Sind 4 (5) * (Vol 15) 1928 Oudh 305 (306) * (Vol 3) 1916 Bom 261 (262) : 40 Bom 158 * (Vol 10) 1923 Lah 505 (506) * (Vol 26) 1939 Mad 34 (35) * (Vol 26) 1939 Sind 173 (176) : I L R (1939) Kar 602.

[5] Where the effect of an amendment sought by the plaintiff would be to avoid the consequences of an adverse decision given against him, it ought not to be allowed. (Vol 18) 1931 Pat 426 (427) : 10 Pat 630.

7. Application not in good faith should be refused. — [1] Court's discretion in allowing an amendment should be exercised only where the applicant has

acted in good faith. (Vol 9) 1922 Cal 255 (256)* (Vol 19) 1932 Lah 322 (323, 324) * (Vol 17) 1930 Nag 295 (296) : 27 Nag L R 226 * (1911) 14 Cal L Jour 188 (207) * (Vol 8) 1921 Lah 367 (368) * (Vol 16) 1929 Rang 33 (34).

[2] Leave to amend will be refused where the applicant has been acting *malà fide*. (Vol 30) 1943 Bom 259 (260) : I L R (1943) Bom 301 * (Vol 29) 1942 Cal 153 (164) : I L R (1942) 1 Cal 326 * (Vol 29) 1942 Sind 104 (105, 106) : I L R (1942) Kar 207 * (Vol 29) 1942 Sind 93 (95) : I L R (1942) Kar 210 * (1910) 8 Ind Cas 600 (601) : 8 Bur L Tim 16 * (Vol 17) 1930 Pat 321 (321) * (Vol 31) 1944 Pat 276 (277, 278) * (Vol 22) 1935 Mad 50 (51) * (Vol 23) 1936 Mad 545 (547).

[3] Courts will infer want of *bona fides* from *great delay* in applying for leave to amend. (Vol 11) 1924 Mad 883 (885) * (Vol 5) 1918 Sind 6 (8) : 13 Sind L R 1.

[4] An amendment which seeks to reagitate the same questions and leads to further evidence, should not be allowed. (Vol 20) 1933 Sind 279 (281, 291) : 27 Sind L R 341 (F B).

8. Addition or substitution of a new plea of fraud.

— [1] One kind of fraud pleaded cannot be substituted by a distinct and new kind of fraud especially after the evidence has closed. (1887) 14 Ind App 111 (121) : 11 Bom 620 (P C).

[2] Where no fraud has at all been alleged in the original plaint, a new plea of fraud will not, except where strong grounds exist, be allowed to be raised by way of amendment. (Vol 15) 1928 Mad 759 (760).

[3] Where the fraud is disclosed only in the pleadings of the defendant or on his cross-examination it can be added by way of amendment. (1898) 25 Cal 371 (388, 390) (S B).

[4] Before granting an amendment the Court must be satisfied about the truth and substantiality of the amendment and also about the reason for omission. (Vol 11) 1924 Mad 883 (885).

[5] Where the omission to refer to fraud in the plaint was due to an oversight and the plaintiff intended from the very outset to allege fraud, the amendment should be allowed in the interests of justice. (Vol 15) 1928 Mad 759 (760).

9. Addition of new reliefs or claims. — [1] Mere alteration in the relief claimed does not change the character of the suit, and such alteration will be allowed if it does not cause injustice to the other side. (1893) 20 Cal 805 (808) * (1895) 22 Cal 692 (710) (S B) * (Vol 20) 1933 Rang 247 (249) * (1905) 23 Mad 500 (501, 502) * (Vol 21) 1934 Rang 266 (267) * (Vol 22) 1935 Mad 160 (161).

[1a] Following are some of the cases where alteration of relief was allowed :—

[a] Suit for sale on mortgage — Amendment into a claim for money decree. (Vol 3) 1916 All 137 (138).

[b] Suit for partition — Amendment into one for joint possession. (Vol 2) 1915 Cal 357 (361).

[c] Suit for partnership account—Addition of prayer for dissolution. (Vol 20) 1933 Lah 245 (245).

[d] Suit for specific performance—Prayer for refund of purchase money can be added. (1897) 21 Bom 827 (851, 852) (S B).

[e] Claim for damages in a suit for specific performance. (Vol 15) 1928 P C 208 (218, 219) : 52 Bom 597 : 55 Ind App 380 (P C).

[f] Plaint praying for redemption of whole mortgage—Alternate prayer for recovery of his share and for partition and possession on payment of proportionate share of mortgage debt allowed. (Vol 5) 1918 Mad 1142 (1145).

[2] An amendment will be allowed by adding a claim left out by *bona fide* mistake, misapprehension of facts or by inadvertence. (Vol 28) 1941 Pat 276 (279) *

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(Vol 27) 1940 Pat 555 (557) * (Vol 25) 1938 Lah 244 (245) * (Vol 6) 1919 Cal 904 (906) : 45 Cal 305 * (Vol 14) 1927 Oudh 513 (514) * (Vol 12) 1925 Oudh 555 (556) * (Vol 15) 1928 Lah 112 (112) * (Vol 10) 1923 Mad 553 (557).

[3] Where the omission is deliberate leave to amend will be refused. (Vol 27) 1940 Pat 555 (557) * (Vol 1) 1914 Mad 687 (689) : 37 Mad 555 * (1913) 17 Cal W N 311 (313) * (Vol 6) 1919 Cal 904 (907) : 45 Cal 305.

[4] Where subsequent to the institution of the suit, the plaintiff becomes entitled to a larger or other relief amendment may be allowed to add such other relief. (Vol 16) 1929 Cal 519 (520) : 58 Cal 622 * (1897) 24 Cal 260 (265) * (1902) 26 Bom 136 (139) * (Vol 17) 1930 Mad 47 (48).

[5] All reliefs ancillary to the main relief may be allowed to be added by way of amendment. (1903) 5 Bom L R 329 (330) * (Vol 19) 1932 Cal 87 (88) * (Vol 17) 1930 Mad 405 (410) * (Vol 19) 1932 Bom 175 (176) * (1884) 1884 All W N 26 (26) (F B). (Consequential prayer for possession.) * (1886) 1886 All W N 243 (248) * (1909) 36 Cal 726 (735) (Plaintiffs dispossessed during a suit for declaration — Possession might then be asked for.) * (1892) 15 Mad 15 (18) * (1905) 2 Nag L R 79 (79) * (Vol 11) 1924 Pat 310 (311) : 2 Pat 919 * (Vol 12) 1925 Sind 260 (261, 262) * (Vol 22) 1935 Lah 91 (91) * (Vol 24) 1937 Nag 84 (84) : I L R (1937) Nag 151 * (Vol 24) 1937 Lah 295 (297).

[6] Even in cases where the consequential relief is deliberately omitted to avoid paying higher court-fee, the Court may allow the amendment on payment of the additional court-fee. (Vol 11) 1924 Pat 310 (311) : 2 Pat 999 * (1912) 39 Cal 704 (710).

[7] If the proposed amendment is likely to cause injustice to the other side, it will not be allowed. (Vol 29) 1942 Cal 153 (163) : I L R (1942) 1 Cal 326.

[8] Where the application for leave to amend was made at a very late stage and the grant of the leave would have necessitated practically a trial of the whole case over again leave should be refused. (1898) 21 Mad 288 (291).

[9] A relief totally different from and inconsistent with the original relief should not be allowed. (Vol 30) 1943 Lah 159 (162) * (Vol 16) 1929 Lah 449 (450).

10. New ground of relief.—[1] A new ground in support of the relief claimed cannot be said to alter the character of the suit and will as a general rule be allowed. (Vol 28) 1941 Nag 273 (277) : I L R (1942) Mad 294 * (1905) 8 Oudh Cas 266 (270) * (Vol 18) 1931 Bom 590 (591, 592) * (Vol 32) 1945 Cal 144 (151) : I L R (1944) 1 Cal 463 * (1910) 12 Cal L Jour 556 (560) * (Vol 12) 1925 Oudh 523 (524) * (Vol 19) 1932 Mad 603 (604) * (1908) 10 Bom L R 346 (348).

[2] Even where false evidence in support of the ground was adduced if the falsity of the claim did not extend to the whole of the title that was set up, amendment of plaint by adding another ground was allowed. (Vol 20) 1933 Cal 271 (274).

11. "As may be necessary for the purpose of determining the real questions in controversy."—

[1] Object of allowing amendments is to get at the rights of the parties. (Vol 6) 1919 Cal 904 (907) : 45 Cal 305 * (Vol 22) 1935 Pat 463 (465).

[2] Finality in litigation is also an object in allowing amendments. (Vol 12) 1925 Nag 195 (196) * (1913) 11 All L Jour 423 (427) * (Vol 7) 1920 Lah 220 (222) * (Vol 12) 1925 Mad 585 (586) * (Vol 13) 1926 Pat 427 (428) : 5 Pat 746 * (Vol 10) 1923 Rang 160 (161) * (Vol 22) 1935 All 651 (652) * (Vol 25) 1938 Mad 708 (709) * (Vol 24) 1937 Nag 84 (84) : I L R (1937) Nag 151.

[3] Its necessity for raising the real question at issue is the proper and only consideration and it should be allowed

at any stage provided it does not affect the other party in such a way as to make compensation by costs insufficient. (Vol 12) 1925 Mad 950 (958) * (Vol 25) 1938 Rang 461 (468) : 1938 Rang L R 521.

[4] Omission or mistake was allowed to be rectified in the following cases :—

(a) Where there is wrong description of properties in the plaint. (Vol 13) 1926 Nag 313 (314) * (Vol 22) 1935 Oudh 92 (93) : 10 Luck 496 * (Vol 19) 1932 Pat 355 (356) : 11 Pat 624 * (1911) 33 All 616 (619) * (1895) 17 All 288 (291).

(b) Omission of properties from the plaint by inadvertence. (Vol 1) 1914 Lah 263 (264, 265) : 1914 Pun Re No. 62 * (Vol 21) 1934 Cal 640 (642) * (Vol 3) 1916 Pat 347 (348) : 1 Pat L Jour 893.

(c) Mistake in the statement of the cause of action. (Vol 17) 1930 All 474 (475).

(d) *Bona fide* mistakes in making the necessary averments. (1906) 8 Mad L Tim 245 (245) * (Vol 12) 1925 Nag 9 (10) * (Vol 22) 1935 Pat 86 (87).

(e) *Bona fide* mistake in the drawing up of pleadings. (Vol 30) 1943 Bom 259 (260) : I L R (1943) Bom 301 * (Vol 27) 1940 Lah 201 (201) * (1921) 62 Ind Cas 652 (653) (Mad) * (Vol 19) 1932 Lah 28 (29) * (1918) 40 Cal 541 (544) * (1910) 7 Ind Cas 251 (252) (Cal) * (Vol 19) 1932 Bom 367 (370) * (Vol 13) 1926 Nag 385 (386) * (Vol 11) 1924 Rang 249 (251) : 2 Rang 66 * (Vol 24) 1937 Pat 526 (527).

(f) Omission to make an averment. (Vol 28) 1941 Mad 669 (670, 671). (Defendant constructing wall across public way close to plaintiff's house — Enjoyment of plaintiff's property interfered with due to obstruction — Plaintiff however not averring special damage in plaint — *Held*, in circumstances of case plaintiff should be allowed to amend plaint accordingly.)

[5] Questions in controversy between the parties mean those questions in contest between them at the time the defendant filed his written statement and do not include those which the defendant wants to contest as an afterthought. (Vol 27) 1940 Oudh 367 (369) : 16 Luck 65 * (Vol 12) 1925 Mad 950 (958).

[6] Plaintiff should be allowed to raise new grounds of claim where, owing to a change in the prevailing view of the law during the pendency of the proceedings it was found that his original stand was not tenable. (Vol 28) 1941 P C 85 (88) : I L R (1942) Bom 75 : I L R (1941) Kar P C 134 : 69 Ind App 64 (P C).

[7] An amendment which will be useless, if made, is not necessary for the purpose of determining the real question in controversy. (Vol 10) 1923 Mad 245 (246).

[8] A merely technical plea is not necessary for deciding the controversy and therefore should not be allowed by way of amendment. (1911) 14 Cal L Jour 83 (86) * (Vol 21) 1934 All 11 (12).

12. Introduction of new cause of action. — [1] See also Note 3.

[2] In the following instances amendments were refused as introducing a new and distinct cause of action.

(a) Suit for specific performance of contract alleged to have been entered failing — Amendment to set up an earlier and independent contract. (Vol 9) 1922 P C 249 (251) : 48 Ind App 214 : 4 Upp Bur Rul 30 : 48 Cal 832 (P C).

[But see (Vol 3) 1916 Mad 1072 (1073).]

(b) Claim on the basis of *kittima* adoption : amendment into claim based on *apathitha* adoption. (Vol 28) 1941 Rang 276 (294) : 1941 Rang L R 445 * (Vol 5) 1918 Low Bur 111 (112).

[See however (Vol 12) 1925 Rang 178 (182) : 2 Rang 661.]

(c) Claim based on negligence : amendment into claim based on nuisance. (1912) 58 Cal 797 (803, 804).

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(d) Suit based on fraud and allegation of false claims by the defendant, into claim based upon an implied contract of indemnity. (1913) 1913 Mad W N 980 (981).

(e) Claim for declaration of ownership, into claim for specific performance of a contract. (Vol 18) 1931 Lah 595 (597).

(f) Claim to establish title to an *archaka* office and for mesne profits of certain lands attached to the office, into an alternate claim for reasonable wages for having rendered *archaka* service. (Vol 15) 1928 Mad 828 (829).

(g) Suit on the basis of a contract : amendment denying contract. (Vol 14) 1927 Mad 973 (973).

(h) Suit for redemption into one for enforcing a right as owner. (Vol 16) 1929 Rang 179 (181) : 7 Rang 140 * (Vol 3) 1916 Low Bur 71 (72) : 8 Low Bur Rul 418 * (Vol 8) 1921 Lah 53 (55).

[See however (Vol 27) 1940 Lah 201 (201).]

(i) Suit alleging right to sue on behalf of a certain committee : on failure addition of parties who had such rights. (Vol 13) 1926 Mad 577 (577).

(j) Suit for specific performance, into one for possession. (Vol 27) 1940 Lah 225 (226).

(k) Amendment changing the whole character of a suit. (Vol 27) 1940 Lah 63 (64) : I L R (1940) Lah 593.

(l) Suit for setting aside rent sale — Amendment to declare that particular sections of Burma Land and Revenue Act were *ultra vires*. (Vol 28) 1941 Rang 97 (98) : 1941 Rang L R 7 (F B).

[3] Where an amendment is objected to on the ground that it would change the cause of action, the Court must look to the substantial nature of the claim and not to the formal manner in which it is inserted. (Vol 13) 1926 Sind 264 (267) : 21 Sind L R 336 * (Vol 25) 1938 Pat 400 (401).

[4] In the following cases the change was held not to affect the cause of action.

(a) Mere change in the date of the cause of action. (Vol 13) 1926 Mad 128 (129) * (Vol 20) 1933 Sind 131 (133) * (Vol 11) 1924 Oudh 385 (386).

[See however (1901) 30 Cal 699 (704).]

(b) Correction of a clerical error. (Vol 9) 1922 All 81 (81).

(c) Amendments to support or amplify the cause of action in the suit. (Vol 29) 1942 Oudh 161 (163) : 17 Luck 226 * (Vol 12) 1925 Nag 9 (11) * (1881) 5 Bom 609 (613, 614) * (Vol 7) 1920 Low Bur 92 (93, 94) * (Vol 12) 1925 Mad 188 (188).

(d) Correction of misdescription of property. (Vol 24) 1937 Lah 895 (896).

[5] A claim can be amended by putting in the necessary ground of exemption from limitation for the suit. (1909) 34 Bom 250 (251) * (Vol 5) 1918 Mad 1200 (1200) * (Vol 5) 1918 Lah 220 (220) : 1918 Pun Re No. 102 * (Vol 15) 1928 Sind 17 (20) : 22 Sind L R 222 * (Vol 22) 1935 Bom 213 (214) * (Vol 22) 1935 Mad 153 (159).

[6] Where a document taken in respect of an original liability is found inadmissible in evidence due to a technical defect, amendment of claim for relief basing it on the original liability is not a substitution by a distinct cause of action. (Vol 9) 1922 Lah 394 (394) * (Vol 18) 1931 Oudh 54 (56) * (Vol 17) 1930 Mad 168 (170, 172) * (Vol 22) 1935 All 353 (357) : 57 All 459 * (Vol 23) 1936 Rang 508 (509) : 14 Rang 383 * (Vol 25) 1938 Rang 461 (467) : 1938 Rang L R 521 * (Vol 25) 1938 Pat 205 (207) : 17 Pat 268 * (Vol 23) 1936 Mad 785 (787) (F B) * (Vol 24) 1937 Pat 656 (656) * (Vol 20) 1933 Bom 476 (477, 478) : 57 Bom 802.

[But see (Vol 12) 1925 Mad 351 (352).]

[7] Where subsequent to the institution of the suit events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or

additional relief, he will be allowed to amend the plaint. (Vol 13) 1926 Mad 6 (12) * (Vol 2) 1915 Sind 25 (27) : 9 Sind L R 61 * (Vol 12) 1925 Pat 168 (173) * (Vol 18) 1931 Nag 10 (12) : 26 Nag L R 348 * (Vol 8) 1921 Lah 220 (221) * (Vol 18) 1931 Mad 505 (509).

[See however (Vol 29) 1942 Sind 4 (5).]

[But see (Vol 14) 1927 Cal 562 (57).]

[8] Where the plaintiff is guilty of *mala fides* he should not be allowed to amend. (Vol 5) 1918 Mad 121 (122).

[9] But where the cause of action is foreign to the original cause of action on which the suit was brought, the amendment cannot be allowed. (Vol 18) 1931 Mad 533 (533).

13. "At any stage of the proceedings." — [1] The amendment can be made at any stage of the proceedings. (Vol 28) 1941 Pat 399 (400) * (Vol 27) 1940 Lah 256 (261) : I L R (1941) Lah 39 * (Vol 12) 1925 Nag 62 (63) * (Vol 20) 1933 Nag 29 (31) : 28 Nag L R 320 * (Vol 12) 1925 Rang 282 (282) : 3 Rang (133) (F B) * (Vol 6) 1919 Mad 1067 (1067) * (Vol 24) 1937 Cal 562 (565) * (Vol 21) 1934 Lah 974 (975) * (Vol 21) 1934 All 273 (276) : 56 All 428 * (Vol 24) 1937 Pat 526 (527) * (Vol 28) 1941 Cal 1 (12, 13).

[2] Amendment can be allowed before or at, or, after the trial, or before the final decree in the case. (Vol 19) 1932 Mad 275 (279).

[3] Amendment can be allowed in appeal also. (Vol 30) 1943 Bom 407 (409) * (Vol 24) 1937 PC 42 (46) : 16 Pat 149 (PC).

[4] Amendment can be allowed in second appeal. (Vol 5) 1918 Mad 1142 (1145) * (Vol 8) 1921 Lah 157 (159) : 2 Lah 73 * (Vol 19) 1932 Bom 175 (176) * (Vol 23) 1936 Mad 545 (547).

[4a] Where objection is taken at an early stage amendment cannot be allowed in second appeal. (Vol 31) 1944 Bom 245 (246).

[5] Amendment can be made in revision. (1913) 1913 Pun L R No. 280 p. 942 (943).

[6] Amendment can be made even in an appeal before Privy Council. (Vol 12) 1925 P C 169 (170) : 47 All 459 (PC) * (1867) 11 Moo Ind App 468 (486) (PC).

[6a] Amendment can be allowed in a proper case at appellate stage in Federal Court. (Vol 32) 1945 F C 47 (59) : 1945 F C R 103 : ILR (1945) Kar F C 101 (FC).

[7] Court of Appeal may remand the case directing the lower Court to amend the plaint and proceed with the trial. (1901) 23 All 167 (173) * (1882) 6 Bom 670 (672) * (1889) 6 Bom 672 (673).

[8] Application for amendment should not be rejected on the ground of delay. (Vol 30) 1943 Lah 159 (162) * (Vol 29) 1942 Cal 153 (164) : I L R (1942) 1 Cal 326 * (Vol 28) 1941 Mad 811 (812) * (Vol 28) 1941 Nag 289 (292) : I L R (1942) Nag 478 * (Vol 12) 1925 Oudh 291 (292) : 27 Oudh Cas 231 * (Vol 20) 1933 All 374 (375, 376) : 55 All 256 * (Vol 6) 1919 Cal 191 (192) * (Vol 25) 1938 Mad 388 (389) * (Vol 22) 1935 Pat 463 (465).

[9] Where the delay is such that it will cause injustice or injury to the opposite party if the leave to amend is granted, the application will be refused. (Vol 29) 1942 Cal 153 (163) : I L R (1942) 1 Cal 326 * (Vol 27) 1940 Pat 494 (496) : 19 Pat 507 * (Vol 27) 1940 Pat 92 (96) : 19 Pat 90 * (Vol 12) 1925 P C 169 (170) : 47 All 459 (PC) * (1887) 11 Bom 620 (638) : 14 Ind App 111 (PC).

[10] The Court will be disinclined to grant leave to amend in the following cases :—

(a) Where it introduces a totally new case. (Vol 30) 1943 Lah 159 (162) * (Vol 29) 1942 Cal 153 (164) : I L R (1942) 1 Cal 326 * (Vol 29) 1942 Lah 1 (6) : I L R (1942) Lah 59 (F B) * (Vol 28) 1941 Mad 569 (571) * (Vol 27) 1940 All 113 (120) * (Vol 8) 1921 Sind 159 (165) : 16 Sind L R 207 (F B) * (Vol 25) 1938 P C 123 (129) : 32 Sind L R 448 : I L R (1938) Mad 646 (PC).

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(b) Where it necessitates fresh trial or letting in of fresh evidence. (Vol 30) 1943 Pat 206 (210) : 22 Pat 411 (FB) (Vol 29) 1942 Bom 280 (281) : I L R (1942) Bom 812 (Vol 28) 1941 Mad 811 (812) (1940) 42 Pun L R 479 (482) (Vol 8) 1921 Cal 125 (126) (Vol 18) 1931 Lah 260 (262) (1898) 21 Mad 288 (291) (1911) 12 Ind Cas 200 (202) : 4 Bur L Tim 244 (Vol 6) 1919 Cal 534 (535, 536) : 46 Cal 168 (Vol 15) 1928 Bom 516 (518) : 52 Bom 640 (Vol 30) 1943 All 74 (76, 77) : I L R (1943) All 112.

(c) Where the amendment will lead to needless complications. (Vol 15) 1923 Lah 375 (376) : 9 Lah 588 (Vol 12) 1925 Mad 441 (442).

[See however (Vol 31) 1944 Mad 530 (531).]

(d) Where the plaintiff is negligent or has taken his stand deliberately. (Vol 30) 1943 Bom 259 (259) : I L R (1943) Bom 301 (Vol 27) 1940 Pat 555 (557) (Vol 27) 1940 Nag 8 (10) (Vol 14) 1927 Bom 521 (525) : 51 Bom 749 (Vol 9) 1922 All 5 (6) (Vol 20) 1933 Cal 271 (274) (Vol 10) 1923 Lah 675 (677) (Vol 15) 1928 Lah 32 (33) (Vol 17) 1930 Pat 321 (321) (Vol 3) 1916 Mad 1203 (1203) (Vol 15) 1928 Oudh 135 (136, 137) (Vol 23) 1936 Mad 545 (547) (Vol 24) 1937 Sind 92 (93) : 31 Sind L R 406.

(e) Where the plaintiff insists on proceeding with the suit as framed. (Vol 27) 1940 Mad 789 (791) : I L R (1940) Mad 808 (Vol 13) 1926 Mad 988 (989) (1897) 24 Cal 584 (588) (Vol 5) 1918 Cal 391 (391) (Vol 5) 1918 Lah 236 (238) : 1918 Pun Re No. 118 (1910) 6 Ind Cas 542 (543) (All) (Vol 11) 1924 Pat 310 (311) : 2 Pat 919 (1906) 9 Oudh Cas 275 (280) (Vol 15) 1928 Rang 134 (135) (Vol 10) 1923 Sind 17 (20) (Vol 21) 1934 Lah 235 (236, 237).

(f) Where the plaintiff had neglected several opportunities to apply for amendment. (Vol 10) 1923 Lah 530 (532) (1909) 36 Cal 481 (487, 488) (SB) (1910) 8 Ind Cas 600 (601) : 3 Bur L Tim 16 (1910) 6 Ind Cas 542 (543) (All) (Vol 4) 1917 Mad 37 (38) (Vol 24) 1937 Mad 484 (487) (Vol 28) 1941 Rang 276 (294) : 1941 Rang L R 445 (Vol 28) 1941 Rang 97 (98) : 1941 Rang L R 7 (FB) (Vol 27) 1940 Mad 531 (532) : I L R (1940) Mad 929 (Vol 32) 1945 All 39 (40) (Vol 33) 1946 Cal 123 (125, 126).

(g) A relief of very wide and exceptional nature at the end of the trial. (Vol 25) 1935 P C 123 (129) : 32 Sind L R 448 : I L R (1938) Mad 646 (PC).

14. Opportunity to be given to the opposite party to amend his pleading. — [1] Where a pleading is allowed to be amended, the opposite side must be allowed to meet the new case by filing additional statement or letting in further evidence. (Vol 28) 1941 Pat 276 (279) (Vol 16) 1929 P C 306 (308) (PC).

[2] Additional contention not covered by pleading should first of all be decided as necessary and included by way of amendment to pleadings before Court can direct the other party to file an answer. (Vol 3) 1916 Mad 903 (907).

[See also (Vol 30) 1943 P C 34 (37) : 70 Ind App 35 : I L R (1943) Kar P C 30 : I L R (1943) 2 Cal 213 (P C).]

[3] Plaintiff amended as a result of counter claim in the written statement — Amendment of written statement is not plaintiff's duty. (Vol 27) 1940 Bom 117 (118) : I L R (1940) Bom 10.

[4] Amendment would not be allowed without fresh notice to defendant who is absent. (Vol 33) 1946 Nag 60 (62) : I L R (1946) Nag 1.

15. "On such terms as may be just." —

[1] The terms to be imposed in granting an amendment of the pleadings are in the absolute discretion of the Judge. (1892) 2 Q B 817 (818, 819).

[2] An amendment will only be allowed on the terms

that the cost of the application for and the costs occasioned by the amendment shall be paid in any event. (Vol 2) 1915 P C 172 (173) (PC).

[3] The terms should be such as will prevent the opposite party from being prejudiced by the amendment. (Vol 12) 1925 Mad 737 (739, 740).

[4] An order for payment of costs against a pauper plaintiff is improper. (Vol 9) 1922 Bom 385 (385) : 47 Bom 104.

[5] A party who accepts costs cannot afterwards object to the order allowing it. (Vol 14) 1927 Mad 1009 (1009) (Vol 20) 1933 Mad 410 (411) (Vol 21) 1934 Cal 554 (555, 556) : 61 Cal 433.

[6] An order for amendment on condition of payment of costs cannot be objected to after the acceptance of the sum awarded as costs. (Vol 28) 1941 Nag 273 (277) : I L R (1942) Nag 294 (Vol 21) 1934 Nag 163 (163) : 30 Nag L R 347 (Vol 24) 1937 Lah 895 (896) (Vol 21) 1934 Lah 974 (975).

16. How amendments should be made. —

[1] The pleading should not be returned for amendment, but is to be kept on the Court's file with direction to the parties to amend, if necessary. (Vol 8) 1921 Sind 166 (168) : 17 Sind L R 223.

[See however (1913) 24 Mad L Jour 455 (456).]

[2] Where the Court has no pecuniary jurisdiction to entertain the suit, the Court should return the plaint to the plaintiff, who may delete certain reliefs and re-present it. (Vol 15) 1928 Mad 559 (559, 560).

[3] The amendment need not be made on the plaint itself but may be made even on a separate sheet of paper. (1893) 1893 All W N 225 (225).

17. Court not having jurisdiction over suit, if can allow amendment of plaint. — [1] A Court is not competent to allow an amendment to bring a suit within its jurisdiction. (Vol 22) 1935 All 842 (843) (Vol 25) 1938 All 17 (18) : I L R (1938) All 40.

[2] Where plaint is presented to a Court having no jurisdiction it should be returned for presentation to the proper Court. The party can amend it and represent it to the same Court. (Vol 25) 1938 All 17 (18) : I L R (1938) All 40.

18. Extent of amendment. — [1] Amendment can be made only to the extent allowed by Court. Therefore, an unauthorised amendment is a nullity though not objected to either by the Court or the party. (1910) 1910 Pun Re No. 213 p. 615 (652).

[2] In order to avoid any doubt as to whether the amendments carried out were permitted it is usual and desirable to submit the proposed amendments in explicit form before the leave sought is granted. (Vol 28) 1941 Rang 37 (39) : 1940 Rang L R 603.

[3] A Court cannot allow an amendment to oust its own jurisdiction over the suit. (Vol 15) 1928 Mad 400 (400).

19. Effect of amendment and limitation. — [1] Suit amended restricting the claim against some of the defendants only as the Court could not take cognisance against the others would not be deemed as commenced at all against such other defendants. (Vol 6) 1919 Low Bur 42 (43) : 9 Low Bur Rul 275.

[2] An amendment allowed under this rule relates back to the date of the suit as originally filed where no party is added. (Vol 21) 1934 Lah 412 (412) (Vol 19) 1932 Bom 367 (368, 370) (Vol 20) 1933 Mad 153 (156) (Vol 32) 1945 Mad 219 (220) (1912) 37 Bom 340 (347) (Vol 1) 1914 Lah 263 (265) : 1914 Pun Re No. 62 (Vol 1) 1914 Nag 77 (78) : 10 Nag L R 32 (Vol 25) 1938 Pat 205 (208) : 17 Pat 268 (Vol 23) 1936 Rang 508 (509) : 14 Rang 383.

[See however (Vol 32) 1945 Oudh 135 (138).]

[3] Where in a suit relief is claimed in respect of certain properties only and by the amendment certain

18. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

[Cf. 1882—S. 53; R. S. C., O. 28, R. 7; Cf. 1877, S. 53.]

ORDER VII.

PLAINT

Particulars to be contained in plaint.

1. The plaint shall contain the following particulars :—

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

O. 6 R. 17 (*contd.*)

other properties are included, the amendment does not relate back in respect of the newly added properties. (Vol 5) 1918 Cal 443 (444).

[4] Amendment adding a necessary party cannot relate back to the date of the filing of the suit. (Vol 24) 1937 Rang 124 (125).

[5] Where the suit as originally instituted was incompetent any subsequent amendment cannot relate back to the date of institution. (Vol 23) 1936 Mad 991 (992).

[6] Amendment under this rule can be allowed although at the time of the amendment the suit (if instituted then) would have been barred by limitation. (1895) 17 All 238 (291) * (Vol 32) 1945 Mad 33 (35) : I L R (1945) Mad 450 * (Vol 1) 1914 Nag 77 (78) : 10 Nag L R 32 * (1911) 7 Nag L R 33 (35) * (Vol 30) 1943 Bom 407 (409).

[7] Where the amendment is directed by the Court as the suit as filed was incompetent all previous orders made against the defendant stand vacated immediately. (Vol 21) 1934 Nag 169 (170).

20. Appeal.—[1] No appeal lies from an order granting or refusing an amendment under this rule. (1911) 1911 Pun L R No. 216 p. 826 (834) : 1911 Pun Re No. 96.

[See however (Vol 5) 1918 Cal 188 (189).]

[2] Appellate Court, in an appeal in the suit, will not interfere with the discretion of the lower Court in granting or refusing amendments. (Vol 3) 1916 Cal 605 (606) * (Vol 20) 1933 Lah 867 (868) * (1909) 1909 Pun Re No. 101 p. 494 (497) * (Vol 25) 1938 Lah 270 (272) * (Vol 25) 1938 Nag 368 (369) : I L R (1939) Nag 194.

[3] Objection not taken would be deemed as waived and cannot be raised at the stage of appeal. (Vol 4) 1917 Cal 614 (615).

[4] Order refusing leave to amend a plaint is an interlocutory order and is not appealable under the Letters Patent as a "judgment". (Vol 4) 1917 Mad 350 (350).

[5] An order amending the title by omitting the word "summary" and transferring the case to the short cause list is not a "judgment" within Clause 15 of the Letters Patent. (Vol 12) 1925 Bom 159 (160).

[6] Where a plaint amended according to direction is returned as being beyond the pecuniary jurisdiction of the Court, the order directing amendment can be challenged in appeal against order returning the plaint. (Vol 23) 1936 Mad 936 (937).

21. Revision.—[1] An order passed purely under O. 6, R. 17 is not open to revision. (Vol 23) 1936 All 686 (689) : I L R (1937) All 17 (FB). ((Vol 22) 1935 All 353: 36 Cri L Jour 102 : 57 All 459 and (Vol 22) 1935 All 651, impliedly overruled.) * (Vol 28) 1941 Oudh 623 (624) * (Vol 28) 1941 Oudh 87 (88) * (Vol 33) 1946 Sind 36 (37) : I L R (1945) Kar 347.

[See also (Vol 20) 1933 Rang 49 (50) : 11 Rang 36 * (Vol 22) 1935 Cal 102 (107).]

[But see (Vol 28) 1941 Nag 289 (290) : I L R (1942) Nag 478.]

Order 6, Rule 18—Note 1.

[1] Failure to amend involves merely loss of right to amend. (Vol 23) 1936 Pesh 155 (157).

[2] The Court cannot reject a plaint or dismiss the suit under O. 6, R. 18 but must proceed to try the suit on the original plaint. (1913) 1913 Pun L R No. 169, p. 561 (562).

[3] Plaintiff moved an amendment which was granted but plaintiff did not amend the plaint accordingly. On a contention being raised later on that ground, *held*, that the application for amendment can be read as a part of the plaint and that the defendant not taking objection at first, waived the objection. (1911) 14 Cal L Jour 627 (630).

[4] Application for adding more defendants allowed — Amendment not embodied in original plaint till date of judgment — After delivery of judgment Judge directing officers of Court to carry out amendment — Order 6, R. 18 held sufficiently complied with. (Vol 27) 1940 Mad 641 (645).

[5] Plaint in previous suit rejected as not amended within time allowed for amendment after it was returned — Such rejection is not bar to fresh suit on the same cause of action. (Vol 14) 1927 Lah 83 (83).

[6] Order of amendment not under O. 6 but under general power of Court—Amendment made after fifteen days is not out of time. (Vol 1) 1914 Cal 637 (638). (Case under Chota Nagpur Landlord and Tenant Procedure Act).

ORDER 7, RULE 1—SYNOPSIS.

1. Scope of the rule.
2. Name, description and place of residence.
3. Facts constituting the cause of action.
4. When cause of action arose.
5. Facts showing that the Court has jurisdiction.
6. Relief which the plaintiff claims.—See O. 7, R. 7.
7. Valuation of suit.

- (e) the facts constituting the cause of action and when it arose;
- (f) the facts showing that the Court has jurisdiction;
- (g) the relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

[1882—S. 50; 1877—S. 50; 1859—S. 26; See S. 26 and O. 6 R. 2.]

O. 7 R. 1 (contd.)

1. Scope of the rule. — [1] The provisions of O. 7, R. 1 are imperative. (Vol 12) 1925 Nag 183 (184)* (1896) 18 All 403 (406). (The word "must" in the old section was held to be most imperative.)

[2] All necessary facts mentioned — Form may be disregarded. (Vol 14) 1927 Cal 806 (807) * (Vol 4) 1917 Cal 562 (563). (Court should not be bound by any technicalities with regard to form of statement of claim in plaint.) * (Vol 10) 1923 Lah 475 (476). (Plaint—Facts should be set forth.)

[3] Substance of plaint rather than its wording should be looked to. (Vol 18) 1931 Pat 179 (181)* (Vol 18) 1931 Mad 94 (95).

2. Name, description and place of residence.—

[1] Where plaint did not contain the ages of the defendants and the father's name of a defendant and when returned for amendment, it was not represented within the time allowed, an order rejecting the plaint was held reasonable. (1897) 7 Mad L Jour 81 (83).

[2] Failure to mention in the title of the plaint the capacity of the defendant but full description of it in the plaint does not justify dismissal of the suit. (Vol 4) 1917 Cal 662 (663).

[3] 'The description of the defendant' includes all those titles by which the party is generally known and if the plaint does not contain those titles of the party, an objection being taken by such party, the plaint should be ordered to be amended. (1874) 12 Beng L R 443 (449) (PC).

[4] Omission to mention the titles of the defendant does not constitute such a misnaming as to justify the dismissal of plaint — A person is sufficiently named when he is called by names which are indisputably his. (1866) 3 Mad H C R 31 (32).

[5] The description of the plaintiff as residing at Road X in Calcutta or the description of a defendant as formerly of X in Calcutta, there being no allegation that the plaintiff has been unable to ascertain his residence, is not sufficient compliance with this rule. (1879) 4 Cal L Rep 366 (370, 371).

[6] That there was some error as to the description of defendant's place of abode in the plaint is no ground for dismissing the suit. (1871) 6 Beng L R (App) 84 (85).

[7] If the plaintiffs rely upon defendant's residence or place of business, as giving jurisdiction, this must be stated in body of plaint — It is not sufficient to state these in the cause title because the cause title is not covered by the verification of plaint. (Vol 18) 1931 Cal 458 (461) : 58 Cal 418.

[8] Suit by shebait — Omission to describe plaintiff as a shebait is merely misdescription and can be cured by amendment. (Vol 18) 1926 Cal 417 (419).

[9] Suit by managing member on contract by previous manager—Plaintiff must be declared as such. (Vol 3) 1916 Pat 310 (311) : 1 Pat L Jour 468.

[But see (Vol 1) 1914 Oudh 353 (357). (Manager suing or sued—He may not be described as such.)]

3. Facts constituting the cause of action. —

[1] The plaint should contain in addition to other particulars, the facts constituting the cause of action

and the time when it arose. (Vol 2) 1915 Cal 681 (682); 42 Cal 85 * (Vol 18) 1931 Cal 458 (460) : 58 Cal 418 * (Vol 5) 1918 Oudh 118 (119). (Plaintiff cannot rely on defendant's written statement.)

[2] Pro-note — Note payable at specified place — Plaint ought to contain a statement that note had been presented for payment — Plaintiff not alleging presentment in the plaint — He cannot be allowed to prove it. (Vol 22) 1935 Pesh 132 (133).

[3] In suits for damages for injury done, the nature of the injury ought to be set out. (1870) 13 Suth W R 248 (249).

[4] Where a plaint in a suit for damages for malicious prosecution does not contain an allegation that the prosecution was made without reasonable or probable cause, it should be rejected. (1873) 10 Bom H C R 182 (186).

[5] Where a suit is for recovery of money due in respect of past monetary dealings, the particulars of loans advanced should be given in the plaint. (Vol 18) 1931 Cal 458 (460) : 58 Cal 418.

[6] If the plaintiff in a suit on a mortgage fails to prove the mortgage upon which he relied and which he alleged in the plaint, he cannot succeed upon the mere fact that the defendant admitted that he was a mortgagee of land — No other mortgage can be sought to be redeemed in that suit. (1896) 18 All 403 (406, 407).

[7] Unless the plaintiff in a suit for redemption of mortgage shows in his plaint that *prima facie* he had at the commencement of suit a title and a right to sue then subsisting, his plaint would not comply with the requirements of this rule. (1889) 11 All 438 (444) (FB).

[8] Suit for redemption—Decree for redemption cannot be passed unless all particulars of the mortgage are in plaint. (Vol 18) 1931 Oudh 378 (379) : 7 Luck 94.

[9] In a suit by sole surviving partner for the recovery of a partnership debt, the plaintiff ought to allege that the debt sought to be recovered was a partnership debt, that the deceased partner had died before the suit and that the plaintiff was suing as a sole surviving partner for his own benefit and that of the estate. (1887) 9 All 486 (492).

4. When cause of action arose.—[1] Under O. 7, R. 1 (e), Civil P. C., the plaint is to state when the cause of action arose. (Vol 3) 1916 Nag 34 (35) : 13 Nag L R 16. (In an action of ejectment, it is for the plaintiff to prove a title subsisting at the date of his suit.) * (1870) 13 Suth W R 248 (249).

[2] Plaintiff must state date on which cause of action is alleged to have arisen unless it is otherwise ascertainable from statement of facts constituting cause of action. (Vol 19) 1932 Cal 259 (261) : 59 Cal 448.

[3] The plaintiff cannot be tied down to the date of the accrual of the cause of action mentioned in the plaint. The Court is entitled to determine the date on which the cause of action arose from the facts alleged and proved. (Vol 15) 1928 Lah 516 (523) : 9 Lah 428.

[4] Burden of proving when cause of action arose, e. g., date of pro-note on which suit is based, is on plaintiff. (Vol 17) 1930 Mad 742 (744).

5. Facts showing that the Court has jurisdiction.—[1] Court concluding that it has jurisdiction—

2. Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed :
In money suits.

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

[1882—S. 50; 1877—S. 50; 1859—S. 26; *See* O. 20.]

PROVINCIAL AMENDMENTS

LAHORE

In the second paragraph, *after* the word "defendant" *insert* "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate" and *after* the word "amount" where it last occurs *insert* "or value".
[12-5-1909.]

N.-W. F. P.

Same as that of Lahore above.

3. Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers.
Where the subject-matter of the suit is immoveable property.

PROVINCIAL AMENDMENT

CALCUTTA

Add at the end the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures."

4. Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.
When plaintiff sues as representative.

[1882—S. 50, para. 4; *See* S. 92, O. 1 R. 8, O. 30, O. 31.]

O. 7 R. 1 (*contd.*)

Mere absence of assertion in plaint does not oust jurisdiction. (Vol 21) 1934 Pat 593 (594).

6. Relief which the plaintiff claims.—*See* O. 7, R. 7.

7. Valuation of suit.—[1] The valuation fixed is for the purpose of determining the Court which has jurisdiction to try the suit. (Vol 5) 1918 Mad 998 (1002). 40 Mad 1 (FB).

[2] For purposes of O. 7, the aggregate of the claim put forward in the plaint is treated as one suit though there may be several causes of action. One plaint is only one suit. Jurisdiction depends on amount or value of the aggregate subject-matters at the date of institution. (Vol 5) 1918 Mad 998 (1001) : 40 Mad 1 (FB).

[3] It is not contemplated by the rule that the subject-matter shall be given two values, one purely arbitrary and fanciful for purposes of jurisdiction and one in strict conformity to the real value for purposes of court-fees. In either case, valuation should conform to reality. If a plaint contains a valuation for purposes of jurisdiction, the same valuation would apply, if it were necessary to have a valuation for an *ad valorem* court-fee. (Vol 13) 1926 Mad 591 (591).

[4] A suit for restitution of conjugal rights and possession of a wife is not one to which any special money value can be attached for purposes of jurisdiction. (1891) 18 Cal 378 (381).

Order 7, Rule 2 — Note 1.

[1] Where the mesne profits have accrued due before suit and the plaintiff is in a position to value it even approximately, he is bound to state the amount. (Vol 1) 1914 Cal 858 (860).

[2] Mesne profits claimed from date of suit—Amount cannot be stated by plaintiff. (Vol 10) 1923 Rang 110 (112) : 4 Upp Bur Bul 140.

[3] Valuation will refer to profits before and after suit where both are claimed.—(*Per Mullick J.*) (Vol 13) 1926 Pat 218 (225, 228) : 5 Pat 361 (FB).

Order 7, Rule 3 — Note 1.

[1] Immoveable property — Discrepancy between two descriptions—Leading description should prevail. (Vol 31) 1944 Pat 254 (255) : 23 Pat 145.

Order 7, Rule 4 — Note 1.

[1] A plaintiff suing in a representative character must set it forth in the plaint and show that he is qualified to fill it. (1883) 7 Bom 467 (470, 471) (Vol 12) 1925 Nag 183 (184).

[2] Some persons coming forward with representative suit without proper representation of community—Court cannot adjudicate upon public right. (Vol 5) 1918 Cal 487 (488).

[3] An executor derives his title and authority from the will of his testator and not from any grant of probate. He can institute a suit in the character of executor before he proves the will though he cannot obtain a decree before probate. (Vol 3) 1916 P C 202 (204) : 43 Ind App 113 (P C).

[4] So long as compliance with S. 187, Succession Act, 1865, is prior to decree, the fact that it is after institution of suit makes no difference and Court is competent to deal with the suit. (Vol 10) 1923 Cal 1 (5) : 50 Cal 49.

[5] Though it is not necessary to obtain probate or letters of administration in case of Muhammadans, still if the suit is for the recovery of a debt due to deceased, debtor can insist on probate or letters of administration. (1884) 8 Bom 241 (255).

[6] Application in *forma pauperis* to recover a debt dismissed for want of production of succession certificate — Held, the dismissal was wrong. (1893) 16 Mad 454 (455).

[7] A probate issued from a native Court is not sufficient for instituting a suit in British India. (1894) 17 Mad 14 (16).

[8] Since the passing of Act 7 [VII] of 1889 (now Act 39 [XXXIX] of 1925) all that can be insisted on by the defendant in a suit where the original plaintiff dies is

5. The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

[1882—S. 50, para. 5; Cf. 1877—S. 50, cl. 5.]

6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

[1882—S. 50, para. 6; 1859—S. 26.]

O. 7 R. 4 (contd.)

that representation shall be complete before the decree. (1892) 16 Bom 519 (520).

[9] Plaintiff or defendant suing or sued in representative capacity — It is not necessary that the character in which they are sued must appear in the cause-title. (Vol 15) 1928 Nag 319 (321) * (Vol 6) 1919 Cal 245 (247) : 46 Cal 877.

Order 7, Rule 5 — Note 1.

[1] The rule makes it obligatory that the plaintiff should show the interest of the defendant in the subject-matter of the suit and his liability to meet the plaintiff's demand. Where the plaint is defective by reason of its non-compliance with O. 7, R. 5, the Court is bound to call upon the plaintiff to disclose his cause of action correctly against each defendant. (Vol 11) 1924 Nag 191 (193).

[2] Suit against limited owner on simple money debt — No issue raised as to whether it was binding on estate — Whether decree-holder in execution of such decree can show that in fact it was binding on estate, depends on view taken by Court of frame of suit — Plaintiff should so frame his suit as to show clearly that he asks for decree against whole estate. (Vol 19) 1932 Mad 185 (186, 187).

Order 7, Rule 6 — Note 1.

[1] It is the duty of the plaintiff to show grounds of exemption from the law of limitation in the plaint. (Vol 10) 1923 Nag 30 (31) * (Vol 20) 1933 Lah 491 (492) * (Vol 24) 1937 Mad 826 (828). (Documents relied on to save time filed in suit and defendant not prejudiced — High Court refused to interfere with decree in plaintiff's favour.) * (Vol 23) 1936 Mad 545 (546) * (Vol 1) 1914 Sind 70 (73) : 8 Sind L R 69.

[See also (Vol 6) 1919 All 227 (228). (Suit for redemption of mortgage alleged to have been executed between 60 years before suit — Plaintiff pleading the mortgage within time — Court declining to consider acknowledgments relied on by plaintiff on ground that they were not specially pleaded in plaint and dismissed suit — Held that it was not necessary for plaintiffs specially to plead that acknowledgments saved limitation.)]

[2] Exemption from limitation should be expressly pleaded. (Vol 20) 1933 Mad 675 (677) * (Vol 6) 1919 Mad 332 (333). (Ground saving limitation must be specifically stated.)

[3] Where the suit as laid down in the plaint was *prima facie* barred by limitation and where there is no reference in plaint to alleged acknowledgments of liability by defendant so as to make S. 19, Limitation Act, applicable to the case, plaintiffs are not entitled to rely upon a ground of exemption which was not contained in the plaint. (Vol 11) 1924 Lah 702 (706) * (Vol 21) 1934 Lah 753 (756). (Plea resting on acknowledgments cannot be taken for the first time at the stage of argument.) * (Vol 1) 1914 Lah 337 (338) : 1914 Pun Re No. 83. (New grounds cannot be raised.) * (Vol 11) 1924 Pat 806 (806). (Specific pleading of ground on which exemption from limitation is claimed, is necessary for admissibility into evidence, of acknowledgment under Limitation Act, S. 19.)

[4] Period of limitation expiring during Court holidays—Plaint presented on re-opening — Suit cannot be barred though plaint does not specifically mention ground of extension under S. 4, Limitation Act. (Vol 24) 1937 Pesh 41 (41) * (Vol 7) 1920 Nag 200 (202) : 16 Nag L R 198.

[5] Suit filed in time in wrong Court—Return and representation to proper Court but beyond time—Benefit of S. 14, Limitation Act claimed—Non-mention of ground of exemption is not fatal to suit. (Vol 10) 1923 Lah 591 (592) * (1911) 9 Ind Cas 157 (158) (Mad). (Endorsement of Court as to dates of receipt and return is substantial compliance with provisions of Civil P. O., O. 7, R. 6.)

[6] It has been held in the undermentioned cases that it is enough if the plaint discloses the ground of exemption; and the plaintiff is not thereby precluded from taking another and an inconsistent ground (not disclosed in the plaint) to get over the bar of limitation. (1911) 13 Cal L Jour 139 (147) * (Vol 9) 1922 Lah 230 (232) : 2 Lah 13 * (Vol 8) 1921 Nag 1 (2) : 17 Nag L R 209 * (Vol 28) 1941 Oudh 111 (112). (Plaintiff is not precluded from relying on any other ground of exemption specially, when such ground is furnished by an Act of Legislature.)

[See however (1903) 30 Cal 699 (709).]

[7] The undermentioned cases hold that a new ground of exemption from limitation not taken in the plaint cannot be allowed without amendment of plaint. (Vol 20) 1933 Mad 874 (876) * (Vol 20) 1933 Mad 395 (396).

[8] Ground of exemption not set up in Court below, cannot be set up in appeal. (Vol 9) 1922 Lah 39 (40) : 3 Lah 233 * (Vol 81) 1944 Nag 37 (40) : ILR (1943) Nag 764. (Exemption from limitation not claimed in plaint — It cannot be claimed for the first time in second appeal.)

[9] The plaint must clearly show that the suit is filed within time; but no objection to the frame of suit can be entertained on further appeal, when the statements in the plaint, properly construed, indicate the time of accrual of the cause of action within the period of limitation. (1909) 1909 Pun L R No. 82. p. 297.

[10] An objection that plaintiff did not set out the ground of exemption from limitation, will not be allowed to be taken in revision in the High Court. (Vol 4) 1917 Mad 845 (845).

[11] Rule 6 does not apply where claim is apparently not barred. (Vol 1) 1914 Lah 408 (410) : 1914 Pun Re No. 70 * (Vol 6) 1919 Lah 20 (21) : 1 Lah 89.

[12] Debt — Acknowledgment of — Not pleaded in plaint — Setting it up in reply to defence of defendant is not barred. (Vol 9) 1922 Oudh 135 (137) : 25 Oudh Cas 89.

[13] Suit on mortgage brought in time — Mortgagee applying for personal decree — Ground of exemption stated in application under O. 34, R. 6 but not in plaint — Law is sufficiently complied with. (Vol 31) 1944 Mad 65 (67) : I L R (1944) Mad 572.

[14] Mortgage deed — Surety making himself personally liable for defect in the title of the mortgagor — Suit on mortgage — No specific allegation in plaint as to when cause of action arose against surety — Held, it

7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

[R. S. C., O. 20 R. 6.]

O. 7 R. 6 (contd.)

was obligatory on plaintiff to set out circumstances in clear and unequivocal terms upon which exemption was claimed against surety. (1937) 20 Nag L Jour 42 (45).

[15] Where, *prima facie*, suit is barred but for the alleged minority of plaintiffs, onus is on plaintiffs to prove that suit is within time. (Vol 15) 1928 Lah 763 (764).

[16] Onus is on plaintiff to show that acknowledgment was taken within period of limitation. (Vol 19) 1932 All 461 (464) : 54 All 506.

[17] This rule should be construed liberally—Amendment of plaint to state grounds of exemptions from law of limitation should be allowed. (Vol 5) 1918 Lah 220 (220) : 1918 Pun Re No. 102.

[18] Exemption of limitation not pleaded cannot be allowed—Oral statement by pleader that plaintiffs relied on debtor's admission before Debt Conciliation Board as saving limitation is not proper procedure—This technical defect can however be removed by allowing amendment. (Vol 31) 1944 Nag 247 (249) : I L R (1944) Nag 244.

ORDER 7, RULE 7 — SYNOPSIS.

1. Relief.
2. General or other relief.
3. Alternative relief.
4. Events happening after suit.

1. Relief.—[1] The word "relief" is not synonymous with "cause of action." Relief means a remedy which a Court may afford in regard to some wrong or injury while a cause of action includes all reliefs covered by the facts on the strength of which a plaintiff comes to Court. (1883) 5 All 345 (359) (F B).

[2] Relief is to be gathered from allegations in plaint as a whole. (Vol 18) 1931 Nag 198 (200) : 27 Nag L R 299*(1911) 11 Ind Cas 882 (884) (Cal). (Plaint in form for confirmation of possession but in substance prayer for possession—Latter relief can be given.) * (Vol 18) 1931 Mad 94 (95).

[3] A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in the pleadings. (1867) 11 Moo Ind App 468 (474) (P C) * (Vol 27) 1940 P C 3 (7) : I L R (1940) Kar P C 15 (P C). (Relief claimed solely on ground that defendant worked coal under particular portion of land—Defendant found to have taken small quantity of coal from different portions—Plaint not amended to include relief in this respect—Claim not allowed.) * (Vol 2) 1915 Mad 74 (75). (Claim not set up in pleadings or even in grounds of first appeal—No relief.) * (Vol 4) 1917 Pat 42 (43) : 2 Pat L Jour 698. (Suit on usufructuary mortgage either for mortgage decree or for possession—Appellate Court granting usufruct for period of dispossession—Held, the relief not having been prayed for, could not be given.) * (1910) 5 Low Bur Rul 192 (194). (Decree cannot be given on a cause of action not put forth in the suit, which is based on a different cause of action.)

[See (Vol 4), 1917 Mad 543 (546). (Plaint not properly setting out relief prayed for but defendant aware of what is in issue—Court will grant relief for which party is entitled.)]

[4] But relief can be granted where the substantial matters which constitute the title of all the parties are

touched in the issues and have been fully put in evidence. (1899) 21 All 53 (59) : 25 Ind App 195 (P C) * (Vol 28) 1941 P C 51 (55) (P C). (Suit not one for administration, subject-matter being only a portion of the estate of the deceased—Yet the shares of plaintiff's children were ascertained and declared.)

[5] Matter not strictly covered by pleadings and issues—In the absence of respondents, Privy Council will not determine it even though there was enough material on record to arrive at a decision. (Vol 28) 1941 P C 85 (88) : 69 Ind App 64 : I L R (1942) Bom 75 : I L R (1941) Kar P C 134 (P C) * (Vol 25) 1938 Lah 296 (299) (S B). (Plaintiff not proving facts constituting his cause of action. The suit should not be decreed on proof of different facts which the defendant had no opportunity to controvert.) * (Vol 7) 1920 Pat 195 (196). (Where plaintiff claims a right of easement and fails to establish it, it is not open to the Court to create a new case for him and to give him relief on the basis of a natural right which is not specifically claimed in the plaint.)

[6] Where the claim is substantiated the fact that relief was claimed on a different ground will not disentitle the plaintiff to relief. (Vol 5) 1918 Cal 802 (803). (If the plaintiff's claim to goods sold and delivered is substantiated, the mere fact that the adjustment of account set out in his plaint is not proved, is not a proper ground for dismissing the suit when it is based upon goods sold.)

[7] A party claiming a larger relief ought not to be denied relief which can properly be granted, unless the ground on which the lesser relief can be granted is inconsistent with the case of the plaintiff as set out in the pleadings or would lead to the determination of the issues which would embarrass the defendants or necessitate the addition of parties or unless the claim of the plaintiff is unconscionable and the Court is unwilling to stretch a point in his favour. (Vol 5) 1918 Mad 300 (307) * (Vol 2) 1915 All 116 (117, 118) * (Vol 8) 1916 Cal 547 (548). (Suit on pro-note—Finding that shorter sum than mentioned in pro-note actually advanced—Suit should not be dismissed but decreed for the amount found due.) * (1866) 5 Suth W R 127 (128). (Suit for mesne profits.) * (Vol 6) 1919 Lah 339 (341) : 1919 Pun Re No. 13. (An exaggerated claim is no ground for refusing a person the rights which he is found entitled to.) * (1913) 24 Mad L Jour 561 (562). (Suit for dissolution of partnership and ascertainment of plaintiff's share—Defendant admitting a certain sum—Decree for admitted amount can be given.) * (1913) 21 Ind Cas 724 (733) (Mad). (In a suit for ejectment, a plaintiff can, if found entitled, be decreed a share of part of property even if no alternative case be set up.) * (1900) 10 Mad L Jour 242 (244). (Where a plaintiff's claim is for partition, a claim to redeem cannot be granted in such a suit, for it would amount to changing the character of the suit.) * (Vol 4) 1917 Nag 81 (32). (Plaintiff is always entitled to lesser relief of the same kind as he has asked for.) * (Vol 18) 1931 Oudh 400 (401) * (Vol 10) 1923 Sind 5 (8) : 16 Sind L R 112 (FB).

[8] Suit by mortgagee for recovery of debt and in default of payment, for foreclosure and possession—Mortgagee found not entitled to possession—That circumstance held did not affect his right to sue for mortgage money and to obtain a decree for sale. (1908) 27 Bom 600 (603, 604).

O. 7 R. 7 (*contd.*)

2. General or other relief.—[1] Where all the material circumstances in the case have been included in the plaint; but the relief claimed is inappropriate or insufficient or not the proper one, the Court has always the power to grant the appropriate relief. (1905) 27 All 325 (331); 32 Ind App 123 (PC)* (Vol 16) 1929 All 555 (555) (Suit property transferred by Hindu widow without necessity—Prayer for declaration that transfer was void beyond life-time of widow not made in suit for possession—Declaration can be given.)* (Vol 14) 1927 Bom 125 (127). (Plaintiff praying for payment to himself—Under O. 7, R. 7 payment can be decreed to plaintiff and defendant partner.)* (Vol 10) 1923 Lah 422 (423). (Declaratory decree can be passed in a suit for possession.)* (Vol 13) 1926 Lah 417 (418)* (Vol 17) 1930 Nag 92 (94); 26 Nag L. R 94* (Vol 5) 1918 Nag 177 (177). (Suit as framed one for ejectment—In a proper case decree for redemption of mortgage can be passed.)* (Vol 30) 1943 Oudh 368 (378); 19 Luck 163. (Suit by officer for his reinstatement on ground of order of dismissal being void—General prayer for relief—Court held could grant decree for salary withheld.)* (Vol 17) 1930 Pat 71 (74)* (Vol 10) 1923 Pat 386 (390). (Relief not asked for—Facts pleaded in plaint which would cover the relief—Court can grant the relief.) (Vol 3) 1916 Pat 94 (95). (Suit for khas possession—Possession found cannot be given till expiry of term—Declaration of title and right to possession can be given.)

[See however (Vol 4) 1917 Oudh 406 (410)].

[2] Future interest can be awarded though not specifically asked for in the plaint. (Vol 8) 1921 Lah 125 (126); 2 Lah 256.

[3] When a person is found entitled only to joint possession though he has sued for exclusive possession, he may be given the former. (1909) 5 Nag L R 105 (106)* (1909) 10 Cal L Jour 213 (215) (FB)* (Vol 1) 1914 Mad 128 (130); 38 Mad 1036.

[4] Suit for possession by partition—Property found impartible—Declaratory decree not asked for—Joint possession may be decreed. (Vol 8) 1921 All 106 (107); 43 All 318.

[5] In a suit for sale of mortgaged property the Court may pass a personal decree against the mortgagor defendant provided the personal remedy is not barred by limitation. (1902) 24 All 456 (457)* (1910) 34 Bom 540 (545)* (1906) 29 Mad 491 (495).

[6] Suit for money against members of partnership—Personal decree though not specifically asked for, held may be granted. (Vol 29) 1942 Pat 204 (208); 20 Pat 811.

[7] Accounts can be directed to be taken, although there was no prayer in the plaint to that effect but only a general prayer. (Vol 6) 1919 Cal 296 (304).

[8] Claim to judicial separation is not general relief—In suit for divorce no prayer for judicial separation made nor plaint amended—O. 7, R. 7 does not apply. (Vol 25) 1938 Bom 65 (67).

[9] Reliefs not prayed for can be granted provided they are based on facts stated in the plaint and are not inconsistent with the case set up by the plaintiff. (Vol 8) 1921 Pat 14 (17); 6 Pat L Jour 190* (1913) 17 Cal W N 427 (428). (Relief on a wholly different basis not to be given.)* (Vol 20) 1933 Lah 267 (268)* (Vol 16) 1929 Lah 126 (127). (Relief granted should not go beyond the scope of suit.)* (Vol 4) 1917 Oudh 221 (229). (Suit to enforce transfer—Recovery of consideration money as damages will not be allowed if the suit fails.)* (1911) 11 Ind Cas 863 (864) (Low Dur). (In a suit for rent, a decree for damages for use and occupation will not be given unless specifically asked in the plaint.)

[See also (1904) 28 Bom 153 (160).]

[10] A portion of purchase money not having been paid to the vendor by the vendee, the Court can grant

a decree for the amount in a suit by the vendor to cancel sale deed and recover properties on the ground of failure of consideration. (1910) 8 Mad L Tim 433 (434).

[11] A suit for a share of inheritance must be treated as an administration suit, though not brought in that form and a decree should be passed on the lines of the model decrees in Appendix D Forms 17 and 20, Civil P. C. (Vol 4) 1917 Low Bur 3 (4).

[12] A prayer "for any other relief" may cover any other relief arising out of the same cause of action but not one arising under a different cause of action. (1912) 1912 Pun L R No 92, p. 277 (278).

[13] Relief granted should not be of an entirely different description from the relief claimed in the plaint. (Vol 3) 1916 Cal 829 (833, 837); 43 Cal 743 (F B).* (1837-41) 2 Moo Ind App 353 (389, 390) (P C). (Relief of a different description can be given if such a relief can be sustained by the allegations in the plaint.)* (Vol 11) 1924 Lah 324 (325).

[14] Plaintiff claiming decree for money found due from the defendants in taking accounts—Decree declaring plaintiff's right to share of the money with the defendant cannot be passed—Nor can decree be passed against defendants against whom no relief was claimed. (Vol 24) 1937 Oudh 484 (487); 18 Luck 584.

[15] Plaintiff suing for partition of certain property can be given a decree for ejectment if the plaintiff in effect asks for that relief and the defendant had not been taken by surprise. (Vol 6) 1919 Sind 98 (99, 100); 13 Sind L R 159.

3. Alternative relief.—[1] A person may rely upon one set of facts if he can succeed in proving them and he may rely upon another set of facts if he can succeed in proving them. (1887) 35 Ch D 492 (499)* (Vol 1) 1914 All 271 (272); 36 All 476. (Suits should not be dismissed as being for inconsistent relief).

[2] Plaintiff may from the beginning put forward an alternative case (1872) 9 Bom H C R 1 (6) (FB)* (Vol 4) 1917 Nag 31 (32). (Plaintiff is always entitled to lesser relief of same kind as he has asked for).

[3] It is open to a plaintiff to ask for relief in the alternative dependent upon what might be found by the Court to be true facts of the case (Vol 11) 1924 Nag 401 (403).

[4] In a suit on a negotiable instrument, relief on the strength of the original consideration could be granted if prayed for in the alternative (Vol 5) 1918 P C 146 (146); 46 Cal 663; 46 Ind App 33 (PC)* (1900) 24 Bom 360 (362)* (1878) 3 Cal 314 (315). (Unstamped promissory note.)* (1912) 8 Nag L R 7 (8). (Unstamped hundis.)* (Vol 15) 1928 Pat 426 (427); 7 Pat 845. (Unstamped promissory note.)* (Vol 18) 1931 Rang 139 (142); 9 Rang 56. (Insufficiently stamped pro-note).

[5] Where all the facts supporting alternative claim are stated in the plaint, the mere fact that no alternative relief is claimed will not bar the granting of the relief. (Vol 19) 1932 Nag 23 (26); 27 Nag L R 327* (Vol 33) 1946 Nag 112 (114); 1 L R (1946) Nag 21.

[6] A prayer for alternative relief does not mean that his original relief is waived. (Vol 1) 1914 Lah 204 (206); 1915 Pun Be No 4.

[7] The fact that the pleadings subsequent to the filing of the plaint, and the evidence in the case, disclosed facts at variance with the plaint, does not disentitle the plaintiff to relief if both parties perfectly well understood the point in dispute. (Vol 1) 1914 All 479 (481).

[8] If a plaintiff asks for "the following reliefs and such other relief as the Court may find just and proper to grant" and follows this up with several prayers without any disjunctive adverb, the presumption is that they are intended to be cumulative and not alternative. (1910) 1910 Pun L R No. 213 p. 615 (652).

8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as separate grounds. may be separately and distinctly.

[R. S. C., O. 20 R. 7; See O. 1, Rr. 1 to 7 and O. 2, Rr. 1 to 6.]

9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

[1882—S. 58; 1877—S. 58; See O. 7, Rr. 4 and 5.]

Provincial Amendments

ALLAHABAD

(a) For the semicolon after "it" in clause (1), substitute a full stop and delete the rest of this clause as well as clauses (2) and (3); and

(b) Re-number clause (4) as clause (2), deleting the words "or statements" therein.

O. 7 R. 7 (contd.)

[9] Claim for alternative reliefs—Decree not granting either relief but granting some other relief — Plaintiff can appeal. (Vol 33) 1946 Pat 231 (234) : 25 Pat 1.

4. Events happening after suit.—[1] The ordinary rule is that the rights of parties must be determined as at the date of the action and not on the basis of rights which accrued to them after the institution of the suit. (Vol 17) 1930 Nag 173 (173, 176) : 26 Nag L R 208* (Vol 4) 1917 Cal 716 (719) : 44 Cal 47.

[2] But where it is shown that the relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, the Court may depart from the ordinary rule. (1907) 6 Cal L Jour 74 (78)* (Vol 2) 1915 Lah 169 (169). (Suit for possession of entire property based on sale cancelled by both parties — Subsequent sale of part of property upon which claim is not based — Court can grant a decree for that part.)* (Vol 24) 1937 Mad 200 (207, 208). (Compromise of suit brought to knowledge of Court—Court is bound to raise and try issue regarding it.)* (Vol 27) 1940 Mad 412 (415). (Right to sue devolving jointly on two persons—Only one of them bringing action — Death of other person *pendente lite* before trial — Court cannot refuse decree to plaintiff under O. 1, R. 9)* (Vol 11) 1924 Nag 204 (207). (Relief refused on basis of subsequent events).

[See also (Vol 17) 1930 Bom 554 (557) : 54 Bom 902. (Events subsequent to filing of suit or appeal can be considered. This applies even to second appeal).]

[3] Suit premature but cause of action during pendency of suit — Held decree might be given. (Vol 10) 1923 Lah 590 (591).

[4] Alteration in case law during pendency of appeal before High Court — Plaintiff placed in embarrassing position—Dismissal of suit entailing risk of injustice—Held amendment of plaint raising new issues and new arguments should be allowed. (Vol 28) 1941 P C 85 (88); I L R (1941) Kar P C 134 : I L R (1942) Bom 75 : 69 Ind App 64 (P C).

[5] Amendment in the light of subsequent event should not be allowed when the plaintiff's suit would be wholly displaced and the fresh suit will be barred by limitation. Nor should it be allowed in Appellate Court to deprive the successful party of his benefit under the decision by the trial Court. (Vol 31) 1944 Lah 319 (320, 321) : I L R (1944) Lah 443 (FB)* (Vol 32) 1945 Pat 87 (92) : 23 Pat 508. (Plaintiff's claim to certain property as her father's heir negated by trial Court — Pending appeal one of defendants dying and plaintiff becoming entitled to share in suit property as her heir—Plaintiff's fresh rights held could not be declared in suit as brought.)

[6] A plaintiff cannot rely upon the pleas in the written statement for making out a cause of action, but must show in his plaint, that a cause of action accrued to him prior to suit. (Vol 5) 1918 Oudh 118 (119).

Order 7, Rule 8 — Note 1.

[1] Either party to a litigation may in a proper case include in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative, but whenever such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed. (Vol 7) 1920 Cal 93 (95).

[2] Plaintiff claiming property by ownership as successor to person in mahantship and in reply to defendant's written statement pleading that he was entitled, even if not owner, to its management. Case falls under O. 7, R. 8 as he has two distinct claims, founded on separate and distinct grounds. (Vol 16) 1929 Nag 347 (347).

[3] Where a plaintiff alleges fraud and also alleges other facts necessary to establish his title independently of the question of fraud, he is entitled to a decree on proof of the latter facts even if he fails to establish the allegation of fraud. (1911) 9 Ind Cas 429 (431) (Oudh).

[4] See also under O. 6, R. 2 and O. 7, R. 7.

Order 7, Rule 9 — Note 1.

[1] This rule relates to the procedure when a plaint is admitted. (Vol 28) 1941 Oudh 80 (81). (Order "register" on plaint is not order of admission necessitating Court to grant time for payment of deficient court-fee.)

CALCUTTA

Cancel clause (1) and *substitute* therefor the following :

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1A) The plaintiff shall present with his plaint :

(i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements ;

(ii) draft forms of summons and fees for the service thereof." [As amended on 3-2-1933.]

MADRAS

After the word "and" occurring in clause (1) *delete* the comma and the five words following, viz., "if the plaint is admitted" and *insert* the expression "along with the plaint" *after* the words "shall present."

[R. O. C. No. 1810 of 1926.]

NAGPUR

Substitute the following for Rule 9.

"9. (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it.

(2) The chief ministerial officer of the Court shall sign such list and the copies of the plaint presented under Rule 1 of Order 4, if, on examination, he finds them to be correct." [29-6-1943]

UDDH

In sub-rule (1) for the words "and, if the plaint is admitted, shall present," *substitute* the words "and shall, at the same time, present." Also *delete* the words "unless the Court present such statements", as well as sub-rules (2) and (3), and *re-number* sub-rule (4) as sub-rule (2) *deleting* the words "or statements."

SIND

Substitute the following for sub-rule (1).

"9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies of it on plain paper as there are defendants; on application made the Court may by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, presented along with the plaint."

"10. (1) The plaint shall at any stage of the suit be returned to be presented to the Court in *Return of plaint.* which the suit should have been instituted.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and *Procedure on returning plaint.* return, the name of the party presenting it, and a brief statement of the reasons for returning it.

[1872—S. 57 ; 1877—S. 57 ; 1859—S. 30 ; See S. 21.]

[a] *Applied* to suits for recovery of rent under the Chota Nagpur Tenancy Act, 1908 (Beng. VI [6] of 1908), S. 265.

ORDER 7, RULE 10—SYNOPSIS.

1. Scope.
2. "At any stage of the suit."
3. Return of plaint by or to Small Cause Court.
4. Return of plaint by Civil Court to Revenue Court and vice versa.
5. Return of applications.
6. Case in which suit should not have been instituted.
7. Court-fee
8. Limitation.
9. Chartered High Courts.
10. Appeal.
11. Revision.

1. Scope. — [1] Order 7, Rule 10, applies when the suit as originally framed was wrongly instituted. (Vol 7) 1920 Nag 47 (49)* (Vol 13) 1926 All 747 (747). (Plaint although mistaken determines jurisdiction in the absence of *mala fides*.)* (Vol 28) 1941 Bom 69 (71) : I L R (1941) Bom 153. (Order 7, Rule 10 has no application when the suit was properly instituted in the first instance.)* (Vol 9) 1922 Bom 152 (154) : 46 Bom 229. (Suit not instituted in wrong Court—Rule does not apply.)* (Vol 14) 1927 Cal 711 (712). (Nature of proceedings should be decided with reference to the plaint

or application.)* (Vol 16) 1929 Lah 107 (109). (Suit for accounts within jurisdiction of Court — On taking accounts amount exceeding Court's jurisdiction — Yet preliminary decree not void.)* (Vol 15) 1928 Lah 484 (486). (Order 7, Rule 10 does not apply to cases where a Court originally had jurisdiction to try the suit but discovers at the time of passing the decree that it has no pecuniary jurisdiction.)* (Vol 13) 1926 Mad 339 (340). (Defendant objecting that plaintiff's claim is purposely overvalued by including item without any title — Court cannot investigate and decide the issue for considering whether it has jurisdiction.)* (Vol 27) 1940 Nag 331 (333) : I L R (1941) Nag 96. (Words "the plaint" in O. 7, R. 10, mean the plaint as originally presented.)* (Vol 4) 1917 Pat 334 (334) : 2 Pat L Jour 394. (Question of jurisdiction in issue—Plaint alone should be considered.)* (1914) 7 Low Bur Rul 20 (22). (It is the nature of suit as brought and not nature of the defence, that determines the jurisdiction.)* (Vol 31) 1944 Sind 98 (100) : I L R (1944) Kar 491. (State at time of institution is test of jurisdiction—Plaintiff found not entitled to relief during trial — Plaintiff need not be returned)* (Vol 20) 1933 Sind 296 (298) (Do.)* (Vol 17) 1930 Sind 252 (253). (Rule 10 does not apply when it is found at trial, whether on admissions made by parties or evidence led by them, that relief which plaintiff is entitled to is different from that originally claimed in

O. 7 R. 10 (*contd.*)

suit—Court should either proceed with suit or allow withdrawal. (1912) 1912 Pun W R No. 221 p. 585 (587) : 1912 Pun Re No. 96.

[2] Where a Court decides that it has no jurisdiction, it cannot proceed to decide any point other than that of jurisdiction and no finding by it that a certain amount was due by one party to the other could be treated as a finding on the merits in the Court to which the plaint had been ordered to be re-presented. (1912) 1912 Pun W R No. 221, p. 585 (587) : 1912 Pun Re No. 96.

[3] The provisions of R. 10 (1) of O. 7 are sufficiently wide to cover a case in which by operation of legislation the situation arises, even after a suit has been instituted, that it should have been instituted in another Court. (Vol 25) 1938 Oudh 224 (225).

[4] Jurisdiction—Aggregate claim must be regarded as one suit—Plaint containing several causes of action—There is only one suit and jurisdiction depends on value of aggregate subject-matter—Court cannot adjudicate upon portion and return other for adjudication by another Court. (Vol 5) 1918 Mad 998 (1001) : 40 Mad 1 (F B).

[5] Plaint containing a claim within jurisdiction and one outside jurisdiction—Portion relating to latter can be treated as a distinct plaint. (Vol 8) 1921 All 193 (193).

[6] Abandonment of claim pending suit is not retrospective so as to vitiate the original institution of the suit and attract the operation of O. 7 R. 10. (Vol 7) 1920 Nag 47 (49).

[7] Order returning plaint should be for presentation to proper Court and not for presentation to particular Court. (Vol 29) 1942 Rang 10 (10, 11).

[8] Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so. (Vol 14) 1927 Cal 87 (88) & (1905) 32 Cal 146 (151).

[9] When a Court returned the plaint to be filed into another Court merely because it was of opinion that it was just possible that the case may be outside its jurisdiction, it was held that the Court had no jurisdiction to act under O. 7, R. 10 as it had come to no definite finding that it had no jurisdiction. (Vol 16) 1929 Lah 248 (249).

[10] When a Court finds that it has no jurisdiction to entertain the suit it should return the plaint for presentation to proper Court under O. 7 R. 10 and not dismiss the suit. (Vol 18) 1931 All 664 (665) & (Vol 29) 1942 All 130 (133) : I L R (1942) All 129 & (Vol 22) 1935 All 157 (160). (It is not necessary that defendant should state that relief has been over-valued to oust jurisdiction of one Court.) & (1882) 8 Cal 834 (836) & (Vol 27) 1940 Lah 171 (172) & (1935) 153 Ind Cas 53 (54) (Lah) & (Vol 18) 1931 Mad 69 (70) & (Vol 17) 1930 Mad 699 (699) & (Vol 20) 1933 Nag 82 (83, 84) : 29 Nag L R 115 & (Vol 12) 1925 Oudh 735 (736). (Court finding that it has no jurisdiction to try suit—Court cannot try suit on merits but should return it for presentation to proper Court.) & (Vol 29) 1942 Pat 1 (3, 16) : 21 Pat 1 (F B). (Revenue Court holding that it had no jurisdiction—Dismissal of suit is improper—Plaint should be returned for presentation to proper Court.) & (Vol 14) 1927 Pat 254 (255) : 6 Pat 358.

[But see (Vol 3) 1916 Oudh 229 (230) : 18 Oudh Cas 364.]

[11] Transfer of parties as plaintiffs raising value of subject-matter higher than Court's jurisdiction—Court should transfer parties and return the plaint. (Vol 13) 1926 Pat 28 (29).

[12] Suit for declaration that award is not binding on plaintiff falls under S. 42, Specific Relief Act and not under S. 14, Arbitration Act, (1899), and as such can be

filed in Sub-Judge's Court and not in the District Judge's Court only. (Vol 9) 1922 Lah 26 (26).

[13] On correct valuation of plaint, suit beyond jurisdiction of Court—Court must return plaint for presentation to proper Court and should not ask plaintiff to amend valuation with a view to direct him to pay additional court-fee and then to return plaint. (Vol 18) 1931 Mad 67 (69).

[14] Question of valuation and jurisdiction should be tried first—Court found to have no jurisdiction—Order requiring additional court-fee is wrong—Court must return plaint. (Vol 20) 1933 Nag 312 (313) : 29 Nag L R 367.

[15] Plaint on face of it triable by Court—Other side challenging allegations in plaint—Plaintiff sticking to his allegations—Court trying case and finding plaintiff's allegations to be false—Case is decided on merits and must be dismissed—No question of return of plaint under O. 7, R. 10 arises. (Vol 27) 1940 Nag 331 (333) : I L R (1941) Nag 96 & (Vol 25) 1938 All 39 (41, 42). (Court has to see plaint and determine if it has jurisdiction—On defence pleadings, Court coming to decision that it has no jurisdiction—Suit should be dismissed and not returned for proper presentation.) & (Vol 24) 1937 Oudh 183 (184) : 13 Luck 18. (Jurisdiction found to be barred on findings arrived at by Court—Dismissal of suit is proper.)

[16] Suit ordinarily to be filed in Munsif's Court filed in Subordinate Judge's Court—Subordinate Judge having jurisdiction to entertain suit—Evidence closed and arguments being heard—Objection as to Court raised—Subordinate Judge should deliver judgment and not direct plaint to be returned to Munsif's Court. (Vol 21) 1934 Cal 524 (525).

[17] Court holding plaintiff's case untrue—Procedure is to dismiss the suit and not return the plaint. (Vol 13) 1926 All 58 (59) : 48 All 168.

[18] Suit of small cause nature—Defendant pleading partnership—Small Cause Judge finding that there was partnership dismissing suit—Plaint need not have been returned. (Vol 16) 1929 All 907 (907).

[19] A suit was filed at C against defendant residing at B for rendition of accounts on allegation that there was contract between the parties that accounts should be rendered at C. Neither allegation as to agreement nor facts which gave plaintiff any right to relief claimed either at C or elsewhere were established on evidence. Held that Court at C was competent to dismiss the suit and need not return the plaint for presentation to some Court at B. (Vol 20) 1933 All 745 (746).

[20] Where some causes of action are within jurisdiction and some without, the Court can strike out from the plaint those that are outside the jurisdiction and retain the plaint. It cannot return plaint, for presentation to proper Court, comprising causes of action beyond its jurisdiction. (Vol 13) 1926 Bom 283 (283, 284).

[21] Return of plaint ordered—Plaintiff willing to drop part of his claim to bring the case within Court's jurisdiction—Court can allow plaintiff to do so. (Vol 13) 1926 Mad 133 (134).

[22] Suit for partition—Preliminary decree passed—At final decree suit discovered to be under-valued and beyond pecuniary limits—Preliminary decree cannot be declared nullity and plaint cannot be returned for proper presentation. (Vol 17) 1930 Cal 147 (147).

[23] When the landlord sues an occupancy tenant in a Civil Court for possession and declaration that the mortgage effected by him of his holding is invalid, the Court should not return the plaint for presentation to the proper Court. It can grant the declaratory relief though it cannot grant the possessory relief. (Vol 4) 1917 Oudh 49 (50).

O. 7 R. 10 (*contd.*)

[24] When a Court discovering that the subject-matter of the suit is beyond its jurisdiction it cannot allow withdrawal of the suit under O. 23, R. 1 but should return the plaint under O. 7, R. 10 for presentation to proper Court. (Vol 6) 1919 Mad 1071 (1075) : 41 Mad 701.

[25] Plaint returned — Vakalatnama should also be returned with it. (Vol 10) 1928 Nag 182 (183) : 19 Nag L R 36.

[26] Suit under S. 92—Claim for possession included — Plaint should not be returned. (Vol 12) 1925 All 683 (684) : 47 All 770.

[27] Court directing plaint to be presented to proper Court can order plaintiff to pay costs of other side—But it cannot make payment of costs condition precedent to filing of suit in proper Court. (Vol 29) 1942 Mad 35 (35).

[28] Plaint returned for presentation to proper Court can after amendment be represented to same Court. (Vol 18) 1931 Mad 8 (9)

[29] Plaint filed in Court — Jurisdiction of Court to entertain it challenged — Application by plaintiff to amend plaint—Court holding that it has no jurisdiction should return original plaint for presentation to proper Court and not proposed amended plaint. (Vol 22) 1935 Rang 310 (314).

[30] Plaint may be returned at the instance of plaintiff. (Vol 16) 1929 Pat 722 (723).

[31] O. 7, R. 10 is mandatory. Where the Court finds that it has no jurisdiction it is bound to return the plaint for presentation to proper Court even though the plaintiff may not have asked for such return. (Vol 7) 1920 Mad 688 (689)* (1887) 10 Mad 211 (212).

[32] Plaint cannot be returned for amendment — It should be kept on Court's file with direction to plaintiff to amend if necessary. (Vol 8) 1921 Sind 166 (168) : 17 Sind L R 223.

[33] Transfer of case is quite different from return of plaint for presentation to another Court. (Vol 3) 1916 Nag 31 (33) : 13 Nag L R 81.

[34] Order 7, Rr. 10 and 11 have nothing in common. (Vol 29) 1942 Oudh 480 (480, 481).

[35] There is nothing in the Punjab Courts Act to show that O. 7 R. 10 has been overridden or made of no effect in the Punjab (Vol 15) 1928 Lah 484 (486).

[36] Plaint filed in second Class Sub-Judge's Court—Court found case cognizable by Small Cause Court and returned it for presentation to proper Court. The latter Court held that suit was not triable by it and returned plaint to the appellant — The appellant in revision asked High Court to determine which Court had jurisdiction—Held the correct procedure would have been to make an application to District Judge under the provisions of O. 46, R. 7. (Vol 20) 1933 Nag 221 (221) : 30 Nag L R 133.

2. "At any stage of the suit".—[1] When it is discovered at any stage in the original proceedings that the suit ought to have been instituted in a different Court the plaint must be returned for presentation to that Court. (1910) 4 Sind L R 264 (266).

[2] The practice is to return plaint even in the course of the trial. (1884) 8 Bom 313 (317) (FB).

[3] Order returning plaint at stages of preliminary arguments when the suit has not proceeded very far is proper. (Vol 25) 1938 All 76 (78).

[4] Plaint can be returned for presentation to proper Court even after the trial is concluded if want of jurisdiction of trial Court was then noticed. (1884) 8 Bom 313 (317) (F B). ((1883) 7 Bom 487, overruled.)

[5] Court having jurisdiction originally discovering at the time of passing decree that it has no jurisdiction to pass it—Rule 10 does not apply. (Vol 15) 1928 Lah 484 (486).

3. Return of plaint by or to Small Cause Court. —[1] A Small Cause Court, finding that a suit is not cognizable by it, should not dismiss the suit but should return the plaint under Rule 10 at any stage, for presentation to the proper Court. (Vol 5) 1918 Cal 869 (870).

[2] Where the Provincial Small Cause Court decides that it has no jurisdiction, it is not competent for it to go into the merits of the case and give a decision on them. It should return the plaint for presentation to proper Court. (Vol 13) 1926 Mad 679 (680).

[3] Valuation of suit inflated to give jurisdiction to Court on regular side—Plaint cannot be returned for presentation to Small Cause Court unless on taking evidence, amount actually recoverable is ascertained. (Vol 26) 1939 All 444 (445).

4. Return of plaint by Civil Court to Revenue Court and vice versa. — [1] For passing an order returning plaint to be presented to the proper Court, it is not necessary that both the Courts should have similar jurisdiction — Revenue Court having no jurisdiction can return plaint to a Civil Court. (Vol 21) 1934 Pat 234 (236).

[2] Where a Civil Court finds that a suit is triable only by a Revenue Court, and not by itself it should return the plaint to be presented to that Court. (1887) 10 Mad 211 (212).

[But see (Vol 1) 1914 Lah 334 (335).]

[3] When a plaint filed in Civil Court is returned to be presented to the Revenue Court the latter has no jurisdiction to return it to be presented to the Civil Court but is bound to entertain it. (Vol 5) 1918 Mad 786 (786).

5. Return of applications. — [1] Application to stay suit—Rule does not apply. (Vol 21) 1934 Sind 95 (95).

[2] Order 7, R. 10 applies to paper on which suit is instituted and not to application made in course of suit — Order returning application for ascertainment of mesne profits for presentation to proper Court is not order returning plaint. (Vol 4) 1917 Pat 334 (335) : 2 Pat L Jour 394.

[3] An application to sue as a pauper is not a plaint. Where, therefore, a Court, regarding such application as a plaint directs it to be returned for presentation to the proper Court it acts without jurisdiction. (Vol 6) 1919 All 213 (214).

[4] Application to file award under Arbitration Act, S. 14 (2) — Court not having jurisdiction must return it for presenting it to proper Court. (Vol 32) 1945 Nag 214 (215) : 1 L R (1945) Nag 781.

[5] Where an insolvency petition is filed in a wrong Court, the proper procedure is to return it for presentation to proper Court and not to dismiss it. (Vol 20) 1933 Lah 851 (851).

6. Case in which suit should not have been instituted. —[1] Where instead of making an application a person wrongly institutes a suit the Court can return the plaint for presentation as an application in the Court having jurisdiction to accept it as an application. (Vol 7) 1920 Oudh 21 (23).

7. Court-fee. —[1] Plaint returned under R. 10—Plaintiff can pay deficient court-fees in a Court having jurisdiction to hear the case and can take advantage of previously paid court-fees. (Vol 14) 1927 Bom 257 (257) : 51 Bom 236* (1912) 35 Mad 567 (568) (F B).

[But see (Vol 11) 1924 Mad 646 (647).]

[2] Plaint returned and then presented in proper Court—Court-fees Act amended in the meantime—Fees according to new Act must be paid. (Vol 13) 1926 Cal 355 (356).

8. Limitation. —[1] Court found to have no jurisdiction to try suit — Plaint returned for presentation to proper Court—Suit instituted in proper Court is not continuation of the first—Date of institution of suit is date

O. 7 R. 10 (*contd.*)

on which plaint is presented in proper Court. (Vol 16) 1929 PC 103 (107); 56 Ind App 128; 56 Cal 1048 (PC)* (Vol 15) 1928 Bom 421 (422); 52 Bom 548 * (Vol 30) 1943 Cal 450 (451)* (1912) 15 Cal L Jour 241 (245) * (Vol 17) 1930 Lah 394 (395) * (Vol 26) 1939 Mad 724 (728) (*Obiter*) * (1913) 24 Mad L Jour 653 (659).

[2] Relinquishment of portion of relief claimed in plaint does not make it a new one. (Vol 3) 1916 Mad 685 (685).

[3] Court cannot return plaint merely on ground that list of documents relied upon is not mentioned — Only effect of not furnishing list is that plaintiff is not entitled to produce them later on — Plaint represented under such circumstances is to be deemed to be presented when it was first presented. (Vol 17) 1930 Lah 480 (480).

[4] Return of plaint — Time allowed to refile plaint in proper Court — Order allowing further time is nullity and will not save suit from bar of limitation. (Vol 4) 1917 Cal 794 (795) * (Vol 24) 1937 Pat 495 (496).

[But see (1910) 6 Ind Cas 637 (637) (Cal). (Under S. 57, Civil P. C. (1882) O. 7, R. 10, Civil P. C. (1908)) a Court has discretion to grant reasonable time, within which to refile the returned plaint in proper Court. The suit filed on the last date of limitation and returned to be filed in proper Court is not barred by limitation if it is refiled within the time allowed by the Court.]

[5] Plaint returned for presentation to proper Court — Representation in proper Court — Plaintiff can claim exclusion of time during which prior proceeding was prosecuted. (Vol 13) 1926 Mad 173 (179). (Period between date of presentation and return should be excluded.) * (Vol 20) 1933 Cal 914 (918); 60 Cal 1122. (Plaint ordered to be returned to be filed in proper Court — Time between date of order and date when plaint is ready for return should be excluded.) * (Vol 28) 1941 Oudh 161 (163, 164); 16 Luck 402.

9. Chartered High Courts. — [1] Order 7, R. 10 does not apply to High Court. The High Court has inherent power to direct return of plaint where necessary. The High Court can, under its inherent powers direct in a suit which it has dismissed for want of jurisdiction that the plaint should be returned to plaintiff so that he may file it in the proper Court and thus avoid payment of court-fee twice over. (Vol 21) 1934 Rang 342 (343); 12 Rang 432.

[2] It is not imperative on the High Court to return the plaint for presentation to proper Court, in every case where defect of jurisdiction is discovered. (1888) 11 Mad 482 (485).

[3] Order of trial Court returning plaint for presentation to proper Court restored by High Court — High Court can return plaint to plaintiff or his counsel without waiting for return of file to trial Court. (Vol 33) 1946 Oudh 116 (118).

10. Appeal. — [1] Order returning plaint for presentation to proper Court is appealable. (Vol 6) 1919 All 82 (83); 42 All 74 * (Vol 30) 1943 Nag 293 (293); 1 L R (1943) Nag 603 * (Vol 25) 1938 Sind 124 (125, 126); 1 L R (1939) Kar 50.

[2] It is the substance and not the form of the order that has to be looked at. If the presentation was as a plaint, and not as an application to sue in '*forma pauperis*' its dismissal would be appealable, and that fact would not be altered by the Judge, dismissing it, having wrongly treated it as an application to sue in '*forma pauperis*'. (1933) 1933 Mad W N 197 (198).

[3] Suit filed in a Court not numbered — Plaint returned without notice to defendant and presented in B Court. Order returning plaint held not appealable and could be questioned in B Court. (Vol 30) 1943 Mad 490 (490).

[4] An order returning an application for ascertainment of mesne profits, for presentation to the proper Court is not an order returning a plaint and is not appealable. (Vol 4) 1917 Pat 334 (335); 2 Pat L Jour 394.

[5] No appeal lies from order under O. 7, R. 10 in suits in revenue Court by virtue of Madras Estates Land Act (1 [I] of 1908), S. 192. (Vol 5) 1918 Mad 191 (193); 41 Mad 554.

[6] Where a small cause Court returns a plaint under S. 23, Provincial Small Cause Courts Act to be presented to another Court and it is presented to an ordinary Civil Court, any order for the return of the plaint by the Civil Court afterwards is not an order under O. 7, R. 10 and therefore no appeal lies therefrom. (Vol 13) 1926 Cal 83 (84).

[7] A plaintiff, whose plaint is returned for presentation to the proper Court and who accordingly presents the plaint to the proper Court, does not lose his right of appeal against the order returning the plaint simply on the ground that he chose to file his plaint in the latter Court. (Vol 6) 1919 Mad 1062 (1063); 41 Mad 721 * (Vol 6) 1919 Cal 447 (448) * (Vol 26) 1939 Lah 18 (19) * (Vol 17) 1930 Nag 207 (208); 26 Nag I R 300.

[8] Only one appeal lies from an order passed under O. 7, R. 10 ordering return of plaint for presentation to the proper Court. (Vol 12) 1925 Bom 431 (431) * (Vol 5) 1918 All 415 (415) * (Vol 18) 1931 Lah 294 (295); 12 Lah 646 * (Vol 13) 1926 Lah 141 (141) * (Vol 22) 1935 Mad 574 (575) * (1913) 1913 Pun L R No. 101 p. 381 (382); 1912 Pun Re No. 119.

[9] Order returning memorandum of appeal for presentation to proper Court — Appeal does not lie — Revision is competent. (Vol 7) 1920 Lah 120 (120).

[But see (1891) 14 Mad 462 (464).]

[10] The Appellate Court has power to return the plaint for presentation to proper Court just as the Court of first instance might have done at an earlier stage. (1888) 11 Mad 482 (484)* (1877) 1 Bom 538 (543) * (Vol 10) 1923 Nag 310 (311).

[11] An Appellate Court setting aside the order of the lower Court returning plaint for presentation to proper Court cannot remand the case for restoration and disposal. It should leave the parties to take what steps they like in the first Court. (Vol 3) 1916 Mad 1154 (1154, 1155) * (Vol 21) 1934 Lah 233 (233). (Appellate Court should return plaint for presentation to proper Court — Order of remand is a mere surplusage.) * (Vol 6) 1919 Mad 561 (562). (Plaint returned for presentation to proper Court after consideration of evidence — Remand by Appellate Court for appointment of experienced Commissioner to re-value properties is not competent.) * (Vol 29) 1942 Oudh 370 (371) (Order 41, R. 23 refers to decree of lower Court on preliminary point against which appeal is preferred, and not the case of an order as distinguished from decree, under O. 7, R. 10.)

[12] Order under appeal — Remand — No second appeal lies against the remand order — Correctness of remand can be questioned in appeal from the decree if he is otherwise entitled to do so. (Vol 13) 1926 Mad 900 (900, 901).

[13] Appeal wrongly filed without excuse was dismissed and not returned to be filed in the proper Court. (Vol 12) 1925 Cal 335 (336).

[14] Plaint returned for presentation to proper Court — Plaintiff appealing — Appeal dismissed — Plaintiff can then present it to proper Court if in time. (Vol 12) 1925 Bom 418 (418).

11. Revision. — [1] Order directing plaint to be returned for presentation to proper Court — Order can be revised by High Court. (Vol 17) 1930 All 158 (160).

[2] In exceptional cases, where the hearing of the suit is, practically, completed, and before delivering

Rejection of plaint. 11. The plaint shall be rejected in the following cases :

- (a) where it does not disclose a cause of action² :
- (b) where the relief claimed is undervalued³ and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped⁴ and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :
- (d) where the suit appears from the statement in the plaint to be barred by any law.⁶

[1882—Ss. 53, 54 ; 1877—Ss. 53, 54 ; 1859—Ss. 29, 31, 32.]

Provincial Amendment

CALCUTTA

Add the following as clause (c) :

"(e) Where any of the provisions of Rule 9 (1A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so." [25-7-1928.]

O. 7 R. 10 (contd.)

the judgment the Court returns the plaint, the High Court is justified in interfering in the interest of justice. (Vol 30) 1943 Cal 450 (451).

[3] Plaint returned by both Munsif and Small Cause Court — High Court in revision can make such order as would enable the plaintiff to have his action tried. (Vol 9) 1922 Pat 368 (369).

[4] Return of appeal for presenting to a proper Court — Revision lies. (Vol 12) 1923 Lah 479 (480).

[5] Lower Court ordering return of plaint for want of jurisdiction — Order set aside on appeal — No revision lies from Appellate Court's order. (1913) 1913 Pun L R No. 101 p. 381 (383) : 1912 Pun Re No. 119 * (Vol 29) 1942 Oudh 370 (371).

[6] Where a Munsiff rightly returns a plaint to be presented to Revenue Court and the plaintiff appeals, the only course open to the Appellate Court, if it holds that the Munsiff is right, is to dismiss the appeal. Dismissing such an appeal does not mean failure on its part to exercise its jurisdiction. (Vol 17) 1930 Oudh 2 (3) : 4 Luck 667.

[7] Order for presentation to proper Court confirmed on appeal — Appellate Court committing error in exercise of jurisdiction — High Court will not interfere in revision. (Vol 5) 1918 All 415 (415).

[8] An application for leave to sue as a pauper is not a plaint, and it only reaches the stage of a plaint when it is granted. Where, therefore, a Court, regarding such application as a plaint directs it to be returned for presentation to the proper Court it acts without jurisdiction and, although such an order is not appealable the High Court will interfere and set aside the order in revision. (Vol 6) 1919 All 213 (214).

[9] Revisional jurisdiction is peculiar to the High Court and there can be no question of returning civil revision petition for presentation as a civil revision petition or as an appeal to any other Court in the province. (Vol 29) 1942 Mad 657 (658).

ORDER 7, RULE 11 — SYNOPSIS.

1. Scope.
2. Cause of action not disclosed.
3. Undervaluation of relief.
4. Insufficiency of stamp.
5. Insufficiency of stamp — Memo of appeal.
6. Barred by other law.
7. Other causes for rejection.
8. Suit in forma pauperis.
9. Rejection in part.
10. Stage at which plaint can be rejected.
11. Appeal.
12. Revision.
13. Review.

1. Scope. — [1] O. 7, Rr. 10 and 11 have nothing in common, former deals with return of plaint and latter deals with rejection of plaint when it is found defective. (Vol 29) 1942 Oudh 480 (480, 481).

[2] In case of defects of the plaint, the proper course is not to dismiss the suit but to reject the plaint. (1888) 15 Cal 533 (538) : 15 Ind App 119 (P C).

[3] A Court should reject the plaint on refusal of plaintiff to pay court-fee though the claim exceeds Court's jurisdiction. (Vol 11) 1924 Mad 646 (647).

[4] O. 7, R. 11, does not refer to a plaint which bears no stamp. Such a plaint must be rejected in accordance with Ss. 4 and 6, Court-fees Act. (Vol 17) 1930 Nag 224 (225) : 26 Nag L R 183. (Memorandum of appeal filed with eight anna stamp — Memorandum must be rejected.)

[5] Section 149 does not control O. 7, R. 11. (Vol 4) 1917 Lah 377 (378) : 1917 Pun Re No. 27.

[6] In deciding an application under O. 7, R. 11, C. P. C., the Court is not entitled to go outside the pleadings. (1937) I L R (1937) 1 Cal 541 (549). (Judgment of a Court outside British India.) * (Vol 20) 1933 Sind 1 (2). (Plaint whether to be rejected depends upon plaint and not upon written statement.)

[7] Dismissal for default cannot be set aside on ground that plaint ought to have been rejected under O. 7, R. 11. (Vol 11) 1924 Pat 271 (272) : 2 Pat 784.

[8] If the plaint is rejected under O. 7, R. 11, the plaintiff can bring a suit on the same subject-matter, provided he is not barred by lapse of time. (1870) 14 Suth W R 289 (290).

[9] Suit dismissed under O. 7, R. 11 (c) cannot be restored under inherent powers. (Vol 10) 1923 Pat 354 (355) : 2 Pat 504.

[10] Provisions of Order 7 apply *mutatis mutandis* to memoranda of appeals as well as to plaints by reason of S. 141. (Vol 26) 1939 Sind 221 (221) : I L R (1939) Kar 527.

2. Cause of action not disclosed. — [1] Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise of every piece of evidence which is necessary to prove each fact, but every fact which is necessary to prove. (Vol 19) 1932 All 543 (545) : 54 All 525.

[2] Plaint not disclosing cause of action — Plaint should be rejected and not dismissed. (Vol 30) 1943 Lah 121 (122) * (Vol 9) 1922 Bom 152 (154) : 46 Bom 229 * (Vol 10) 1923 Lah 290 (291).

[3] Dismissal of suit and rejection of plaint are not identical terms. In one case decree is passed, in the other case it is merely an appealable order. (Vol 19) 1932 All 543 (545) : 54 All 525.

[4] Cause of action exists or not is to be determined from plaint alone — If it exists evidence to prove or

O. 7 R. 11 (*contd.*)

disprove it must be taken. (Vol 4) 1917 All 355 (356) : 39 All 516* (1913) 40 Cal 598 (609) : 40 Ind App 56 (P. O.). (All statements in plaint are to be taken as true, for argument on preliminary issue as to whether plaint discloses a cause of action.)

[5] Onus is on defendant to prove non-disclosure of cause of action. (Vol 28) 1941 Bom 286 (287) : I L R (1941) Bom 521.

[6] Whether there appears to be a cause of action that is likely to succeed is not the question which Court should decide while rejecting the plaint — It is enough if it appears that the subject-matter alleged raises a fair question of claim or right for trial and determination between the plaintiff and the party made defendant. (1862-63) 1 Mad H C R 240 (243).

[7] In the following cases plaint was held to disclose cause of action:—(Vol 16) 1929 All 597 (598) : 51 All 895. (Person claiming damages from railway but omitting to give details of his claim — Omission is not sufficient to dismiss his claim.) * (Vol 4) 1917 All 355 (356, 357) : 39 All 516. (Plaintiff sued a Magistrate on the allegation that the latter took him into custody and brought a false charge against him. The trial Court dismissed the suit as barred by the Judicial Officer's Protection Act. *Held*, that the allegation in the plaint disclosed the cause of action to which the Act referred to, did not apply.) * (Vol 12) 1925 Mad 792 (792). (Suit to set aside decree on mortgage — Fraud regarding execution of mortgage alleged — Continuance of fraud in conduct of suit need not be alleged.) * (Vol 12) 1925 Mad 192 (193, 194). (Suit to recover bonus credited to plaintiff in two years and partly paid to the plaintiff is based either on a completed gift or on contract and therefore there is good cause of action.) * (1910) 7 Mad L Tim 113 (115). (Where an agreement was executed by 1st defendant in favour of plaintiff, 2nd defendant standing surety for the performance of the agreement and plaintiff sued thereon joining both as defendants, *Held*, that the plaint disclosed a cause of action against both the defendants.)

[8] No cause of action was disclosed in the plaints in the following instances: (Vol 26) 1939 Lah 153 (159, 160). (Denial of right of inheritance held did not furnish cause of action.) * (Vol 4) 1917 All 432 (432). (The mortgagee paid the Government revenue for two mortgagors out of three in separate possession. He sued all the three for the recovery of his money. *Held*, there was no cause of action against the third who had paid his revenue.) * (Vol 29) 1942 Mad 343 (344). (Teacher filing suit for damages for wrongful dismissal against President of managing committee of High School — President filing some extracts in support of his defence — Subsequent suit for defamation against President by teacher on ground that extracts filed in previous suit were defamatory — Secretary of managing committee and Head master also impleaded without allegation that they were concerned in publication of extracts — Plaint basing cause of action entirely on publication of extracts in Court by President in previous suit — Plaint held disclosed no cause of action against Secretary and Head master) * (Vol 11) 1924 Oudh 128 (129) : 26 Oudh Cas 333. (Claim against Committee — Suit against Secretary alone is bad.)

3. Undervaluation of relief.—[1] Rule 11 covers cases where the Court has jurisdiction to try suit even if the relief claimed is undervalued. (Vol 14) 1927 Bom 257 (258) : 51 Bom 236.

[2] The proper course in a suit with an undervaluation is not to dismiss the suit but to return the plaint to be represented to the Court of competent jurisdiction when the proper valuation necessitates a change of

forum. (Vol 5) 1918 Mad 590 (591) * (1914) 1914 Pun L R No. 194, page 640 (642).

[3] Plaint alone is to be considered for valuation of suit. (Vol 11) 1924 Cal 969 (969).

[4] Court-fees Act, S. 7 (IV) must be read with O. 7, R. 11 (b), Civil P. C. — Relief sought is to be valued by plaintiff. (Vol 23) 1936 Sind 25 (25) * (1890) 12 All 129 (147) (F B). (Sections 9, 10, 11 and 28 of the Court-fees Act, should be read together with O. 7, R. 11.) * (Vol 21) 1934 Cal 448 (451) : 61 Cal 796 (F B). (Rule controls Court-fees Act, S. 7, sub-s. (iv).) * (Vol 7) 1920 Pat 290 (290) : 5 Pat L Jour 394. (Reasonable value must be put on consequential relief prayed in declaratory suit — Court can fix it if plaintiff has failed to do it.) * (Vol 24) 1937 Sind 241 (241, 242) : 31 Sind L R 442 (F B). (Plaintiff cannot value injunction arbitrarily — Court can revise arbitrary valuation.) * (1937) 31 Sind L R 37 (40). (It is for the Court to see that proper court-fees are paid.)

[5] Rule 11 does not enlarge any taxing section. (Vol 17) 1930 Lah 686 (688).

[6] If a wrong or arbitrary valuation is made by a claimant of his claim the Court can compel him to correct it under O. 7, R. 11, Civil P. C., but does not afford any warrant for the Court itself to amend the valuation put by the claimant and thus enlarge the taxation of costs. (Vol 32) 1945 Oudh 177 (179) * (Vol 4) 1917 All 78 (79) : 39 All 723. (Suit for money on accounts — *Ad valorem* court-fee on amount which appeared due on face of account ordered to be paid — *Held* Court could not fix valuation — It should have ordered plaintiff to make fresh valuation.)

[7] Plaintiff can relinquish part of claim to bring it within court-fee paid — No application for amendment of plaint is necessary. (Vol 33) 1946 Mad 126 (127) * (Vol 18) 1931 Mad 716 (716).

[8] Words "properly valued" cover cases where proper valuation is arrived at by the Court in the course of the suit. (Vol 19) 1932 Cal 685 (686).

[9] Value of property found for court-fees — Court is not precluded to find subsequently whether it has jurisdiction. (Vol 29) 1942 Mad 503 (503).

[10] Tenant in house—Plaintiff suing for declaration of ownership of house on basis of will — Defendant though not in possession of house, obstructing plaintiff to realize rent from tenant — Trial Court holding that suit should be for possession called for *ad valorem* court-fee and on failure to pay it rejected the plaint — *Held* the order was wrong as suit for possession against defendant was not needed—Suit as presented held proper. (Vol 19) 1932 Lah 97 (98).

[11] Mortgage decree — Property sold not satisfying decree — Other properties attached — Declaratory suit by mortgagor's son that transaction was immoral and that joint Hindu family property could not be sold — Possession given to auction-purchaser during suit and not at its institution — Court asking plaintiff to convert suit into one for possession and pay full stamp on value of property sold — Plaintiff not doing so though time given — Plaintiff rejected — O. 7, R. 11, held properly applied. (Vol 18) 1931 Lah 622 (623).

[12] Court-fees — Non-payment of — Amendment of plaint allowed — Plaintiff directed to give value of property and put in deficit court-fee — Non-compliance with order — Suit dismissed for default on refusing permission to withdraw under O. 23, R. 1, Civil P. C. — Proper order is rejection of plaint — Fresh suit is not barred by O. 23, R. 1, O. 9, R. 9, or O. 2, R. 2, Civil P. C. (Vol 22) 1935 Cal 764 (765, 766).

[13] Inquiry under S. 9, Court-fees Act — Plaintiff directed to pay additional court-fee — If he fails to do so suit should be dismissed under S. 10, Court-fees Act.

O. 7 R. 11 (contd.)

instead of rejecting plaint under O. 7, R. 11, Civil P. C. (Vol 1) 1914 Bom 117 (118).

[14] If a claim is advanced *bona fide* the fact that claim would lie only with regard to some of the properties of a value below the jurisdiction of the Court in which the suit is instituted, will not justify the Court in rejecting the plaint. (1912) 16 Ind Cas 612 (614) (Mad).

[15] Under-valuation of property in dispute — Plaintiff or appellant cannot be required to prove the correct valuation before plaint or memorandum can be registered. (Vol 17) 1930 Cal 65 (67) : 57 Cal 587.

4. Insufficiency of stamp. — [1] Court has no jurisdiction to return plaint presented with insufficient stamp—It must fix time for making up deficiency and can reject plaint if deficiency is not made within the time fixed. (Vol 24) 1937 Mad 266 (266, 267). (Order declining to receive plaint with stamps of smaller denomination is unjust.) * (Vol 13) 1926 Cal 504 (505) * (Vol 15) 1928 Lah 221 (223). (Proceedings following admission of insufficiently stamped document are not void.) * (Vol 4) 1917 Lah 377 (378) : 1917 Pun Re No. 27 * (Vol 14) 1927 Mad 1002 (1003) * (Vol 28) 1941 Nag 304 (305) : 1 L R (1941) Nag 629. (Refusal to grant extension amounts to improper exercise of discretion.) * (Vol 17) 1930 Oudh 104 (105) : 5 Luck 474. (Reasonable time should be allowed.) * (Vol 24) 1937 Pat 550 (553, 554) : 16 Pat 600 (S B). (Conditions in cl. (c) are conjunctive and not disjunctive.) * (Vol 7) 1920 Pat 656 (659) : 4 Pat L Jour 703.

[But see (Vol 25) 1938 Lah 361 (364) (F B). (It is not incumbent on a Court of justice to allow the plaintiff an opportunity to make good the deficiency under O. 7, R. 11—(Vol 4) 1917 Lah 377 : 1917 Pun Re No. 27, dissented.)]

[2] Under O. 7, R. 11 (c) of the Civil P. C., a Court has power to extend the period originally fixed by it for the payment of the court-fees, even more than once. (Vol 6) 1919 Cal 261 (261) * (Vol 23) 1936 Cal 221 (223) * (Vol 13) 1926 Mad 676 (677). (Court can extend time or accept fees beyond the time fixed but it cannot refuse to fix time under R. 11.) * (Vol 13) 1926 Nag 312 (312) * (Vol 14) 1927 Oudh 507 (507). (Delay of one day may be excused — Refusal to take the deficit court-fee for delay by one day is an abuse of the powers of the Court.)

[3] Once time is fixed, plaintiff cannot, as of right, claim extension which depends upon discretion of Court under Ss. 148 and 149 — Court acting under these sections must be presumed to have really exercised discretion. (Vol 25) 1938 Mad 542 (543, 544) * (Vol 1) 1914 Cal 735 (736) : 41 Cal 1092. (Court not to give time only to suit plaintiff's convenience.) * (Vol 7) 1920 Lah 92 (93) : 1 Lah 234. (*Bona fide* mistake is good ground.) * (Vol 28) 1941 Oudh 30 (31, 32). (Order 7, R. 11 does not compel Court to give time—Application showing no reason for grant of time but merely stating that applicant had not got amount of necessary court-fee without offering explanation—Refusal to grant time held justified.) * (Vol 4) 1917 Pat 26 (27) : 3 Pat L Jour 74. (Appellant deliberately paying insufficient court-fee — He cannot get time to make good deficiency.)

[4] Order 7, R. 11 is mandatory and the Court must reject a plaint written on insufficiently stamped paper, when the plaintiff on being required to supply the requisite stamp within a time fixed by the Court fails to do so. (Vol 4) 1917 Cal 77 (78) : 44 Cal 352 * (Vol 1) 1914 Lah 268 (269) : 1914 Pun Re No. 35 * (Vol 16) 1929 Mad 344 (345). (Court dismissing suit noting while dismissing "Plaintiffs have not paid additional court-fees. Plaintiffs are absent"—Dismissal was under O. 7, R. 11 and not under O. 9, R. 8.) * (Vol 28) 1941 Sind 154 (158) : 1 L R (1941) Kar 102.

(Correct order to be passed is one rejecting plaint and not one dismissing suit.)

[5] The mandatory provision contained in O. 7, R. 11 is intended for cases where no other complications intervene and the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situations. (Vol 23) 1936 Cal 221 (223).

[6] Alternative reliefs—One relief claimed larger than the other — Court ordering court-fee on larger relief — Plaintiff applying for amendment to reduce claim of larger relief before expiry of time allowed to make good deficiency—Court not allowing amendment and rejecting plaint—Court held had power to allow abandonment of claim before rejecting plaint or to allow application therefor as amendment of pleadings under O. 6, R. 17. (Vol 24) 1937 Cal 562 (564, 565).

[7] Suit dismissed on merits — Order for additional court-fee and for rejection of plaint in case of non-payment is incompetent. (Vol 12) 1925 Lah 326 (327).

[8] Court-fee stamps not available in treasury on the day of presentation of plaint and hence court-fee paid beyond time—Plaint must be deemed to have been presented within time. (Vol 15) 1928 Lah 274 (275).

[9] Court-fees—Question should be decided at earliest opportunity — Court recording finding on all issues and while dismissing suit on merits requiring plaintiffs to make good deficiency in court-fees—Procedure is not proper. (Vol 22) 1935 Lah 75 (76).

[10] Court may be deemed to have extended the time fixed for payment of deficient court-fee when it accepts it on a subsequent date. (Vol 3) 1916 Mad 685 (685) * (1907) 34 Cal 20 (24) (F B).

[11] Dismissal of suit for non-payment of proper court-fee — Fresh suit is not barred under O. 9, R. 9, but case comes under O. 7, R. 11. (Vol 19) 1932 Pat 11 (12).

[12] Plaint rejected under O. 7, R. 11 — Application for restoration under S. 149 read with S. 151 accompanied with deposit of deficient court-fee may be treated as fresh plaint under O. 7, R. 13. (Vol 31) 1944 Oudh 327 (328) : 20 Luck 268.

[13] Deficit court-fee not paid due to treachery of pleader's clerk—Plaint rejected—Application to restore lies. (Vol 12) 1925 Pat 435 (437, 438) : 4 Pat 180.

[14] Plaint insufficiently stamped filed on last day of period of limitation — Court allowing certain time for payment of deficit court-fee — Proper court-fee paid within time allowed but beyond period of limitation for suit — Suit is not time-barred. (Vol 25) 1938 Mad 560 (562) * (Vol 1) 1914 All 216 (216) * (Vol 13) 1926 Nag 156 (157) * (Vol 24) 1937 Pat 550 (553) : 16 Pat 600 (S B) * (Vol 9) 1922 Pat 56 (56).

[See also (Vol 24) 1937 Lah 392 (393).]

See also S. 149. Civil P. C.

[15] Partition suit referred to arbitration — Decree drawn up in accordance with award — Failure of plaintiff to comply with order to deposit stamp duty — Suit cannot be dismissed merely by reason of non-deposit—Clause (c) does not apply to the case. (Vol 6) 1919 All 269 (270).

5. Insufficiency of stamp—Memo of appeal.—[1] Appeal memorandum insufficiently stamped should not be rejected without giving further time to make up the deficiency. (Vol 1) 1914 Bom 249 (250) : 33 Bom 41 * (Vol 28) 1941 Pat 108 (109) * (Vol 26) 1939 Pat 432 (432) * (Vol 26) 1939 Pat 137 (137) * (Vol 26) 1939 Pat 83 (85) : 17 Pat 687 * (Vol 26) 1939 Pat 432 (432). [See also (Vol 28) 1941 Bom 242 (244) : 1 L R (1941) Bom 477. (Preliminary objection as to insufficiency of court-fee allowed — Appeal memo rejected for non-payment of court-fee within time fixed — Appellant can be ordered to pay costs of hearing of preliminary objection.

O. 7 R. 11 (*contd.*)

—Rule 130, Bombay High Court Appellate Side, Rules applies.]

[See however (Vol 7) 1920 Pat 656 (659) : 4 Pat L JOUR 703. (Deficiency in court-fee discovered in appeal — Plaintiff should be called upon to pay balance — On failure appeal should be dismissed under S. 10 and not that plaintiff should be rejected under Civil P. C., O. 7 R. 11.)]

[But see (Vol 17) 1930 Nag 224 (225) : 26 Nag L R 183. (Rule 11 does not refer to appeals) ✕ (Vol 25) 1938 Mad 316 (316, 317) (Do.)]

[2] Appeal on insufficiently stamped paper filed within limitation — Prayer along with appeal to grant time to make good deficiency — Appellate Court can grant time under S. 149 and O. 7, R. 11 (c) — Order dismissing appeal as time-barred, ignoring prayer is bad. (Vol 24) 1937 Oudh 414 (416) : 13 Luck 397.

[3] Where an appellant deliberately and to suit his own convenience, pays on his appeal an insufficient court-fee, the Court is not bound to receive the appeal and give the appellant time to make good the deficiency — Thus inability to raise money is not sufficient reason for the exercise of discretion vested in Court under S. 149. (Vol 21) 1934 Cal 659 (660) : 61 Cal 663 ✕ (Vol 19) 1932 Cal 482 (484) : 59 Cal 388.

[4] Appellant disputing order to make up deficiency in stamp on his appeal and not making up the deficiency till long after is not entitled to benefit of S. 149. (Vol 8) 1921 Lah 371 (372).

[5] Rejection of memorandum of appeal does not preclude presentation of fresh one — Fresh memo accepted after proper court-fee and admitted after hearing parties as to objection of limitation — Order is not without jurisdiction. (Vol 19) 1932 Cal 482 (484) : 59 Cal 388.

[6] Appellate Court has also equal powers of rejecting the plaintiff, and also it can allow time for payment of deficit court-fee and reject the plaintiff with costs on failure to do so. (Vol 29) 1942 Sind 160 (161) : 1 L R (1942) Kar 424.

[7] Appeal memo rejected for non-payment of court-fees — Cross-objections must fail. (Vol 28) 1941 Bom 242 (244) : 1 L R (1941) Bom 477.

[8] Plaintiff rejected for under-valuation, plaintiff appealing putting same value on appeal as he puts on plaintiff — Appeal cannot be rejected as insufficiently stamped, without investigating true value of suit properties. (Vol 13) 1926 Cal 427, (427).

[9] Appeal — Objection as to valuation of suit should not be entertained unless under-valuation has prejudicially affected — Duty of appellate Court is not to dismiss but to return for presentation to proper Court. (Vol 5) 1918 Mad 590 (591).

[10] Proper court-fee must be paid on insufficiently stamped memorandum of appeal even after its dismissal under O. 41, R. 17 where order for payment of proper court-fee is prior to dismissal of appeal. (Vol 21) 1934 Oudh 396 (398).

[11] Order 7, R. 11 (c) contemplates cases in which court-fee on plaintiff or on memorandum of appeal itself is not paid — Appellate Court cannot reject memorandum of appeal properly stamped on ground that pauper applicant has not paid court-fee payable on plaintiff owing to dismissal of suit. (Vol 24) 1937 All 280 (281, 282) : 1 L R (1937) All 484.

6. Barred by other law. — [1] If from the allegations in the plaintiff, the suit appears to be barred by any law, the proper course is to reject the plaintiff under R. 11 (d) and not to dismiss the suit. (Vol 6) 1919 Cal 755 (756).

[2] Though discretion is given to Court under O. 7, R. 11, the Court has no power to admit the plaintiff after period of limitation. (Vol 2) 1915 Mad 426 (427).

[3] Suit barred by limitation — Party can ask Court to take plaintiff off the file. (Vol 19) 1932 Cal 146 (146) : 59 Cal 150.

[4] Law under which and facts on which suit is barred must be stated. (Vol 4) 1917 Cal 79 (80) ✕ (Vol 2) 1915 Cal 62 (63). (Plaint containing no statement showing suit barred — Rule 11 (d) does not apply.) ✕ (Vol 11) 1924 Nag 80 (80). (Appellate Court — Grounds for exemption not shown in plaintiff — Plaintiff can be rejected.) ✕ (Vol 15) 1928 Oudh 495 (498). (Suit, not barred by law on face of it, proceeding to arguments — Plaintiff cannot be rejected under R. 11.)

[5] Pleadings and not the result of suit is to be seen for deciding limitation. (Vol 13) 1926 Mad 1190 (1192) ✕ (Vol 14) 1927 Nag 10 (11, 12) : 22 Nag L R 147. (Form of suit will determine what article of Limitation Act should apply.)

[6] Suit in contravention of Bengal Tenancy Act, (8 [VIII] of 1885), S. 11, filed within three months of date of publication of Record of Rights should not be dismissed but taken as filed on day following expiration of such period — Plaintiff however should be returned or rejected under Civil P. C. (1908), O. 7, R. 11. (Vol 6) 1919 Cal 755 (758).

7. Other causes for rejection. — [1] A Court cannot either dismiss a suit or reject a plaintiff merely because the plaintiff is defective in that, it does not comply with a provision of law. It should call on plaintiff to cure the defect and on his failure to do so, may proceed to decide the suit forthwith and dismiss it under O. 17, R. 3, or may reject the plaintiff under its inherent powers. (Vol 7) 1920 Pat 82 (83). (Contravention of S. 148 (b) (2) of Bengal Tenancy Act.) ✕ (Vol 12) 1925 Mad 1045 (1046). (Plaint rejected because plaintiff did not file amended plaintiff as asked to do — Order 7, R. 11 and not O. 17, R. 3 applies.) ✕ (1875) 7 N W P H C R 354 (357) ✕ (1911) 7 Nag L R 33 (35). (Want of proper signature.) ✕ (Vol 11) 1924 Oudh 413 (414) ✕ (Vol 25) 1938 Pat 127 (128, 129). (Secretary of State impleaded in suit along with other defendants — No statement in plaintiff about issues of notice under S. 80 — Plaintiff is defective and is liable to be rejected as a whole — Secretary of State only *pro forma* defendant — His name may be ordered to be expunged from suit but only if such amendment is possible without material change in nature of suit.) ✕ (1911) 1911 Pun L R No. 132, p. 496. (The mere fact that there is a misjoinder of parties and of causes of action or non-joinder of parties does not justify a Court in rejecting the plaintiff.)

[2] This rule does not preclude amendment of plaintiff which under O. 6, R. 17, may be made at any stage. (Vol 26) 1939 Bom 354 (357).

[3] The only grounds on which a plaintiff can be rejected are set out in O. 7, R. 11. The punishment for non-production of a document sued on or on which the plaintiff relies is not the rejection of the plaintiff but that set out in O. 7, R. 18. (Vol 30) 1943 Mad 645 (645).

[4] Where the suit is entirely frivolous and is based on inconsistent pleas, it might be dismissed without the framing at any issues whatsoever under O. 7, R. 11. (1942) 1942 Oudh W N (B R) 287 (288).

[5] Suit by minor's next friend not in best interests of minor can be dismissed. (Vol 11) 1924 Oudh 413 (414).

[6] The Court cannot reject a plaintiff in which the plaintiffs sue for declaration of their right to the land in suit, without going into the question of possession of the plaintiffs and other merits of the case. (1910) 1910 Pun L R No. 129, page 353.

[7] If after a plaintiff has been formally admitted it is objected that the suit was not instituted with the consent and knowledge of the plaintiff the Court should raise a regular preliminary issue whether the plaintiff has been duly signed by and presented under the authority

O. 7 R. 11 (contd.)

of the plaintiff and decide the same after recording evidence of both parties thereon. Where serious allegations of fraud are involved, such further evidence, as may be necessary may be called in. An order rejecting a plaint without holding such formal enquiry is bad and liable to be set aside on appeal. (1910) 4 Sind L.R. 35(36).

8. Suit in forma pauperis. — [1] Applications for leave to sue as pauper are not governed by O. 7, R. 11, Civil P. C. — Suit is not regarded as instituted until application is granted — O. 7, R. 11 only applies to regularly instituted suits. (Vol 23) 1935 Mad 878 (879) ✕(Vol 27) 1940 Lah 446 (447) : I L R (1941) Lah 462.

[2] Order for payment of deficit court-fee within given time — Application for pauperism made within time granted is maintainable. (Vol 20) 1933 Mad 498 (499) ✕(Vol 20) 1933 Cal 238 (239).

[3] Pauper suit — Suit registered as ordinary suit — Plaintiff failing to pay deficit court-fee though given time to do so — But subsequently applying for permission to continue suit as pauper — Application should not be rejected merely on ground that suit has been registered as ordinary suit but should be considered on merits. (Vol 23) 1936 Cal 221 (222).

[4] Court ordering that if court-fee not paid by 9th December, suit should stand dismissed — Plaintiff defaulting but on 16th applying to sue as pauper — Application rejected without investigation — Between 9th and 16th December plaintiff making application for amending plaint — Suit held must be regarded as dismissed on 9th December — Court had no jurisdiction to entertain application to sue as pauper — Making of applications for amendment held immaterial. (Vol 29) 1942 Pat 302 (303).

[5] Application for leave to appeal as pauper — Dismissal of application leaves appeal intact — Appellate Court can grant time for payment of court-fees. (Vol 5) 1918 Mad 1039 (1039, 1040) : 40 Mad 687.

[6] Pauper application rejected and court-fee demanded — Revision filed against this order — Subsequently suit dismissed for not producing stay order — Revision from the original order is maintainable. (Vol 15) 1928 Nag 24 (26).

9. Rejection in part. — [1] Under O. 7, R. 11 Court cannot reject a plaint in part. (1907) 29 All 325 (326, 327) ✕(Vol 22) 1935 Mad 389 (390). (Two plaintiffs — Notice under S. 80 given only by one — There is no compliance with S. 80 — Whole suit is bad.) ✕(Vol 18) 1931 Mad 175 (176) : 54 Mad 416. (Non-compliance with S. 80, Civil P. C. — Suit should be wholly dismissed.) ✕(Vol 9) 1921 Sind 106 (108) : 17 Sind L. R. 9. (Court must exercise power of rejecting plaint with great caution.)

[2] Note appended to an issue, in effect rejecting the plaint to the extent of interest as not showing cause of action — Note does not amount to rejection of plaint, there being no provision in the Code for rejection of plaint in part. (Vol 23) 1936 Lah 1021 (1022). (Order therefore not appealable — Revision is only remedy.)

10. Stage at which plaint can be rejected. — [1] The terms of O. 7, R. 11 are imperative and mandatory, the wording being "the plaint shall be rejected" — It is competent for the Court to reject the plaint though it is admitted and registered. (1900) 27 Cal 376 (378) ✕(1890) 12 All 553 (556) ✕(Vol 9) 1922 Cal 506 (508) : 49 Cal 880 ✕(1907) 34 Cal 20 (26) (F.B.) ✕(Vol 22) 1935 Mad 569 (571) : 58 Mad 1051. (Power to correct valuation is not limited to any particular stage of suit — It can be done even in appeal.) ✕(1895) 18 Mad 338 (341) ✕(Vol 30) 1943 Pat 102 (105) : 21 Pat 720. (Plaint or appeal admitted — Court can still reject it under O. 7, R. 11.)

[See however (Vol 33) 1946 Nag 266 (268) : I L R (1946) Nag 301. (Objection that plaint is defective by defendant having knowledge of such defect cannot be

raised for first time in second appeal.) ✕(1915) 29 Ind Cas 410 (411) (U P B.R.). (If a plaint is once admitted, it cannot afterwards be rejected on the ground of any defect subsequently discovered in it.)]

[2] After issue of notice to defendant, correct word to use is dismissal of suit and not rejection of plaint. (Vol 25) 1938 All 497 (500).

[3] When both the plaint and the written statement are defective, the Court may either return the plaint for presentation or it may call upon the parties and examine them; but should not dismiss the suit. (1911) 10 Ind Cas 922 (923) (Low Bur).

11. Appeal. — [1] Order rejecting plaint is in itself appealable as decree — No decree need be drawn up. (Vol 16) 1929 Lah 83 (84) ✕(Vol 24) 1937 Lah 800 (801). (Suit on pro-note executed by A, B, C and D — Court ordering that suit could not proceed against A on ground that pro-note was signed by him at place beyond that Court's jurisdiction — Order held was tantamount to rejection of plaint as regards A, and appeal was therefore competent — Even if no appeal lay, revision was competent as there was case decided.) ✕(Vol 2) 1915 Mad 483 (484) ✕(Vol 28) 1941 Pat 385 (389) : 20 Pat 417 : 42 Cri L Jour 375.

[See (Vol 6) 1919 Oudh 98 (101) : 22 Oudh Cas 289. (Order dismissing suit or appeal for insufficiency of stamp is appealable if question of law is involved.)]

[2] Order rejecting a plaint is a decree — An order passed in appeal from that order that no appeal lies amounts to the dismissal of the appeal — Even such order is a decree and is open to a second appeal and not a revision to the High Court. (Vol 16) 1929 Cal 226 (227) ✕(Vol 26) 1939 Pat 83 (84) : 17 Pat 687.

[But see (Vol 19) 1932 Cal 482 (484) : 59 Cal 388. (Order of appellate Court has not same effect as one by Court of original jurisdiction — Order rejecting memorandum of appeal as insufficiently stamped is not decree within S. 2.)]

[3] Order rejecting plaint if based on question of valuation only is non-appealable — But if it necessarily involves decision of category or class under which suit falls it is appealable though question of valuation is decided. (Vol 6) 1919 Pat 270 (275) : 4 Pat L Jour 57 ✕(Vol 6) 1919 Lah 11 (11, 12) : 1919 Pun Re No. 120.

[4] Trial Court rejecting plaint for want of court-fee — Appellate Court reversing order may reject plaint on another ground. (Vol 10) 1923 Nag 30 (31).

[5] Where the trial Court rejects the plaint on the ground of insufficiency of court-fee and the appellate Court directs the trial Court to entertain the plaint and proceed with the suit, the order of the appellate Court does not fall under O. 41, R. 23 and is not appealable under O. 43, R. 1 (u) but revision lies against that order. (Vol 32) 1945 Mad 430 (430, 431) : I L R (1945) Mad 886 ✕(Vol 24) 1937 Lah 380 (381).

[But see (Vol 24) 1941 Nag 304 (305) : I L R (1941) Nag 629.]

See also Notes on O. 43, R. 23.

[6] Order rejecting plaint for failure to pay additional court-fee is a complete and final determination of rights of parties — Appeal from such order — Subject-matter in appeal is same as that in suit — Subject-matter in appeal is capable of valuation. (Vol 22) 1935 Nag 83 (86) (F.B.).

12. Revision. — [1] Order under O. 7, R. 11 (d) being appealable no revision lies. (Vol 1) 1914 Lah 153 (153) : 1914 Pun Re No. 80.

[2] Revision lies under S. 25, Prov. S. C. C. Act from an order wrongly dismissing a suit as time-barred. (Vol 15) 1928 Lah 274 (275).

[3] Application to sue as pauper dismissed — Court-fee not paid within appointed date — Extension of time refused — Plaint rejected — Order rejecting appeal as untenable is revisable. (Vol 16) 1929 Lah 125 (125).

12. Where a plaint is rejected the Judge shall record an order to that effect with the reasons *Procedure on rejecting plaint.* for such order.

[1882—S. 55 ; 1877—S. 55.]

13. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its *Where rejection of plaint does not* own force preclude the plaintiff from presenting a fresh plaint *preclude presentation of fresh plaint.* in respect of the same cause of action.

[1882—S. 56 ; 1877—S. 56 ; 1859—S. 36.]

DOCUMENTS RELIED ON IN PLAINT.

14. (1) Where a plaintiff sues upon a document in his possession or power, he shall produce *Production of document on* it in Court when the plaint is presented, and shall at the same time *which plaintiff sues.* deliver the document or a copy thereof to be filed with the plaint.

(2) Where he relies on any other documents (whether in his possession or power or not) as *Last of other documents.* evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

[1882—S. 59 ; 1877—Ss. 58, 59, 62, 63 ; 1859—S. 39.]

Provincial Amendments

ODDH

Substitute the following for sub-rule (2) :

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

Explanation. — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be "in the power" of the plaintiff.

N.—W. F. P.

Add to sub-rule (2) "and shall also produce such documents as are in his possession or power."

O. 7 R. 11 (*contd.*)

[4] Suit filed when claim is about to be barred—Rejection of plaint for failure to pay deficit court-fee—No appeal filed from order—Court cannot use inherent power to set aside order—If it uses it, High Court can interfere in revision. (Vol 22) 1935 Cal 336 (337) : 62 Cal 61.

[5] There is a conflict of opinion on the question whether order demanding additional court-fee is revisable or not—Some cases hold that no revision lies against such an order as the further order rejecting plaint for insufficient court-fee under O. 7, R. 11 is appealable. (Vol 20) 1933 Nag 107 (108) : 29 Nag L R 125 (FB). ((Vol 14) 1927 Nag 256, overruled.) * (Vol 17) 1930 Pat 277 (278) * (Vol 7) 1920 Pat 789 (789).

[6] Other cases have held that revision lies against such an order. (Vol 12) 1925 Mad 722 (722). (Madras practice—Order under as to court-fees—Revision lies.)

13. Review.—[1] There is complete power in the Court under O. 47, R. 1 to review the order passed by it in rejecting the plaint under this rule. (Vol 10) 1923 Pat 354 (355) : 2 Pat 504.

[2] Plaint rejected—Court contemplated in S. 12, Court-fees Act, may for sufficient reasons review its order of demand on application by plaintiff or revise it of its own motion. (Vol 6) 1919 Pat 270 (276) : 4 Pat L Jour 57.

[3] Court-fee, deficiency in—Jurisdiction—Court has jurisdiction to accept court-fee and restore plaint rejected as being insufficiently stamped if deficiency in court-fee could not be paid within time allowed due to illness of plaintiff—If liability is established and decree passed, High Court should not interfere on technical ground. (Vol 26) 1939 All 452 (453).

Order 7, Rule 13—Note 1.

[1] Where a plaint is rejected under O. 7, R. 11 the plaintiff is not thereby precluded from presenting a

fresh plaint in respect of the same cause of action, provided his right of action is not barred by the law of limitation. (Vol 12) 1925 Mad 1045 (1046) * (Vol 30) 1943 Lah 121 (122) * (Vol 31) 1944 Oudh 327 (328) : 20 Luck 268.

[2] Plaint in previous suit rejected as not amended within time allowed for amendment—Rejection is no bar to a fresh suit on the same cause of action. (Vol 14) 1927 Lah 83 (83).

[3] Rejection of memorandum of appeal does not preclude presentation of fresh one. (Vol 19) 1932 Cal 482 (484) : 59 Cal 388.

[4] Plaint rejected under O. 7, R. 11—Application for restoration under S. 149 read with S. 151, accompanied with deposit of deficient court-fees may be treated as fresh plaint under O. 7, R. 13. (Vol 31) 1944 Oudh 327 (328) : 20 Luck 268.

Order 7, Rule 14—Note 1.

[1] Order 7, Rule 14 makes a distinction between documents sued upon and documents relied on. In the case of the first, the plaintiff must produce either the original or a copy when the plaint is presented; of the second neither the production at the time of presentation of the plaint is required nor delivery of the document or the copy. (Vol 7) 1920 Cal 416 (416).

[2] A plaintiff cannot put forward as creating rights a document on which he has not in terms sued and which he has not filed with the plaint. The document filed subsequently can only be treated as evidence. (Vol 3) 1916 P C 217 (219) (P C) * (Vol 7) 1920 Lah 136 (140) : 1 Lah 6 * (1869-70) 13 Moo Ind App 77 (83) (P C) * (Vol 24) 1937 Mad 122 (123).

[3] Object of rules is to shut out suspicious documents.—Document not produced along with plaint can be relied on subsequently as evidence. (Vol 7) 1920 Pat 811 (812).

Statement in case of documents not in plaintiff's possession or power.

in whose possession or power it is.

[1882—S. 60 ; 1877—S. 60.]

15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state

Provincial Amendment

OUDH :—Delete the rule.

16. Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

[1882—S. 61 ; 1877—S. 61.]

17. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the original entry to be compared with the copy, and after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

[1882—S. 62 ; 1877—Ss. 58, 62, 63 ; 1859—S. 39.]

Provincial Amendments

ALLAHABAD

Add the following proviso to sub-rule (2) :

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in O. 13, R. 12 as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original.

LAHORE

After sub-rule (2) add the following Explanation :

Explanation.—When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration, but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the ministerial officer shall be required except by a special order of the Court. [9-3-1935.]

OUDH

Add the following proviso :

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13, Rule 12, as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original.

18. (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

O. 7 R. 14 (contd.)

[4] Documents relied on not enlisted with plaint nor produced at first hearing—For producing at later stage good cause must be shown for previous non-production. (Vol 14) 1927 Oudh 612 (612, 613).

[5] The punishment for the non-production of a document sued on or on which the plaintiff relies is not the rejection of the plaint. (Vol 30) 1943 Mad 645 (645).

[6] Party is bound by documents filed with plaint or written statement unless shown to be filed by *bona fide* mistake. (Vol 1) 1914 Oudh 357 (358) : 17 Oudh Cas 327.

Order 7, Rule 16—Note 1.

[1] A plaintiff basing his suit on a lost hundi must furnish security against possible claims. (1912) 1912 Pun L R No. 166, p. 530 (Vol 7) 1920 Mad 336 (336).

Order 7, Rule 17—Note 1.

[1] Document relied upon as basis of suit must be filed with plaint or produced at first hearing—Such document produced at evidence stage—Defendant denying its knowledge—Plaintiff's assertion as to its being genuine is insufficient. (Vol 7) 1920 Lah 136 (140) : 1 Lah 6.

[2] See also Notes under Bankers' Books Evidence Act, XVIII (18) of 1891.

ORDER 7 RULE 18.—SYNOPSIS.

1. Scope and object.
2. Leave not necessary.
3. Revision.

1. Scope and object.—[1] The policy is to exclude evidence, the existence of which, at the date of the

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[1882—S. 63 ; 1877—Ss. 58, 62, 63 ; 1859—S. 39.]

Provincial Amendments

Rules 19 to 25 — ALLAHABAD

Add the following Rules 19 to 25 :

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given

O. 7 R. 18 (contd.)

suit is doubtful and raises suspicion of genuineness, which may arise because it was produced at a late stage. (1909) 10 Cal L Jour 33 (37)* (Vol 7) 1920 Pat 811 (812.)

[2] The penalty for the non-production of a document under O. 7, R. 14 is contained in O. 7, R. 18 (1) and O. 7, R. 18 (2) is an exception to O. 7, R. 18 (1). (Vol 24) 1937 All 55 (56)* (Vol 11) 1924 Lah 608 (608). (Order 17 R. 3 does not apply.)

[3] Court has wide discretion as regards admitting documents not filed or listed with the plaint. (Vol 14) 1927 Cal 168 (169, 173)* (Vol 7) 1920 Bom 94 (94): 44 Bom 625* (Vol 18) 1926 Lah 527 (527)* (1882) 4 Mad 417 (418).

[4] Discretion exercised by trial Judge in rejecting documents produced at late stage will not be interfered with unless it has been exercised capriciously or arbitrarily. (Vol 20) 1933 Lah 892 (893)* (Vol 14) 1927 Cal 168 (169, 173)* (Vol 6) 1919 Cal 800 (801)* (1909) 10 Cal L Jour 33 (37, 38)* (1885) 8 Mad 373 (374). (If the trial Court receives the documents later on of which a list was not given in the plaint, Appellate Court must consider them.)* (Vol 8) 1921 Nag 49 (50).

[5] If document is proved to be not fabricated it can be received even at a late stage. (Vol 7) 1920 Pat 811 (812)* (1884) 8 Bom 377 (380).

[6] Document not filed with plaint nor within time fixed by Court—Document in existence at time of institution of suit—Rejection of document held not proper exercise of discretion. (Vol 5) 1918 Cal 329 (330).

[7] Document, if not produced for long time, can be rejected, unless satisfactory reasons for the delay are given. (Vol 7) 1920 Bom 94 (95): 44 Bom 625* (Vol 22) 1935 Lah 648 (649): 17 Lah 218* (Vol 14) 1927 Oudh 612 (612, 613).

[8] Leave of Court may be implied or inferred. (1913) 11 All L Jour 537 (539).

[9] Defendant producing account books when other evidence in case was produced—Plaintiff neither protesting nor asking for opportunity to rebut evidence of account books — Plaintiff held was not prejudiced by

production of account books. (Vol 27) 1940 All 393 (393).

[10] Document neither produced with plaint nor listed—Document can be allowed to be produced under R. 18 of O. 7, only for purpose of evidence and not for putting forward new rights under it. (Vol 24) 1937 Mad 122 (123).

[11] The punishment for not filing document (account book) relied on, along with plaint is not to reject the plaint. But the plaintiff cannot produce the document in evidence except with the leave of the Court. (1898) 22 Bom 971 (972)* (Vol 30) 1943 Mad 645 (645).

2. Leave not necessary.—[1] Court's leave not necessary when the document is produced in answer to any case set up by the defendant. (Vol 21) 1934 Lah 126 (127)* (Vol 3) 1916 Lah 262 (264)* (Vol 9) 1922 Pat 569 (571).

[2] Suit on promissory note for cash consideration—Defendant denying receipt of consideration — Plaintiff, in answer, producing documents not included in list of documents filed with plaint—Adverse inference could not be drawn against plaintiff. (Vol 23) 1936 Lah 1016 (1017).

[3] Documents produced by plaintiffs can be used to cross-examine his own witnesses. (Vol 7) 1920 Nag 43 (43).

[4] Plaintiff is entitled to tender in evidence previous statement in writing by defendant for purpose of contradicting him under S. 145, Evidence Act, even though such document was not produced under O. 7, R. 14, (Vol 24) 1937 All 55 (56.)

[5] Document not probative in itself but only useful for refreshing witness's memory is admissible at a later stage. (Vol 5) 1918 P C 118 (119): 41 All 63: 45 Ind App 284: 21 Oudh Cas 228 (PC)* (1862-63) 1 Mad H C R 168 (170).

3. Revision.—[1] The question of admissibility of evidence being one of law, no revision will lie. (Vol 1) 1914 Cal 826 (827).

Order 7, Rule 22 (Allahabad)—Note 1

[1] Service by affixing to outer door — Party absent at first hearing—Additional service should be ordered. (Vol 8) 1921 All 52 (52).

to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so."

Rules 19 to 26—BOMBAY

The following shall be added as Rules 19 to 26 :

"19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address *Address to be filed with* at which service of notice, or summons or other process may be made on the *plaint or original petition*. plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court *Nature of address* within which the suit or petition is filed, or if he cannot conveniently give an address as *to be filed*. aforesaid, at a place where a party ordinarily resides.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *Consequences of failure* *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the *Procedure when party not found at the place of address*. notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the address supplied by that party by registered post pre-paid for acknowledgment (which payment shall be made within one month from the date originally fixed for hearing) and such service shall be deemed to be as effectual as if the notice or process had been personally served [as amended in 1942].

23. Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by *Service of notice on* Order 3, Rule 5, unless the Court directs service at the address for service given by the *pleaders*. party.

24. A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum *Change of address*. in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

Rules not binding on Court. 25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

Applicability to notice under Order 21, Rule 22. 26. Nothing in these rules shall apply to the notice prescribed by Order 21 Rule 22." [15-10-1930.]

Rules 19 to 25—LAHORE

Add the following as Rules 19 to 25 :

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court, within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so." [24-11-1927.]

Rules 19 to 23—NAGPUR

Add the following as Rules 19 to 23 :

"19. Every plaint or original petition shall be accompanied by a memorandum giving an address at which *Registered address*. service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the Civil District in which the plaint or original petition is filed or, if an address

within such Civil District cannot conveniently be given, within the local limits of the Civil District in which the party ordinarily resides. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

Registered address by a party 20. Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be subsequently added as plaintiff or petitioner.

Consequence of non-filing of registered address. 21. (1) If the plaintiff or the petitioner fails to file a registered address as required by Rule 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

Affixing of process and its validity. 22. Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

Change of registered address. 23. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform." [29-6-1943.]

Rules 19 to 22 — N.-W.F.P.

Add the following as Rules 19 to 22:

"19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or, of the District Court within which the party ordinarily resides, if within the limits of the North-West Frontier Province.

21. Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties, or be sent to them by registered post, as the Court thinks fit."

Rules 19 to 27 — OUDH.

Add the following as Rules 19 to 27:

"19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the "registered address," and service thereat shall be deemed to be sufficient service.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the District Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

22. If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

23 Where the registered address of the plaintiff or petitioner is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which Rule 23 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If, on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him, a notice or process of service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at his registered address:

Provided that, where a notice is served on pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

Explanation.—Where ten days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such ten days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

27. Nothing in Rules 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reason, it thinks fit."

Rules 19 to 22—PATNA

Add the following as Rules 19 to 22 :

"19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars :—

- (1) the name of the street and number of the house (if in a town);
- (2) the name of the town or village;
- (3) the Post Office;
- (4) the district; and
- (5) the munsiff (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

Rules 19 to 25—SIND

Add the following as Rules 19 to 25 :

"19. *Address to be filed with plaint.*—Every plaint shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff. Plaintiffs subsequently added, shall immediately on being so added, file a memorandum in writing of this nature.

20. *Nature of address to be filed.*—An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

21. *Consequences of failing to file address.*—Where a plaintiff fails to file an address for service, he shall be liable to have his suit dismissed by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. *Procedure when party not found at the place of address.*—Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. *Service of notice on pleaders.*—Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

24. *Change of address.*—A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to all the other parties to the suit and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. *Rules not binding on Court.*—Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so."

ORDER VIII

WRITTEN STATEMENT AND SET-OFF

1. The defendant may, and, if so required by the Court, shall, at or before the first hearing or *Written statement.* within such time as the Court may permit, present a written statement of his defence.

[1882—S. 110 ; 1877—S. 110 ; 1859—S. 120.]

Order 8 Rule 1 — Note 1.

[1] Defendant is not compelled to file a written statement unless he is directed to do so by the Court. (Vol 32) 1945 All 352 (353) : ILR (1945) All 499.

[2] Written statement not filed by defendant or his agent but by third person — Procedure is not regular.

(Vol 18) 1931 All 333 (335) : 53 All 466 * (1876) 25 Suth W R 17 (18).

[3] Small Cause suit— Written statement not necessary in absence of specific notice in summons — If the Court wants a written statement, it should grant time. (Vol 17) 1930 Oudh 171 (172) : 4 Luck 529.

Provincial Amendments

LAHORE

After the word "defence" place a semicolon and add the following :

"(1) and with such written statement or if there is no written statement, at the first hearing shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement, or where there is no written statement, to be presented at the first hearing. If no such list is so annexed or presented, the defendant shall be allowed a further period of ten days to file this list of documents.

(3) A document which ought to be entered in the list referred to in sub-clause (2) but which has not been so entered, shall not, without the leave of the Court, be received in evidence on the defendant's behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents produced for cross-examination of plaintiff's witnesses or handed to a witness merely to refresh his memory."

[15-6-1939.]

N.-W. F. P.

Add the following as sub-clause (2) :

"The defendant at the time of presenting a written statement shall, where he relies on any documents (whether in his possession or power or not), enter such documents in a list and produce those documents which are in his possession or power."

OUDH

Add the following as Rule 1 (2), and read the existing Rule 1 as Rule 1 (1) :

"1. (2) The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose.

Explanation. — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be "in the power" of the defendant."

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

[R. S. C., O. 19, R. 15. See O. 6 Rr. 4 and 8.]

O. 8 R. 1 (contd.)

[4] Term "first hearing" means hearing on which case is gone into and not the date when the case is fixed for hearing but not gone into. (Vol 6) 1919 Cal 70 (71).

[5] Case under O. 8, R. 1 (2) (Oudh)—Defendant not filing documents on date of issues nor filing list under O. 8, R. 1 (2)—On date of evidence defendant applying for permission to file two documents — Discretion in refusing application held properly exercised. (Vol 29) 1942 Oudh 145 (146).

Order 8 Rule 2 — Note 1.

[1] It is the duty of a defendant to particularize in his defence all points, either of fact or law, which he desires to take. (Vol 10) 1923 Cal 578 (578). (Evasive denials deprecated.)

[See (Vol 17) 1930 Bom 511 (512). (Not points of law but only facts are required to be stated in the written defence.)]

[2] Defendant may use in defence a plea which would furnish him with a ground for a suit as this procedure would avoid multiplicity of suits. (Vol 7) 1920 Nag 80 (83); 16 Nag L R 3.

[3] A party omitting to raise a question depending on evidence in the pleadings, cannot be allowed in first appeal to entirely alter his case by a new defence. (1926) 28 Bom L R 513 (514, 515) * (Vol 24) 1937 Bom 476 (477). (Suit under O. 21, R. 63 by judgment-creditor — Plea that suit should have been on behalf of all the creditors.) * (Vol 11) 1924 Cal 463 (463). (Plea of special limitation under Bengal Tenancy Act.) * (Vol 8) 1921 Cal 661 (671, 672). (Limitation under special Act.) * (Vol 7) 1920 Cal 846 (848). (Plea of limitation.) * (Vol 6) 1919 Cal 1025

(1026). (Plea of bar of limitation under special Act.) * (Vol 31) 1944 Pat 77 (86); 22 Pat 513. (Suit by landlord for possession and rent — Objection as to sufficiency of notice to quit.) * (Vol 9) 1922 Pat 356 (358) : 1 Pat 612. (Want of legal necessity.)

[4] A plea of *res judicata* not taken at the time of trial is not such a matter as could show that a plaintiff's suit was not maintainable and can be raised in appeal with the leave of the Court. (Vol 2) 1915 Cal 373 (374).

[5] Suit for possession on basis of gift—Defence that gift was invalid as death-bed gift etc. — Question whether gift was made under undue influence can be gone into in appeal. (1913) 18 Ind Cas 568 (569) (Rang).

[6] Defendant is not entitled as of right to rely on any ground of defence not taken in his written statement. (Vol 2) 1915 Cal 478 (481); 42 Cal 625. (Plea as to want of notice.) * (Vol 24) 1937 Mad 571 (574) : ILR (1937) Mad 990. (Pleading Married Women's Property Act as bar to suit.) * (Vol 3) 1916 Mad 940 (941). (Fraud.) * (Vol 11) 1924 Pat 664 (664) : 3 Pat 546. (Plea of limitation.) * (Vol 27) 1940 Rang 207 (210, 211); 1940 Rang L R 273.

[See (Vol 1) 1914 All 179 (180). (Defendant's plea not stated in written statement but contained in robar drawn up at first hearing can be considered by Courts.) * (Vol 7) 1920 Nag 80 (83) : 16 Nag L R 3. (Suit under O. 21, R. 63 by purchaser from judgment-debtor — Attaching decree-holder is entitled to set up plea that sale in favour of plaintiff was sham and intended to defraud creditors of judgment-debtor.)]

[7] Whether a matter is open upon the proceedings, sufficiently to give the Court the right to form a judg-

3. It shall not be sufficient for a defendant in his written statement to deny generally the *Denial to be specific.* grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

[R. S. C., O. 19, R. 17.]

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, *Evasive denial.* but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

[R. S. C., O. 19, R. 19.]

5. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, *Specific denial.* or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted² except as against a person under disability³:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[R. S. C., O. 19, R. 13.]

O. S. R. 2 (*contd.*)

ment, depends upon the allegations and form of the pleadings. The Courts must look not to the mere wordings of the plaint but to the issues settled and the manner of the treatment in the lower Courts. (Vol 2) 1915 Mad 770 (772).

[8] Bengal Cess Act (9 [IX] of 1880) — Notice under S. 54 is condition precedent to pay cess — Defendant failing to raise want of notice in written statement but raising it in course of argument—Plaintiff should prove notice. (Vol 20) 1933 Cal 632 (634) : 60 Cal 733.

[9] See also O. 6, Rr. 4 and 8.

Order 8 Rule 3 — Note 1.

[1] Rules 3, 4 and 5 of Order 8 are intended to bring the Indian practice as to pleadings into a position approaching that which obtains in England. (Vol 3) 1916 Bom 103 (103) : 41 Bom 89.

[2] This rule and Rule 5 must be read together. This rule gives directions as to how denials are to be made. Rule 5 states the consequences of a defendant's failing to observe the directions of this rule. (Vol 12) 1925 Mad 950 (957). (Defendant should specifically deny publication in a libel suit.)

[3] If a defendant puts the plaintiff to proof of a mortgage document set up by him he must be taken to be putting the plaintiff to proof of its execution. (Vol 7) 1920 Oudh 68 (69).

[4] In a money suit where the claim is for recovery of specific amount, the defendant must clearly state what amount has been paid off; if all the claim was discharged he must clearly state so. (Vol 3) 1916 Pat 411 (416). ("Accounts incorrect", is not a specific denial.)

[5] Where the plaintiffs are aware at every stage what the case of the defendants really was, want of precision in the defendants' written statement becomes an academic question. (Vol 32) 1945 Sind 177 (182); ILR (1945) Kar 224.

Order 8 Rule 4—Note 1.

[1] Pleading should be specific. (Vol 16) 1929 All 721 (723). (Plea as to limitation held wholly evasive.)

[2] Defendants' statement that they do not admit plaintiff's allegation as to the date of a certain event is not evasive denial or admission notwithstanding that defendants do not give their own date for the event. (Vol 11) 1924 Mad 838 (839).

ORDER 8 RULE 5 — SYNOPSIS.

1. Applicability and scope.
2. Facts not denied will be taken as admitted.
3. "Except as against a person under disability."
4. Court may require the facts so admitted to be proved.
5. Rule does not apply where no statement is filed.

1. Applicability and scope.—[1] This rule states the consequences of a defendants' failing to conform to Rule 3. (Vol 12) 1925 Mad 950 (957).

[2] The principle that non-admission in certain cases are equivalent to admissions does not apply where averments in plaint are vague and inconclusive. (Vol 24) 1937 Sind 11 (12) : 30 Sind L R 345.

[3] Principle may be applied to a judgment-debtor on whom notice of execution application containing allegation of fact has been served. (Vol 23) 1936 All 21 (32) : 58 All 313 (FB).

2. Facts not denied will be taken as admitted.—[1] Every allegation of fact if neither denied nor stated to be not admitted, is deemed to be admitted and the plaintiff is not obliged to prove such allegation. (Vol 14) 1927 All 225 (226, 227) * (Vol 3) 1916 Bom 103 (104) : 41 Bom 89 * (Vol 29) 1942 Mad 413 (413). (Assertion that she is a Byragi, when not denied by the defendant, is enough to sustain a finding that she is a Byragi.) * (Vol 7) 1920 Mad 717 (718) * (Vol 10) 1923 Nag 7 (7) * (Vol 6) 1919 Pat 162 (162) * (1911) 9 Ind Cas 470 (472) (Rang). (Allegation in the plaint that requirements as to notice, not denied—Notice admitted.)

[2] A judgment may be based on defendant's admissions in his pleadings. (1938) 1938 Oudh W N 1080 (1083).

[3] The traversal of statement in plaint is enough to put the plaintiff to the proof of it. (Vol 21) 1934 Mad 579 (579).

[4] Statements on certain point by plaintiff and defendant agreeing — That much part of plaintiff's claim should be deemed to be admitted. (Vol 18) 1931 Lah 203 (205).

[5] Allegations in plaint not traversed in written statement cannot be denied afterwards. (Vol 6) 1919 Mad 927 (927) : 42 Mad 315.

6. (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money⁸ legally recoverable⁹ by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court,¹¹ and both parties fill the same character¹⁰ as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

O. 8 R. 5 (contd.)

[6] Defendants' statement that they do not admit plaintiff's allegation as to the date of a certain event is not evasive denial or admission notwithstanding that defendants do not give their own date for the event. (Vol 11) 1924 Mad 838 (839).

[7] Recital in the statement that a certain allegation in the plaint is not admitted cannot be deemed to be an admission but amounts to a denial by implication. (Vol 20) 1933 All 521 (522): 55 All 700*(Vol 11) 1924 All 180 (182): 46 All 55.

[8] Fact explicitly relied on in the plaint—General denial in written statement is not enough. (Vol 10) 1923 Mad 114 (115).

[9] "Not known" does not amount to "not admitted." (Vol 18) 1931 All 423 (424).

[10] Failure to deny does not necessarily amount to admission. (Vol 10) 1923 Lah 409 (410)*(Vol 1) 1914 Cal 842 (842).

[11] Statement in plaint that A had founded thakurbaris and had installed idols therein—Statement not challenged in written statement—Court can find that A was first founder shebait. (Vol 33) 1946 Pat 347 (351).

[12] Where execution of a pronote is denied but not the consideration, the question of consideration cannot be gone into. (1910) 5 Low Bur Rul 192.

[13] Mere denial of knowledge of mortgage amounts to admission of mortgage by implication. (Vol 21) 1934 Rang 278 (280).

[14] There is not a denial by necessary implication of statements in plaint when the language which can be looked to to find that denial is a statement which is in itself so inconsistent as not to be capable of admitting or denying anything. (Vol 27) 1940 Rang 190 (191): 41 Cri L Jour 899.

[15] Contention that allegation needs no reply is no denial by necessary implication. (Vol 28) 1941 Rang 49 (50): 1941 Rang L R 101.

[16] Defendant admitting to have executed bond for certain amount on certain date and admitting to have agreed to pay it on certain date—Case does not fall under this rule. (Vol 28) 1941 Nag 95 (96).

[17] In suit for contribution of mesne profits plea of plaintiff's exclusive possession must be specifically pleaded. (Vol 1) 1914 Cal 863 (865).

[18] Omission to deny allegation of title in plaint by defendant does not amount to constructive admission warranting decision in plaintiff's favour. (Vol 5) 1918 Cal 178 (179).

[See (Vol 4) 1917 Cal 614 (614)].

3. "Except as against a person under disability."

[1] Scope of the rule is only this, that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants and the rule has nothing to do with the conduct of the suit afterwards. (Vol 6) 1919 Mad 698 (698).

4. Court may require the facts so admitted to be proved.—[1] Pleadings in mofussil are not given strict construction. (Vol 5) 1918 Cal 402 (402, 403).

[2] Court requiring proof must state points to be proved in the form of issues. (Vol 10) 1923 Nag 83 (84).

[3] Admission of execution of mortgage in pleadings—Court can still frame issue to see whether document is validly attested. (Vol 6) 1919 Mad 469 (470).

[4] Fact admitted by defendant's muktair may be required to be proved. (Vol 11) 1924 Lah 744 (744).

[5] Appellate Court can decide point in issue in spite of failure of denial of specific points. (Vol 1) 1914 Cal 842 (843).

[6] Appellate Court requiring clearer proof of attestation under S. 58, or O. 8, R. 5—Court must give opportunity to prove. (Vol 7) 1920 Mad 717 (718).

[7] Discretion under the rule to be exercised when the Court suspects that the admission is made collusively or to avoid a rule of public policy. (Vol 7) 1920 Mad 588 (589).

5. Rule does not apply where no statement is filed.—[1] Rule 8 does not apply to a case where the defendant had not put in a written statement. (Vol 31) 1944 Sind 61 (63): ILR (1943) Kar 420*(Vol 4) 1917 Cal 269 (272): 43 Cal 1001 (FB)*(Vol 15) 1928 Lah 769 (771)* (Vol 12) 1925 Nag 380 (381)*(Vol 29) 1942 Pat 226 (229): 20 Pat 841*(Vol 22) 1935 Pat 306 (331): 14 Pat 70*(Vol 17) 1930 Pat 293 (296). (Defendant not putting in written statement is not debarred from giving evidence which traverses allegations in plaint.)

[But see (Vol 23) 1936 Bom 285 (285): 60 Bom 788.]

[2] *Ex parte* decree cannot be passed without evidence except in suits on negotiable instruments governed by O. 37, R. 2. (Vol 4) 1917 Cal 269 (273): 43 Cal 1001*(Vol 28) 1941 Sind 41 (47): ILR (1941) Kar 146.

ORDER 8 RULE 6 — SYNOPSIS.

1. Appeal.
2. Applicability and scope.
3. Ascertained sum of money.
4. Counter-claim.
5. Court-fee.
6. Effect of not claiming set-off.
7. Equitable set-off.
8. Insolvency proceedings.
9. Legally recoverable.
10. Parties must fill the same character.
11. Pecuniary limits of the jurisdiction of the Court.
12. Proceedings under other special Acts.
13. Separate and joint debts.
14. Solicitor's lien for costs.
15. Suit for recovery of money.
16. Winding up proceedings.

Illustrations.

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set off the debt of Rs. 1,000.

[1882—S. 111 ; 1877—S. 111 ; 1859—S. 121 ; R. S. C., O. 19, R. 3 ; See O. 20, R. 19.]

Provincial Amendment

PATNA

Add the following words to sub-rule (1) :

"and the provisions of O. 7, Rr. 14 to 18 shall, *mutatis mutandis*, apply to a defendant claiming set-off as if he were a plaintiff".

O. 8, R. 6 (*contd.*)

1. Appeal.—[1] The valuation of a claim of set-off is the amount claimed by the defendant and an appeal relating to a claim of set-off will lie to the High Court where it exceeds Rs. 5000. (1888) 10 All 587 (594).

2. Applicability and scope. — [1] There are two kinds of set-off, (1) statutory and (2) equitable — Statutory set-off can be claimed as of right under O. 8, R. 6 — But this provision of law does not take away any rights of equitable set-off which parties can claim independently. (1910) 1910 Pun L R No. 145, p. 895 : 1910 Pun Re No. 77.

[2] Order 8, R. 6 is not exhaustive—Equitable set-off can be pleaded. (Vol 30) 1943 Pat 152 (159) : 22 Pat 5.

[3] Set-off under this rule has a wider meaning than English set-off but not as wide as counter-claim. (Vol 21) 1934 All 543 (546, 547) : 56 All 912.

[4] The principles upon which the Court would proceed under O. 21, Rr. 18 and 19 are substantially the same as under this rule. (Vol 18) 1931 Cal 23 (24) : 57 Cal 855.

[5] Set-off is available to defendant only. (Vol 29) 1942 Cal 559 (560) : I L R (1942) 2 Cal 485* (Vol 5) 1918 Mad 258 (262).

[6] Plea of set-off cannot be raised without filing a written statement. (Vol 2) 1915 Mad 242 (243).

[7] Where the defendant does not specifically plead a set-off in his written statement, the Court must decline to allow the same to be set up subsequently. (Vol 14) 1927 Lah 431 (432).

[See however (1910) 32 All 525 (527). (Suit by principal against agent for accounts — Defendant need not plead a set-off.)]

[8] Plea of satisfaction is not a plea of set-off. (Vol 14) 1927 Nag 120 (120) * (Vol 12) 1925 Rang 22 (25) : 2 Rang 349.

[9] Plaintiff's claim denied—Set-off is not merely defence to plaintiff's claim — Decree may be granted to defendant though plaintiff's suit is dismissed. (Vol 21) 1934 All 543 (546) : 56 All 912.

[10] Suit on subject-matter of set-off not entertainable by Court trying suit on grounds of jurisdiction —

Set-off can be entertained. (Vol 19) 1932 Bom 617 (618).

[11] Defendant having first repudiated plaintiff's claim and stated in the statement that he would make a separate counter-claim is not estopped from claiming a set-off in the same suit. (Vol 12) 1925 Mad 228 (229).

[12] Defendant's claim under this rule must be treated as a plaint and a decree must be granted. (Vol 21) 1934 All 543 (545) : 56 All 912.

[13] Order 20, R. 19 lays down the form in which a decree in a suit in which set-off is allowed should be drawn up. (Vol 4) 1917 Lah 261 (265) ; 1917 Pun Re No. 62.

[14] Set-off not claimed in the suit cannot be claimed in the execution proceedings. (Vol 11) 1924 Oudh 430 (435) : 27 Oudh Cas 248.

[15] In the case of a legal set-off the Court has no option to refuse to adjudicate upon the plea when raised. (Vol 7) 1920 Mad 142 (143).

3. Ascertained sum of money. — [1] The words 'ascertained sum' mean a sum of money of which the amount is fixed and known admitted sum—It does not necessarily mean a sum admitted by the other side or decreed by the Court. (1910) 14 Cal W N 170 (173). (Ascertained sum is not only admitted sum.)* (Vol 11) 1924 All 872 (873) : 46 All 922. (Sum can be "ascertained sum" though neither admitted by plaintiff nor decreed by Court.)* (Vol 20) 1933 Rang 13 (14). (Counter-claim for sum by way of set-off not admitted is yet claim for ascertained sum.)

[2] Set-off can be successfully pleaded, even if no money is found due to the plaintiff. (1910) 7 All L Jour 105 (108, 109).

[3] The following have been held to be claims for ascertained sum :

(a) Orders awarding costs to both parties. (Vol 13) 1926 Cal 454 (454, 455) * (Vol 4) 1917 Pat 259 (260).

(b) Suit for rent — Defendant can claim set-off in respect of payments made on plaintiff's behalf *qua* property which he holds under law. (Vol 3) 1916 Pat 167 (168, 169).

(c) Rent suit—Defendant can claim set-off in respect

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of road cess paid erroneously by him. (Vol 27) 1940 Pat 180 (181, 182) : 18 Pat 723.

(d) Suit for rent — Jeth raiyat can set off his commission. (Vol 3) 1916 Pat 84 (84).

(e) Claim of a definite balance shown in account books. (Vol 11) 1924 All 872 (873) : 46 All 922.

[4] The following have been held to be not claims for ascertained sums:

(a) Unliquidated damages and mesne profits. (Vol 18) 1931 Nag 12 (13)* (Vol 16) 1929 All 52 (52). (Damages ascertainable only after protracted inquiry.) * (Vol 4) 1917 All 176 (176) : 39 All 362. (Unascertained damages.)

(b) Claim for accounts. (Vol 11) 1924 All 872 (873) : 46 All 922.

(c) Preliminary decree for sale directing account to be taken of what is due to mortgagee. (Vol 18) 1931 Cal 23 (24) : 57 Cal 855.

(d) Interest on certain items at a rate fixed by the defendant and not admitted by the plaintiff. (1912) 1912 Pun L R No. 80, p. 254.

(e) Suit by tenants for mesne profits for period during which landlord was in wrongful possession—Rents due from tenants prior to landlord's wrongful possession cannot be set off. (Vol 4) 1917 Mad 314 (314, 315).

(f) Claim depending upon taking accounts. (Vol 7) 1920 Mad 179 (820, 821) : 42 Mad 873 * (Vol 27) 1940 Nag 177 (177) : ILR (1941) Nag 753* (Vol 6) 1919 Sind 88 (89) : 12 Sind L R 70.

(g) Suit for rent — Claim by defendant tenant for damages for dispossession. (Vol 28) 1941 Pat 106 (107).

4. Counter-claim.—[1] A set-off and a counter-claim are essentially different. In one sense both are cross-actions but a set-off is also a ground of defence. If established it affords an answer to the plaintiff's claim either wholly or *pro tanto* for a set-off is really a debt claimed by a defendant against the plaintiff. A counter-claim, on the other hand, is really a weapon of offence and enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. (Vol 19) 1932 Bom 617 (618).

[2] Order 8 makes no provision for counter-claims—It merely provides for set-off in suits for recovery of money. (Vol 9) 1922 Cal 1 (1).

[3] Counter-claim is allowed to be pleaded by the defendant at his option subject to certain rules in order to avoid multiplicity of proceedings between the parties. (Vol 19) 1932 Bom 617 (618).

[4] Set-off and counter-claim distinguished — In former case, it must be within limitation at time of plaint—In case of counter-claim, it must be in time at date of written statement. (Vol 29) 1942 Cal 559 (561) : I L R (1942) 2 Cal 485* (Vol 23) 1936 Cal 277 (278, 279) * (Vol 24) 1937 Nag 210 (210, 211). (Defendant pleading that full amount due to plaintiff has been paid off and on day of such payment he advanced further loan to plaintiff and that it was due from him — Claim of defendant held a counter-claim and not set-off and if barred on date of written statement cannot be allowed.)

[5] Court can treat the counter-claim as a plaint in a cross-suit and hear the two together if the counter-claim is properly stamped. (Vol 23) 1936 Cal 277 (278, 279)* (Vol 20) 1933 Cal 27 (28) : 59 Cal 833* (Vol 22) 1935 Rang 116 (117). (Defendant failing to pay court-fee on counter-claim in trial Court — Filing of stamp paper in Appellate Court will not validate counter-claim—Separate suit must be filed on counter-claim.)* (Vol 21) 1934 Rang 160 (161). (Withdrawal of suit by plaintiff—Counter-claim can be proceeded with as suit.)* (Vol 11) 1924 Rang 346 (346) : 2 Rang 276.

[6] Counter-claim by person, not a defendant, is bad. (Vol 6) 1919 P C 129 (132) (PC).

[7] If a counter-claim is triable by the Court of Small Causes it cannot be agitated in the regular Court in which the suit is instituted. (Vol 28) 1941 Nag 258 (261).

5. Court-fee. — [1] The word 'set-off' in Art. 1, Sch. I, Court-fees Act, includes also an equitable set-off and as such court-fee is payable on such set-off. (Vol 23) 1936 Nag 290 (291) : I L R (1937) Nag 481 * (Vol 20) 1933 Mad 203 (204).

[2] A plea of set-off cannot be entertained until the court-fee with respect to it has been paid by the defendant. (1912) 15 Ind Cas 526 (528) (Oudh)* (Vol 28) 1941 Pat 106 (107). (Failure to pay court-fee on counter-claim — Defendant is not entitled to any relief.)

[But see (Vol 26) 1939 Bom 386 (388). (Mere omission of defendant to pay court-fee does not affect his claim to set-off.)]

[3] In a partnership case a defendant may get a decree for whatever is found due to him without being called upon to pay the court-fee on what he alleges himself entitled to. (1911) 1911 Pun L R No. 163, p. 604.

[4] Court-fee is payable only on amount claimed in excess of that claimed by the plaintiff and if defendant wants a decree for that excess. (Vol 14) 1927 Nag 74 (75).

[5] Payment of further court-fee after decision is not permissible—Defendant claiming Rs. 325 as set-off but paying court-fee only on Rs. 50—Set-off to the extent of Rs. 50 only can be allowed. (Vol 30) 1943 Nag 314 (314, 315) : I L R (1944) Nag 260.

[6] Equitable set-off — Claim for damages by defendant—Plaintiff's claim and damages arising out of same contract—No separate court-fee is necessary. (Vol 24) 1937 Lah 73 (75).

6. Effect of not claiming set-off. — [1] Defendant who pleads set-off is bound by O. 2, R. 2 and must claim entire amount due — He cannot claim set-off in respect of portion only and subsequently sue for the balance. (Vol 29) 1942 Mad 580 (580, 581) : ILR (1942) Mad 886.

[2] Failure to plead set-off or counter-claim does not bar fresh suit for the claim. (Vol 13) 1926 Mad 1020 (1021)* (Vol 6) 1919 Lah 220 (220) : 1919 Pun Re No. 74 * (Vol 12) 1925 Mad 830 (831) * (Vol 26) 1939 Pat 264 (265). (Landlord taking advances and buying goods from tenant — Understanding to set off dues against rent—Rent suit by landlord—Tenant not claiming set-off, but filing cross-suit—Cross-suit is not barred.)

[But see (Vol 7) 1920 Mad 531 (532). (Suit upon mortgage — Mortgagor not counter-claiming amounts due from mortgagee—Later suit in respect of it is barred.)]

7. Equitable set-off. [1] The provisions of O. 8 R 6 which relate to a legal set-off and require that an ascertained sum of money should be legally recoverable by the defendant from the plaintiff do not apply to an equitable set-off. (Vol 32) 1945 Oudh 229 (230) : 20 Luck 245* (Vol 4) 1917 Lah 261 (264) : 1917 Pun Re No. 62.

[2] In cases of mutual debits and credits and in cases where cross demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that plaintiff should recover and defendant driven to cross-suit, Courts of Equity allow a plea of set-off even though the amount may be unascertained. This set-off is known as equitable set-off and can be allowed apart from the provisions of O. 8 R. 6. (Vol 30) 1943 Oudh 17 (20) : 18 Luck 327 (Claim for damages.)* (Vol 17) 1930 All 875 (876) (Equitable set-off can be claimed independently of specific provisions of O. 8 R 6.)* (Vol 18) 1931 Cal 358 (359)* (Vol 10) 1923

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Bom 113 (118)* (Vol 1) 1914 Lah 363 (365):1914 Pun Re No 82.

[3] Equitable set-off can be claimed only if cross demands arise out of same transaction. (Vol 13) 1926 Nag 155 (156)* (Vol 10) 1923 Bom 24 (25):47 Bom 182* (Vol 2) 1915 Cal 649 (650)* (1904) 8 Cal W N 174 (177)* (Vol 12) 1925 Mad 830 (831). (If cross demands are very closely connected equitable set-off for unascertained sum can be pleaded.)* (Vol 4) 1917 Mad 928 (930):40 Mad 883* (Vol 4) 1917 Pat 533 (535):2 Pat L Jour 451.

[4] Equitable set-off was allowed in the following cases:

(a) If a washerman loses some of the articles given to him for washing his employer can equitably set-off the price of those articles when paying wages. (1910) 1910 Pun L R No. 145, p. 395: 1910 Pun Re No. 77.

(b) Servant is not deprived of entire wages earned by subsequent default—Master is entitled to claim damages by way of equitable set-off. (Vol 2) 1915 Low Bur 119 (119).

(c) Timber supplied by tenant—Agreement to deduct costs from rent brings the matter within same transaction in suit for arrears of rent. (Vol 21) 1934 All 115 (117).

(d) Where the defendant suffered loss due to plaintiff's negligence in not sticking to defendant's instructions the Court may recognise defendant's right to equitably set off the loss against plaintiff's claim. (1905) 27 All 145 (148).

(e) Suit for accounts by principal against agent's surety—Surety can claim set-off for arrears of pay due to agent. (Vol 1) 1914 Cal 164 (165, 166).

(f) Cross-debts due to garnishee can be set off and equity arising from cross-debt can be set up without paying court-fee. (Vol 1) 1914 Bom 299 (299).

(g) Suit for accounts of joint family money-lending business—Defendants entitled to receive certain sum from plaintiff—Doctrine of equitable set-off was applied. (Vol 1) 1914 P C 153 (153, 155):17 Oudh Cas 35 (P C).

(h) Plaintiff who promised to supply 700 or 800 tons, supplied only 469 tons of coal and sued the defendant for the price. The defendants can claim set-off from the price, the damages for the breach of contract caused by not supplying the full stock promised. (1910) 37 Cal 334 (336, 337, 338).

(i) A's guardian during his minority mortgaging certain property to B and subsequently selling same to him along with other properties—In 1923 A becoming major and suing B to set aside sale—Suit decreed and A awarded mesne profits—Suit by B against A to enforce mortgage in 1936—A held could set off amount of mesne profits decreed to him in previous suit against B's claim. (Vol 29) 1942 Pat 247 (250).

(j) Suit for arrears of rent on basis of leases—Set-off arising under lease, though inadmissible under O. 8, R. 6, can be claimed. (Vol 23) 1936 All 522 (523).

[5] A claim to equitable set-off will not be available where it does not arise out of the same transaction and relates to a different transaction. (Vol 17) 1930 Lah 808 (809) (Step-mother suing on partnership agreement for maintenance allowance—Step-son claiming his share of sale proceeds of her deceased husband's property sold by her—No set-off can be claimed.)* (Vol 13) 1926 Oudh 301 (302). (Vendor cannot claim mesne profits in suit for refund of sale consideration by vendee against vendor on dispossession by vendor's relatives.)* (Vol 25) 1938 Pat 484 (485) (A purchasing property from B and again mortgaging it to him. In suit by third party it was established that B had only eight annas interest in property sold to A—Suit by B against A on his mortgage—A

claiming reduction of his liability on ground that he had purchased only half of the property—Sale and mortgage being separate transactions B's claim held could not be reduced and being unliquidated was not allowable under O. 8, R. 6.]

[6] The equity of set-off may arise even where transactions are distinct if the one party has given credit to the other on the faith of goods deposited by the other party with him. (1912) 6 Sind L R 138 (139, 140).

[7] A set-off may be created by agreement and on this ground a claim may be set off which could not be allowed under the statutory law. Set-off on basis of an agreement cannot be allowed beyond the terms of an agreement. (Vol 30) 1943 Pat 152 (159):22 Pat 5.

8. Insolvency proceedings. — [1] This rule does not apply to matters arising in insolvency. (Vol 27) 1940 Mad 266 (268).

[2] Section 47, Presidency Towns Insolvency Act, and S. 46, Provincial Insolvency Act, provide for set-off in case of mutual dealings between an insolvent and his creditors. There can be no set-off unless there are mutual dealings. (Vol 27) 1940 Mad 266 (268). (Company owing money to surety in separate transaction—Money payable to company by surety as surety—Dealing held mutual and set off allowed.)

[3] Mutual credits which can be set-off include credits having a natural tendency to terminate in debts and not only those which must necessarily terminate in debts. (1910) 33 Mad 53 (54).

9. "Legally recoverable." — [1] Specified sums are not necessarily "ascertained sums of moneys legally recoverable" within O. 8, R. 6. (Vol 13) 1926 Sind 225 (228): 21 Sind L R 385.

[2] The following are held to be not "legally recoverable":

(a) Where the claim is based upon a document not receivable in evidence. (1870) 13 Suth W R 307 (309).

(b) Where the claim is based upon a decree incapable of execution. (1871) 16 Suth W R 308 (309, 310).

(c) Where the claim is barred by *res judicata*. (1871) 15 Suth W R 252 (252).

(d) Where plaintiff is not liable to the defendant in respect of the claim. (Vol 28) 1941 Cal 308 (310).

(e) Where the plaintiff is not bound by law to pay the claim. (1892) 15 Mad 29 (34).

[3] A barred debt is not legally recoverable and therefore in order to enable a defendant to claim a set-off under this rule the sum due to him must not have been time-barred on the date of the suit. (Vol 5) 1918 Mad 258 (262)* (Vol 8) 1921 Cal 67 (68): 48 Cal 817* (Vol 6) 1919 Cal 916 (917). (Claim barred at date of filing written statement cannot be allowed to be set off.)* (1930) 31 Pun L R 107 (109)* (Vol 8) 1921 Mad 688 (688)* (Vol 7) 1920 Mad 819 (821): 42 Mad 873* (Vol 26) 1939 Pat 567 (567)* (Vol 26) 1939 Pat 142 (143, 144)* (Vol 23) 1936 Pesh 57 (60, 61).

[4] A claim which is barred by limitation according to the law of the place where the suit is brought but is subsisting according to the *lex loci contractus* is a legally recoverable claim. (1913) 35 All 238 (239, 240).

[5] In cases of equitable set-off where there is a fiduciary relationship as of trustee and cestui que trust or where there is accountability as between plaintiff and defendant, even barred debts can be set off. (Vol 3) 1916 Mad 720 (725, 726): 39 Mad 365. (Trustee and cestui que trust)* (1936) 164 Ind Cas 530 (532) (Cal). (Partition suit among Hindus governed by Dayabhaga law — Right of defendant to debts due out of estate—Equitable set-off can be allowed even in case of time-barred

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debt.) (Vol 2) 1915 Cal 649 (650) (Vol 13) 1926 Lah 633 (634).

[6] In a suit for rent by lessor the lessee cannot plead by way of equitable set-off an unliquidated claim for damages for wrongful obstruction to quiet enjoyment which was barred. (Vol 4) 1917 Mad 258 (259) : 39 Mad 939.

[7] Ascertained sum barred by limitation — No equitable set-off can be claimed. (Vol 23) 1936 Nag 290 (290) : I L R (1937) Nag 481.

[8] The assignee of benefited ticket-holder can claim set-off against the assignee of stake-holder of a Malabar Chit Fund in a suit by latter against former. Such a set-off is admissible under S. 132, Transfer Property Act. (1912) 1912 Mad W N 1235 (1236, 1237).

[9] Plea of set-off — Money found due to defendant in excess of that due to plaintiff — Limitation in regard to recovery of balance must be determined with reference to date of written statement and not date of plaint — Court cannot pass decree for balance if defendant's claim is barred on date of written statement. (Vol 21) 1934 All 427 (428); 56 All 821 (Vol 12) 1925 Nag 445 (447).

10. Parties must fill the same character. —

[1] In order to entitle a defendant to plead a set-off it is necessary that the parties should fill the same character as they fill in the plaintiff's suit. (Vol 3) 1916 Bom 139 (140) : 41 Bom 163. (Plaintiff's claim for goods supplied—Set-off for wages can be allowed.) (Vol 1) 1914 Bom 238 (238, 239) : 39 Bom 131. (Plaintiff's claim as inamdar—Defendant's as pujari—No set-off.) (Vol 14) 1927 Lah 228 (230) : 8 Lah 105. (Dealings 'not mutual' cannot be set-off one against the other.) (Vol 27) 1940 Nag 177 (178). (The characters of debtor and creditor are the same whether the creditor became so in his capacity of servant or agent in one case and in an independent capacity in the other.) (Vol 28) 1941 Cal 308 (310). (Company by registered deed creating floating charge in favour of Bank for securing its existing and future indebtedness to Bank—Bank in pursuance of terms of deed appointing receiver who under terms of deed and also under S. 69A, Transfer of Property Act, was to be deemed agent of company—Prior to receiver's appointment company owing to defendant over Rs. 2000 in respect of prior dealings—Suit by receiver against defendant for price of goods sold and delivered by him after his appointment—Defendant held not entitled to set off price claimed against amount due to him from company.) (Vol 27) 1940 Lah 290 (291). ((Vol 14) 1927 Lah 228 distinguished — Accounts of one and same person — Fact of accounts being separate or in different names would not come within O. 8, R. 6 — Set-off allowed.)

[2] See also illustrations (a) and (b) to this rule.

11. Pecuniary limits of the jurisdiction of the Court. [1] For purposes of jurisdiction, the valuation of the entire sum claimed, and not the difference between the plaintiff's claim and the defendant's claim, is to be taken into account. (1893) 20 Cal 527 (532) (Vol 12) 1925 Rang 22 (25) : 2 Rang 349.

[2] Where the plaintiff admits any portion of the sum set off, that portion should be deducted in determining the jurisdiction to try the set-off. (Vol 12) 1925 Rang 65 (66, 67) : 2 Rang 462.

12. Proceedings under other special Acts.

[1] Malabar Compensation for Tenants' Improvements Act (1 [I] of 1900) S. 6 (2)—Kanom—Suit for redemption by jenmi—Jenmi can set off decree for arrears of rent obtained by him against kanom amount and value of improvements even if decree is barred by limitation.

(Vol 29) 1942 Mad 307 (309) : I L R (1942) Mad 550. ((Vol 14) 1927 Mad 189, overruled.)

[2] Bengal Patni Regulation (8 [VIII] of 1819), S. 13 (3) and (4)—The darpatnidar made a deposit to save the patni from sale for arrears of rent and on the specific representation that the rent due from him had been paid in full and the deposit was made from private funds, took possession of the patni taluk. In the rent suit by the patnidar against the darpatnidar who was still in possession of the patni taluk it was found that the darpatnidar at the time of making the deposit was in arrears in respect of a portion of the rent : Held that the darpatnidar could not set off the amount of deposit against the claim for rent. (1913) 17 Cal L Jour 96 (101).

13. Separate and joint debts.—[1] Debt sought to be set off due jointly to defendant and another not party to suit—It cannot be pleaded by way of set off for defendant could not have sued plaintiff without making the other person party to suit. (1910) 14 Cal W N 786 (788).

[2] Where a plaintiff sues several defendants alleging a joint debt, a defendant who denies a joint debt may plead a set-off due to him alone — Illustration (g) to O. 8 R. 6 does not apply. (Vol 21) 1934 All 543 (545) : 56 All 912.

[3] See Illustrations (f) and (g) to O. 8 R. 6.

14. Solicitor's lien for costs. — [1] Solicitor has lien over property recovered or proceeds of judgment obtained for client by his exertions—*Bona fide* compromise between parties—Court will not interfere for preserving solicitor's lien—But if it is collusive Court will interfere. (Vol 22) 1935 Cal 168 (172, 173) : 61 Cal 1005.

[2] Costs ordered to be paid by petitioning creditor to debtor when an adjudication in bankruptcy is set aside cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor. (Vol 17) 1930 Bom 516 (517) : 55 Bom 377.

[3] Costs allowed to plaintiff at preliminary stage—Ultimately larger sum found due from plaintiff—Solicitor's lien on costs cannot prevail. (Vol 19) 1932 Bom 619 (622).

15. Suit for recovery of money.—[1] Suit on mortgage for payment of money and in default thereof for sale of the mortgaged property is a suit for recovery of money within the meaning of this rule. (Vol 20) 1933 Rang 13 (14).

[2] Set-off can be claimed in a suit on a negotiable instrument. (Vol 18) 1931 Nag 12 (13).

[3] A suit merely for the dissolution of partnership or for account is not a suit for money, but if there is also a prayer for the payment of such balance as might be found due to the plaintiff, the suit would be one for the payment of money. (1888) 10 All 587 (593).

16. Winding up proceedings. — [1] Where A is debtor to a company and B is surety for A and the company proceeds against them for the debt, each of them can claim to set off a debt due to him by the company, their liability being joint and several. (Vol 27) 1940 Mad 266 (268).

[2] A liquidator in winding-up proceedings can set off even time-barred debts due to the company against the claims made against the company by the debtors, the reason being that this rule does not apply to set off in liquidation proceedings. (Vol 28) 1941 All 278 (279) : I L R (1941) All 415.

[3] Debtor of company who is not a share-holder can claim set-off of ascertained sum due to him against liquidators in action for recovery of debt. (Vol 2) 1915 Lah 204 (205, 206) : 1915 Pun Re No. 63 (Vol 6) 1919 Lah 242 (243).

Defence or set-off founded on separate grounds.

7. Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

[R. S. C., O. 20 R. 7; See O. 7 R. 8.]

New ground of defence. 8. Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

[R. S. C., O. 24 Rr. 1 and 2; See R. 9.]

Subsequent pleadings. 9. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

[1882 — S. 112; 1877 — S. 112; 1859 — S. 122; See O. 6 R. 7.]

Procedure when party fails to present written statement called for by Court.

10. Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

[1882 — S. 113; 1877 — Ss. 113, 370; 1859 — S. 106.]

Provincial Amendments

Rules 11 and 12—ALLAHABAD

Add the following Rules :

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service, written in English in block letters, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

Rules 11 and 12—BOMBAY

The following shall be added as Rules 11 and 12 :

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing; *Parties to file addresses.* file in Court, a memorandum in writing stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit :

Order 8 Rule 9 — Note 1

[1] Court's permission is necessary for filing pleadings in reply to defendant's written statement. (Vol 12) 1925 Bom 390 (392, 396).

[2] In suit for partition against coparceners and numerous transferees, their alleged titles were not mentioned nor was any relief with respect to them claimed—Defect was noticed late—Application for amendment was rejected and plaint also—It was held that amendment should have been allowed. (Vol 2) 1915 Mad 984 (986).

[3] Where in a suit on guarantee, no plea was taken that there was any misrepresentation in obtaining the guarantee and no issue was framed but such misrepresentation was sought to be proved by defendant in evidence which was accepted by the two lower Courts, held, that the finding was unsustainable. The proper course was to have the written statement amended and to frame an issue and allow the defendant to adduce evidence. (Vol 6) 1919 Mad 471 (471).

[4] Minor defendant is not entitled on attaining majority to put in additional written statement without leave of Court. (Vol 22) 1985 Mad 117 (117)* (Vol 24) 1937 Pat 625 (626).

[5] Where more than a year after the settling of issues in a suit, when the case was completely ready

for hearing, defendant applied to file a fresh written statement raising a completely new point, the Court would exercise a proper discretion in refusing to allow it. (Vol 5) 1918 Pat 230 (233).

Order 8 Rule 10 — Note 1

[1] Rule 10 applies to default under R. 9 and not under R. 1 — Court has no jurisdiction to pronounce judgment under this rule against the defendant who has failed to file his written statement. (Vol 32) 1945 Mad 299 (300) : I L R (1945) Mad 866. (View of *Seshagiri Iyer J.* in (Vol 5) 1918 Mad 1163 approved.)*(Vol 5) 1918 Mad 1163 (1164). (Per *Seshagiri Iyer J.*; *Ayling J. Contra.*)* (Vol 15) 1928 Rang 261 (262) : 6 Rang 466.

[2] Rule applies only if there is specific requirement by Court for written statement and not merely general direction in summons. (Vol 12) 1925 Oudh 567 (568).

[3] Held, dismissal under O. 8, R. 10 was not justified except in cases of written statements and set-off. (Vol 16) 1929 Bom 413 (413).

[4] Order requiring written statement must be unconditional—Order permitting written pleas to be filed, if any, is not absolute — Passing decree in such a case justifies interference under S. 115. (Vol 14) 1927 Mad 1007 (1008).

[5] A defendant did not file his written statement on the date on which he was ordered to file it. The Munsif

Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under Section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

Applicability of Br. 20 and 22-26 of O. 7 to addresses for service.

12. Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule." [15-10-1930.]

Rules 11 and 12—LAHORE

Add the following Rules :

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule." [24-11-1927.]

Rules 11 to 13—NAGPUR

Add the following as Rules 11 to 13 :

"11. Every defendant in a suit or opposite party in any proceedings, shall, on the first day of his appearance in Court, file a memorandum giving an address for service on him of any subsequent process. The address shall be within the local limits of the Civil District in which the suit or petition is filed or, if an address within the local limits of such Civil District cannot conveniently be given, within the local limits of the Civil District in which the party ordinarily resides. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

12. (1) If the defendant or the opposite party fails to file a registered address as required by Rule 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-r. (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-r. (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of Order 7 shall apply, so far as may be, to addresses for service filed under Rule 11." [29-6-1943.]

Rules 11 and 12—N.-W.F.P.

Add the following Rules :

"11. Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service, filed under the preceding rule."

Rules 11 to 13—OUDH

Add the following Rules :

"11. Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the "registered address") for service on him of any subsequent notice,

O. 8 R. 10 (contd.)

thereupon decreed the claim of plaintiff under O. 8, R. 10 without going into the merits of the case or without stating the ground of his order. *Held*, that the Munsif's order was not a judgment, but merely an order decreeing the plaintiff's claim, and that the Munsif acted with material irregularity. (1912) 15 Ind Cas 212 (212): 15 Oudh Cas 79.

[6] An order refusing to pronounce a judgment under this rule is not appealable. (Vol 18) 1931 Lah 77 (77).

Order 8 Rule 11 (Lah.) — Note 1

[1] Rule applies to corporations also. (Vol 16) 1929 Lah 459 (460).

[2] Striking off defence for default is discretionary. (Vol 16) 1929 Lah 459 (460).

[3] Provisions of R. 11 not complied with—No harm caused due to non-filing of address — Case going on normally — Address subsequently filed accepted as sufficient — Defence cannot be struck out — No *ex parte* decree can be passed. (Vol 22) 1935 Lah 791 (792).

summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence, or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court, *suo motu* or on the application of any party.

12. Rules 21, 23 and 25 to 27 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule, and R. 24 shall, in the same manner, apply, but as if the words at the beginning, "In all cases to which R. 23 does not apply" were omitted.

13. Nothing in Rr. 11 and 12 shall apply to the notice prescribed by O. 21, R. 22."

Rules 11 and 12—PATNA

Add the following Rules :

"11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20 and 22 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

Rules 11 and 12—SIND

Add the following Rules :

"11. *Parties to file address.* — Every party whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him, as the date of hearing, file in Court, a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just :

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under S. 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise.

12. *Applicability of Rules 20 and 22-26 of Order 7 to addresses for service.*—Rules 20, 22, 23, 24, 25 and 26 of O. 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule."

Note.—Order 7 Rule 26 is now deleted by the Sind Court.

ORDER IX

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

Parties to appear on day fixed in summons for defendant to appear and answer. 1. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

[1882—S. 96; 1877—S. 96; 1859—S. 109.]

ORDER 9, GENERAL—SYNOPSIS

1. Applicability of order to execution proceedings.
2. Applicability of order to applications under O. 9 itself.
3. Applicability of order to proceedings under local and special Acts.

1. *Applicability of order to execution proceedings.* — [1] Order 9 does not apply to execution proceedings. (Vol 20) 1933 Mad 418 (422) : 56 Mad 490 (FB). (Court has inherent power to dismiss execution application for default.) * (Vol 18) 1931 All 594 (594, 595). (Dismissal of application under O. 21, R. 90—Restoration under inherent powers can be made) * (Vol 15) 1928 Cal 179 (179, 180). (Can be restored by exercising inherent powers.) * (Vol 14) 1927 Cal 420 (420) * (Vol 26) 1939 Lah 223 (223, 224). (Court has inherent powers under S. 151 to restore application in execution dismissed for default.) * (Vol 20) 1933 Lah 99 (101) : 13 Lah 761. (Restoration under inherent powers of Court is allowed.) * (Vol 18) 1931 Lah 505 (505). (Order 9 does not apply to proceedings under O. 21, R. 2.) * (Vol 16) 1929 Lah 744 (745) * (Vol 18) 1931 Mad 656 (657, 658) : 55 Mad 17 (FB). (*Ex parte* order under S. 47 is not an *ex parte* decree in a suit and hence O. 9, R. 13 will not apply.) * (Vol 13) 1926 Mad 412 (415) * (Vol 2) 1915 Mad 811

(812) : 38 Mad 199 * (Vol 4) 1917 Nag 171 (171). (Execution application dismissed for default cannot be restored to file under O. 9.) * (Vol 12) 1925 Oudh 552 (555) : 28 Oudh Cas 158 * (Vol 10) 1923 Pat 239 (241) : 2 Pat 372 * (Vol 6) 1919 Pat 540 (541). (Proceedings under O. 21, Rr. 100 and 101 are not suits within O. 9, R. 4.) * (Vol 3) 1916 Pat 331 (332). (Restoration under this Order of execution application dismissed for default.) * (Vol 18) 1931 Sind 97 (98) : 25 Sind L R 475 (FB). (Application to set aside *ex parte* order can be entertained under S. 151.) * (Vol 8) 1921 Sind 55 (56) : 17 Sind L R 105. (*Ex parte* disposal of application under O. 21, R. 90 — Can be restored under inherent powers.)

2. *Applicability of order to applications under O. 9 itself.* — [1] Order 9 applies to applications under O. 9 itself by virtue of S. 141. (Vol 13) 1926 Mad 325 (326) * (Vol 14) 1927 Lah 71 (71). (Second application for restoration is competent.) * (Vol 7) 1920 Lah 304 (304) : 1 Lah 339. (Application for restoration of dismissed application was described as one for review.) * (Vol 10) 1923 Oudh 146 (146) * (Vol 21) 1934 Pesh 13 (14) * (Vol 13) 1926 Rang 74 (75) : 3 Rang 534.

[But see (Vol 10) 1923 Bom 386 (386) * (Vol 16) 1929 Cal 17 (18) * (Vol 9) 1922 Pat 121 (121) : 4 Pat L Jour 287.]

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

2. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

[1882—S. 97; 1877—S. 97; 1861—S. 5.]

Provincial Amendment

ALLAHABAD

After the words, "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant".

O. 9 General (contd.)

[2] Application for restoration of suit dismissed for default—Restoration can be made under inherent powers but not under O. 9 R. 9 read with S. 141. (Vol 19) 1932 Nag 101 (102); 28 Nag L R 83 (F B). ((Vol 10) 1923 Nag 293 overruled; 7 Nag L R 32 impliedly overruled.)

[3] Order refusing restoration of an application for setting aside dismissal of suit for non-appearance dismissed for default is not appealable. (Vol 5) 1918 Pat 612 (613) : 2 Pat L Jour 720.

3. Applicability of order to proceedings under local and special Acts.—[1] Application under S. 84, Madras Hindu Religious Endowments Act of 1927 dismissed for default—Application can be restored under this order. (Vol 24) 1937 Mad 653 (653).

[2] Order of annulment under the Provincial Insolvency Act cannot be set aside under O. 9. (Vol 13) 1926 Mad 942 (942) : 49 Mad 935.

[But see (Vol 27) 1940 Pat 58 (59). (Provisions of O. 9 may perhaps be held to be applicable to insolvency proceedings.)]

Order 9 Rule 1 — Note 1

[1] For applicability of this rule to Arakan Hills see the Arakan Hills Civil Justice Regulation (VIII of 1874) and the Arakan Hill Tracts Laws Regulation, 1916 (1 [I] of 1916), Sch. 1.

ORDER 9 RULE 2 — SYNOPSIS

1. Scope of the rule.
2. "Defendant."
3. Dismissal for failure to pay court-fee or postal charges.
4. Plaintiff's remedy after dismissal.
5. Appeal.
6. Revision.

1. Scope of the rule.—[1] Failure of plaintiff to furnish correct addresses of defendants or to accompany process-server does not justify dismissal under R. 2. (Vol 14) 1927 Lah 170 (170) * (Vol 18) 1931 Lah 655 (655). (Order 9 R. 5 applies to such case.)

[2] The failure contemplated by O. 9, R. 2 includes not merely an entire omission to pay the requisite court-fee but also failure to pay the same within time which the Court fixes for payment. (1911) 7 Nag L R 114 (116) * (1935) 158 Ind Cas 250 (250) (Pesh). (Court should fix the time within which process fee ought to be deposited—Omission is a material irregularity.)

[3] Default to pay damages for omission to get summonses served is failure to pay costs within the meaning of this rule. (Vol 14) 1927 All 464 (464).

[4] Order of dismissal on failure to pay process-fees on an application for restoration of suit dismissed for default falls under R. 9 and not under this rule. (Vol 23) 1936 All 737 (738, 739).

[5] An application under O. 34, R. 5 can be dismissed under this rule by virtue of S. 141, for non-payment of process fees. (Vol 24) 1937 Sind 273 (278) : 31 Sind L R 180.

2. "Defendant."—[1] The word 'defendant' does not include the guardian *ad litem* of a minor and therefore the suit cannot be dismissed on the ground of non-payment of process fee for issuing notice to him. (1911) 1911 Pun L R No. 211, p. 813 (815) : 1912 Pun Re No. 85.

[2] Two defendants minor—Plaintiff failing to file affidavit of service of summons against guardians—Dismissal of suit is bad—Suit should have proceeded against major defendants. (Vol 7) 1920 Pat 820 (821) * (Vol 24) 1937 Oudh 502 (503). (One of the defendants not properly served through negligence of plaintiff—Suit cannot be dismissed against the defendants properly served.)

[3] Summons served on wrong person—Such person appearing and denying liability—The suit should be dismissed with costs. (1890) 4 Bom 619 (623).

3. Dismissal for failure to pay court-fee or postal charges.—[1] The Court must fix a time for payment of process fee. Unless it so fixes it cannot dismiss the suit. (Vol 11) 1924 Nag 298 (299).

[2] Reasonable time and opportunity should be allowed to comply with the order. (Vol 7) 1920 Cal 244 (245). (Two days time for payment of process fees when the party is absent, is not a reasonable time.) * (Vol 20) 1933 Pat 582 (583). (Non-payment of process-fee for fresh summons with the application is no ground.)

[3] Ignorance of party's agent as to the Court where the fee should be deposited is no excuse for non-compliance. (1869) 11 Suth W R 417 (418).

[4] Where a new defendant is added and there is failure to pay process fee on the part of plaintiff, the failure will entail dismissal of whole suit even against the original defendant unless he waives his objection. (1868-69) 5 Bom H C R (A C) 118 (121).

[See however (1880) 2 All 318 (319). (Dismissal should be only against the particular defendant.) * (Vol 8) 1921 Pat 422 (422) : 11 Pat 430.]

[5] Process fee not paid but defendant applying for time to file his statement—Suit cannot be dismissed under R. 2. (Vol 6) 1919 Pat 372 (373) * (1891) 15 Bom 160 (162, 163) * (1870) 4 Beng L R App 75 (76). (Defendant's appearance by his counsel before the time fixed in summons—Court can order the case to be included in the general cause list immediately.)

[6] Court cannot require process fees to be paid before fixing the date for defendant's appearance. Failure to comply with such an order is no ground for dismissing the suit. (Vol 26) 1939 Pat 160 (160).

[7] Process fees insufficient for service on all defendants—Court pointing out deficiency and fixing date for disposal of suit—On fixed date Court dismissing suit for

Where neither party appears, suit to be dismissed.

3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

[1882—S. 98; 1877—Ss. 98, 99; 1859—S. 110.]

O. 9 R. 2 (contd.)

default in paying deficiency in process fee — Dismissal held justified — Plaintiff if wishing to issue notice to some of defendants held ought to have specified names of those defendants. (Vol 28) 1941 Pat 402 (402, 403).

4. Plaintiff's remedy after dismissal. — [1] On dismissal of suit under O. 9 R. 2 the plaintiff can apply under R. 4 for setting aside the order or may bring fresh suit. (1883) 9 Cal 163 (166).

5. Appeal. — [1] Suit dismissed for default under O. 9 R. 2 — Dismissal is not decree and no appeal from it lies. (Vol 3) 1916 All 326 (326) : 38 All 357 & (1883) 9 Cal 627 (628).

6. Revision. — [1] Order by Court to pay both process fees and postal charges — O. 5 R. 10 as amended in the Punjab leaving option of service of summons by ordinary way or by registered post — Dismissal of suit for failure to pay postal charges — Order was held revisable. (Vol 14) 1927 Lah 157 (158).

[2] Payment of process fee by the date fixed but insufficient time to get summons served — Suit dismissed for non-service of summons — Order is revisable. (Vol 9) 1922 Lah 63 (63).

[3] Order under Rr. 2 and 8 when conditions are not satisfied is without jurisdiction — Revision lies. (Vol 6) 1919 Pat 372 (373).

[4] Dismissal of Small Cause suit under the rule — Revision lies under S. 25, Provincial Small Cause Courts Act. (Vol 19) 1932 Oudh 106 (107).

ORDER 9 RULE 3 — SYNOPSIS

1. Where neither party appears.

2. Appearance — See O. 9 R. 9 and O. 3, R. 1.

3. "When the suit is called on for hearing."

4. The Court may order that the suit be dismissed.

1. Where neither party appears. — [1] Dismissal under this rule is justified only when neither party appears. Where the plaintiff appears the suit cannot be dismissed. (Vol 5) 1918 All 333 (335) : 40 All 590. (One plaintiff present as the general attorney of all the other plaintiffs.)

[2] Authorised agent with witness present in Court — Dismissal for non-appearance of pleader is illegal. (Vol 9) 1922 Pat 504 (507).

[3] Fresh summons ordered by Court not issued due to plaintiff's failure to file copies of amended plaint — Non-appearance of parties on the day fixed — Case is governed by this rule. (Vol 21) 1934 Pat 18 (18, 19).

[4] Mere presence of pleaders without instructions when both the parties are absent is not an appearance and the suit can be dismissed under this rule. (1911) 9 Ind Cas 842 (844) (Cal) & (Vol 25) 1938 Cal 547 (548). (Plaintiff's pleader reporting no instructions — Defendant absent — Order of dismissal is one under this rule.)

[5] Plaintiff and some defendants absent while some defendants were present — Suit dismissed — Dismissal against absent defendants is under this rule. (Vol 7) 1920 Bom 54 (55) : 44 Bom 767.

2. Appearance — See Order 9 R. 9 and O. 3, R. 1.

3. "When the suit is called on for hearing."

— [1] The hearing referred to is the first hearing after the issue of summons to defendant and not necessarily a hearing of evidence. (Vol 6) 1919 Sind 189 (191) & (1869) 4 Mad H C R 56 (59) & (Vol 31) 1944 Nag 335 (336) : 1 L R (1944) Nag 408. (Suit stayed under S. 10 — Next date fixed for calling of suit is not date fixed

for hearing.) & (Vol 5) 1918 Pat 62 (62). (Date fixed for settlement of issues is date fixed for hearing.)

[2] Hearing of suit after settlement of issues — Absence of parties and pleaders — Suit should be dismissed under this rule unless the Judge for reasons recorded otherwise directs. (1910) 8 Mad L Tim 450 (450).

[3] Disposal of routine matters within the power of an officer of the Court is not hearing and default then cannot entail dismissal. (Vol 25) 1938 Rang 860 (362). (Date fixed for filing list of witnesses — Failure to appear on the date cannot entail dismissal.)

[4] Where the case was transferred from one Court to other but no notice of the transfer was given to the plaintiff and where the suit was dismissed for absence of parties, and the application by plaintiff under O. 9 R. 4 was dismissed, held the order was illegal and the case should be restored under O. 9 R. 4. (1936) 38 Pun L R 1118 (1118, 1119).

[5] If the parties have no notice that their case would be heard in camp, the case cannot be dismissed for default of appearance. (1913) 1913 Pun L R No. 165, p. 556 (556).

[6] Failure to turn upon the day fixed for the consideration of application for amendment of issues — The suit cannot be dismissed. (Vol 8) 1921 Pat 96 (97) : 6 Pat L Jour 33. (It can only dismiss the application for amendment.) & (Vol 21) 1934 Lah 237 (237, 238).

[See (Vol 14) 1927 Sind 228 (229). (Date fixed for hearing of application in the suit — Whole suit cannot be dismissed.)]

[7] A suit cannot be dismissed for default unless and until a date was fixed for the appearance of the defendant and the plaintiff did not appear on that date. (Vol 30) 1943 Pesh 51 (51) & (Vol 14) 1927 All 439 (440) : 49 All 592. (No date fixed for defendant's appearance — R. 3 does not apply.) & (Vol 22) 1935 Lah 656 (656) & (Vol 18) 1931 Lah 69 (70) & (Vol 8) 1921 Lah 320 (321) & (Vol 29) 1942 Pat 56 (57, 58). (Date fixed for plaintiff to prove service only.)

[8] Dismissal of suit for default on the day of judgment is improper. (Vol 14) 1927 Lah 888 (888).

[9] Day fixed for hearing preliminary issue — Parties absent — Suit cannot be dismissed though objection may be rejected. (Vol 16) 1929 Lah 830 (831) & (Vol 4) 1917 Mad 196 (197). (Failure to appear on day of re-hearing fixed because Court had no time.) & (Vol 1) 1914 Mad 381 (382). (Parties agreeing to accept decision according to decision in another suit — Failure of parties to appear on adjourned date — Suit should not be dismissed.)

[10] After the passing of a preliminary decree the suit should not be dismissed for default of appearance. (Vol 20) 1933 Oudh 229 (230) : 8 Lack 496. (Dismissal set aside under S. 151 after two and a half years.) & (Vol 14) 1927 All 439 (441) : 49 All 592. (Mortgage suit.) & (Vol 25) 1938 Pesh 27 (27). (Partition suit.)

[See also (Vol 21) 1934 Oudh 209 (210). (Application for final decree cannot be dismissed under this rule.)]

4. The Court may order that suit be dismissed.

— [1] The Court has discretion in the matter of dismissing a suit under this rule. (Vol 23) 1936 Pat 437 (438). (On facts it was held discretion was exercised with material irregularity.) & (Vol 20) 1933 Nag 234 (236) : 29 Nag L R 326. (Failure of parties to turn up on date posted for defendant's evidence without sufficient cause — Court should proceed under this rule.)

[2] The case cannot be struck off under this rule but can only be dismissed. (1887) 10 Mad 270 (271).

4. Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

[1882—S. 99; 1877—Ss. 98, 99; 1859—S. 110.]

Provincial Amendment

BOMBAY

Rule 4 shall be numbered Rule 4 (1) and the following sub-rule (2) shall be added to it, namely :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

[21-12-1927.]

O. 9 R. 3 (contd.)

[3] Suit struck off at the request of parties on the ground that it was settled out of Court—Dismissal is not under this rule. (Vol 4) 1917 Mad 495 (496).

[4] Case adjourned to await result of appeal — Date fixed for hearing — Parties absent on the date — Order of dismissal is one coming under this section—Order can be set aside only under R. 4 and not by review. (1909) 1909 Pun Re No. 33, page 96.

ORDER 9 RULE 4—SYNOPSIS

1. Scope.
2. "Sufficient cause".
3. Applicability of rule to miscellaneous proceedings.
4. Notice to defendant.
5. Appeal.
6. Limitation.

1. Scope. — [1] The two remedies prescribed by O. 9 R. 4 are not mutually exclusive. When a suit is dismissed under O. 9, R. 2 or R. 3 a fresh suit may be brought even though no application for restoration has been made under O. 9, R. 4 or even after an application under that rule has been dismissed. (Vol 24) 1937 Oudh 262 (262) : 13 Luck 108 * (Vol 16) 1929 All 131 (131) : 50 All 837. (Application to restore suit, dismissed — Fresh suit can still be brought.) * (Vol 13) 1926 All 678 (678) * (1878-80) 2 All 318 (320). (Suit dismissed not on merits but on default to pay process—Fresh suit not barred.) * (Vol 6) 1919 Cal 108 (108) * (1883) 9 Cal 163 (166). (Order passed under O. 9, R. 2 or R. 3 not on merits is no bar.) * (Vol 24) 1937 Oudh 262 (262, 263) : 13 Luck 108. (Application under S. 4, U. P. Encumbered Estates Act, dismissed for default—Application for restoration also dismissed for default—Applicant held not barred from making second application under Encumbered Estates Act.) * (Vol 4) 1917 Oudh 62 (63) : 20 Oudh Cas 66 * (Vol 21) 1934 Pesh 13 (13). (Suit dismissed — Application to restore again dismissed for default — Second application to restore is competent.) * (Vol 12) 1925 Nag 31 (31) (Do.) * (Vol 24) 1937 Pat 9 (11) : 15 Pat 716 (Do.).

[But see (Vol 15) 1928 Nag 220 (221). (Plaintiff dying pending suit — Suit dismissed as parties were absent—Fresh suit by successor of plaintiff on the same cause of action is barred.)]

[2] Shebait is only the representative of the idol, the idol is the real plaintiff. Hence a new shebait can apply for restoration of a suit under O. 9, R. 4, which has been filed by other persons as shebait. (Vol 25) 1938 Cal 547 (548).

[3] Restoration of entire suit after dismissal for default and on application of one or more of several plaintiffs is not improper. (Vol 17) 1930 All 168 (169).

[4] Where a suit is re-admitted after dismissal for default, it is deemed as filed on the date of the presenta-

tion of plaint and not the date of re-admission. (1909) 1909 Pun Re No. 31, p. 91.

[5] Restoration to file of suit dismissed for default — All interlocutory matters whether pending in trial Court or appellate Court are also restored unless order of restoration expressly mentions anything against this view. (Vol 21) 1934 Mad 49 (51) : 57 Mad 308.

[6] The Court when setting aside the dismissal order has no jurisdiction to pass an order as to costs at the same time under this rule. (1902) 26 Bom 201 (202).

[7] The Court which can under R. 4 set aside an order dismissing a suit for default is the Court which passed the order of dismissal and where the dismissal is set aside by a Judge having no jurisdiction, all subsequent proceedings in the suit are *ultra vires* and the decree must consequently be set aside. (Vol 7) 1920 Lah 418 (419).

[8] Under O. 9 *status quo ante* is only restored. (Vol 11) 1924 Cal 814 (815).

2. "Sufficient cause". — [1] If sufficient cause is shown Court must restore case to file. (Vol 20) 1933 Nag 39 (40) : 28 Nag L R 295 * (Vol 5) 1918 All 176 (176). (Dismissal for default for second time is no ground to refuse restoration.) * (1903) 26 Mad 599 (603). (When sufficient cause is shown the Court has no discretion in the matter.)

[2] In the following cases there was held to be "sufficient cause": (Vol 3) 1916 All 326 (327). (Date of hearing of appeal postponed—Order not communicated to any of the parties—Appeal dismissed for default—Held there was a sufficient cause for restoration.) * (1867) 3 Bom H C R 60 (62). ('Bona fide' mistake on plaintiff's part, mistake not being unreasonable.) * (Vol 22) 1935 Lah 163 (163). (Pleadings or parties not getting information of Appellate Court's order to appear before lower Court on certain date is sufficient cause for parties' absence on such date.) * (Vol 21) 1934 Lah 34 (34). (Plaintiff ill—Counsel late only by few minutes—Fresh suit barred—Case was restored.) * (Vol 19) 1932 Lah 176 (176). (Mistake as to date of hearing due to misunderstanding.) * (Vol 17) 1930 Lah 70 (70, 71). (Plaintiff's absence on adjourned date unintentional—Plaintiff applying to restore on same date.) * (Vol 16) 1929 Lah 882 (882). (Plaintiff absent being in jail — Mukhtyar through *bona fide* mistake not appearing in right Court — But applying for restoration as soon as mistake came to his notice.) * (Vol 14) 1927 Lah 911 (912). (Plaintiff stating on oath that process fee was paid but apparently mislaid in Court.) * (Vol 13) 1926 Lah 634 (634). (The plaintiff came from a long distance to attend the Court but not having found the name of his case in the cause list went to another Court thinking that his case might be before another Court, and not finding it either there returned to the first Court and found that his case had been dismissed under O. 9, R. 3 — Case held should be res-

5. ^a[(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved,¹ the plaintiff fails, for a period of three months² from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make

an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that —

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

[1882—S. 99A.]

[a] Substituted by the Code of Civil Procedure (Amendment) Act, 1920 (24 [XXIV] of 1920), Section 2, for the original sub-rule (1).

O. 9 R. 4 (contd.)

tored. (Vol 2) 1915 Lah 476 (477). (Date fixed happening to be holiday — *Ex parte* decree on next date is improper — Fresh notice must be given and absence without it is justifiable.) (1926) 27 Pun L R 264 (264). (Even in cases of extreme carelessness suit can be restored — But if respondent objects it would be done so by awarding very heavy costs.) (Vol 21) 1934 Mad 616 (617) (Vol 18) 1931 Pat 87 (88). (Plaintiff prevented from attending Court for some unavoidable reason, e.g., picketing by volunteers of Gandhiji.)

[3] The application for restoration need not be accompanied by an affidavit. (1901) 8 Bom L R 180 (181).

[4] An appeal was filed against an order dismissing an execution application for default on the ground that the appellant had gone to call his pleader and learnt on his return that the application was dismissed. No affidavit from the pleader was filed: Held that in the absence of an affidavit from the pleader the appeal must be dismissed. It was the duty of the appellant to file an application in the lower Court either soon after the *ex parte* order under appeal was passed against him, or on the following day to set aside the order. (1918) 19 Pun L R No 64, p. 236 (237).

[5] The dismissal of suits without considering whether payment of costs will not meet situation so far as the opposite side, if any, is concerned must be deprecated. The Court itself should be anxious to see that litigants obtain justice without being hampered by rules of procedure, unless such are imperative or there is contumacious obstruction or deliberate delay with a view deliberately to lengthen proceedings. (Vol 26) 1939 Lah 592 (592).

[6] If the claim in the suit dismissed in the absence of both parties is a substantial one and would be barred by limitation, it is a case where the Judge ought to use his inherent power and restore the suit despite the absence of sufficient cause for plaintiff's non-appearance. (Vol 11) 1924 Pat 274 (275).

[7] Inherent power to set aside dismissal of suit cannot be used where a party allows his remedy to be time-barred with his eyes open. (Vol 11) 1924 Rang 274 (275).

3. Applicability of rule to miscellaneous proceedings.—[1] Application for adjudication dismissed for default—Application for restoration dismissed without its merits being gone into — Second application for restoration within limitation can be entertained. (Vol 20) 1933 Nag 39 (40) : 28 Nag L R 295 (Vol 15) 1928 Pat 116 (117).

[2] Application for amendment of decree dismissed for default — Subsequent application is not barred. (Vol 20) 1933 Pat 208 (208) : 12 Pat 179.

[3] Dismissal of application for making final decree does not bar subsequent application. (Vol 20) 1933 Mad 55 (56) : 56 Mad 310.

4. Notice to defendant. — [1] Application under — Notice to defendant is not necessary. (Vol 10) 1923 Oudh 55 (55) : 24 Oudh Cas 347 (1912) 10 All L Jour 399 (400). (The rule applies also to appellate Court.)

[2] Suit dismissed under R. 3—Plaintiff applying to restore suit — Suit restored and date fixed for hearing — Notice must as of right be issued to defendant of this date. (Vol 20) 1933 All 522 (522) : 55 All 684 (Vol 32) 1945 Nag 185 (185) : 1 L R (1945) Nag 312.

5. Appeal.—[1] An order under O. 9, R. 4, is not appealable. (Vol 4) 1917 Pat 593 (593) (Vol 5) 1918 All 176 (177). (Appeal cannot be indirectly allowed by treating appeal as revision.) (Vol 6) 1919 Cal 125 (125) (Vol 5) 1918 Cal 164 (164) (1887) 10 Mad 270 (271). (Order restoring suit—No appeal lies.) (1911) 9 Ind Cas 238 (238) (Lah).

6. Limitation. — [1] Suit dismissed under O. 9, R. 2—If fresh suit under R. 4 is brought, S. 14, Limitation Act, would not be applicable. (Vol 16) 1929 Nag 219 (221) : 25 Nag L R 99.

[2] Time to file application under R. 4 cannot be extended under S. 5, Limitation Act. (Vol 16) 1929 All 127 (128) : 51 All 487 (Vol 15) 1928 Mad 556 (557).

ORDER 9, RULE 5 — SYNOPSIS

1. "Returned unserved."
2. "Period of three months."
3. Fresh summons when granted.
4. Failure to take fresh summons does not discharge defendant from liability.
5. Applicability of rule to appeals.

1. "Returned unserved." — [1] Order 9, R. 5 applies only when summons had been returned as unserved. (1941) 22 Pat L Tim 950 (951).

[2] Rule 5 does not apply where plaintiff fails to appear—Non-service on opposite party is no ground for setting aside order of dismissal for default. (Vol 13) 1926 Cal 112 (112).

[3] Court cannot dismiss suit simply because summonses are not served—It should proceed under O. 9, R. 5. (Vol 18) 1931 Bom 533 (535) (Vol 18) 1931 Pat 420 (421).

[4] Where a date was fixed not for the defendant to appear but for the plaintiff to prove service and the plaintiff fails to appear on that date, *held*, dismissal of

Procedure when only plaintiff appears.

When summons duly served.

When summons not duly served.

6. (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then —
- (a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;
- (b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;
- (c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

[1882—S. 100; 1877—Ss. 100, 101; 1859—Ss. 111, 112, 118.]

O. 9 R. 5 (*contd.*)

suit under O. 9, R. 3, is illegal — Proper course is to issue fresh summons. (Vol 29) 1942 Pat 56 (58).

[5] Fresh summons ordered to be issued along with amended plaint—Summons not issued on account of failure of plaintiff to file copies of amended plaint—Non-appearance of parties on day fixed—Case is governed by O. 9, R. 3 and not by O. 9, R. 5. (Vol 21) 1934 Pat 18 (19).

2. "Period of three months." — [1] Summons issued to defendant returned unserved—Dismissal of suit before expiry of three months is premature and irregular. (Vol 20) 1933 Pat 557 (558).

[2] Order 9, R. 5 is only an enabling provision created for a special purpose only and the Court can dismiss a suit for default within the period. (1910) 5 Ind Cas 537 (538) (Cal).

[3] Mere fact that Court can dispense with notice and can direct that final decree be passed does not invalidate order to issue notice and to dismiss application for final decree on default of decree-holders—Court should conform with O. 9, R. 5 if it issues notice — By force of S. 141, provisions of O. 17 and O. 9 apply to application for final decree under O. 34, R. 5. (Vol 13) 1931 Mad 795 (796, 797).

[4] Inherent power can be exercised only when powers expressly conferred are exhausted. (Vol 20) 1933 Pat 582 (583).

3. Fresh summons when granted. — [1] Plaintiff must apply for fresh summons within the period prescribed by this rule. (Vol 3) 1916 Cal 507 (509). * (1901) 3 Bom L R 402 (404). (He should also satisfy that he used diligence.)

[2] An order staying proceedings under O. 9, R. 5, Civil P. C. is illegal where the report on the summons which was attempted to be served is that the defendant is absconding. Proper course is to order substituted service. (1936) 38 Pun L R No. 197 (197).

[3] Summons returned unserved as defendant could not be found—Case consigned to record room as defendants' correct address was not furnished by plaintiff—Application for fresh summons within 3 months — Order 9, R. 5 and not O. 9, R. 2 applies. (Vol 18) 1931 Lah 655 (655).

4. Failure to take fresh summons does not discharge defendant from liability. — [1] When the records of suit were placed in the record-room, on account of a non-service of summons to one of the defendants, a subsequent suit against the same defendants on the same cause of action could not be filed as the previous suit must be held to be still pending. (Vol 4) 1917 Lah 211 (211).

[2] Contract Act (1872), Ss. 134 and 137 — Suit

against principal debtor and surety—Omission to pursue suit against former—Surety is not discharged by dismissal of suit under O. 9, R. 5. (Vol 1) 1914 Bom 242 (242); 39 Bom 52.

[But see (Vol 5) 1918 Upp Bur 1 (2); 3 Upp Bur Rul 62.]

5. Applicability of rule to appeals.—[1] Order 9, R. 5 does not apply to appeals but only to suits. Order 41 contains specific rules covering corresponding cases that arise in appeal. (Vol 14) 1927 Bom 68 (70); 50 Bom 815.

ORDER 9, RULE 6 — SYNOPSIS

1. Applicability and scope.

2. *Ex parte* decree.

1. Applicability and scope.—[1] Order 9, R. 6 contemplates a hearing of the suit on the day fixed in the summons for the defendants' appearance whereas O. 17, R. 2 contemplates hearing of the suit on some later date to which hearing may be adjourned, but in either case, the procedure contemplated is the same. (Vol 9) 1922 Pat 435 (437, 438); 1 Pat 188* (1885) 7 All 538 (541)* (Vol 14) 1927 Mad 799 (800)* (Vol 32) 1945 Sind 98 (102); 1 L R (1945) Kar 1.

[2] If the defendant had already appeared in answer to summons but fails to appear at the adjourned hearing the case falls under O. 17, R. 2. (Vol 1) 1914 Cal 360 (361); 41 Cal 956* (1880) 2 All 67 (71); 5 Ind App 283 (P C).

2. *Ex parte* decree. — [1] "Proceed *ex parte*" means "proceed to take and determine evidence in defendant's absence." (Vol 4) 1917 Cal 269 (274); 43 Cal 1001 (F B)* (Vol 29) 1942 Bom 344 (344).

[2] Rule does not apply where plaintiff is absent. (Vol 11) 1924 Cal 806 (807, 808).

[3] Even where a suit is *ex parte* plaintiff has to prove his case before he can obtain a decree. (Vol 16) 1929 All 612 (613)* (Vol 4) 1917 All 475 (476); 39 All 143. (Absence of defendant on adjourned hearing.)* (Vol 4) 1917 Cal 269 (273); 43 Cal 1001. (Except in suits on negotiable instruments governed by O. 37, R. 2.)* (1937) 1937 Oudh W N 620 (621)* (Vol 13) 1926 Oudh 192 (193).

[4] Defendant *ex parte* — Matters to be proved by evidence—Court must state that definitely, preferably in form of issues. (Vol 15) 1928 Nag 165 (166).

[5] Decree, merely because it is *ex parte*, cannot be passed on unreliable evidence. (Vol 4) 1917 Oudh 194 (196).

[6] Service by registered post — Defendant acknowledging such service — *Ex parte* proceedings should not be taken. (Vol 13) 1926 Lah 579 (580).

7. Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

[1882—S. 101; 1877—Ss. 100, 101; 1859—S. 111.]

8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing³ the Court shall make an order that the suit be dismissed,⁵ unless the defendant admits⁶ the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

[1882—S. 102; 1877—Ss. 102, 103; 1859—S. 114.]

O. 9 R. 6 (contd.)

[7] *Ex parte* decree without notice of date of disposal is invalid. (Vol 4) 1917 All 125 (126).

[8] The plaintiff is not entitled to have the suit declared *ex parte* before it is proved that the summons was duly served. (1901) 23 All 99 (101).

[9] Party present should not be declared *ex parte*. The omission to make provision in O. 9, R. 13 regarding the non-filing of a written statement is a clear indication that the declaration of *ex parte* can be made only for non-appearance of defendant. (Vol 5) 1918 Mad 1183 (1164, 1165).

[10] If defendant absents himself on date fixed for arguments on preliminary issue, *ex parte* decree cannot be passed. (Vol 11) 1924 Lah 224 (225).

[11] Claim alleged to be within time by part payment endorsed on bond — One defendant *ex parte* — Other contesting — Only 4 out of 8 witnesses allowed to be examined and account books not admitted — Whole evidence should have been allowed — Suit should have been decreed against absent defendant. (Vol 6) 1919 Cal 217 (218).

[12] A decree passed against a defendant, summons to whom has been returned unserved, is in no sense an "*ex parte*" decree and it is liable to be set aside. The effect of an order discharging a decree on the ground that it was passed without service of summons on a defendant is that the entire decree is discharged, and the suit is revived for retrial. (Vol 3) 1916 Cal 507 (509).

Order 9, Rule 7—Note 1.

[1] Until a suit is actually called on a party is entitled to appear and defend. (Vol 9) 1922 Bom 345 (345).

[2] Court has discretion to set aside order declaring proceedings *ex parte* against defendant — Court should however interpret rule liberally (Vol 18) 1931 Oudh 159 (160).

[3] "Defendant" includes plural—Court can proceed *ex parte* against absent defendants. (Vol 32) 1945 Sind 98 (104) : I L R (1945) Kar 1.

[4] Rule applies only to setting aside proceedings which have taken place during party's absence, but does not debar party from resuming appearance afterwards. (Vol 12) 1925 Mad 1274 (1275)* (Vol 31) 1944 Nag 77 (78) : I L R (1944) Nag 442* (Vol 18) 1931 Nag 122 (123) : 27 Nag L R 50. (Rule 7 does not debar party from appearing when case is still *subjudice*.)

[5] *Ex parte* order — A party against whom an *ex parte* order has been made and who desires to take part in the proceedings from the stage he appears, need not have the *ex parte* order passed against him set aside. (Vol 15) 1928 Mad 211 (212)* (Vol 9) 1922 All 33 (34)* (Vol 13) 1926 Sind 181 (183, 184).

[6] Defaulting defendant cannot as of right by appearing at any time before judgment intervene in *ex parte* proceedings — He must show good cause. (Vol 16) 1929 Sind 46 (46, 48) * (Vol 10) 1923 Oudh 177 (178) :

26 Oudh Cas 10 * (Vol 32) 1945 Sind 98 (99) : I L R (1945) Kar 1.

[7] Party filing a statement and absenting himself—He is not debarred from coming in at the stage at which the suit is. (Vol 14) 1927 Mad 1197 (1197) : 51 Mad 597.

[8] Civil Procedure Code does not in terms provide for application to set aside order declaring defendant *ex parte*. All that O. 9, R. 7 provides is that where the *ex parte* hearing of a suit has been adjourned, the defendant may at any time before the disposal of the suit appear and if he assigns good cause for his previous non-appearance he may be heard in answer to the suit, as if he had appeared on the day fixed for his appearance. It is only when a decree has been passed that an application to set aside that decree is contemplated in R. 13. (Vol 26) 1939 Mad 385 (385).

[9] Though the rule gives a discretion to the Court to impose conditions, failure to do so is not an improper or irregular exercise of discretion such as to justify interference in revision. (Vol 7) 1920 Mad 213 (214, 215).

[10] *Ex parte* defendant appearing and not asking for re-hearing of prior proceedings — Court has no jurisdiction to order costs against him. (Vol 18) 1931 Lah 616 (616).

[11] Refusal to set aside *ex parte* order can be challenged in appeal from the decree. (Vol 12) 1925 Oudh 645 (647) : 26 Oudh Cas 85.

ORDER 9, RULE 8 — SYNOPSIS.

1. Scope of the rule.
2. Appearance.
3. When the suit is called on for hearing.
4. More defendants than one.
5. "Shall make an order that the suit be dismissed."
6. Unless the defendant admits.
7. Effect of dismissal under O. 9, R. 8.
8. Review and revision.

1. Scope of the rule. — [1] Plaintiff adjudicated insolvent before hearing — Plaintiff absent at the hearing — Official Assignee not served — Dismissal of suit under O. 9, R. 8 is improper. (Vol 14) 1927 Cal 76 (77, 78) : 53 Cal 844. (Dismissal can be set aside in appeal—Provision of O. 22, R. 8, should be applied.)

[2] Order of dismissal of suit for default under this rule when plaintiff dies is improper and nullity as the rules applicable to defaulters cannot be applied to dead persons. (1913) 35 All 331 (335, 336) : 40 Ind App 150 (P.C) * (Vol 22) 1935 Nag 189 (190) : 31 Nag L R 374. (Legal representative need not file formal application under O. 9, R. 9 — Application by him to bring him on record falls under O. 22, R. 3.) * (Vol 17) 1930 Oudh 3 (5) : 5 Luck 241. (Plaintiff dying in course of suit — Portion of claim admitted — Order should be passed under O. 22, R. 3 and not under O. 9, R. 9.) * (Vol 11) 1924 Oudh 114 (114).

O. 9 R. 8 (*contd.*)

2. Appearance. — [1] Word "appear" in O. 9, R. 8 means appearing in suit — Party present in precincts of Court or in court room, but not taking part in suit cannot be said to have "appeared." (Vol 19) 1932 Cal 419 (419) : 59 Cal 756.

[2] Suit called — Plaintiff's pleader engaged elsewhere — Court asking plaintiff to engage another pleader or proceed himself — Plaintiff doing neither — Suit dismissed—Application for restoration is one under O. 9, R. 9. (Vol 19) 1932 Cal 425 (427) : 59 Cal 906 * (Vol 5) 1918 Pat 351 (351, 352) : 3 Pat L Jour 355.

[3] Where the clerk of the pleader is present in the Court when the case is called but the suit is dismissed before the clerk fetches the pleader from the Bar-room where he is at the time, dismissal is unjustifiable. (Vol 11) 1924 Oudh 405 (406).

[4] Pleader's telling Court that he has no instructions tantamounts to default of appearance by the party. (Vol 23) 1936 Lah 1000 (1001) * (1900) 22 All 66 (76) (F B) * (Vol 5) 1918 Pat 256 (257) : 3 Pat L Jour 481.

[See also (Vol 25) 1938 Cal 74 (75) : 1 L R (1938) 1 Cal 218. (Plaintiff when can be held to have not appeared stated.)]

[5] Application for adjournment rejected and suit dismissed on party's pleader stating that he had no further instructions — Dismissal is under R. 8 and so application under R. 9, is competent. (Vol 13) 1926 Cal 246 (246) * (Vol 9) 1922 All 68 (68, 69) * (1899) 23 Bom 414 (427). (Suit can be treated *ex parte*.) * (1907) 34 Cal 403 (415) (F B) * (1910) 5 Ind Cas 499 (499) (Cal) * (Vol 10) 1923 Pat 156 (157).

See also Notes on O. 3, R. 1.

[6] Dismissal of suit for default — Order mentioning that plaintiff was present but that he subsequently went away — Order was held improper. (Vol 8) 1921 Lah 139 (140).

3. When the suit is called on for hearing. — [1] O. 9, R. 8 applies only when suit is called on for hearing and not when no date is fixed for next hearing. (Vol 22) 1935 Pesh 186 (188) * (Vol 16) 1929 Lah 374 (375).

[2] The reader of a Court when the presiding Judge is on leave is not competent to pass any order, e. g., giving a further date, which can be held to be binding on the parties and the fact that such order is signed by another Judge who is not seized of the case makes no difference. If the plaintiff fails to appear on such a date, the proper procedure for the Court is to fix a fresh date for his appearance. (1932) 33 Pun L R 804 (804).

[3] The hearing of suit means the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to determination of suit which would enable him finally to come to an adjudication upon it. (Vol 23) 1936 Lah 280 (281) * (Vol 6) 1919 Sind 89 (91) : 13 Sind L R 149. ('Hearing' is not necessarily equivalent to hearing of evidence.)

[4] Date fixed for filing list of witnesses is not date fixed for hearing. (Vol 25) 1938 Rang 360 (362).

[5] The date fixed for the settlement of issues is a date fixed for the hearing. (Vol 5) 1918 Pat 62 (62) * (Vol 9) 1922 Mad 416 (416) * (Vol 12) 1925 Oudh 682 (682).

[6] Failure to amend plaint and to pay costs of adjournment does not justify dismissal of suit (Vol 13) 1926 Lah 571 (571) * (Vol 24) 1937 Lah 118 (118, 119) (Date fixed for payment of adjournment costs—Party ill and his pleader though present in case failing to hear case being called — Suit dismissed for default—Restoration of suit should be granted)

[7] Where suit was adjourned for appointment of guardian (and not for disposal of suit) it cannot be dis-

missed on ground of plaintiff's absence. (Vol 11) 1924 Pat 714 (715) * (Vol 9) 1922 Pat 252 (254, 255) : 6 Pat L Jour 650.

[8] When the plaintiff absented himself owing to the arbitrator's application to the Court for an extension of time for filing the award and the Court dismissed the suit for default. *Held*, that the dismissal was harsh. (1910) 8 Ind Cas 224 (224) : 1910 Pun L R No. 29.

[9] A Court is not competent to dismiss for default a suit in which a Commissioner is appointed and has not made his report, as such suit cannot be heard until the Commissioner has finished work. (Vol 7) 1920 Cal 204 (205). (No appeal lies against such order of dismissal but the High Court can set it aside in revision.) * (Vol 23) 1936 Lah 280 (281). (Date for report of commissioner as to market value for purposes of court-fees is not 'date for hearing'.) * (Vol 21) 1934 Lah 56 (57).

[10] Order 17, R. 2 only gives a judicial discretion to the Court to dismiss the suit under O. 9, on default of plaintiff to appear; hence a Court will not be justified in dismissing when plaintiff has *prima facie* proved his case. (Vol 3) 1916 Mad 897 (897).

[11] A part-heard case was adjourned for further hearing and on the date fixed plaintiff being absent the suit was dismissed simply for the reason that the plaintiff did not appear. *Held* that as the case was part heard and there was reason to suppose that the plaintiff had not abandoned his claim, the Judge was not right in proceeding under Ch. VII. He should have adjudicated on the materials on the record and proceeded to hear the defendant, if necessary. (1909) 3 Ind Cas 683 (683, 684) : 5 Low Bur Rul 75.

[12] Plaintiff sued for the amount which he had paid to release certain property from wrongful attachment and secondly for damages on the ground of the illegality of the attachment. The trial Judge held that the plaintiff's first claim was unsustainable in law, and dismissed it with costs, directing that "the case will proceed on the question of damages for illegal attachment." The trial Judge refused the plaintiff's application, that a decree might be drawn up embodying the dismissal of his claim for the money paid. The claim for damages proceeded, and the trial Judge dismissed the whole case for default under this rule. *Held* that the case should go back to the Appellate Court to be heard upon the merits. (1910) 37 Cal 426 (437) : 37 Ind App 80 (P C).

[13] After decree there can be no dismissal of suit except on appeal, if any. (Vol 11) 1924 P C 198 (200) : 51 Ind App 321 : 4 Pat 61 (P C).

[14] Rules 8 and 9 do not apply to proceedings after preliminary decree and before final decree. (Vol 14) 1927 Oudh 49 (50) * (Vol 12) 1925 Pat 433 (434). (Dismissal after preliminary decree is revisable) * (Vol 20) 1933 Sind 200 (201, 202) : 28 Sind L R 167.

[See also (Vol 15) 1928 Mad 963 (964). (Dismissal of suit after preliminary decree — Plaintiff applying for restoration four years after dismissal — Restoration refused — Application to appoint Commissioner in pursuance of preliminary decree also refused — Refusal is proper.)]

[15] Court should proceed under O. 9, R. 8 and not under O. 17, R. 3 when before the hearing of a suit has commenced the plaintiff fails to appear on an adjourned date. (Vol 10) 1923 Bom 27 (28, 29) : 46 Bom 1026.

[16] Plaintiffs deliberately absent and courting dismissal rather than begin leading evidence before the written statement in another connected suit had been filed — *Held* that the plaintiffs did not show sufficient cause for their failure to enter an appearance. (Vol 10) 1923 All 153 (159).

O. 9 R. 8 (contd.)

[17] Where the parties had no proper notice that the case would be heard in camp and not at head-quarters, and suit was dismissed for default of appearance it was held that order of dismissal was wrong and must be set aside. (1913) 1913 Pun L R No. 165 p. 556 (556).

[18] Transferee Court issuing notice to plaintiff and his counsel to appear on certain day — Notice on plaintiff not served — Notice on counsel served but he refused to accept notice — Trial Court holding service on counsel good and dismissing suit — Procedure held to be unfair. (Vol 21) 1934 Lah 91 (91).

[19] Parties not informed by Court — Neither parties nor pleader present on date of hearing — Suit dismissed for default — Held on revision, Court's refraining from serving notice on parties of change of Court, and date fixed, is not justifiable — Case remanded. (Vol 23) 1936 Lah 560 (560, 561).

[20] Plaintiff not aware of date of hearing but not intending to prosecute suit — Dismissal of suit and refusal to restore suit are justified. (Vol 8) 1921 Mad 617 (618).

[21] Persistent absence of plaintiff cannot entail dismissal on merits — No order granting time to produce evidence or to perform any act — Though decree purports to be under O. 17, R. 3 it is really under O. 9, R. 8 and lower Appellate Court can hear appeal from an order refusing to restore suit. (1929) 27 All L Jour 391 (392).

[22] Legal practitioner's mistake about date — Court need not excuse default. (Vol 12) 1925 Oudh 682 (682).

[23] A suit or a petition should not be dismissed in the early part of the day owing to the temporary absence of the party or pleader and if the absence is explained, the suit or petition even if it had been dismissed, must be restored. (1911) 13 Ind Cas 468 (468) (Lah).

4. More defendants than one. — [1] The word "defendant" in R. 8 means the particular defendant with whose case the Court is dealing — Fresh suit against absentee defendants only is not barred. (Vol 13) 1926 All 169 (170) : 48 All 97 * (Vol 12) 1925 All 425 (426). (Suit against several defendants — One defendant only present — Plaintiff and other defendants absent — Suit dismissed for default — Plaintiff can bring fresh suit against absent defendants for whole amount if cause of action be joint and several.)

[2] Defendant applying for time, being not ready to proceed — Order dismissing suit is one under R. 8 and not under O. 9, R. 4. (Vol 15) 1928 Pat 335 (336) : 7 Pat 333.

5. "Shall make an order that the suit be dismissed." — [1] If on the date fixed for hearing, plaintiff is absent and defendant appears, the Court is bound under O. 9, R. 8 to dismiss the suit for default. It has no jurisdiction to record the defendant's statements and to decree the claim in part. (Vol 7) 1920 All 193 (193) * (Vol 2) 1915 All 139 (140) : 37 All 460.

[2] Where the Court dismisses a suit for default under this order, it cannot dismiss the suit and at the same time say that the order of dismissal will not prejudicially affect the interests of the minor. (Vol 8) 1921 Pat 103 (103) : 6 Pat L Jour 317.

[3] Where the plaintiff offers no evidence, the Court is bound to dismiss the suit for want of prosecution and the defendant is not entitled to let in evidence. But if the plaintiff has given evidence, the defendant is entitled to let in evidence though the Court did not believe the plaintiff's evidence. Thus, the defendant is entitled to, to avoid a remand. (1913) 40 Cal 119 (122).

6. Unless the defendant admits. — [1] For the purpose of O. 9, R. 8, it is the net amount for which defendant admits liability after deducting all payments

alleged by him which has to be taken into account. (Vol 13) 1926 All 284 (284).

[2] Words "admits the claim, or part thereof" apply to a case where, on examining the plaintiff and the defendant's admission in the written statement it can be considered that he there and then, agreed to pay the money or to submit to the relief claimed in the plaint. (Vol 4) 1917 Mad 732 (734, 735). ('Claim' means the claim as laid down in plaint.)

[3] "Claim" is not synonymous with amount sued for — Burden of proof on defendant — No admission of right sued for — Plaintiff is not entitled to decree in case under O. 9, R. 8. (Vol 4) 1917 Mad 732 (734).

[4] Suit on bond — Plaintiff absent — Defendant admitting part of claim — Dismissal of other part of claim held to amount to decree — Plea of defendant held to fall under O. 9, R. 8. (Vol 4) 1917 Mad 732 (734).

[5] Plaintiff present all along except on one date — Defendant admitting part of the claim — Case should not be dismissed for default. (Vol 12) 1925 Pat 712 (713) * (1909) 33 Bom 475 (477).

7. Effect of dismissal under O. 9, R. 8. — [1] Order under rule 8 does not operate as *res judicata* but bars suit on same cause of action (Vol 7) 1920 Mad 710 (710) * (Vol 3) 1916 Cal 791 (791, 792). (Bars fresh suit.) * (Vol 7) 1920 Nag 113 (114) (Does not operate as *res judicata*.) * (Vol 1) 1914 Nag 20 (21) : 10 Nag L R 39.

See also Notes on O. 9, R. 9.

[2] If the suit is dismissed as against some under O. 9, R. 8 and as against the rest under R. 8 of the same order, a subsequent suit on the same cause of action would be barred as against the former but not against the latter. (Vol 7) 1920 Bom 54 (55) : 44 Bom 767.

[3] Suit for injunction prohibiting defendant from removing fodder and for value of fodder removed — Application for permission to withdraw suit — Suit dismissed for default — Subsequent suit for recovery of money advanced as well as for damages for breach of contract held not barred. (Vol 7) 1920 Lah 41 (42).

[4] Party pleading bar of O. 9 must prove that prior dismissal was under R. 8. (Vol 12) 1925 Mad 986 (988).

8. Review and revision. — [1] Plaintiff absent — Dismissal — Remedy is either review or an application under R. 9 of O. 9 and revision. (Vol 10) 1923 Bom 395 (395).

[2] Dismissal of suit for default — Application for review is maintainable where no petition for restoration is filed. (Vol 6) 1919 Mad 844 (844) * (1899) 26 Cal 598 (602). (Non-applying under O. 9, R. 9, to have the suit dismissed for default being restored, is no bar to an application for review of judgment.)

[But see (Vol 12) 1925 Bom 521 (521, 522) : 44 Bom 839. (Remedy by review is not competent.) * (Vol 29) 1942 Cal 99 (104, 118) : 1 L R (1941) 2 Cal 477. (Whether review under O. 47, R. 1 lies, is doubtful.)]

[3] Application for restoration made and dismissed as time barred — Application for review subsequent to such dismissal cannot be entertained. (Vol 12) 1925 Lah 517 (518).

[4] Dismissal — No appeal lies — Question of jurisdiction involved — Appeal may be treated as revision petition. (Vol 12) 1925 Pat 374 (375) * (Vol 12) 1925 Oudh 485 (485) : 23 Oudh Cas 124.

[5] Suit dismissed — Trial Judge has discretion to wait for pleader to appear — High Court cannot interfere with the discretion. (Vol 8) 1921 Sind 50 (50) : 15 Sind L R 172.

[6] Dismissal of a suit owing to plaintiff's inability to produce evidence in support of his case does not amount to a dismissal under O. 9, R. 8 and the plaintiff can either appeal against that order or apply for a review. (Vol 4) 1917 Pat 688 (688).

9. (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. *Decree against plaintiff by default bars fresh suit.* But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1892—S. 103; 1877—Ss. 103, 108, 109, 588; 1859—S. 119; See O. 22 R. 9.]

Provincial Amendments.

BOMBAY

Add the following as sub-rule (3) :

"(3) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule." [21-12-1927.]

CALCUTTA

Re-number sub-rule (2) as sub-rule (3) and insert after the words "notice of the application" the words "with a copy thereof (or concise statements as the case may be)."

Insert the following as sub-rule (2) :

"The plaintiff shall, for service on the opposite parties, present along with his application under this rule either —

- (i) as many copies thereof on plaint paper as there are opposite parties, or,
- (ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

LAHORE

Add the following proviso to sub-rule (1) :

"Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default." [12-5-1909.]

N.-W.F.P.

Same proviso as that added by the Lahore High Court is added.

ORDER 9, RULE 9 — SYNOPSIS.

1. Scope.
2. Appearance.
3. Fresh suit barred.
4. Suit, meaning of.
5. Sufficient cause.
6. Restoration in favour of one of the plaintiffs — Effect.
7. Restoration under inherent powers of Court — See notes on S. 151.
8. Conditional order of restoration.
9. Appeal.
10. Revision.

1. Scope. — [1] Judgment given on merits — O. 9, R. 9 does not apply. (Vol 32) 1945 Oudh 177 (179) & (Vol 23) 1936 All 659 (660, 661). (Court dismissing suit in case where explanation to O. 17, R. 2 applies — It must be deemed to have decided suit on merits—Proper remedy is by way of appeal and not by application under O. 9, R. 9.)

[2] Order dismissing suit on an adjourned date "for default" or "for want of prosecution" is one under O. 17, R. 2, read with O. 9, R. 8 and can be restored under O. 9, R. 9. (Vol 24) 1937 Rang 437 (438).

[3] Order 9 does not apply where plaintiff has already appeared but has failed to appear at adjourned date. (Vol 22) 1935 All 210 (211).

[4] Plaintiff absent on adjourned hearing — Defendants present—Plaintiff's pleader applying for adjournment—Adjournment refused and suit dismissed—Order falls under R. 3 and not R. 2 of O. 17—Proper remedy is not an application under O. 9, R. 9. (Vol 20) 1933 All 41 (41).

[5] Application for postponement on ground of illness of plaintiff rejected—Suit dismissed — Application to set aside dismissal is to be disposed of under O. 9, R. 9

—Order 17, R. 3 is inapplicable. (Vol 5) 1913 Cal 330 (331).

[6] Suit dismissed for default restored against some defendants only — Other defendants exonerated by plaintiff — Court cannot *suo motu* restore suit against them. (Vol 9) 1922 Oudh 160 (160) : 25 Oudh Cas 67. & (Vol 12) 1925 Oudh 105 (106). (Restoration against some defendants on plaintiff's application—Restoration against others by Court after limitation is *ultra vires*.)

[7] Suit dismissed for default — Application for restoration can be presented by pleader without fresh appointment. (Vol 25) 1938 Nag 272 (272) : I L R (1939) Nag 157.

[8] If a suit is dismissed for default but is subsequently restored on plaintiffs' application the restoration relates back to the date of the application. (Vol 6) 1919 Cal 40 (42).

[9] Effect of restoration under R. 9 is to bring the suit back as regards parties, to the exact position in which it was when the suit was dismissed. (Vol 11) 1924 Cal 814 (815).

[See also (Vol 4) 1917 Lah 379 (380) : 1916 Pun Re No. 115.]

2. Appearance.—[1] The term "appearance" has nowhere been defined in the Code and it must be understood in reference to the particular subject-matter to which it relates. (1907) 34 Cal 403 (415, 417) (F B). (Application by counsel or pleader who is instructed to apply only for an adjournment, which is refused—It is not an "appearance.")

[2] Mere presence of party in Court is sufficient to constitute appearance within the Order. (Vol 11) 1924, Nag 26 (27).

[3] A party may appear in two ways, either by person or pleader. If he is not appearing in person, the mere fact that he is standing in Court does not amount

O. 9 R. 9 (contd.)

to an appearance. (Vol 5) 1918 Pat 351 (352) : 3 Pat L Jour 355* (Vol 32) 1945 Mad 300 (301). (If a vakil who is authorised to appear for the appellant is absent the Court is bound to treat the appeal as one in which appellant is absent and dismiss it for default.)

[4] Suit called—Plaintiff's pleader engaged elsewhere—Court asking plaintiff to engage another pleader or proceed himself—Plaintiff doing neither—Suit dismissed—Application for restoration is one under O. 9, R. 9. (Vol 19) 1932 Cal 425 (427) : 59 Cal 906.

[5] Plaintiff's petition for adjournment rejected—Plaintiff's pleader saying that he had no further instructions—Suit dismissed for default—Application for restoration of case under O. 9, R. 9 can be granted. (Vol 19) 1932 Cal 418 (418, 419) : 59 Cal 756* (Vol 25) 1938 Cal 74 (75) : I L R (1938) 1 Cal 213* (Vol 30) 1943 Mad 728 (728, 729)* (Vol 26) 1939 Mad 974 (975)* (Vol 12) 1925 Mad 21 (22) : 47 Mad 819 (F B)* (Vol 2) 1915 Mad 16 (17).

[6] To constitute "appearance" within O. 9 by a pleader, it must be shown that the pleader is duly instructed and able to answer all material questions relating to the suit. (Vol 15) 1928 Mad 831 (834)* (Vol 14) 1927 Rang 46 (47, 48) : 4 Rang 408. (Pleader present but only instructed to apply for an adjournment—There is no appearance within the Code.)

[7] Appearance by pleader—Dismissal in pleader's presence is not dismissal for default—Rule 9 does not apply. (Vol 5) 1918 Pat 259 (259)* (Vol 20) 1933 All 539 (539, 540). (Case fixed for certain date—Plaintiff found absent—His pleader present and willing to argue case—Suit dismissed for default—Held dismissal was incorrect.)

[8] Order of dismissal in presence of one of the plaintiffs is not an order of dismissal for default but amounts to a decree. (Vol 5) 1918 Pat 376 (377).

[9] One of several plaintiffs ordered to appear in person—Dismissal of suit for default held justified. (Vol 6) 1919 Pat 36 (37) : 4 Pat L Jour 152.

3. Fresh suit barred.—[1] Dismissal of suit for default does not operate as *res judicata* in favour of the defendant; but this rule bars a subsequent suit on the same cause of action. (1910) 11 Cal L Jour 61 (66)* (Vol 3) 1916 Cal 791 (791, 792)* (Vol 3) 1916 Lah 273 (273, 274) : 1916 Pun Re No. 66. (Objection under R. 58 summarily dismissed—Suit filed but dismissed for default—Fresh attachment does not give fresh cause of action.)* (Vol 26) 1939 Nag 145 (146). (Previous suits alleging forcible and wrongful possession of a certain land and praying for ejectment dismissed under O. 9, R. 8—Subsequent suit alleging forcible and illegal possession and praying for possession is barred being based on same cause of action which is not a continuing one.)* (Vol 16) 1929 Pat 685 (688) : 9 Pat 447. (Cause of action in previous suit included in subsequent suit—Material facts giving occasion to suits same—Subsequent suit is brought on same cause of action as previous suit.)

[2] Subsequent suit in respect of the same cause of action is barred under O. 9, R. 9 though a different relief is claimed. (Vol 15) 1928 Rang 73 (75) : 5 Rang 785. (Suit for administration dismissed—Subsequent suit for partition of same property barred.)* (Vol 13) 1926 Lah 562 (563).

[3] Suit by voluntary liquidator of company against a person for recovery of money said to be due by him to company by reason of being a share-holder dismissed for default—Application by official liquidator for placing the same person on list of contributories of company is barred by provisions of O. 9, R. 9. (Vol 7) 1920 Lah 43 (44) : 1 Lah 237.

[4] Causes of action different in previous and sub-

sequent suits—Dismissal of previous suit does not bar subsequent suit. (Vol 29) 1942 Cal 99 (104, 111, 112) : I L R (1941) 2 Cal 477* (Vol 10) 1923 All 409 (410) : 45 All 81* (Vol 2) 1915 All 395 (395). (Suit for profits dismissed in default—Subsequent suit for next three years including items for first three years recovered in years in suit—Claim not barred as cause of action is different.)* (1886) 10 Bom 28 (30)* (Vol 7) 1920 Cal 407 (408). (Prior suit by tenant for possession of portion of tenure—Subsequent claim for abatement of rent in rent suit on ground of dispossession.)* (Vol 4) 1917 Cal 11 (11). (Previous suit in Munsif's Court for declaration that rent decree and execution sale were fraudulent—Subsequent suit in Subordinate Judge's Court for recovery of possession of holding on same declaration.)* (Vol 7) 1920 Mad 710 (712). (Suit for declaration that alienation in favour of defendant was invalid—Subsequent suit for partition and separate possession.)* (Vol 17) 1930 Oudh 510 (519) : 6 Luck 106* (Vol 14) 1927 Pat 375 (376) : 7 Pat 28.

[5] Where there is even a slight discrepancy arising out of a single fact among many other facts common to the two causes of action, that single fact alone makes them different causes of action and the subsequent suit is not barred. (Vol 12) 1925 Nag 366 (368).

[6] Dismissal of suit for partition and separate enjoyment, for default—Subsequent suit for partition is not barred. (Vol 13) 1926 Mad 1018 (1018) : 49 Mad 939* (Vol 22) 1935 Mad 458 (459).

[7] Redemption suit dismissed for default—Second suit for redemption is not barred. (Vol 15) 1928 Bom 67 (68) : 52 Bom 111. (1888) 15 Cal 422, distinguished—Order 9, R. 9 does not override S. 60, T. P. Act.)

[8] A suit is not barred under this rule if the plaintiff in the subsequent suit was not a plaintiff in the previous suit. Order 9, R. 9 bars a fresh suit by the same plaintiff. (1910) 33 Mad 31 (32)* (Vol 29) 1942 Cal 99 (104) : I L R (1941) 2 Cal 477. (Previous suit by person not having power to do so—No bar to subsequent-suit.)* (Vol 20) 1933 Lah 365 (368) : 14 Lah 485.

[See also (Vol 16) 1929 All 861 (862). (Mortgagees fraudulently allowing suit to be dismissed for default—Attaching creditors are not bound by dismissal.)]

[9] Bar of suit by plaintiff under R. 9 operates only against defendants actually present. (Vol 1) 1914 Nag 20 (20) : 10 Nag L R 39.

[10] Dismissal of suit for non-payment of proper court-fee—Case comes under O. 7, R. 11—Fresh suit is not barred under O. 9, R. 9. (Vol 19) 1932 Pat 11 (12)* (Vol 22) 1935 Cal 764 (766). (Amendment of plaint allowed—Plaintiff directed to give value of property and put in deficit court-fee—Non-compliance with order—Suit dismissed for default on rejecting permission to withdraw under O. 23, R. 1—Proper order is rejection of plaint under O. 7, R. 11—Fresh suit is not barred by O. 9, R. 9 or O. 23, R. 1 or O. 2, R. 2.)

[11] Party pleading bar of O. 9 must prove that prior dismissal was under O. 9, R. 8. (Vol 12) 1925 Mad 986 (988).

4. Suit, meaning of.—[1] It has been held in the undermentioned cases that the rule applies only to suits and not to applications such as applications for probate. (Vol 13) 1926 Cal 1057 (1057) : 53 Cal 578* (1910) 12 Cal L Jour 185 (191). (Dismissal does not bar subsequent applications for probate of the same will.)* (Vol 22) 1935 Lah 145 (145). (Application under S. 292, Succession Act, dismissed for default—Fresh application can be entertained.)* (Vol 12) 1925 Mad 861 (869)* (Vol 30) 1943 Pat 281 (281) : 22 Pat 273. (Application for probate of will dismissed for default—Order 9, R. 9 does not apply—Second application is not barred.)

[2] A contrary view is taken in the undermentioned cases: (Vol 23) 1936 Lah 863 (864)* (Vol 23) 1936

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Lah 712 (718)* (Vol 6) 1919 Mad 112 (112). (Order 9, R. 9 is applicable to the dismissal of an application for probate which had under S. 83 of the Probate and Administration Act been treated as suit.)

[3] Application for permission to sue as pauper dismissed for default of appearance can be restored. (Vol 28) 1941 Oudh 367 (369). (Applicant present in Court on day of hearing but failing to appear as he did not hear case being called out and filing application for restoration on same day — Application held should be restored.)* (Vol 26) 1939 Mad 681 (681). (Order 9, R. 9 read along with S. 141 applies to pauper petitions.)* (Vol 20) 1933 Mad 5 (6).

[4] Application under S. 47, Civil P. C. stands on the footing of a suit — Provisions of O. 9, R. 9 are applicable to an order dismissing for default such an application. (Vol 24) 1937 Oudh 337 (338) : 13 Luck 309.

[5] Application for adjudication as insolvent dismissed for default — Rule 9 does not bar second application. (Vol 14) 1927 Mad 579 (580). (Section 10, Cl. (2), Provincial Insolvency Act implies that apart from annulment, a second petition lies.)

[6] Application under Bengal Tenancy Act, S. 158 is not a suit — Order 9, R. 9 does not apply. (Vol 10) 1923 Pat 381 (382, 384) : 2 Pat 192.

[7] Order 9, R. 9, Civil P. C., applies in terms only to suits and therefore is not applicable to petitions under S. 73, Madras Village Courts Act. Nor can S. 141, Civil P. C., be invoked to make O. 9, R. 9, applicable to those petitions. (Vol 32) 1945 Mad 107 (107, 108).

[8] Order 9, R. 9 has no application to civil revision petitions (Vol 32) 1945 Mad 103 (104).

[9] It has been held in the undermentioned decisions that where an application under O. 9, R. 9 is itself dismissed for default an application for restoration of such application lies. (Vol 12) 1925 All 773 (774, 775) : 47 All 878* (Vol 16) 1929 Lah 878 (879). (Application under O. 9, R. 9, dismissed — Second application for restoration, summarily dismissed without hearing applicant — Revision allowed.)* (Vol 10) 1923 Lah 302 (303). (Dismissal of an application against order dismissing an application under O. 9, R. 9 for default — Order is not appealable but revision lies.)* (Vol 7) 1920 Lah 804 (307) : 1 Lah 389. (An application for restoration of the previous application is maintainable under O. 9, R. 9 read with S. 141 of the Code.)* (Vol 13) 1926 Mad 654 (654)* (Vol 24) 1937 Oudh 344 (346, 347) : 13 Luck 246. (Application to restore such application lies under O. 9, R. 9 read with S. 141.)* (Vol 10) 1923 Oudh 146 (146)* (Vol 13) 1926 Rang 74 (75) : 3 Rang 534.

[See also (Vol 20) 1933 Rang 406 (407). (Dismissal of application under O. 9, R. 9 for default — Court has inherent power to deal with application for setting aside order of dismissal.)]

[10] A contrary view has been taken in the undermentioned cases. (Vol 10) 1923 Bom 386 (386)* (Vol 16) 1929 Cal 17 (18)* (Vol 9) 1922 Pat 121 (121) : 4 Pat L Jour 287.

[11] It has been held in the undermentioned cases that R. 9 does not apply to set aside dismissal of application under R. 9 — But second application may be treated as application to restore suit itself. (Vol 14) 1927 Cal 534 (535, 536) : 54 Cal 405. (If not in time, S. 151 may be invoked.)* (Vol 4) 1917 Cal 548 (548) : 44 Cal 950.

[12] Proceedings spoken of in S. 141 include original matters in the nature of suits such as proceedings for probate, guardianship, etc., and do not include executions. (1895) 17 All 106 (111) : 22 Ind App 44 (PC).

[13] Rule 9 does not apply to proceedings in execution. (Vol 14) 1927 Cal 938 (939)* (Vol 10) 1923

All 544 (544)* (Vol 10) 1928 All 460 (460) : 45 All 148* (Vol 4) 1917 Cal 31 (32, 33, 34)* (Vol 14) 1927 Mad 355 (355)* (Vol 13) 1926 Mad 980 (981) : 50 Mad 67* (Vol 12) 1925 Mad 12 (14) : 47 Mad 813 (FB)* (Vol 10) 1923 Nag 18 (19)* (Vol 5) 1918 Pat 67 (68) : 4 Pat L Jour 330* (Vol 1) 1914 Sind 61 (62) : 8 Sind L R 327.

[See also (Vol 6) 1919 Nag 91 (93). (A Collector has no jurisdiction to restore an execution case to his file after it was dismissed by him in default of the decree-holder.)]

[But see (1912) 1912 Pun L R No. 82, p. 257 (257)* (Vol 31) 1944 Mad 293 (295) : I L R (1944) Mad 857.]

[14] Order 9, R. 9, does not apply to an application under O. 21, R. 2. (Vol 7) 1920 Cal 914 (914, 915)* (Vol 18) 1931 Lah 505 (505, 506). (Application under O. 21, R. 2, dismissed for default — Order refusing to set aside dismissal cannot be appealed from but if O. 9, R. 9, does not apply fresh application on same subject lies.)

[15] Rule 9 does not apply to application under O. 21, R. 89, Civil P. C. (Vol 13) 1926 Bom 377 (378) : 50 Bom 457.

[16] Order 9, R. 9, does not apply to proceedings under O. 21, R. 90. (Vol 6) 1919 Pat 192 (193) : 4 Pat L Jour 135 (F B)* (Vol 15) 1928 All 301 (301). (Dismissal of application under O. 21, R. 90 in default — Party appearing on the same day and applying for restoration — Court can set aside the dismissal under its inherent powers.)* (Vol 6) 1919 Pat 540 (541).

[But see (Vol 3) 1916 Cal 613 (614)* (Vol 3) 1916 Cal 221 (222)* (1909) 2 Ind Cas 156 (156) (Cal)* (Vol 17) 1920 Oudh 177 (178) : 23 Oudh Cas 349.

[17] It has been held in the undermentioned Patna decisions that O. 9, R. 9 applies to proceedings under O. 21, R. 100. (Vol 32) 1945 Pat 132 (132, 133)* (Vol 10) 1923 Pat 239 (241) : 2 Pat 372* (Vol 5) 1918 Pat 486 (486) : 3 Pat L Jour 250.

[18] Though a previous application for execution is dismissed for default, a fresh application for execution is not barred. (1911) 13 Cal L Jour 532 (533).

[19] Execution application dismissed for default — Court can restore application in a proper case under its inherent powers. (Vol 8) 1921 Lah 67 (68) : 2 Lah 66* (Vol 26) 1939 Lah 223 (223, 224)* (Vol 15) 1928 Oudh 478 (478).

[20] Application for a personal decree under O. 34, R. 6 is in continuation of suit and if it is dismissed for default, second application is barred under O. 9, R. 9. (Vol 17) 1930 Nag 188 (189) : 26 Nag L R 154* (Vol 17) 1930 Rang 257 (258, 259) : 8 Rang 316.

[21] Order 9, R. 9 applies to application for final decree which is not a proceeding in execution. (Vol 11) 1924 Oudh 30 (30) : 26 Oudh Cas 194.

[See however (Vol 24) 1937 Sind 273 (278, 279) : 31 Sind L R 180. (Application under O. 34, R. 5 dismissed for default — Second application can be made.)]

[22] Award made without taking any evidence cannot be set aside under O. 9, R. 9, but should be remitted to arbitrator for re-consideration. (Vol 5) 1918 Cal 247 (247).

5. Sufficient cause.—[1] Suit dismissed in default should only be restored on showing sufficient cause for default. (Vol 20) 1930 Lah 169 (171)* (Vol 10) 1928 All 189 (189). (Plaintiff and witnesses ready and present in precincts of Court, but not coming in when called — Dismissal should be set aside by plaintiff being put on terms.)* (Vol 2) 1915 All 196 (196). (Plaintiff failing to produce account books — Order not referring to documents disclosed in pleading or affidavits — Suit dismissed for default — Application lies to restore suit.)* (Vol 25) 1938 Cal 74 (75) : I L R (1938) 1 Cal 218. (Applica-

O. 9 R. 9 (contd.)

tion under R. 9 — Plaintiff must show some fact either not known to Court when it dismissed suit or at least at that stage lacked satisfactory proof.) * (1929) 117 Ind Cas 382 (382, 383) (Lah). (Satisfactory explanation for counsel's absence at the hearing besides sufficient cause for applicant's own absence is required.) * (Vol 12) 1925 Mad 209 (210, 211). (Rule does not empower Court to set aside dismissal for default as matter of grace.) * (Vol 31) 1944 Nag 317 (317) : I L R (1944) Nag 558. (Order dismissing can be set aside in proper circumstances.) * (Vol 22) 1935 Pesh 145 (146) * (Vol 16) 1929 Rang 224 (224). (Person alleging false cause for non-appearance — Court can refuse to restore his suit.) * (Vol 1) 1914 Sind 92 (93) : 8 Sind L R 241. (Adjournment on ground that some witnesses were absent was refused — Pleader withdrawing — Suit dismissed — Sufficient cause for default under O. 9, R. 9 held not shown.)

[2] The term "sufficient cause" has not been defined anywhere. Each case depends upon its own peculiar circumstances and Court has to arrive at its own conclusion upon facts of each case. (Vol 14) 1927 Lah 622 (624) * (Vol 16) 1929 All 599 (599) : 51 All 908. (Suit dismissed for default — Plaintiff appearing on same day and satisfying Court for his non-appearance — Sufficient ground for restoration of suit.) * (Vol 4) 1917 All 290 (290). (Neither party being present when suit was called on, suit dismissed — Plaintiff turing up later in the day and alleging that journey took longer than he had anticipated — Application to set aside should be allowed.) * (Vol 12) 1925 Bom 423 (424). (Plaintiff arriving late in Court but on same day — Suit if already dismissed for default, should be restored on payment of costs if any.) * (Vol 10) 1923 Bom 480 (480). (Party appearing only a few minutes after dismissal — Suit should be restored on condition of his paying costs.) * (1907) 30 Mad 274 (276). (What is "sufficient cause" is a matter in the Court's discretion.) * (Vol 29) 1942 Oudh 75 (76) : 17 Luck 243. (Dismissal for default of appearance early in day — Circumstance that litigant appears later in the day and applies for restoration is a point in his favour in considering whether there was sufficient cause.) * (Vol 22) 1935 Sind 198 (200).

[3] In deciding whether there was good cause for non-appearance on particular day, the Court has to judicially consider that question alone putting aside all predilections. (Vol 31) 1944 Nag 317 (317) : I L R (1944) Nag 558.

[4] Words 'satisfies' and 'was prevented by sufficient cause' should receive same interpretation as in O. 41, R. 19 and Limitation Act, S. 5. (Vol 21) 1934 Nag 183 (186) : 31 Nag L R 32.

[5] Application for restoration — Court should go into merits and not be dictated by opposite party. (Vol 11) 1924 Oudh 389 (390) : 27 Oudh Cas 103.

[6] The applicant must be given an opportunity to adduce evidence in support of his allegations, even though there is reason to suspect that the application for restoration of suit dismissed in default is not made *bona fide*. (1928) 106 Ind Cas 821 (821, 822) (Lah).

[7] A party should not be deprived of a hearing under O. 9, R. 9, unless there has been something equivalent to misconduct or gross negligence on his part. (Vol 10) 1923 Mad 63 (64) : 46 Mad 60 * (Vol 25) 1938 Bom 199 (204) (S B) * (Vol 7) 1920 Sind 34 (35) : 14 Sind L R 239. (Default in payment of process fee — Misconduct of agent even of pardanashin lady is not sufficient cause.)

[8] Application for restoration should not be dismissed without giving plaintiff an opportunity to substantiate his allegation put forward in the application. (1932) 33 Pun L R 804 (805).

[9] Sufficient cause — Test is whether the party honestly intended to be in Court and did his best to do so. (Vol 29) 1942 Oudh 350 (351) : 18 Luck 104. (If he is prevented by some accident, he is not responsible.) * (Vol 12) 1925 All 601 (601). (Plaintiff missing train — Suit dismissed for default — Plaintiff reaching Court and applying for restoration same day — Restoration was ordered.) * (Vol 20) 1933 Cal 73 (74). (Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause.) * (Vol 25) 1938 Lah 295 (295). (Break-down of lorry on way is sufficient reason for non-appearance.) * (Vol 21) 1934 Lah 416 (416). (Puncture of tyre on the way to Court is sufficient cause.) * (Vol 16) 1929 Lah 506 (506). (Decree-holder starting to reach Court in time on day fixed for hearing his execution case — Late arrival in Court by few minutes due to accident in way — Case dismissed for default — Application for restoration immediately filed — His application should be accepted.) * (Vol 23) 1936 Rang 204 (206). (Missing last available train by few minutes.)

[10] A *bona fide* mistake which is not unreasonable is a sufficient cause. (1866) 3 Bom H C R 60 (62).

[11] Fact that day was declared holiday for Civil Courts is reasonable ground for not appearing on such day. (Vol 19) 1932 Nag 10 (10).

[12] Plaintiff not getting notice of transfer of case to another Court — That Court dismissing suit for default — Suit should be restored. (Vol 20) 1933 Lah 558 (559) : 14 Lah 240.

[13] Transferee Court issuing notice to plaintiff and his counsel to appear on certain day — Notice on plaintiff not served — Notice on counsel served but he refused to accept notice — Trial Court holding notice on counsel good and dismissing suit — Procedure held to be unfair to plaintiff — Plaintiff held had sufficient cause for absence. (Vol 21) 1934 Lah 91 (91).

[14] Taking up new case after 5 P. M., in contravention of directions of High Court — Dismissal in default of plaintiff — Suit must be restored. (Vol 9) 1922 All 72 (73) : 44 All 325.

[15] Late arrival of train is a sufficient cause. (Vol 14) 1927 Lah 40 (41).

[16] Illness of plaintiff can be a sufficient cause (Vol 13) 1926 Lah 541 (542) * (Vol 30) 1943 Mad 38 (38). (Inability to be present in Court does not mean inability to raise the wherewithal to continue the suit but some physical inability such as breakdown of a conveyance or illness.)

[17] That the person is not in fit condition to attend Court on account of operation having been performed on him is sufficient cause. (Vol 22) 1935 Pat 119 (120).

[18] Application dismissed for default owing to prior evidence — Case on cause list being postponed at the end of the day — Application should be restored. (Vol 21) 1934 Pesh 13 (14).

[19] Party's agent attended Court and after disposing of some work went away under *bona fide* belief that he had no more cases in the Court — His suit dismissed for non-appearance — Such *bona fide* mistake would amount to "sufficient cause". (Vol 16) 1929 Rang 224 (224).

[20] Case adjourned for plaintiff's reply — Reply filed and also application made for amendment — Court requiring further statements — Pleader unable to make them — Court holding plaintiff as absent and dismissing suit — Order of dismissal held *ultra vires* and was sufficient cause for restoring case. (Vol 21) 1934 Nag 101 (102, 103).

[21] Plaintiff not aware of date of hearing but not intending to prosecute suit — Dismissal of suit and refusal to restore suit are justified. (Vol 8) 1921 Mad 617 (618).

O. 9 R. 9 (*contd.*)

[22] Not obtaining carriage in time is not sufficient cause. (Vol 8) 1921 Sind 55 (57) : 17 Sind L R 105.

[23] Under O. 9, R. 9 failure to be in time to catch a train, in order to attend a case, is not a sufficient cause. (1913) 19 Ind Cas 234 (234) (Cal).

[24] Party present in Court for sometime but leaving it of his own accord to attend other business without instructing his pleader is not sufficient cause. (Vol 2) 1915 Cal 539 (541).

[25] Dismissal for default cannot be set aside on ground that plaintiff ought to have been rejected under O. 7, R. 11. (Vol 11) 1924 Pat 271 (272) : 2 Pat 784.

[26] The fact that plaintiff was too poor to possess a watch or clock to look up the proper time to attend Court or that he had no control over his witnesses in the matter of attendance in Court was held not to be a sufficient cause. (Vol 22) 1935 Sind 198 (200).

[27] Applicant's claim dismissed by Court A for default—Applicant alleging in restoration application to have been present in adjoining Court B in connexion with execution application when case was called in A Court—Presence in Court B not proved—Sufficient cause for applicant's absence in Court A held could not be inferred from fact that he had no reason to absent himself. (Vol 29) 1942 Oudh 75 (76) : 17 Luck 243.

[28] Minority in itself is not "sufficient cause"—Enquiry into guardian's gross neglect is necessary. (Vol 2) 1915 Mad 52 (52) * (1939) 1939 All W R (C.C.) 141 (143) * (1910) 1910 Pun L R No. 99 page 281 (282). (The minor may sue again through another next friend or himself on attaining majority.) * (Vol 8) 1921 Sind 200 (202) : 17 Sind L R 41. (Guardians *ad litem* being different is not enough to make a second suit competent.)

[29] Minor represented by next friend or guardian—Latter absent not *bona fide* but deliberately to obstruct litigation—Order passed *ex parte* cannot be set aside. (Vol 22) 1935 Mad 565 (567, 568) : 58 Mad 929.

[30] Minority of applicant alone is sufficient reason for allowing application for setting aside *ex parte* decree or order for dismissal of suit. (Vol 21) 1934 Mad 616 (617) * (Vol 22) 1935 Mad 196 (197).

[31] The pleaders engaged in cases must take reasonable precautions in attending the hearing. (Vol 27) 1940 Rang 162 (164) : 1940 Rang L R 512 (F.B.).

[32] Dismissal of suit due to absence of counsel—*Bona fide* attempt on pleader's part to attend is good case for restoration of suit. (Vol 16) 1929 Lah 96 (99, 100) : 10 Lah 570.

[33] Pleader sitting in adjoining court-room, but not hearing call—Restoration should be ordered. (Vol 14) 1927 Sind 228 (229).

[34] Few minutes delay due to plaintiffs' going to call his pleader—Restoration should be granted. (Vol 13) 1926 Lah 650 (651) * (Vol 19) 1932 All 450 (451) * (Vol 17) 1930 Lah 943 (943). (Plaintiff *pardanashin* lady—Counsel engaged in another Court when case called—Suit can be restored if application made on the same day) * (Vol 15) 1928 Lah 454 (454). (Absence of one of the applicants for fetching counsel and of other due to blindness.)

[35] Few minutes delay of counsel of *pardanashin* plaintiff held sufficient cause. (Vol 21) 1934 Oudh 491 (492).

[36] Party engaging two pleaders—No warning from them that they should not be depended upon for appearance—Party can expect that default would not ordinarily occur. (Val 31) 1944 Nag 317 (317) : I L R (1944) Nag 558.

[37] Mere absence of a party's pleader does not constitute a sufficient cause for a failure to appear. (Vol 8) 1921 Nag 3 (5) * (1885) 7 All 542 (545). (Counsel on other side also absent—Fifteen minutes delay held suffi-

cient cause.) * (Vol 14) 1927 Oudh 211 (211). (Absence of pleader and of plaintiff's agent is no excuse.)

[But see (Vol 13) 1926 Nag 409 (410).]

[38] Application to restore on ground that counsel was engaged in another Court dismissed—High Court refused to interfere in revision against that order. (Vol 14) 1927 Lah 791 (791).

[39] Misjudgment by a counsel as to when his case would be taken is not a sufficient cause. (Vol 14) 1927 Lah 224 (224).

[40] Suit dismissed for pleader's absence—Plaintiff must show why he was absent—Mere negligence of pleader is not sufficient. (Vol 16) 1929 Lah 148 (149).

[41] Sufficient cause shown—Re-opening is mandatory. (Vol 23) 1936 Rang 335 (336). (Questions to be considered in setting aside dismissal, stated.)

6. Restoration in favour of one of the plaintiffs.—Effect.—[1] Order setting aside order dismissing suit at instance of some plaintiffs may operate in favour of all if the Court so directs. (Vol 6) 1919 Oudh 4 (6) : 23 Oudh Cas 18.

7. Restoration under inherent powers of Court—See Notes on S. 151.

8. Conditional order of restoration.—[1] Case dismissed for default restored—Court can pass conditional order of restoration directing payment of costs to opposite side within particular time. (Vol 23) 1936 All 477 (478).

[2] Court deciding to restore suit dismissed for default may direct plaintiff to pay amount of damages within certain time and reserve final order. (Vol 1) 1914 All 336 (337).

[3] Court's order to restore suit on payment of damages within prescribed time and directing restoration application to be considered dismissed on default of payment—Restoration application is completely disposed of and such order is appealable after it has effect of dismissing application. (Vol 1) 1914 All 336 (337).

9. Appeal.—[1] Dismissal of application under O. 9, R. 9 is appealable under O. 43, R. 1, cl. (c). (Vol 30) 1943 Mad 387 (388) : I L R (1943) Mad 732. (Suit under S. 189, Madras Estates Land Act (1908) dismissed for default—O. 9, R. 9 applies.) * (Vol 7) 1920 All 219 (219) * (Vol 23) 1936 All 737 (738, 739). (Application for restoration of suit which was dismissed for default of appearance—Plaintiff depositing process-fee—But trial Court refusing to accept it on the ground of its being late and dismissing application for non-prosecution with costs to opposite party—Dismissal was held to be under this rule.) * (1929) 27 All L Jour 391 (392) * (1912) 10 All L Jour 41 (44). (Application for restoration of suit under O. 9, R. 9 pending. Forum transferred from British territory to native state—Court returning application for presentation to proper Court. Order is, in substance order refusing to grant application for restoration.) * (Vol 5) 1918 Cal 164 (164) * (Vol 33) 1946 Pat 184 (185). (Suit partly dismissed for failure to pay adjournment costs—Application for restoration is competent—Remedy for dismissal of such application is by appeal.)

[See also (Vol 13) 1926 All 284 (284). (Appeal from order refusing to restore—Appellate Court cannot pass decree on admission of part of the liability—Plaintiff's remedy is by way of appeal against decree.) * (Vol 32) 1945 Oudh 273 (274, 276) : 20 Luck 427. (Suit dismissed for default—Application to set aside dismissal allowed on condition of depositing Rs. 25 as costs within week—Money not deposited in time—Application one day late to accept deposit dismissed for want of jurisdiction—Order held came within O. 43, R. 1 (c)—If no appeal lay order held revisable under S. 115.)

[2] Application under R. 9 dismissed for default—Appeal lies. (Vol 30) 1943 Mad 584 (585).

10. Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

[1882—S. 105; 1877—S. 105; 1859—S. 116.]

11. Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

[1882—S. 106; 1877—S. 106; 1859—S. 116.]

O. 9 R. 9 (contd.)

[But see (Vol 15) 1928 Pat 335 (336) : 7 Pat 333.]

[3] No appeal lies under O. 43, R. 1 from an order refusing to restore an application for restoration of suit dismissed for default. (Vol 9) 1922 Cal 572 (573) ✕ (Vol 19) 1932 Nag 101 (102) : 23 Nag L R 83.

[4] No appeal lies against order admitting application under O. 9, R. 9. (Vol 21) 1934 Oudh 491 (492).

[5] Order refusing to restore suit dismissed for default by Judge on original side is appealable under O. 43, R. 1. (Vol 3) 1916 Cal 361 (362, 365) : 43 Cal 357 (F B).

[6] Order by a Judge on original side of a High Court restoring a suit is not a "judgment" and hence not appealable. (Vol 9) 1922 Cal 407 (407) : 49 Cal 616.

10. Revision. — [1] Revision against order re-admitting suit dismissed for default lies. (Vol 2) 1915 All 289 (290) : ✕ (Vol 28) 1941 Oudh 367 (368). (Order under O. 9, R. 9 restoring application to sue as a pauper — Order is open to revision under S. 115 — (Vol 20) 1933 Oudh 331 overruled.)

[2] Order granting application for restoration without proof as to the allegations contained in the application is without jurisdiction and can be set aside in revision. (1912) 14 Ind Cas 221 (224) (Oudh).

[But see (Vol 6) 1919 Cal 979 (980). (Appellate Court restoring suit in spite of fact that plaintiff could not show sufficient cause for his non-appearance — Order of Appellate Court, is not without jurisdiction.)]

[3] Case being called on, parties appeared but the plaintiffs did not prosecute the case. The Court dismissed the case for plaintiff's default. The plaintiff then applied for restoration but the Court held that the suit was not dismissed for default and therefore had no jurisdiction. *Held*, that order dismissing suit was under O. 9, R. 8 and that the Court was required to deal with the matter under O. 9, R. 9. (Vol 5) 1918 Pat 351 (352) : 3 Pat L Jour 355.

[4] Preliminary decree modified in appeal — Date for further inquiries per appellate Court's directions — On default of party, Court dismissing suit under O. 9, R. 9 — Dismissal is wrong and revision lies. (Vol 17) 1930 Mad 158 (158, 159) : 53 Mad 395.

[5] Petition for restoration dismissed — Party has right to question correctness of order on it in revision. (Vol 21) 1934 Mad 669 (669).

[6] Suit dismissed for default — Court refused to restore it on the ground that it would fail on merits without going into reason for plaintiff's absence — *Held*, order of dismissal was revisable. (Vol 10) 1923 Mad 177 (178).

[7] Order setting aside order of dismissal without considering evidence is vitiated by material irregularity. (Vol 18) 1931 All 452 (452).

[8] What is sufficient cause is matter in the Court's discretion — High Court will not ordinarily interfere in revision with the exercise of such discretion. (1907) 30 Mad 274 (276) ✕ (Vol 20) 1933 All 118 (119, 120). (Suit for profits dismissed for want of prosecution — Order

dismissing suit held to be under O. 9, R. 8 — Suit restored held to be under O. 9, R. 9 and no revision was competent from order of restoration.) ✕ (Vol 9) 1922 Lah 290 (290) : 3 Lah 79. (Order refusing to restore, suit dismissed for default — Court disbelieving plea of sickness of plaintiff — No revision lies.)

[See also (Vol 24) 1937 All 691 (692). (Question whether party is prevented from sufficient cause from appearing being one of fact, High Court cannot interfere in revision.)]

[9] Order dismissing an application for restoration on the ground that it did not fall under O. 9, R. 9 is not revisable. (Vol 14) 1927 Cal 928 (929).

ORDER 9, RULE 10 — SYNOPSIS.

1. Applicability.

2. Appeal.

1. Applicability. — [1] The rule applies where one of two plaintiffs is absent. (Vol 8) 1921 Cal 176 (177) : 48 Cal 57 ✕ (Vol 5) 1918 Pat 376 (376). (Order of dismissal in presence of one of several plaintiffs amounts to a decree.)

[2] One of several plaintiffs ordered to appear in person — Dismissal of suit for default as against him only held justified — Court had no jurisdiction to dismiss it as against other plaintiffs. (Vol 6) 1919 Pat 36 (37) : 4 Pat L Jour 152.

[3] Representative suit on behalf of plaintiff and other members of community — Plaintiff dying — Other members are not plaintiffs *eo nomine* — Suit cannot be dismissed for their non-appearance. (Vol 18) 1931 Mad 590 (591) : 54 Mad 770.

2. Appeal. — [1] Adjournment application of only attending plaintiff rejected and suit dismissed — Order amounted to a decree from which an appeal lies. (Vol 5) 1918 Pat 376 (376).

Order 9, Rule 11 — Note 1.

[1] Failure to attend on hearing date — Order to proceed *ex parte* — Appearance at subsequent hearing — Party must be heard and *ex parte* decree should not be passed. (Vol 9) 1922 All 110 (111) ✕ (Vol 9) 1922 All 33 (34).

[2] 'Defendant' includes the plural. (Vol 32) 1945 Sind 98 (104) : 1 L R (1945) Kar 1.

[3] A party omitting to defend in trial, cannot be allowed to be heard for the first time in Letters Patent appeal. (Vol 13) 1926 All 427 (427).

[4] Proof of plaintiff's title to decree must be given for even an *ex parte* decree. (Vol 11) 1924 Cal 647 (648).

[5] *Ex parte* defendant not wanting re-hearing of proceedings before his appearance — Court cannot grant costs against him. (Vol 18) 1931 Lah 616 (616).

[6] Where in a suit on bonds one of the defendants alone contested and the suit was decreed *ex parte*, as against defendant 2, the suit was a non-contested one and judgment should have been entered in favour of the plaintiff for the amount claimed, and costs. (Vol 6) 1919 Cal 217 (218).

12. Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

[1882—S. 107; 1877—S. 107; 1859—S. 117. See Ss. 132, 133; O. 3 R. 1; O. 5 R. 3; O. 10 R. 4 and O. 29 R. 3.]

Setting aside decrees ex parte.

13. In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1882—S. 108; 1877—Ss. 108, 109, 588; 1859—S. 119.]

Objects and Reasons

"Order 9 Rule 13. — The Committee have inserted words to make it clear that a decree can only be set aside in favour of a defendant against whom the decree has been passed *ex parte*. There is some conflict of judicial authority upon this point, and the Committee

think that the matter should be set at rest in this sense."—S. O. R.

"Order 9 Rule 13. — We think it necessary to provide, specially for cases in which it may not be possible to set aside the decree as against the applicant only."—S. C. R.

Provincial Amendments.

ALLAHABAD

Add the following further proviso :

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

Order 9, Rule 12—Note 1.

[1] The Court can order a party to appear in person in the interest of justice even if not specifically empowered by the Code. (1912) 23 Mad L Jour 676 (677).

[2] Order 9, Rule 12 expressly covers case of party ordered to appear in person, but not so appearing. (Vol 19) 1932 All 595 (596).

[3] Where a party ordered to appear in person did not appear he may be declared *ex parte* though his vakil may be present in Court. (Vol 5) 1918 Mad 1256 (1257) : 41 Mad 256 * (Vol 19) 1932 Mad 414 (414).

[4] Where the plaintiff's vakil asked for further processes against absent witnesses but was unable to say which of them were material, the proper course would have been to grant adjournment to produce evidence on this point, instead of dismissing the suit. (1872) 17 Suth W R 141 (143).

[5] Plaintiff ordered to appear in person—Non-appearance — He should be given opportunity to prove cause of non-appearance. (Vol 4) 1917 Oudh 127 (128).

[6] On the failure of one of several plaintiffs ordered to appear in person, suit should be dismissed as against him only. (Vol 6) 1919 Pat 36 (37) : 4 Pat L Jour 152.

[7] Defendant summoned but absent — Suit can be heard *ex parte*. (1880) 5 Cal 353 (355).

[8] Defendant ordered to appear—Order striking out his defence for his persistent failure to attend is competent. (Vol 15) 1928 Oudh 262 (263) * (Vol 13) 1926 Lah 577 (578). (Failure of person ordered by Court to be added as plaintiff to appear, does not justify dismissal of original suit.) * (Vol 20) 1933 Mad 821 (822). (But order should be free from ambiguity—

Ambiguous orders should be construed in favour of defendant.)

[9] When a defendant appears either in person or by pleader, his failure to put in written statement does not by itself authorize *ex parte* trial. (1865) 2 Mad H C R 311 (312).

[10] *Ex parte* order for disobedience of order to appear passed against minor or lunatic can be set aside by fresh guardian appointed. (Vol 7) 1920 Mad 213 (215).

ORDER 9, RULE 13—SYNOPSIS.

1. Scope of the rule.
2. Decree passed by the Presidency Court or Small Causes.
3. Decree passed by the Provincial Court or Small Causes.
4. When a decree can be said to be *ex parte*.
5. Where a written statement is filed.
6. Remedies in the case of an *ex parte* decree.
7. Whether the remedies are concurrent.
8. Hearing of application pending appeal.
9. Hearing of application after disposal of appeal.
10. Suit to set aside an *ex parte* decree — *Ex parte* decree obtained by fraud.
11. Application to be made to the Court which passed the decree.
12. Fresh vakalatnama, if necessary.
13. Who can apply to set aside.
14. Application by the legal representative of the defendant.
15. Grounds for setting aside an *ex parte* decree.
16. Summons not duly served.

BOMBAY

Re-number Rule 13 as Rule 13 (1) and *add* the following sub-rule :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

[16-1-1929.]

CALCUTTA

Re-number Rule 13 as Rule 13 (1) and *add* the following as sub-rule (2) :

"(2) The defendant shall, for service on the opposite party, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties, or

(ii) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

MADRAS

(1). *Re-number* Rule 13 as Rule 13 (1) [Dis. No. 621 of 1914] and *insert* the following as proviso to sub-rule (1) :

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

[R. O. C. No. 1810 of 1926.]

(2). *Add* the following as sub-rule (2) to Rule 13 :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

[Dis. No. 621 of 1914.]

NAGPUR

(a) *Re-number* the existing rule as sub-rule (1).

(b) *Substitute* "there was sufficient cause for his failure to appear" for "he was prevented by any sufficient cause from appearing" occurring in sub-rule (1) so re-numbered.

(c) *Add* the following as an additional proviso and explanation to sub-rule (1) :—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation.—Where a summons has been served under Order 5, Rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this sub-rule."

(d) *Add* the following as sub-rule (2) :

"(2) The provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)."

[29-6-1943.]

N.-W.F.P.

Add the following as an additional proviso :

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

ODDH

Between the words "was not duly served or that" and the words "he was prevented by any sufficient cause," *insert* the words "notwithstanding due service of the summons," and *add* the following further proviso :

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

Explanation.—Where a summons has been served under Order 5, Rule 15 on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

SIND

Add the following further proviso :

"Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

O. 9 R. 13 (contd.)

17. Sufficient cause.

18. Minor defendant.

19. Decree having been satisfied.

20. "Upon such terms as to costs," etc.

21. Proviso to the rule.

22. Effect of setting aside the *ex parte* decree.

23. *Ex parte* decree against a firm.

24. Limitation.**25. Appeal.****26. Revision.**

1. Scope of the rule.—[1] The object of the rule is to ensure that every defendant shall have a hearing. (1895) 22 Cal 981 (984).

[2] The successful applicant is to be restored to the same position as before the decree was passed. (1908) 31 Mad 454 (455).

O. 9 R. 13 (*contd.*)

[3] An application under this rule is not strictly an application for a re-hearing. (1894) 19 Bom 208 (210).

[4] Proceedings on an application under this rule are not in continuation of the suit terminated by the passing of the *ex parte* decree and which revives only when the application is allowed. (Vol 14) 1927 Lah 200 (207) : 8 Lah 54.

[See however (Vol 28) 1941 Rang 314 (315) : 1941 Rang L R 254.]

[5] Proceedings resulting in final decree are continuation of and part of suits governed by this rule. (Vol 16) 1929 All 279 (280) : 51 All 634 * (1912) 14 Cal L Jour 603 (604) * (1910) 11 Cal L Jour 501 (502) (SB) * (Vol 6) 1919 Mad 964 (965) * (Vol 31) 1944 Nag 181 (181, 182) : I L-R (1944) Nag 425 * (Vol 9) 1922 Nag 175 (178).

[6] Proceedings for personal decree in mortgage suits are also part and in the nature of suits governed by this rule. (Vol 17) 1930 All 841 (843) : 52 All 839 * (1905) 1 Nag L R 143 (145).

[But see (1906) 9 Oudh Cas 288 (288).]

[7] The rule does not apply to appeals. (1869) 1 Ind Jur (OS) 68 * (1867) 7 Suth W R 425 (426).

[8] This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act 5 [V] of 1920. (Vol 27) 1940 Pat 58 (59) * (Vol 27) 1940 Pat 623 (624) * (Vol 19) 1932 Mad 63 (65) * (Vol 19) 1932 Lah 522 (523) * (Vol 14) 1927 Mad 897 (898).

[But see (1904) 8 Cal W N 468 (469, 470).]

[9] An order setting aside an *ex parte* decree is a judgment and cannot "be altered or added to, save as provided by S. 152 or on review." (Vol 20) 1933 Oudh 385 (386).

[10] The rule applies only when an *ex parte* decree has been passed and not when a Court declares a defendant *ex parte* as is the practice of the mofussil Courts. (Vol 26) 1939 Mad 385 (385).

2. Decree passed by the Presidency Court of Small Causes. — [1] Section 37, Presidency Small Cause Courts Act, XV of 1882, does not apply to an *ex parte* decree and an application under this rule to set it aside is competent. (1892) 17 Bom 507 (509).

[2] Where restoration is sought for under this rule and is refused a retrial under S. 38, Presidency Small Cause Courts Act (15 [XV] of 1882) cannot be asked for. (1905) 3 Cal L Jour 199 (201).

[3] Under the rules framed by the Calcutta High Court, the Registrar of the Court of Presidency Small Causes cannot entertain an application under this rule. (1903) 30 Cal 588 (592).

3. Decree passed by the Provincial Court of Small Causes. — [1] Deposit of decretal amount or furnishing of security is a condition precedent to the entertainment of an application to set aside an *ex parte* decree. (Vol 28) 1941 Oudh 103 (105) * (Vol 27) 1940 Sind 105 (107) : I L R (1940) Kar 154 * (Vol 21) 1934 Nag 43 (43) * (1910) 34 Mad 88 (89) * (1904) 8 Cal W N 355 (356) * (1898) 2 Cal W N 693 (695) * (Vol 4) 1917 All 484 (485) : 38 All 425 * (Vol 22) 1935 Pesh 159 (160) * (1938) 1938 All L Jour 742 (745).

[2] Where security is furnished within time though found insufficient and is made up subsequently after expiry of limitation, the requirements of Provincial Small Cause Courts Act will be deemed to have been satisfied. (Vol 24) 1937 Oudh 206 (207) * (Vol 23) 1936 Oudh 407 (409) : 12 Luck 287.

[3] Court ordering deposit of decretal amount — Court can condone delay in making deposit and extend time. (Vol 23) 1936 All 371 (372) * (Vol 23) 1936 Mad 524 (524).

[4] Even the abolition of the Small Cause Court

passing the *ex parte* decree will not excuse compliance with the rule requiring deposit of security. (Vol 21) 1934 All 943 (944).

[5] An order setting aside an *ex parte* decree of a Provincial Small Cause Court is one passed under the Code. (Vol 22) 1935 Mad 380 (381) : 58 Mad 687 (FB).

4. When a decree can be said to be *ex parte*. —

[1] The rule applies only to decrees passed under O. 9 and to those other decrees to which application of O. 9 is extended. (1898) 2 Cal W N 676 (679).

[2] Decree in a suit, decided under O. 17, R. 3 or O. 11, R. 21 is not *ex parte* and defendant cannot apply under this rule. (Vol 30) 1943 Sind 94 (95) : I L R (1942) Kar 547 * (Vol 26) 1939 All 642 (643) * (1911) 10 Ind Cas 770 (771) (Burma) * (Vol 5) 1918 Pat 256 (257) : 3 Pat L Jour 481 * (Vol 12) 1925 Mad 316 (317) * (1908) 35 Cal 1023 (1027) * (Vol 22) 1935 Mad 210 (211) : 58 Mad 817 * (Vol 23) 1936 All 670 (671).

[3] Decree referred to under this rule is one passed under R. 6 of this Order or under O. 17, R. 2 read with O. 9. (1909) 2 Ind Cas 67 (68) (Cal). (Order passed under R. 6 of this order.) * (1896) 18 All 241 (244). (Do.) * (Vol 29) 1942 Bom 344 (344). (Order passed under O. 17, R. 2.) * (Vol 10) 1923 All 551 (552) : 45 All 618. (Do.) * (1896) 23 Cal 738 (753, 756, 759) (FB). (Do.) * (Vol 1) 1914 Cal 360 (361) : 41 Cal 956. (Do.) * (Vol 12) 1925 Oudh 360 (360). (Do.)

[4] Under O. 17, R. 2 specific provision is made for the Court to proceed under O. 9 and the aggrieved party is also entitled in such a case to the remedy provided for by this rule. (1896) 20 Bom 380 (382) * (Vol 20) 1933 Nag 370 (372) : 30 Nag L R 94 * (1909) 36 Cal 189 (192) * (1896) 23 Cal 738 (753, 756) (FB) * (Vol 23) 1936 All 619 (621).

[5] A final decree passed in the absence of the defendant is an *ex parte* decree. (Vol 26) 1939 Oudh 111 (112) : 14 Luck 435.

[6] Decree passed on merits after consideration of evidence on record is not *ex parte*. (Vol 3) 1916 Oudh 335 (335, 336) * (Vol 18) 1931 All 294 (301) : 53 All 612 (FB).

[7] Mere failure by a defendant who has actually appeared to adduce evidence will not make the decree passed an *ex parte* decree. (1912) 17 Cal W N 627 (629).

[See also (Vol 25) 1938 Bom 470 (471). (Failure to file written statement as directed.)]

[8] Pleader filing additional written statement and applying for framing of fresh issues — Fresh issues framed — Pleader moving for adjournment and reporting no instructions — Decree passed is not *ex parte*. (Vol 22) 1935 Mad 210 (211) : 58 Mad 817.

[But see (Vol 30) 1943 Bom 321 (323, 325) : I L R (1944) Bom 1 (FB).]

[9] The recitals on the record are not conclusive as to the character of the decree. (1913) 20 Ind Cas 67 (68) (Cal) * (Vol 10) 1923 Lah 281 (281) * (Vol 24) 1937 Pat 17 (18).

[10] Defendant can show that the decree is *ex parte*. (1897) 1 Cal W N cxxvii (cxxviii).

5. Where a written statement is filed. — [1] Defendant failing to appear on the date of hearing after filing written statement — Decree passed is *ex parte* and can be set aside. (1909) 31 Mad 505 (506) * (Vol 12) 1925 Oudh 717 (717, 718).

[But see (1881) 3 Mad 264 (265).]

[2] Where an order permits the defendant to file written statement on a day, he is not compelled to do so and absence on that day is not a default. (Vol 32) 1945 All 352 (353) : I L R (1945) All 499.

6. Remedies in the case of an *ex parte* decree.

[1] A defendant can apply under this rule to set aside the *ex parte* decree. (Vol 16) 1929 Cal 322 (325) : 56 Cal 21 * (Vol 7) 1920 Lah 408 (409) : 1 Lah 344.

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[2] The defendant can apply for a review. (1884) 6 All 65 (66) (1910) 12 Bom L R 886 (890) (1899) 3 Cal W N 375 (377) (1911) 15 Cal L Jour 408 (409) (Vol 6) 1919 Mad 844 (844) (1907) 3 Nag L R 55 (65).

[3] The defendant can appeal from the decree. (Vol 22) 1935 Mad 196 (198) (1878) 2 All 67 (70, 71): 5 Ind App 283 (P C).

[4] The defendant can institute a suit on the ground of fraud. (1909) 9 Cal Jour 367 (371, 372).

7. Application for review. — [1] The defendant may apply for a review without applying under this rule. (1912) 15 Ind Cas 554 (554) (Cal).

[2] The defendant can apply for review even after an application under this rule has been rejected. (1873) 20 Suth W R 284 (284).

[3] An application for review will lie even though an application under this rule is barred by limitation at the time of making the application for review. (1912) 16 Cal W N 643 (644) (Vol 7) 1920 Mad 633 (634).

[But see (1912) 1912 Pun W R No. 131, p. 352 (353) (Vol 7) 1920 Lah 261 (262).]

8. Hearing of application pending appeal. —

[1] The mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule and the application ought to be presented to the Court which passed the decree. (Vol 8) 1921 Mad 568 (568, 569): 41 Mad 781 (Vol 31) 1944 Mad 576 (576) (1909) 32 Mad 416 (420) (F B). (Review.) (Vol 11) 1924 Lah 224 (225) (1911) 38 Cal 394 (404) (Vol 2) 1915 Cal 418 (414) (Vol 4) 1917 Nag 26 (28): 14 Nag L R 36.

[2] An appeal and proceedings under this rule are entirely distinct and therefore there is no possibility of conflicting judgments being pronounced in the two proceedings. (1908) 12 Cal W N 865 (887).

[3] Decree *ex parte* against some defendants and after contest against others — Appeal by the contesting defendants — *Ex parte* defendants not impleaded ought to present an application only to the trial Court. (Vol 8) 1921 Cal 248 (249): 48 Cal 153 (Vol 4) 1917 All 298 (299) (Vol 5) 1918 Mad 665 (666) (Vol 19) 1932 All 340 (342): 54 All 423.

[See however (Vol 11) 1924 All 173 (175) (Vol 9) 1922 Mad 33 (33, 34). (Even if *ex parte* defendants are included the application ought to be presented to the trial Court only.)]

9. Hearing of application after disposal of appeal. — [1] After decision in appeal from an *ex parte* decree the setting aside of the decree by trial Court is *ultra vires*. (1910) 7 All L Jour 598 (601) (1907) 30 Mad 535 (536) (Vol 4) 1917 Cal 728 (730): 44 Cal 954 (Vol 24) 1937 Cal 548 (550) (Vol 24) 1937 Nag 381 (382): I L R (1940) Nag 496.

[2] Decision in revision bars an application under this rule. (Vol 21) 1934 All 134 (136): 56 All 608.

[See also (1910) 32 All 295 (301): 37 Ind App 70 (P C).]

[See however (Vol 14) 1927 Mad 722 (723, 724).]

[3] Appeal dismissed as abated on failure to implead legal representatives — The decree of the trial Court does not merge in the decree of appellate Court and can be set aside. (Vol 11) 1924 Cal 890 (892, 895): 51 Cal 715 (Vol 8) 1921 Cal 248 (249): 48 Cal 153.

[3a] Appeal against *ex parte* decree dismissed — Lower Court's decree continues to exist and can be set aside. (Vol 32) 1945 All 352 (354): I L R (1945) All 499.

[3b] Where the decree has been confirmed on appeal or revision it can be set aside under O. 9, R. 13. (Vol 33) 1946 Pesh 7 (8).

[4] *Ex parte* defendants not impleaded can apply under this rule. (Vol 4) 1917 All 281 (289): 39 All 13

(1912) 15 Cal L Jour 241 (244) (Vol 19) 1932 Cal 773 (774) (Vol 25) 1938 Oudh 11 (12).

[5] Where liability of co-defendants is separately and distinctly stated the defendant who does not appeal can apply under this rule. (Vol 19) 1932 All 340 (341): 54 All 423.

[6] The mere fact of the inclusion of a person as *pro forma* respondent in appeal does not oust the jurisdiction of the trial Court to act under this rule on his application. (Vol 21) 1934 Lah 1016 (1017).

[7] An *ex parte* final decree can be set aside only by the Court passing the decree and not by the appellate Court confirming the preliminary decree. (Vol 3) 1916 Low Bur 20 (21): 8 Low Bur Rul 450.

10. Suit to set aside an *ex parte* decree — *Ex parte* decree obtained by fraud — [1] A suit will lie to set aside an *ex parte* decree on the ground of fraud. (Vol 7) 1920 Lah 164 (165) (Vol 20) 1933 Rang 123 (123) (Vol 10) 1923 Cal 425 (426) (1911) 38 Cal 936 (941) (Vol 14) 1927 Rang 281 (282): 5 Rang 471 (Vol 13) 1926 Nag 383 (388, 389) (Vol 13) 1926 Bom 63 (63) (Vol 22) 1935 Nag 66 (67): 31 Nag L R 159. (Omission to state some facts in the plaint held did not amount to fraud.) (Vol 1) 1914 Mad 158 (159). (Suppression of fact of compromise effected amounts to fraud.) (1857) 8 Moo Ind App 91 (102) (P C). (Do.)

[2] A sale under a decree tainted with fraud can be set aside by separate suit. (1907) 5 Cal L Jour 328 (331) (1900) 27 Cal 197 (200).

[3] The fraud alleged must be extraneous to everything which has been adjudicated upon by the Court. (Vol 3) 1916 Mad 364 (365): 38 Mad 208.

[4] A separate suit to set aside the decree does not lie on the ground of mere falsity of the claim in the former suit. (Vol 29) 1942 Pat 357 (360) (Vol 24) 1937 Sind 18 (19): 30 Sind L R 405.

[5] Where it is found that non-service of summons alone is not sufficient to prove fraud the Court can go into the merits of the previous case to see whether there was wilful or fraudulent suppression of summons for obtaining an *ex parte* decree on a false claim. (Vol 27) 1940 Cal 489 (493): I L R (1940) 2 Cal 477 (Vol 18) 1931 Pat 204 (205): 10 Pat 516 (F B) (Vol 26) 1939 Cal 732 (733) (Vol 29) 1942 Oudh 217 (218): 17 Luck 341.

[6] Onus of proving fraud is upon the party who sues to set aside the decree on that ground. (Vol 28) 1941 Cal 215 (216): I L R (1940) 2 Cal 418 (Vol 7) 1920 Pat 246 (248) (Vol 3) 1916 All 93 (95) (Vol 7) 1920 Cal 126 (129) (Vol 13) 1926 Lah 86 (86, 87) (Vol 24) 1937 Pat 384 (384).

[7] An *ex parte* decree does not raise a presumption of non-service of summons but raises the contrary presumption that there was due service to the satisfaction of the Court. (Vol 10) 1923 Pat 406 (407).

[8] Separate suit will lie even though remedy under this rule has not been exhausted. (Vol 4) 1917 Upp Bur 9 (10): 2 Upp Bur Rul 106 (Vol 12) 1925 Rang 200 (201): 3 Rang 65 (Vol 3) 1916 Cal 876 (878).

[9] Infructuous application under this rule is no bar to a suit. (1901) 28 Cal 475 (478) (P C) (Vol 23) 1936 Mad 161 (163): 59 Mad 770 (Vol 20) 1933 Rang 123 (123).

[10] Adverse decision in the application on the same point operates as *res judicata* in respect of it. (Vol 29) 1942 Pat 357 (360) (Vol 24) 1937 Lah 614 (615) (Vol 22) 1935 Pat 453 (453): 14 Pat 439.

[11] No suit can be entertained where the only question submitted is one that could, and should have been dealt with under this rule. (Vol 1) 1914 Sind 63 (63): 8 Sind L R 81 (Vol 20) 1933 Cal 274 (277): 60 Cal 98 (1910) 8 Ind Cas 599 (600) (Low Bur) (Vol 27) 1940 Cal 536 (537). (Only question raised is fraud

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alleged on bare non-service.) * (Vol 10) 1923 Pat 327 (329). (Do.) * (1907) 29 All 212 (213). (Do.) * (1912) 16 Ind Cas 5 (6) (All). (Do.) * (1910) 37 Cal 197 (203). (Do.) * (Vol 17) 1930 Sind 298 (299) : 24 Sind L R 232 * (Vol 24) 1937 Pat 384 (384).

[12] Where whole suit is attacked on the ground of fraud and non-service is relied on only as an evidence to prove the fraud separate suit will lie. (1902) 29 Cal 395 (400) : 29 Ind App 99 (P C).

[13] A fraudulent suppression in the matter of the service of summons can afford a sufficient ground for setting aside the *ex parte* decree. (Vol 29) 1942 Oudh 217 (219) : 17 Luck 341 * (1910) 37 Cal 197 (203) * (Vol 7) 1920 Cal 773 (774) * (Vol 4) 1917 Pat 529 (530) * (Vol 2) 1915 All 163 (163) : 37 All 189 * (Vol 9) 1922 Sind 20 (21) : 16 Sind L R 109 * (Vol 1) 1914 Lah 450 (452) : 1914 Pun Re No. 65. (Obtaining substituted service by falsely alleging that defendant was away in a distant place.)

[14] To sustain an allegation of fraud mere proof that decree was obtained by false evidence or perjury is not enough. (Vol 28) 1941 Cal 215 (220) : ILR (1940) 2 Cal 418 * (Vol 14) 1927 Cal 84 (86) * (Vol 7) 1920 Pat 741 (741) : 5 Pat L Jour 259 * (Vol 6) 1919 Mad 1044 (1046) : 41 Mad 743 (FB). (29 Mad 179, overruled.) * (Vol 6) 1919 Oudh 272 (275) : 22 Oudh Cas 60 * (Vol 23) 1936 Sind 212 (212).

[15] Question of fraud already agitated and decided in the application operates as *res judicata* in the subsequent suit. (Vol 5) 1918 Cal 125 (126) * (Vol 4) 1917 Mad 894 (895) * (Vol 11) 1924 Pat 238 (239) : 2 Pat 833 * (1907) 29 All 608 (612) * (Vol 8) 1921 Pat 12 (13) : 6 Pat L Jour 1 * (1897) 24 Cal 546 (549, 550).

[16] *Ex parte* decree set aside in subsequent suit — Whether the original decree is revived depends upon the issues and decision in the second suit. (Vol 29) 1942 Oudh 217 (219) : 47 Luck 341 * (Vol 26) 1939 Cal 732 (733) * (Vol 18) 1931 Pat 204 (205) : 10 Pat 516 (F B).

[17] *Ex parte* decree not set aside is final and operates as *res judicata*. (Vol 1) 1914 All 886 (889) * (1910) 1910 Pun L R No. 47, page 112 (113) * (1910) 13 Cal L Jour 38 (39) * (Vol 7) 1920 Lah 88 (89).

11. Application to be made to the Court which passed the decree. — [1] The rule requires an application by the defendant for an order to set aside the decree. (Vol 28) 1936 Oudh 50 (51) : 11 Luck 519.

[2] Trial Court itself becoming different by reason of territorial re-adjustment — Application to Court seized of the matter is valid. (Vol 9) 1922 Mad 10 (12) : 40 Mad 1.

[3] High Court can, in second appeal, entertain an application for setting aside an *ex parte* decree passed by the trial Court. (Vol 3) 1916 Mad 641 (641).

[4] An application under this rule is not bad merely because it omits to give the names of some of the decree-holders. (Vol 22) 1935 Cal 506 (507) : 62 Cal 1057.

12. Fresh vakalatnama, if necessary. — [1] Fresh vakalatnama to file application under the rule is not necessary in the case of a pleader who appeared in the suit. (Vol 28) 1941 Rang 314 (315) : 1941 Rang L R 254 * (Vol 9) 1922 Bom 207 (209) : 47 Bom 11 * (Vol 31) 1944 All 238 (239) : I L R (1944) All 592.

13. Who can apply to set aside. — [1] Any one of several defendants against whom the decree is *ex parte* can apply. (1904) 8 Cal W N 621 (625).

[2] The rule allows any defendant even if he is a contesting defendant to apply under this rule if his rights are adversely affected though the decree may not in terms have granted relief against him. (Vol 21) 1934 All 163 (164) : 56 All 578.

[3] A person, not a party to the suit is not entitled to apply under this rule. (Vol 13) 1926 Cal 1015 (1015).

[4] A formal party against whom nothing is said in the operative portion of decree cannot apply under this rule. (1904) 1 All L Jour 470 (472).

[5] Person expressly exempted from the decree cannot apply under this rule. (1921) 61 Ind Cas 484 (485) (All).

[6] A person against whom the suit is dismissed cannot apply. (1911) 8 All L Jour 674 (677) * (Vol 14) 1927 Mad 227 (228).

[6a] Pending suit defendant's property coming under Court of Wards — Decree passed without impleading Court of Wards — Court of Wards can apply to set it aside. (Vol 31) 1944 Lah 397 (398).

[7] The Court cannot *suo motu* set aside an *ex parte* decree. (Vol 14) 1927 Lah 372 (372).

14. Application by the legal representative of the defendant. — [1] A legal representative can apply under the rule to set aside an *ex parte* decree against a deceased defendant. (Vol 10) 1923 All 30 (30) * (1902) 29 Cal 33 (35) * (Vol 2) 1915 Mad 1204 (1205) : 38 Mad 442 * (Vol 12) 1925 Oudh 370 (371) : 27 Oudh Cas 299.

[2] Proceedings under this rule already initiated by the defendant, can be continued by his legal representative. (1907) 29 All 574 (575).

[3] Son in womb at the time of dismissal of suit cannot apply for restoration after his birth. (Vol 30) 1943 All 161 (162) : I L R (1943) All 66.

15. Grounds for setting aside an *ex parte* decree. — [1] The Court dealing with the application should satisfy itself about (a) absence of due service of summons, or (b) existence of sufficient cause preventing defendant's appearance. (Vol 12) 1925 Lah 577 (577) * (Vol 22) 1935 All 565 (566).

[2] Where sufficient cause is shown to exist for the absence or there was no service of summons the Court cannot refuse to set aside the decree on any other ground. (1899) 26 Cal 267 (272) * (Vol 12) 1925 Cal 627 (628) : 52 Cal 179 * (Vol 15) 1928 Nag 75 (76). (Failure to take out witness summons is not a ground.)

[3] Unless summons were not duly served or sufficient cause existed for failure to appear the Court cannot set aside the decree on other grounds. (Vol 29) 1942 Nag 78 (79) : I L R (1942) Nag 675 * (Vol 27) 1940 Oudh 405 (408) : 16 Luck 79 * (Vol 17) 1930 Rang 152 (152) * (Vol 18) 1931 All 294 (296) : 55 All 612 (F B) * (Vol 3) 1916 Mad 487 (488) * (Vol 25) 1938 Cal 797 (798) * (Vol 23) 1936 Mad 524 (524) * (Vol 22) 1935 Mad 196 (197). (*Ex parte* decree passed as defendant was not ready — Decree cannot be set aside).

[4] Merits or demerits of case are not relevant for the question whether the *ex parte* decree should be set aside or not. (Vol 30) 1943 Sind 188 (189) : I L R (1943) Kar 255.

[5] The Court should decide upon evidence. (Vol 12) 1925 Mad 1264 (1265).

[6] In the absence of any other evidence the decision can be based upon proper affidavits. (1913) 1913 Mad W N 857 (858).

[7] Finding as to the facts alleged in the application should be definite. (Vol 13) 1926 Oudh 118 (119) * (Vol 7) 1920 Pat 621 (622) * (Vol 28) 1941 Mad 114 (114, 115). (Although recording of finding regarding presence of sufficient cause for interference under O. 9, R. 13 is not mandatory still it is most desirable that finding on facts should be given explicitly.)

[8] Under further proviso added by Allahabad High Court irregularity of service of summons is no ground where defendant is aware of hearing of suit. (Vol 20) 1933 All 165 (166).

16. Summons not duly served. — [1] Absence of due service of summons should be proved by the appli-

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cant claiming the benefit of this rule. (Vol 11) 1924 Pat 446 (447) : 3 Pat 236* (Vol 20) 1933 Lah 288 (289)* (Vol 20) 1933 Rang 156 (157)* (Vol 15) 1928 Mad 655 (655)* (Vol 15) 1928 Nag 80 (80) : 22 Nag L R 166.

[2] Where the applicant establishes that the Court passed *ex parte* decree without proof of due service the decree should be set aside. (1901) 23 All 99 (100, 101).

[3] Want of due service is not proved by an assertion of the ignorance of defendant. (Vol 13) 1926 Mad 558 (559)* (1928) 108 Ind Cas 753 (754) (Mad).

[4] The Court must decide the matter upon enquiry and upon evidence. (1911) 9 Ind Cas 31 (32) (All)* (Vol 10) 1928 Mad 27 (28)* (Vol 22) 1935 Pesh 137 (139).

[5] Where the summons is not served personally on the defendant but on his agent the burden of proof of showing that service on defendant personally was impracticable or that the defendant was carrying on business through such agent is on plaintiff. (1913) 14 Mad L Tim 535 (535).

[6] In each case the Court must see that the serving officer has used all due and reasonable diligence to find out the defendant before affixing the summons. (Vol 13) 1926 Cal 327 (330, 333)* (Vol 11) 1924 Lah 233 (233)* (Vol 5) 1918 All 331 (331).

[7] A summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding and having no reference to the order ultimately passed. (Vol 11) 1924 All 818 (823) : 46 All 864* (Vol 26) 1939 Rang 436 (440) : 1939 Rang L R 606.

[8] In the following cases it was held that there was no due service : —

(a) A summons served not on the defendant but upon his brother. (1911) 9 Ind Cas 763 (763) (Mad).

(b) Service on the karta of a joint family—No due service upon the other members. (Vol 24) 1937 Pat 17 (19).

(c) Summons intended for a pardanashin lady—Service on a male member when she was inside the house. (Vol 22) 1935 All 660 (662).

(d) Service by registered post the receipt of which is denied by the defendant. (Vol 9) 1922 Bom 377 (377) : 46 Bom 130* (Vol 23) 1936 Pesh 199 (200).

(e) Substituted service without anything on record to show that provisions of O. 5, Rr. 19 and 20 were complied with. (Vol 11) 1924 Lah 191 (191)* (Vol 17) 1930 Lah 560 (560)* (Vol 27) 1940 Oudh 81 (82) : 15 Luck 150.

(f) Where order for substituted service resulted out of fraud or misrepresentation. (Vol 21) 1934 Cal 745 (747)* (Vol 22) 1935 Lah 129 (129).

(g) Where time available after service is insufficient to appear and defend. (Vol 28) 1941 Mad 435 (436)* (1905) 27 All 192 (193, 194)* (1911) 11 Ind Cas 433 (434) (Sind).

[9] The un rebutted oath of the applicant is sufficient proof of non-service (Vol 11) 1924 Rang 336 (336).

[10] Though an affidavit of the officer serving summons is enough to prove service he should be examined in box when service is denied. (Vol 28) 1936 Mad 660 (661) : 59 Mad 1049.

[11] Appearance before the registration of suit for appointment of guardian *ad litem* does not dispense with the service of suit summons. (1913) 35 All 163 (163).

[12] Defendant's knowledge of the suit cannot cure the defect arising out of want of due service. (Vol 3) 1916 Cal 181 (184) : 43 Cal 447 (S B)* (Vol 19) 1932 Pat 150 (152).

[13] Refusal to accept service is no ground for setting aside *ex parte* decree. (Vol 12) 1925 Nag 356 (357).

[14] Willful or careless default in appearance after due service is no ground for setting aside *ex parte* decree. (1913) 10 B ng L R 68 (70, 71)

[15] Irregularity in service can be waived by the

defendant and there is a waiver when he accepts the summons. (Vol 1) 1914 Nag 73 (74) : 10 Nag L R 144.

[16] The summons referred to is the first summons issued to the defendant giving him notice of suit and not of any application made during the course of the suit. (Vol 10) 1923 Nag 13 (15).

17. Sufficient cause. — [1] Fraudulent suppression of summons from the knowledge of the defendant is sufficient cause. (Vol 18) 1931 Pat 204 (205) : 10 Pat 516 (F B).

[2] Record of finding as to the presence of parties though not mandatory is desirable. (Vol 28) 1941 Mad 114 (115).

[3] Impression created by Court that the suit will not be proceeded with is sufficient cause. (Vol 31) 1944 Nag 181 (181) : I L R (1944) Nag 425.

[4] Where the party has by way of precaution engaged two pleaders, in the absence of any warning that they could not be depended upon, he has sufficient cause for not appearing. (Vol 31) 1944 Nag 317 (317) : I L R (1944) Nag 558.

[5] Defendant's failure to appear when suit was called on for hearing as he had been away to fetch his pleader from some other part of the Court—*Held*, there was sufficient cause. (Vol 31) 1944 Nag 103 (103) : I L R (1944) Nag 161.

18. Minor defendant. — [1] *Ex parte* decree against a minor properly represented is binding upon him. (Vol 4) 1917 Pat 700 (700).

[2] It is not necessary to serve the minor with notice of the intention of the Court to appoint a guardian *ad litem*. (Vol 11) 1924 Pat 772 (773)* (Vol 5) 1918 Mad 545 (547).

[3] Mere non-appearance of the guardian or his failure to instruct properly is no ground for setting aside an *ex parte* decree against the minor. (1901) 5 Cal W N 58 (59)* (1907) 9 Bom L R 1099 (1101)* (Vol 23) 1936 Mad 961 (962)* (Vol 22) 1935 Mad 435 (436) : 38 Mad 1045.

[4] Irregularity in the appointment of the guardian is not a ground for setting aside the *ex parte* decree. (1912) 9 All L Jour 653 (659, 660)* (Vol 13) 1926 All 545 (545) : 49 All 123 (F B).

Also see O. 32, R. 3, Note 7.

[5] Guardian wrongfully or negligently allowing a claim against minor to be decreed *ex parte*—Decree can be set aside. (Vol 12) 1935 Mad 435 (436) : 58 Mad 1045.* (Vol 23) 1936 Mad 961 (962)* (Vol 21) 1934 Mad 428 (429) : 57 Mad 1069. (6 Cal L Rep 69, followed.) Also see O. 32, R. 3, Note 5.

[6] Guardian guilty of fraud or gross negligence—The *ex parte* decree can be impeached in a separate suit by the minor. (1895) 19 Bom 571 (576)* (Vol 5) 1918 Nag 187 (191)* (1900) 24 Bom 547 (552)* (1886) 12 Cal 69 (76).

Also see O. 32, R. 3, Note 5.

[7] Where the decree allowed to be passed *ex parte* prejudicially affects the minor it can be set aside. (Vol 18) 1931 Mad 6 (7).

[8] Failure to apply under this rule is no bar to a separate suit by minor to impeach the decree. (Vol 2) 1915 All 62 (64) : 37 All 179.

19. Decree having been satisfied. — [1] Satisfaction of the decree does not disentitle the defendant from applying under this rule. (1899) 23 Bom 716 (718).

20. "Upon such terms as to costs," etc. — [1] The Court has unlimited discretion in fixing terms on which the *ex parte* decree will be set aside and so can order the deposit of the entire decretal amount. (Vol 13) 1926 Sind 50 (51)* (1903) 7 Cal W N 13.

[2] The Court may order the payment of costs as a term. (Vol 7) 1920 Pat 660 (661) : 5 Pat L Jour 420* (1892) 1892 All W N 216 (217).

O. 9 R. 13 (*contd.*)

[3] The Court may order that a surety be furnished for the amount that may be found under the decree to be passed. (1899) 26 Cal 222 (223, 224).

[4] Security can be ordered to be paid in cash or property. (Vol 11) 1924 Oudh 181 (181).

[5] Where the conditions are not strictly carried out the *ex parte* decree will remain valid. (Vol 9) 1922 Oudh 14 (15) * (Vol 13) 1926 Oudh 481 (482).

[6] The time fixed for payment of the costs or of the decree amount can be extended by the Court. (Vol 5) 1918 Mad 638 (639) * (Vol 1) 1914 All 55 (56); 36 All 77.

[7] Very onerous terms should not be imposed on the applicant. (Vol 11) 1924 Oudh 229 (229) * (Vol 20) 1933 All 601 (602).

[8] Pending the trial of an application under this rule, the Court cannot order the deposit of costs or to furnish security and dismiss the application for failure. (Vol 27) 1940 Mad 585 (585) * (Vol 31) 1944 All 238 (237); I L R (1944) All 504.

21. Proviso to the rule. — [1] Where the suit as framed could have been maintained without impleading the *ex parte* defendants an order under this rule does not set aside the whole decree. (1907) 6 Cal L Jour 226 (229, 231) * (Vol 15) 1928 Cal 397 (398).

[2] Decree which is incapable of being set aside against particular defendants applying can be wholly set aside. (Vol 25) 1933 Lah 823 (824).

[3] The following are cases where a decree cannot be set aside as against particular defendants alone:—

[a] Where the decree is joint and indivisible. (1907) 6 Cal L Jour 226 (227, 231) * (Vol 14) 1927 Mad 550 (550) * (Vol 23) 1936 Lah 243 (243) * (Vol 21) 1934 All 1051 (1052) * (Vol 24) 1937 Pat 17 (20) * (1900) 5 Cal W N 58 (59) * (Vol 11) 1924 Pat 771 (772) * (1898) 25 Cal 155 (157, 160).

[b] Where the decree proceeds on a ground common to all the defendants. (Vol 4) 1917 Lah 194 (195) * (Vol 1) 1914 Oudh 220 (220).

[c] Where the relief which the applicant is entitled to cannot effectively be given except by setting aside the decree against the other defendants also. (1907) 5 Cal L Jour 202 (203) * (1911) 33 All 264 (271); 38 Ind App 37 (P. O.). (Decree against several co-mortgagors.)

[d] When the suit would result in two inconsistent decrees if the *ex parte* decree be not set aside against the other defendants also. (1902) 24 All 383 (388) (F B) * (Vol 23) 1936 Lah 243 (243).

[4] Where the non-restoration of the suit in whole would result in inconsistent decrees being passed the suit should be restored in full even though it is *ex parte* against some and contested against the others. (1898) 25 Cal 155 (156, 157) * (1902) 24 All 383 (400) (F B).

[5] In the following cases it was held that the decree can be set aside only as against defendant applying:—

[a] Where the decree is not joint and indivisible. (Vol 13) 1926 Mad 256 (257) * (1908) 31 Mad 454 (456, 457, 458) * (1902) 6 Cal W N 109 (110) * (1900) 4 Cal W N 456 (458) (S B).

[See however (1894) 18 Bom 142 (143) * (Vol 14) 1927 Sind 245 (247) * (1913) 1913 Pun L R No. 91, p. 345 (346). (This was however a case in which the proviso did not apply.) * (1906) 3 Cal L Jour 160 (162).]

[b] Where the decree is not based upon a ground common to all defendants. (1903) 26 Mad 604 (606) * (1907) 6 Cal L Jour 226 (232).

[c] Where each defendant has a distinct defence peculiar to himself alone. (Vol 12) 1925 Oudh 181 (182) * (1907) 6 Cal L Jour 226 (232).

[6] An Appellate Court reversing the decision as against the contesting defendant on the ground that he was not a necessary party should not remand the suit

for fresh trial as against the defendants who remained *ex parte*. (Vol 23) 1936 Rang 2 (4).

[7] Where decree is *ex parte* against one of the co-defendants and the suit was dismissed as against others no decree can be passed against them in the re-trial. (Vol 27) 1940 Cal 9 (10, 11).

[8] Where a suit is withdrawn as against one of the defendants and an *ex parte* decree is passed against the other, no decree can be passed in the retrial against the person against whom the suit is withdrawn. (Vol 27) 1940 Mad 765 (766).

22. Effect of setting aside the *ex parte* decree.

— [1] On the setting aside of an *ex parte* decree, the parties are restored to their original position in the suit. (Vol 5) 1918 Cal 883 (883) * (Vol 20) 1933 Pesh 24 (26) * (Vol 21) 1934 Lah 45 (46) * (Vol 15) 1928 Mad 969 (971).

[2] Where a decree is set aside the Court should decide the suit as it stood before the decree. (1907) 17 Mad L Jour 81 (82).

[3] The trial should commence *de novo* and the evidence that had been taken in the *ex parte* proceedings should not be used. (1912) 23 Mad L Jour 273 (275).

[4] Attachment ordered under the *ex parte* decree becomes null and void (1906) 29 Mad 175 (176). Also see S. 64, Note 7.

[5] Any sale that has taken place in pursuance of the *ex parte* decree becomes null and void. (1898) 25 Cal 175 (178) * (Vol 3) 1916 Mad 706 (707) * (Vol 4) 1917 Cal 564 (565).

[6] The Court can also order restitution except as against a stranger auction-purchaser. (1906) 3 Cal L Jour 181 (182).

[7] *Ex parte* final decree set aside does not vacate the preliminary decree (Vol 11) 1924 Mad 890 (891).

23 *Ex parte* decree against a firm. — [1] The rule applies to *ex parte* decrees against firms also. (Vol 29) 1942 Sind 99 (100); I L R (1942) Kar 220.

[2] Where service of summons has been made as indicated by O 30 the *ex parte* decree cannot be set aside on the motion of a partner who alleges that he has not been duly served. (Vol 11) 1924 Bom 366 (367); 47 Bom 778.

[3] If a partner who has been served under O. 30, is unavoidably absent he can apply under this rule when an *ex parte* decree is passed against the firm. (Vol 29) 1942 Sind 99 (100); I L R (1942) Kar 220.

[4] Where the applicant denies that he is a partner with other defendants, the Court can enquire into the matter and set aside the decree. (Vol 29) 1942 Sind 97 (98); I L R (1942) Kar 218 (S. 151, Civil P. C., applied.) * (1910) 8 Ind Cas 448 (449) (Low Bur).

[5] Where a suit against a firm through one of its partners is decreed *ex parte* against both, such decree if set aside must be done so against both. (Vol 25) 1938 Lah 823 (824).

24. Limitation. — [1] It is the duty of the Court to see whether the application is within the time prescribed. (Vol 12) 1925 Lah 577 (577) * (Vol 11) 1924 Mad 890 (891) * (Vol 2) 1915 All 240 (241) * (Vol 8) 1921 Pat 69 (71, 72); 5 Pat L Jour 460.

[2] Under Art. 164 of Limitation Act the defendant can apply within thirty days from the date of the decree or, where the summons is not duly served, within thirty days from the date of his knowledge of the decree. (Vol 3) 1916 Cal 651 (652) * (Vol 19) 1932 Lah 522 (523) * (Vol 20) 1933 Pat 279 (279); 12 Pat 745 * (Vol 19) 1932 Oudh 326 (327).

[3] The Court has no power, inherent or otherwise, to enlarge the period of limitation. (Vol 9) 1922 Pat 479 (480); 1 Pat 277 * (Vol 23) 1936 Rang 305 (305).

[4] Section 5 of the Limitation Act is not applicable to this rule unless the High Court under its rule-making powers extends its application. (Vol 12) 1925 Mad

No decree to be set aside without notice to opposite party.

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

[1882—S. 109; 1877—S. 109.]

O. 9 R. 13 (contd.)

14 (17) : 47 Mad 824 (FB) * (Vol 20) 1933 Rang 110 (111) * (Vol 12) 1925 Rang 187 (188) : 2 Rang 655.

[5] Section 22 of the Limitation Act does not apply to this rule. (Vol 10) 1923 Pat 88 (88): 6 Pat L Jour 463.

[6] Time spent in prosecuting an application under this rule cannot be excluded in computing the period of limitation for appeal. (1896) 23 Cal 325 (327).

25. Appeal. — [1] The rule contemplates three classes of orders: (i) Order setting aside the *ex parte* decree. (ii) Order setting aside the *ex parte* decree on certain terms. (iii) Order rejecting the application to set aside the *ex parte* decree. (Vol 14) 1927 Bom 1 (3) : 51 Bom 67 (F B.).

[2] No appeal lies from an order setting aside *ex parte* decree. (1889) 16 Cal 426 (426) * (1878) 1 All 748 (750) (F B) * (Vol 14) 1927 Lah 775 (776) * (Vol 6) 1919 All 426 (427).

[3] No appeal lies against an order setting aside *ex parte* decree on certain terms. (Vol 27) 1940 Mad 585 (585, 586) * (Vol 5) 1918 Mad 257 (258). (Setting aside on Letters Patent Appeal, (Vol 4) 1917 Mad 596 (596). * (Vol 20) 1933 Rang 63 (64) * (Vol 21) 1934 Rang 192 (193) * (Vol 12) 1925 Mad 1182 (1183) * (Vol 14) 1927 Bom 1 (3): 51 Bom 67 (F B.). (Overruling (Vol 13) 1926 Bom 353 : 50 Bom 326.)

[But see (Vol 1) 1914 All 336 (337).]

[4] Order, whether on merits or for default, rejecting application for restoration is appealable. (Vol 16) 1929 Pat 529 (530) : 8 Pat 533 * (Vol 14) 1927 Pat 240 (240, 241) : 6 Pat 474 * (Vol 4) 1917 Cal 548 (549) * (Vol 4) 1917 Cal 558 (559) * (Vol 11) 1924 Lah 281 (281) * (Vol 14) 1927 Lah 883 (884).

[5] The Appellate Court may in an appeal remand the application for enquiry. (1901) 23 All 220 (226) : 23 Ind App 28 (P C) * (Vol 18) 1931 Mad 813 (817, 820) : 55 Mad 223.

[6] An appeal against an order rejecting an application to set aside *ex parte* final decree cannot be rejected on the ground that a final decree has been passed. (Vol 15) 1928 Cal 720 (721).

[But see (Vol 12) 1925 Cal 790 (791).]

[7] In an appeal from an *ex parte* decree the Court can always consider whether an adjournment should not have been granted in the interests of justice. (Vol 24) 1937 Mad 922 (927, 928).

[8] Order dismissing an application for restoration of an application for setting aside *ex parte* decree dismissed for default is not appealable. (Vol 22) 1935 Mad 609 (610) : 58 Mad 814 * (Vol 28) 1941 Mad 17 (17).

[9] Order for execution for costs of application to set aside *ex parte* decree can be stayed pending appeal. (Vol 29) 1942 Pat 146 (148).

[10] Appellate Court can question the validity of substituted service. (Vol 27) 1940 Oudh 81 (82, 83) : 15 Luck 150.

[11] An order under O. 9, R. 13 by a revenue Court under the Madras Estates Land Act is appealable under O. 43. (Vol 30) 1943 Mad 656 (657).

26. Revision. — [1] Revision will lie from an order setting aside an *ex parte* decree. (Vol 29) 1942 Nag 78 (79) : I L R (1942) Nag 675 * (Vol 12) 1925 All 610 (611) : 48 All 175 (FB) * (Vol 20) 1933 Rang 110 (111) * (Vol 2) 1915 Mad 492 (492) * (Vol 20) 1933 Rang 156 (156) * (Vol 25) 1938 Sind 76 (78) : 32 Sind L R 703 * (Vol 26) 1939 Oudh 111 (112) : 14 Luck 435 (No illegality or irregularity committed by Court in

setting it aside—No interference in revision.)

[2] In the following cases where restoration was refused revision was held to lie :

(a) Where the provisions of this rule were not complied with. (Vol 18) 1931 All 294 (302) : 53 All 612 (FB) * (Vol 12) 1925 Nag 356 (357) * (1912) 22 Mad L Jour 409 (410) * (Vol 7) 1920 Pat 621 (622) * (Vol 14) 1927 Mad 722 (724). (When decree against several defendants was set aside on application by some, without finding that decree was indivisible.) (1900) 4 Cal W N 456 (458) (SB). (Do.) * (1897) 25 Cal 155 (158) (Do.) * (Vol 23) 1936 Lah 243 (243).

[See however (1913) 17 Cal W N 142 (143)].

(b) Where in spite of the absence of proper service of summons, restoration is refused. (1909) 6 All L J 45 (48).

(c) Where Court refuses to exercise its jurisdiction. (Vol 12) 1925 All 267 (268, 270) : 47 All 140 * (1901) 8 Bom L R 567 (569).

(d) Where decision is based upon an erroneous view of the law of limitation. (Vol 5) 1918 Lah 268 (268).

(e) Absence of finding as to sufficient cause. (Vol 27) 1940 Oudh 405 (409) : 16 Luck 79 * (1931) 1931 Mad W N 239 (240) * (Vol 7) 1920 Pat 621 (622).

[But see (Vol 28) 1941 Mad 114 (115). ((Vol 23) 1936 Mad 524, relied on—1931 Mad W N 239, not approved.)]

(f) Order passed without enquiry. (1906) 1906 Upp Bur Rul C F C 42 * (Vol 1) 1914 Cal 872 (873). (Vol 7) 1920 Oudh 220 (220) : 23 Oudh Cas 104. (Ground taken by defendant not gone into, but disposal on ground not taken.) * (Vol 14) 1927 Mad 507 (508).

[3] Revision does not lie when other remedies are available. (1928) 113 Ind Cas 409 (409) (Mad) * (Vol 25) 1938 Mad 217 (217) * (Vol 24) 1937 All 691 (693, 694).

[4] The High Court will not interfere with a finding of fact as to sufficient cause or otherwise. (1912) 34 All 592 (594) * (Vol 13) 1926 Pat 29 (30) * (Vol 11) 1924 Pat 816 (816) * (Vol 24) 1937 All 691 (692) * (Vol 25) 1938 Nag 370 (373).

[5] Absence of record of finding as to presence of party by itself is no ground for revision. (Vol 28) 1941 Mad 114 (115).

[6] Any of the conditions imposed by the Court in the exercise of its discretion will not be interfered with in revision. (Vol 13) 1926 All 142 (143) : 48 All 199.

[7] Where the party has acquiesced in the order of the trial Court by accepting costs, he cannot apply for a revision. (Vol 13) 1926 Lah 637 (637) * (1928) 110 Ind Cas 528 (529) (Mad) * (Vol 14) 1927 Lah 55 (55, 56) * (Vol 25) 1938 Mad 603 (604).

[See (Vol 23) 1936 Mad 49 (50). (But where the order setting aside the *ex parte* decree was without jurisdiction, the acceptance of the costs will not preclude the plaintiff from questioning the decree).]

[8] A dismissal of an application under this rule cannot be said to be a denial of the right of fair trial so as to justify the interference of the High Court under S. 107 of the Government of India Act of 1915. (See now S. 224 of the Government of India Act of 1935, under which the revisional powers of the High Court have been taken away.) (Vol 13) 1926 Pat 37 (38).

Order 9, Rule 14—Note 1.

[1] Rule 14 is imperative and an *ex parte* decree against the defendant cannot be set aside unless notice has been served on the plaintiff. (1913) 24 Mad L Jour 482 (482). (Oral notice to a pleader not appearing in the case but in other proceedings connected with

Provincial Amendments.

CALCUTTA

Cancel the word "thereof" and substitute therefor the following words :

"together with a copy thereof (or concise statement as the case may be.)"

[3-2-1933.]

Rule 15—BOMBAY.

Add the following as Rule 15 :

"15. In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an 'appeal'."

[21-12-1927.]

Rule 15—MADRAS.

Add the following :

"15. (1) Rules 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings in execution falling within

Setting aside ex parte orders on execution. Section 47 of the Code in which notice to the opposite party is required under the provisions of the Code,

(2) Subject to the provisions of sub-rule (2) of Rule 13, an application under this rule shall be made within thirty days of the date of the order, or, where the notice was not duly served, of the date when the applicant has knowledge of the order."

[6-3-1933.]

ORDER X.

EXAMINATION OF PARTIES BY THE COURT

1. At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the *Ascertainment whether allegations in pleadings are admitted or denied.* plaint or written statement (if any) of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

[1882—S. 117; 1877—S. 114.]

2. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

[1882—S. 118; 1877—Ss. 118, 119; 1859—S. 125.]

O. 9 R. 14 (*contd.*)

same decree is not sufficient.) * (Vol 10) 1923 Rang 49 (50) : 11 Low Bur Rul 394. (An order without notice is without jurisdiction).

[2] The principle of representation cannot be urged against the definite provisions of this rule. (Vol 21) 1934 Pat 396 (397).

[3] The words "opposite party" do not include a person who has attached an *ex parte* decree. It is only the party on record that is entitled to notice before the decree is set aside. (1910) 20 Mad L Jour 524 (525) * (Vol 23) 1936 All 410 (410, 411). (Person impleaded as defendant by reason of being subsequent purchaser of part of mortgaged property is not opposite party).

[4] 'Opposite party' held meant the plaintiff who obtained *ex parte* decree against the defendants and did not include defendants besides the petitioner who were in the position of counter claimants in the partition suit. (Vol 14) 1927 Cal 692 (693) : 55 Cal 78.

Order 9, Rule 15—(Madras)

[1] Rule 15 is not retrospective. (Vol 22) 1935 Mad 585 (586) * (Vol 22) 1935 Mad 714 (715).

Order 10, Rule 1—Note 1.

[1] The Court is bound to examine the parties, only when there is no clear, express or implied denial of any statement of fact in the pleadings. But where a party puts in a written replication covering all statements of facts referred to in the written statement, Court need not examine the parties or their pleaders. (1926) 27 Pun L R 136 (137).

[2] Proper procedure to clear up any ground is under O. 10, R. 1. (Vol 16) 1929 Bom 413 (413).

[3] Replication statements from parties filed without

leave of Court as required by O. 8, R. 9, are no substitute for examination under O. 10. (Vol 9) 1922 Oudh 30 (31) : 24 Oudh Cas 348.

[4] Failure to examine to ascertain real points in dispute justifies interference in revision. (Vol 11) 1924 Nag 191 (195).

[5] Admissions under O. 10, R. 1 are conclusive against the party making them but is no evidence against the opposite party. (Vol 13) 1926 All 710 (710) : 49 All 219 * (Vol 17) 1930 Lah 947 (948) : 32 Cri L Jour 303.

[6] Plaintiff can properly refuse to make admission about matters not directly involved in suit. (Vol 17) 1930 Lah 229 (230).

[7] All defendants confessing judgment—Joint statement is legal. (Vol 21) 1934 Lah 540 (541).

Order 10, Rule 2—Note 1.

[1] Power under, is to be used to obtain information on material questions and not for superseding ordinary procedure at trial. (Vol 18) 1931 P C 175 (176) (P C) (Fact that judge thought it useful to have whole story at first from one party deeply implicated, does not justify deviation.) * (Vol 28) 1941 Sind 41 (45) : 1 I L R (1941) Kar 146.

[2] Person examined on behalf of the party — His statement is not necessarily binding on the party. (Vol 13) 1926 All 411 (412).

[3] Death of widow of last male-holder — Suit by plaintiffs for declaration that they were entitled to last male-holder's estate as next reversioners—On date fixed for hearing, Court at once examining defendant and recording his admission as to plaintiffs' relation with last male-holder—Both parties closing case thereafter—Court granting declaration asked for—Procedure held illegal—Plaintiffs held not entitled to decree unless they esta-

Substance of examination to be written.

^a3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

[1882—S. 119; 1877—S. 119; 1859—S. 125.]

[a] This rule is not applicable to the Chief Court of Oudh, *see* the Oudh Courts Act, 1925, (U. P. Act 4 [IV] of 1925), S. 16 (2).

4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

[1882—S. 120; 1877—S. 120; 1859—S. 127. See O. 5, R. 3.]

ORDER XI.

"The provisions in the Code as to discovery are based on the rules of English procedure, in force at the time when it was passed. Since then the English procedure has been amended and is now contained in O. XXXI. This order has in effect been adopted in the rules regulating the procedure on the original side of the High Courts of Calcutta and Bombay and has, it is believed, been found to work satisfactorily in practice. On the other hand, in mufassil Courts little use has yet been made of the machinery of discovery, and the Committee therefore think the rules of the Calcutta and Bombay High Courts on their original sides may be safely adopted without risk of disturbing a procedure with which the mufassil Courts have become familiarised. This will secure uniformity of practice and also the advantage of the commentary on the rules prescribed by the English decision."—S. O. R.

DISCOVERY AND INSPECTION

1. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an

O. 10 R. 2 (*contd.*)

blished by evidence their reversionary title. (Vol 28) 1941 Sind 41 (45, 46); I L R (1941) Kar 146.

[4] Order 10, R. 2 cannot be used to enable counsel to evade a clear direction of the Court. (Vol 24) 1937 Nag 268 (269); I L R (1937) Nag 519.

Order 10, Rule 4 —Note 1.

[1] The intention of O. 10, R. 4 seems to be not only to enable the Court to get obscure points cleared up by obtaining information from either of the parties but also, if possible, to get admissions of the parties so as to narrow down issues. (1903) 5 Bom L R 687 (688).

[2] Court's powers under O. 10, R. 4 are discretionary. (1908) 5 Bom L R 687 (688).

[3] Personal appearance of plaintiff can be compelled only under O. 5, R. 3 and O. 10, R. 4. (Vol 19) 1932 Nag 135 (136); 28 Nag L R 146.

[4] The parties to suits should not be required to attend the Court under O. 10, R. 4, unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused to answer them. (Vol 5) 1918 Oudh 429 (429); 21 Oudh Cas 252.

[5] Even under O. 10, R. 4 pardanashin lady cannot be compelled to attend Court. (Vol 20) 1933 All 551 (553); 55 All 666* (1926) 24 Mad L W 757 (758).

[6] Pleader or agent not refusing or unable to answer material questions — Court cannot order personal attendance — Such order in absence of inability or refusal is irregular and can be rectified under S. 151 and O. 47, R. 1. (Vol 20) 1933 All 517 (518, 519).

[7] Plaintiff directed to appear under O. 10, R. 4 and case adjourned — On his non-appearance case dismissed

under O. 10, R. 4—*Held* proper order was under O. 17, R. 2 read with O. 9, R. 8—Also held order under O. 10, R. 4 must be held to be one under O. 9, R. 8. (Vol 4) 1917 All 136 (137, 138)* (Vol 19) 1932 All 595 (596).

[But see (Vol 8) 1921 Mad 417 (418). (Order 9 does not apply to O. 10, R. 4 which is self-contained.)]

[8] Several adjournments given for appearance — Warning to pleader and agent that action would be taken under O. 10, R. 4 (2) — Non-appearance by party and neither pleader nor agent undertaking to answer questions — Disposal of suit under O. 10, R. 4 (2), is proper though no questions were put to pleader or agent. (Vol 20) 1933 Lah 922 (924).

[9] An order by a Judge to the defendants to appear in person is an order under O. 10, R. 4 and is appealable under O. 43, R. 1. (1909) 6 All L Jour 340 (342).

[10] Order against one of several parties not amounting to judgment—No appeal lies against it. (Vol 4) 1917 All 300 (300); 39 All 450..

ORDER 11, RULE 1—SYNOPSIS.

1. Scope of the rule.
2. Interrogatories on questions of law.
3. "Opposite party."
4. Leave of Court.
5. Probate proceedings.
6. Revision.

1. Scope of the rule. — [1] A party may deliver interrogatories in order to ascertain nature of his opponent's case, or to support his own case, in order to narrow the points in issue, or to avoid proving admitted facts. But interrogatories cannot be directed to prove

order for that purpose : Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

[1882—S. 121 ; See S. 30 ; R. S. C., O. 31 R. 1.]

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

[R. S. C., O. 31, R. 2.]

3. In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

[1882—S. 128; R. S. C., O. 31, R. 3.]

4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 31, R. 4.]

5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

[1882—S. 124; R. S. C., O. 31, R. 5.]

O. 11 R. 1 (*contd.*)

contents of documents held to be inadmissible in evidence. (Vol 21) 1934 Nag 181 (182).

[2] Interrogatories can be administered in same manner as in England or even for discovering the nature of the opponent's case. (Vol 1) 1914 Cal 767 (767) : 41 Cal 6.

[See however the following cases decided under the Code of 1882 which held that interrogatories could not be administered for the purpose of discovering the nature of the opponent's case : (1896) 23 Cal 117 (124) & (1890) 17 Cal 840 (848).

[3] Interrogatories for discovering other party's evidence cannot be allowed. (Vol 20) 1933 Cal 151 (153).

[4] Suit on promissory note—Plea of want of consideration — Application by defendant without letting in evidence to issue interrogatories to plaintiff must be dismissed. (Vol 20) 1933 Mad 298 (299).

2. Interrogatories on questions of law.—[1] An interrogatory as to opinion of a party on what is really a question of law is not admissible. (1996) 23 Cal 117 (124).

3. "Opposite party." — [1] Interrogatories must not be administered to persons supporting the party administering them. (Vol 8) 1921 Mad 381 (381).

[2] The words "any party" and "any other party" in R. 12 contemplate opposite parties within the meaning of O. 11, R. 1. Consequently before a defendant can claim an order for discovery against co-defendant, there must be an issue raised between the defendants at that stage. (Vol 19) 1932 Cal 72 (72, 73) : 53 Cal 1091.

[3] Plaintiff's father died during his minority and third defendant obtained letters of administration — Shortly after plaintiff became major—He and third defendant executed mortgages for alleged debts of deceased

in favour of defendants 1 and 2—Plaintiff sought to set aside those mortgages—Plaintiff stated that he received no money from defendants 1 and 2 and third defendant was not paid anything in his presence— The Court holding third defendant as a "party opposite" allowed inspection against him on the application of two other co-defendants. (1893) 17 Bom 584 (589).

4. Leave of Court. — [1] It is duty of Court to determine whether to grant leave to interrogate, but not to determine at that stage what questions, the party should be compelled to answer. (1880) 5 Cal 707 (709).

[2] If an *ex parte* order is made giving leave to interrogate the other party has a right to get the order set aside, if improper. (1880) 5 Cal 707 (710).

5. Probate proceedings. — [1] Order 11 of the Code applies to proceedings in probate and a Court can on submission of interrogatories direct an enquiry. (Vol 3) 1916 Cal 953 (953) : 43 Cal 300.

6. Revision. — [1] Refusal to issue interrogatories for examination of witnesses is no ground for revision. (Vol 10) 1923 Lah 282 (283).

[2] Order declining to re-issue interrogatories—High Court cannot interfere under S. 44, Punjab Courts Act, but can do so under S. 107, Government of India Act, (1919). (Vol 24) 1937 Lah 28 (28).

Order 11, Rule 2 — Note 1.

1. Scope of the rule. — [1] Order 11 R. 2 does not apply to an order for production. (Vol 11) 1924 Mad 582 (583).

[2] Interrogatories aimed at discovering nature of evidence should be disallowed—Inspection of documents can be obtained but not their particulars by way of interrogatories. (Vol 4) 1917 Cal 658 (658).

[3] Documents held inadmissible — Interrogatories to prove contents—Procedure is bad. (Vol 21) 1934 Nag 181 (182).

6. Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

[1882—S. 125; 1877—S. 125; R. S. C., O. 31, R. 6.]

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

[R. S. C., O. 31, R. 7. (Annulled in 1917).]

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

[1882—S. 126; 1877—S. 126; R. S. C., O. 31, R. 8. See R. 9 below.]

Form of affidavit in answer.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 31, R. 9.]

No exception to be taken.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

[Cf. R. S. C., O. 31, R. 10. (Annulled in 1917).]

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by viva voce examination, as the Court may direct.

[1882—S. 127; 1877—S. 127; R. S. C., O. 31, R. 11.]

12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1882—S. 129, para. 1; 1877—S. 129; R. S. C., O. 31, R. 12.]

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents

ORDER 11, RULE 6 — SYNOPSIS

1. Scope of the rule.

2. Objection to answering interrogatories.

1. Scope of the rule. — [1] An objection to the relevancy of interrogatories must be adjudicated upon by the Court. (Vol 5) 1918 All 303 (304, 305). (Court must decide the question before requiring party to answer or refuse.)

2. Objection to answering interrogatories. — [1] Assessee can refuse to answer interrogatories on statements made in income-tax proceedings. (Vol 21) 1934 Nag 181 (182).

[2] Defendant calling upon the plaintiff to answer an interrogatory as to how he estimated the amount of damages claimed — *Held*, plaintiff was not bound to answer as the interrogatory was premature and would cause the plaintiff to disclose his evidence. (1887) 14 Cal 703 (706).

[3] Objection as to prayer for discovery not taken in grounds of appeal in lower Appellate Court — It cannot be taken in second appeal. (Vol 20) 1933 Cal 865 (870).

Order 11 Rule 7 — Note 1.

1. Setting aside or striking out interrogatories. — [1] If the interrogatories are scandalous the Court may interfere at any stage. (1880) 5 Cal 707 (710).

[2] Interrogatories objected to as irrelevant — Court must decide the question before requiring party to answer or refuse. (Vol 5) 1918 All 303 (304, 305).

[3] Order disallowing interrogatories is not appealable — No revision lies — It can be challenged in appeal on final decision. (Vol 7) 1920 Sind 1 (1, 5): 14 Sind L R 28.

Order 11, Rule 8 — Note 1

1. Affidavit in answer through agent. — [1] Party ordered to answer interrogatories — No special direction to answer personally — Party can answer through recognized agent — Agent can swear affidavit. (Vol 28) 1941 Nag 205 (206) : I L R (1942) Nag 258.

Order 11, Rule 11 — Note 1

1. Scope of the rule. — [1] The party interrogated might omit to answer the interrogatories to which he objects, at his peril. Then the interrogating party can apply to the Court requiring the other party to answer, or answer further either by affidavit or by *viva voce* examination. The more cautious course is to file an affidavit stating in it his objections. (1880) 5 Cal 707 (710).

[2] Order under R. 11 to make sufficient answers — Revision lies. (Vol 21) 1934 Nag 181 (182).

ORDER 11, RULES 12-13—SYNOPSIS

1. Scope of the rules.

2. Professional or legal privilege.

ments therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

[1882—S. 129, para. 2; R. S. C., O. 31, R. 13.]

O. 11 Rr. 12–13 (*contd.*)

3. Documents relating solely to the case of the party producing them.
4. Documents incriminating party.
5. Production of public official documents.
6. Who may file affidavit?
7. "Opposite party."
8. Corporation.
9. Affidavit of documents, if conclusive — Further affidavit.
10. Effect of non-disclosure of documents.

1. Scope of the rules. — [1] The object of procedure under rules 12 and 13 is two fold: first to secure that all material documents are disclosed by putting the party upon oath; and secondly to put an end to a protracted inquiry as to the material documents actually in possession or under the control of the party. (Vol 7) 1920 Pat 131 (135) : 5 Pat L Jour 550.

[2] Right to obtain discovery is not limited to those documents which may be held to be admissible in evidence when suit is ultimately tried. (Vol 27) 1940 Cal 331 (333) : 1 L R (1940) 1 Cal 504.

[3] Affidavit of documents does not protect the party from an obligation to give inspection of other documents that may be proved to be in his possession. (1911) 38 Cal 428 (430, 431).

[4] Decision of case depending upon documentary evidence — In absence of application by parties under O. 11, R. 12, for discovery of documents Judge should himself make order to that effect under S. 30. (Vol 27) 1940 Cal 331 (332) : 1 L R (1940) 1 Cal 504.

2. Professional or legal privilege. — [1] Affidavit not showing that documents were written for the purpose of being communicated to solicitor — No privilege can be claimed regarding them. (1885) 11 Cal 655 (658).

[2] Privilege claimed with reference to correspondence — Affidavit must show that every letter therein and not merely the correspondence in general contains instructions or confidential communications to the attorney regarding conduct of suit. (1886) 12 Cal 265 (266).

[3] Documents containing the purport of interviews with and of advice received from solicitors and counsel as to position with regard to the claim and the steps to be taken therefor are privileged; it is immaterial that such communications pass from agent to principal and *vice versa*, before or after communication with solicitors. However, the affidavit should discriminate between contents of different letters. (1891) 15 Bom 7 (10).

[4] No privilege can be claimed for statements in documents made by servants of a party. (Vol 14) 1927 Bom 367 (376).

3. Documents relating solely to the case of the party producing them. — [1] Order for discovery can be refused against defendant on ground that it may compel him to produce document relating solely to his title; but if such document has some bearing in support of plaintiff's claim, order for discovery can be refused. (Vol 27) 1940 Cal 331 (333) : 1 L R (1940) 1 Cal 504.

[2] Discovery of title deeds cannot be ordered on mere fishing application — When application is well founded presumption arises from non-production. (Vol 18) 1931 Pat 426 (428) : 10 Pat 630.

4. Documents incriminating party. — [1] The objection by the person called on to make an affidavit of documents that the disclosure may tend to incriminate him cannot be taken in summons for discovery

but that objection can only be taken in affidavit in answer. (1897) 2 Q B 124 (132, 133, 134)

5. Production of public official documents. — [1] State-papers — Privilege is founded upon concern for public interest, State-policy or security and is to be exercised no further — Fact that production of document might prejudice the Crown's case or assist that of the other side does not justify claim for privilege. (Vol 18) 1931 P C 254 (257, 258) (P C).

6. Who may file affidavit. — [1] When there are several plaintiffs all of them must join in the affidavit for discovery of documents unless some specific reasons are shown to the contrary. (1891) 15 Bom 7 (9). (Residence in England is not a sufficient reason.)

[2] Court may allow affidavit to be filed by agent of party — Discretion of Court must be exercised with special reference to facts of each case. (Vol 21) 1934 Pat 693 (694).

[3] Discovery of documents — It is attorney's duty to ascertain from client documents in latter's possession — When further documents are found to be in client's possession attorney must disclose these to opponents and allow inspection by them. (Vol 8) 1921 Cal 267 (269).

7. "Opposite party." — [1] Words "any party" and "any other party" contemplate opposite parties. (Vol 19) 1932 Cal 72 (72, 73) : 58 Cal 1091.

[2] Administration suit — Defendants *inter se* are not opposite parties without issues between them. (Vol 19) 1932 Cal 72 (73) : 58 Cal 1091.

[3] Father of plaintiff dying during his minority — The third defendant executed mortgages in favour of defendants 1 and 2 on behalf of himself and the minor for the alleged debts of his father — On attaining majority the minor sued to set aside these mortgages. *Held*, the third defendant was "opposite party" and defendants 1 and 2 could obtain an order for discovery of documents in his possession. (1893) 17 Bom 384 (387, 388).

8. Corporation. — [1] Discovery under R. 12 can be made even in cases against corporate bodies. (Vol 9) 1922 All 1 (5) : 44 All 202.

9. Affidavit of documents, if conclusive — Further affidavit. — [1] Affidavit of documents required from the party under R. 12 or R. 13 is in the ordinary circumstances to be taken as conclusive on the question of what documents are in his possession or power. (Vol 7) 1920 Pat 131 (135) : 5 Pat L Jour 550* (1893) 17 Bom 384 (388). (Mere suspicion about the truth of the statement as to documents is not enough to negative the conclusiveness.)

[2] Affidavit of documents — No evidence to contradict or cross-examination is to be allowed. (Vol 31) 1944 Lah 209 (213, 214).

10. Effect of non-disclosure of documents. — [1] Procedure under O. 11, Rr. 12 and 13 not followed — No adverse inference can be drawn against party from non-production of his account books. (Vol 29) 1942 All 242 (247) : 1 L R (1942) All 247. (Following (Vol 2) 1915 P C 96 : 37 All 557 : 42 Ind App 202 (P C).)

[2] Order for discovery against a party — Party alleging that the documents have perished or been destroyed — In the absence of evidence of diligent search for them the presumption is that the documents if produced will be unfavourable to the party. (Vol 4) 1917 P C 1 (4) (P C).

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

[1882—S. 130; 1877—S. 130; R. S. C., O. 31, R. 14.]

15. Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

[1882—S. 131; 1877—S. 131; R. S. C., O. 31 R. 15, See R. 16.]

ORDER 11, RULE 14 — SYNOPSIS.

1. Scope of the Rule.
2. "Possession or power."
3. Relating to any matter in question in suit.
4. Revision.

1. Scope of the Rule. — [1] Order 11, Rule 14 refers to further orders on production, such as inspection. (Vol 11) 1924 Mad 582 (583).

[2] Production of documents — Order for, must follow one under O. 11, R. 12. (Vol 10) 1923 Pat 337 (338).

[3] Inspection of documents should not be allowed to party who has not established his right thereto nor at a stage at which the exercise of that right is not proved to be legitimate. (Vol 11) 1924 Mad 846 (846, 847) : 47 Mad 984.

[4] Order under R. 14 can be made before issues are framed. (1909) 10 Cal L Jour 407 (411).

[5] No order will be made under R. 14 against party unless he has directly or indirectly admitted the document to be in his possession or power. (Vol 7) 1920 Pat 131 (135) : 5 Pat 550.

[6] Court should not delegate to a Commissioner the exercise of the power which it possesses under R. 14. (1909) 10 Cal L Jour 407 (412).

[7] Order for discovery — Documents produced are not exhibits of party producing them but of party at whose instance order was passed. (Vol 8) 1921 Lah 328 (330).

[8] Document produced in compliance with order for discovery if not properly proved is not piece of evidence in Court. (Vol 8) 1921 Lah 328 (330).

[9] Order for production must relate to documents in existence — Party cannot be asked to apply for and produce certified copies of income-tax returns. (Vol 28) (1941) Mad 709 (709, 710) : I L R (1941) Mad 716.

[10] Suit for accounts — Court has no jurisdiction under R. 14 to call upon defendant to show in detail the extent of his income, how it was realised and how spent. (1912) 14 Ind Cas 51 (52) (Cal).

[11] Suit by husband for restitution of conjugal rights relying upon correspondence between parties — Husband claiming privilege for some time but promising to produce it thereafter — Husband is entitled to no such privilege, and must produce it in time. (Vol 24) 1937 Sind 97 (97, 98).

2. "Possession or power." — [1] Court trying suit in which Secretary of State represented by Collector is party is not justified by terms of O. 11, R. 14 in requiring Collector to produce certain old palmash registers in original on ground that he is agent of Secretary of State — Collector cannot be deemed to be agent of Secretary of State for all purposes. (Vol 26) 1939 Mad 52 (52, 53).

3. Relating to any matter in question in suit. — [1] Order under R. 14 is limited only to such documents as relate to matters in question in suit. Hence Court must, before making order, determine for that purpose what are the matters in dispute. (1909) 10 Cal L Jour 407 (410, 411)* (1896) 23 Cal 117 (125)* (1912) 14 Ind Cas 51 (52) (Cal).

[2] Suit on a promote — Promisor putting in no defence — Promisee under this rule cannot be ordered to produce documents in the suit — Until it is known what the promisor's defence is and what the points in issue will be, it is impossible for Court to decide the matters in question in the suit. (Vol 24) 1937 Nag 136 (136, 137) : I L R (1937) Nag 266.

[3] Party cannot be asked to apply for and produce certified copies of income-tax returns as such returns are confidential documents under S. 54, Income-tax Act. (Vol 28) 1941 Mad 709 (709, 710) : I L R (1941) Mad 716* (Vol 25) 1938 Rang 276 (277).

4. Revision. — [1] An order refusing to direct the production of documents is not revisable. (1886) 9 Mad 256 (257).

[2] Order for production of documents made without jurisdiction or under circumstances causing injury to one of the parties — High Court has power to set matters right under S. 15 of Statute 24 & 25 Vict., Ch. 104. (1909) 10 Cal L Jour 407 (413).

ORDER 11, RULE 15 — SYNOPSIS.

1. Scope of the Rule.
2. "At any time."
3. Documents referred to in the pleadings or affidavits.
4. Copies of documents produced, if can be taken.

1. Scope of the Rule. — [1] The object of Rules 15, 17 and 18 is that a party is not to have accounts sprung on him at any time, the contents of which he had no opportunity to acquaint himself beforehand. Rule 18 is not a pre-requisite to R. 15. (Vol 22) 1935 Mad 234 (235).

[2] It is good cause for non-production of document that the document is not in the possession or power of the person called upon to produce it. (Vol 7) 1920 Pat 131 (135) : 5 Pat L Jour 550.

16. Notice to any party to produce any documents referred to in his pleading or affidavits *Notice to produce.* shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 31 R. 16. See R. 15.]

17. The party to whom such notice is given shall, within ten days from the receipt of such *Time for inspection when notice given.* notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

[1882—S. 132. R. S. C., O. 31, R. 17.]

18. (1) Where the party served with notice under rule 15 omits to give such notice of a *Order for inspection.* time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1882—Ss. 133, 134; 1877—Ss. 133, 134; R. S. C., O 31, R. 18.]

O. 11 R. 15 (contd.)

[3] Plaintiff can inspect documents filed by the defendant material to the case, though enclosed in a sealed cover and defendant prays that they may be kept in the said sealed cover for the time being. (1911) 1911 Pun L R No. 256, p. 951 (954).

[4] Suit on pro-note.—Reference in plaintiff to certain account books proving transaction between parties.—Notice by defendant to produce account books for inspection.—Books necessary every day is not sufficient reason for not giving inspection. (Vol 22) 1935 Mad 234 (235).

[5] Suit to recover moveables.—Plaintiff is not entitled to obtain search warrant from Court to recover papers from defendant's house and choose such out of them as may prove his case. (Vol 32) 1945 All 363 (367).

2. "At any time."—[1] Document referred to in plaintiff or affidavit.—Notice to inspect can be given even before filing written statement.—Documents relating to matter in question but not referred to in pleadings.—Inspection cannot be insisted prior to written statement. (Vol 31) 1944 Pat 177 (178): 22 Pat 644.

[2] Whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly and delay in itself may be a good ground for refusing to grant time for the filing of written statement until after the inspection has been made. (Vol 25) 1938 Nag 239 (241): I L R (1940) Nag 331.

3. Documents referred to in the pleadings or affidavits.—[1] Documents sued upon and documents relied upon.—Inspection of latter cannot be claimed by defendant before he files his written statement. (Vol 7) 1920 Cal 416 (416)* (Vol 25) 1938 Nag 239 (240): I L R (1940) Nag 331. (Inspection may be allowed in exceptional cases.—But then procedure in O. 11, R. 18 (2) must be observed.)

[2] Documents referred to in pleadings but not material.—Inspection cannot be claimed by defendants. (Vol 10) 1923 Bom 73 (73, 74): 46 Bom 866.

[3] Documents mentioned in list under O. 7, R. 14 (2) — Documents referred to in plaintiff and forming material facts upon which plaintiff's claim was based.—Inspection of documents held should be allowed. (Vol 30) 1943 Lah 207 (208). (List of documents is part of plaintiff.) * (Vol 18) 1931 Mad 825 (826). (Do.)

[But see (Vol 7) 1920 Cal 416 (416)* (Vol 25) 1938 Nag 239 (241): I L R (1940) Nag 331. (Defendant, unless he proceeds under O. 11, R. 18 (2), cannot insist to inspect them before filing written statement.)]

4. Copies of documents produced, if can be taken. — [1] Inspection of documents — *Verbatim* copies of documents may be taken.—Costs of inspection to be borne by the party inspecting though under exceptional circumstances such costs may be made costs in the cause. (1909) 11 Bom L R 402 (404, 405)* (1909) 10 Cal L Jour 407 (413). (For obtaining copies party must apply to Court for directions.)

Order 11, Rule 17 — Note 1.

1. Usual place of custody. — [1] In suit instituted in Bombay for breach of contract to give cotton in defendant's mill at Broach, plaintiff applied for inspection of defendant's account books in Bombay — Defendant offered to give inspection at Broach—*Held*, that latter place was the place where the books were kept and was the proper place for inspection. (1880-1881) 5 Bom 467 (469).

ORDER 11, RULE 18 — SYNOPSIS

1. Scope of the Rule.
2. Discretion of Court.
3. Convenient place of inspection.

1. Scope of the Rule. — [1] One party alleging that other party has documents in his possession relative to matters in suit but disclosed by his affidavit—Party should proceed under this rule and not by way of interrogatories. (1896) 23 Cal 118 (125).

[2] Documents referred to in pleadings but not

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, *Verified copies.* instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

[R. S. C., O. 31, R. 19A.]

20. Where the party from whom discovery of any kind or inspection is sought objects to the *Premature discovery.* same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

[1882—S. 135 ; 1877—S. 135 ; R. S. C., O. 31, R. 20.]

O. 11 R. 18 (contd.)

material—Inspection cannot be claimed by defendants (Vol 10) 1923 Bom 73 (73, 74) : 56 Bom 866.

[3] No party is entitled to inspection of documents not referred to in pleadings or affidavits without order under R. 18 (2). (1912) 14 Ind Cas 51 (52) (Cal) * (Vol 18) 1931 All 221 (222) : 53 All 442. (If Court is satisfied as to relevancy, affidavit is not necessary — Want of affidavit cannot invalidate order requiring defendant to produce document.) * (1887) 14 Cal 768 (777). (Application under R. 18 if not supported by an affidavit is bad.)

[4] No order under R. 18 could be made until questions raised under R. 20 had been determined. (1887) 14 Cal 768 (776, 777).

[5] Detailed application and detailed orders must be made under sub-r. (2). (Vol 4) 1917 Nag 176 (176).

[6] Absence of denial by the other party taken along with absence of proper affidavit does not justify penal action—Affidavit is generally conclusive—Notice under R. 18 to other side is necessary. (Vol 11) 1924 All 510 (511) : 46 All 470.

[7] A party cannot be compelled to show the account books to the opposite party, which contain trade secrets. (1911) 14 Ind Cas 371 (373) (Lah).

2. Discretion of Court.—[1] Fact that inspection is sought for before written statement is filed is no ground for refusing it. (Vol 18) 1931 Mad 825 (828).

[2] Accounts between principal and agent settled wholly on agent's accounts — No accounts with principal — Particulars of misconduct should not be insisted upon from principal prior to inspection — Mere in-

ability to particularize instances of fraud or error should be no ground for refusing application for inspection of accounts. (Vol 19) 1932 Mad 284 (285, 286) : 55 Mad 704.

[3] Order to plaintiff to file affidavit within specified time and to give inspection forthwith—Word "forthwith" means within reasonable time. (Vol 25) 1938 Cal 353 (356) : 1 L R (1938) 2 Cal 14.

3. Convenient place of inspection. — Court is not proper place to offer inspection. (Vol 22) 1935 Mad. 234 (235).

Order 11 Rule 19—Note 1

1. Inspection by the Judge. — [1] Court has power to inspect State documents and official communications in spite of certificate from minister of state claiming protection — But the power must be so used as not to destroy the privilege in case in which it is found to exist. (Vol 18) 1931 P C 254 (259) (PC).

Order 11 Rule 20 — Note 1

[1] Object of O. 11, R. 20 is to give power to Court of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence to be used at the trial and before hearing of the cause. (1882) 6 Bom 572 (578).

[2] The provisions of O. 11, R. 20 are not intended to come into operation until an application has been made under R. 18. (1887) 14 Cal 768 (776).

[3] Discovery precedes particulars when information required is solely within opponent's knowledge and inquiry is not for fishing out case. (Vol 22) 1935 Mad 288 (289).

21. Where any party fails to comply with any order to answer interrogatories, or for *Non-compliance with discovery or inspection of documents*, he shall, if a plaintiff, be liable to *order for discovery.* have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

[1882—S. 136 ; 1877—S. 136 ; R. S. C., O. 31, R. 21. See Rr. 11, 12 and 18.]

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or *Using answers to inter-* any part of an answer of the opposite party to interrogatories without *rogatories at trial.* putting in the others or the whole of such answer : Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

[R. S. C., O. 31, R. 24.]

ORDER 11 RULE 21—SYNOPSIS.

1. Scope of the rule.
2. Committal for contempt.
3. Appeal.
4. Review.

1. Scope of the rule.—[1] Rule 21 requires that the documents must be referred to in pleadings or affidavits. (Vol 2) 1915 All 196 (196).

[2] Order under R. 21 can be passed only when there is a previous order under R. 11. (Vol 13) 1926 All 553 (553).

[3] Strict compliance with the terms of R. 18 (2) is necessary for an order under this rule. (1887) 14 Cal 768 (776, 777)* (Vol 13) 1926 Sind 272 (272) : 20 Sind L R 309.

[4] This rule requires to be worked with caution and should be made use of only as a last resort. (1898) 1898 Pun Re No. 58, p. 194. (Practice of English Courts stated.)*(Vol 12) 1925 Cal 166 (168). (Dismissal should be ordered only when Court is satisfied that plaintiff avoids fair discovery.)* (1922) 65 Ind Cas 661 (664) (Lah). (Do.)* (Vol 7) 1920 Pat 131 (134, 135) : 5 Pat L Jour 550. (Penalty must be used only in extreme cases.)* (Vol 22) 1935 Rang 310 (313).

[5] Non-compliance with order under R. 14—Dismissal under R. 21 is not justified. (Vol 16) 1929 All 83 (83)* (Vol 2) 1915 All 350 (351) : 38 All 5. (Unless order for discovery and inspection is disobeyed.)* (Vol 20) 1933 Mad 870 (870)* (Vol 11) 1924 Mad 582 (583)* (Vol 30) 1943 Pat 69 (71) : 21 Pat 735.

[6] Disobedience of order under R. 14 — Defence cannot be struck off. (Vol 9) 1922 All 235 (237) : 44 All 565* (Vol 12) 1925 Bom 386 (387). (Except when default is wilful.)* (Vol 16) 1929 Lah 750 (751) : 11 Lah 209. (Except for wilful default — Wilful means deliberate and intentional and not accidental or through inadvertence.)* (Vol 5) 1918 Nag 77 (79)* (Vol 5) 1918 Pat 83 (89) : 4 Pat L Jour 394. (Proper remedy is to apply for stay.)

[See (1891) 18 Cal 420 (422) (FB). (Omission to answer interrogatories only after leave under O. 11, R. 1 does not entail the striking out of defence.)]

[See however (1883) 9 Cal 923 (925). (Order striking out defence was made and party was given liberty to seek to set it aside on showing good grounds.)* (Vol 18) 1931 Pat 114 (121, 122). (Party should not be shut out from producing further evidence — Party should have been dealt with as not to have defended at all.)]

[7] Court has inherent power to strike the defence of a defendant of its own motion. (1910) 1910 Pun L R No. 84, p. 243 (244).

[But see (1892) 1892 Pun Re No. 59, p. 221.]

[8] Rule 21 applies to guardians of minor defendants by virtue of O. 11 R. 23. (1935) 39 Cal W N 1029 (1029).

[9] Disobedience of order for production or inspection—Party can be dealt with under O. 11 R. 21—He is not punishable under S. 173, Penal Code. (1910) 11 Cr L Jour 386 (386) : 1910 Pun Re No. 15 (Cr).

[10] Where Court has no power to proceed under this rule, it cannot do so under S. 25, Provincial Insolvency Act. (Vol 23) 1936 Nag 130 (131) : I L R (1936) Nag 142.

[11] See also the following cases. (Vol 25) 1938 Cal 353 (355, 356) : I L R (1938) 2 Cal 14. (Order that plaintiff should file affidavit within prescribed time and that inspection be given forthwith and that in default suit be dismissed—On default suit is automatically dismissed without further order of dismissal.)* (Vol 20) 1933 Lah 248 (249). (Defendant absent on adjourned date — *Ex parte* order — Application to set aside *ex parte* order dismissed without inquiry — On appeal District Judge holding that O. 17, R. 2 and O. 11, R. 21 applied — Held that O. 11, R. 21 did not apply, but O. 17, R. 2 did).

2. Committal for contempt. — [1] The chartered High Courts have power to commit a party to a suit filed in such High Courts, who has failed to obey an order for discovery or inspection, for contempt of Court. (Vol 16) 1929 Cal 117 (118) : 55 Cal 1110.

3. Appeal.—[1] Order refusing to strike out defence under O. 11, R. 21, is appealable. (Vol 17) 1930 Cal 426 (427).

[2] Order of dismissal wrongly passed under R. 21, without jurisdiction — It is decree and appeal lies. (Vol 16) 1929 All 83 (83, 84)* (Vol 19) 1932 Mad 316 (317). (Notwithstanding that judgment and decree are passed, in judging appealability Court should look to substance of order).

[3] Appellate Court holding that no appeal could lie from order under O. 11 R. 21 striking out defence as decree had been passed in suit — Appellate Court held should have treated appeal as one from decree. (1912) 14 Ind Cas 637 (638, 639) : 5 Bur L T 80.

4. Review.—[1] Dismissal of suit under—Setting aside dismissal under O. 9, R. 9 is wrong — Remedy is by appeal or review. (Vol 12) 1925 Rang 218 (218, 219) : 3 Rang 63.

[See however (Vol 14) 1927 Cal 158 (160). (Court cannot review the order under S. 151.)]

Order 11 Rule 22 — Note 1

1. Using answers to interrogatories at trial. —

[1] Answers to interrogatories are admissible against party but should be used with caution. (Vol 5) 1918 Mad 1108 (1107).

[2] Cross-interrogatories are administered under O. 11, R. 1—Answers may be admitted under S. 33, Evidence Act. (Vol 5) 1918 Mad 1103 (1108).

23. This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

[R. S. C., O. 31, R. 29.]

ORDER XH.

ADMISSIONS

"The Committee think the practice of admissions may with advantage be extended to facts as well as to documents. The procedure is not compulsory, but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by the Courts".—S. O. R.

Notice of admission of case.

1. Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

[See S. 30, R. S. C., O. 32, R. 1.]

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

[1882—S. 123; R. S. C., O. 32, R. 2.]

3. A notice to admit document shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 32, R. 3.]

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

[R. S. C., O. 32, R. 4.]

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 32 R. 5.]

6. Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

[R. S. C., O. 32, R. 6.]

Order 12 Rule 1 — Note 1

[1] Admissions must be interpreted as a whole. (Vol 11) 1924 Nag 129 (131): 20 Nag L R 63.

[2] As to other provisions regarding admissions by parties, see O. S. R. 5; O. 10 R. 1; O. 11 R. 8; O. 12 Rr. 2 and 4; and O. 14, R. 3.

Order 12 Rule 6 — Note 1

[1] Object of rule is to get a speedy judgment. (Vol 13) 1926 Sind 119 (120): 20 Sind L R 216.

[2] Admission must be clear and unambiguous. (Vol 20) 1933 Lah 403 (403)* (Vol 7) 1920 Cal 163 (165)* (Vol 14) 1927 Sind 25 (26, 27).

[3] Rule 6 refers to an admission of fact and not to a pure question of law. (Vol 16) 1929 Lah 569 (572).

[4] Order 12, R. 6 cannot be restricted in its operation to cases where the plaintiff accepts the admission of the defendant in its entirety or where the claim is severable into distinct portions and the defendant admits his liability in respect of one such fragment of the claim. (Vol 5) 1918 Cal 467 (471): 45 Cal 138.

[5] Judgment on admission is in discretion of Court — Discretion must be exercised judicially. (Vol 5) 1918 Cal 467 (470): 45 Cal 138* (Vol 11) 1924 Cal 190 (191, 192)* (Vol 16) 1929 Lah 569 (572)* (Vol 18) 1931 Oudh 321 (322): 6 Luck 651* (Vol 11) 1924 Rang 144 (144): 1 Rang 580. (The rule is permissive.)

[6] Defendant admitting claim — Plaintiff absent—

Provincial Amendments

MADRAS

Re-number the existing Rule 6 as sub-rule 6 (1) and *insert* the following as sub-rules (2) and (3) :

"(2) The Court may also of its own motion make such order or give such judgment as it may consider just having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced."

[R. O. C. No. 1729 of 1926.]

PATNA

Substitute the following for Rule 6 in Order 12 :

"6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just."

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in *Affidavit of signature.* pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

[R. S. C., O. 32, R. 7.]

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations *Notice to produce* as circumstances may require. An affidavit of the pleader, or his clerk, of the *documents.* service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

[R. S. C., O. 32, R. 8.]

9. If a notice to admit or produce specifies documents which are not necessary, the costs *Costs.* occasioned thereby shall be borne by the party giving such notice.

[R. S. C., O. 32, R. 9.]

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

1. (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the *Documentary evidence to* documentary evidence of every description in their possession or power, *be produced at first hearing.* on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced : Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

[1882—Ss. 138, 140 ; 1877—Ss. 138, 140 ; 1859—Ss. 128, 129.]

O. 12 R. 6 (contd.)

Decree should be passed on admission. (Vol 16) 1929 Lah 830 (831).

[7] Where the Court is of opinion that defendant has not admitted facts not specifically denied in written statement it should not proceed to pass decree. (1885) 11 Cal 111 (118) : 11 Ind App 186 (P C).

[8] Portion of claim admitted—Judgment can be passed in respect of that portion—Suit can proceed in respect of remainder of claim. (Vol 5) 1918 Cal 467 (468) : 45 Cal 188.

[9] On a judgment on admission decree need not be drawn up — Plaintiff may enforce payment as an order in execution by reason of S. 36. (Vol 13) 1926 Sind 119 (120) : 20 Sind L R 216.

[10] Admission not acted upon under O. 12, R. 6, is piece of evidence. (Vol 1) 1914 Mad 648 (651) : 37 Mad 38.

[11] Admission which is insufficient under O. 12, R. 6 is also insufficient under O. 39, R. 10. (Vol 14) 1927 Sind 25 (27).

Order 13, Rule 1 — Note 1.

[1] Object of R. 1 is to prevent production of manufactured evidence, and not to penalize parties for not producing genuine documents in time. (Vol 15) 1928 Pat 537 (538).

[2] This rule has been enacted with the object of preventing fraud by the late production of suspicious documents. It cannot therefore be so construed as to shut out formal evidence beyond suspicion such as certified copies of public documents like records of Government. (1898) 22 Bom 178 (175).

[3] Documents not in the possession or power of the party cannot and therefore need not be produced at the first hearing. (1930) 1930 Mad W N 511 (513).

[4] Documents under this rule refer to documents mentioned in O. 7, R. 14. This rule does not apply to documents produced in answer to the defendant's claim under O. 7, R. 18 (2). (Vol 9) 1922 Pat 569 (571).

[5] The rule is peremptory and all documents on which party relies must be produced at the first hearing. (Vol 18) 1931 Mad 512 (513).

[6] It is enough if documents are filed before the day when the case is actually gone into. They need not be filed before the day to which the case is adjourned but on which it is not actually gone into. (Vol 6) 1919 Cal 70 (71) * (Vol 1) 1914 Cal 547 (547). (Khasra produced by plaintiff before defence evidence — Delay should be excused.) * (Vol 30) 1943 Mad 286 (287). (Small cause suit — Documentary evidence tendered, not with written statement but on day appointed by Court for trial — Evidence should not be rejected.)

Provincial Amendments

N.-W.F.P.

Substitute the following :

"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8 : provided that after the settlement of issues, the Court may fix a date, not being more than 30 days after such settlement, within which the parties may present supplementary list of documents on which they rely."

OUDH

Substitute the following :

"1. (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court under Order 7, Rule 14, and Order 8, Rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct.

Explanation.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant."

PATNA

After the words "at the first hearing of the suit" add the words :

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit."

2. No documentary evidence in the possession or power of any party which should have been

Effect of non-production of documents. but has not been produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

[1882—S. 139 ; 1877—Ss. 138, 139 ; 1859—S. 128.]

O. 13 R. 1 (*contd.*)

[7] The parties are required only to keep their documents in readiness at the first hearing to be produced when called for by the Court. (1874) 21 *Suth W R* 42 (43).

[8] Omission to give particulars of defence does not entitle refusal to admit evidence. (Vol 30) 1943 *Mad* 286 (287).

[9] Provisions relating to the production of documents are made applicable to proceedings under the following Local Acts :—

(i) The Chota Nagpur Tenancy Act (6 [VI] of 1908), S. 265 (3).

(ii) The Bengal Embankment Act (7 [VII] of 1866), S. 3.

(iii) The Estates Partition Act (Bengal Act 5 [V] of 1897), S. 97.

[10] As to the meaning of "first hearing" see O. 8, R. 1; as to admission of document after first hearing—See R. 2.

ORDER 13, RULE 2—SYNOPSIS

1. Effect of non-production of document.

2. "Unless good cause is shown."

3. Appeal.

1. Effect of non-production of document.—[1] Documentary evidence which has not been produced at the first hearing of a suit under O. 13, R. 1 may be admitted at a later stage at the discretion of the Court. (Vol 5) 1918 *P C* 11 (14) : 45 *Cal* 878 : 45 *Ind App* 73 (P C). (Affirming (1912) 15 *Cal L Jour* 621.) * (Vol 6) 1919 *Cal* 800 (801). (Documents relied on by party not produced at first hearing—Court can refuse to accept them.)

[2] Documents which are obviously genuine should not be rejected on mere technical grounds like late

production. (Vol 16) 1929 *Pat* 324 (325) * (Vol 16) 1929 *P C* 99 (103) : 56 *Ind App* 119 : 56 *Cal* 1003 (P C). (Official records of undoubted authority should not be excluded.) * (1898) 22 *Bom* 173 (175). (Certified copies of public documents like records of Government should not be refused.) * (Vol 24) 1937 *Cal* 537 (540) : 1 *L R* (1937) 2 *Cal* 661. (Unimpeachable authenticity of document is material under O. 13, R. 2.) * (Vol 15) 1928 *Cal* 416 (416). (Documents received at re-hearing on review held not improper.) * (Vol 27) 1940 *Mad* 540 (542). (Official records of undoubted authenticity—Leave to produce should be granted even though produced late.) * (Vol 15) 1928 *Mad* 516 (517) : 51 *Mad* 472. (Public documents or certified copies or other genuine documents—Court should not refuse to receive them.) * (Vol 14) 1927 *Nag* 269 (270) * (Vol 17) 1930 *Pat* 603 (604). (Private documents above suspicion can be admitted.) * (Vol 15) 1928 *Pat* 537 (538) * (Vol 14) 1927 *Pat* 117 (119). (Registered document.) * (Vol 11) 1924 *Pat* 208 (208). (Document having important bearing on question should be allowed.) * (Vol 15) 1928 *Rang* 196 (196) : 6 *Rang* 337.

[See (Vol 19) 1932 *Pat* 332 (333). (A receipt filed after long delay involving a new case—Not received.)]

[See also (1930) 1930 *Mad W N* 511 (513). (Documents produced by witnesses cannot be rejected.)]

[3] Satisfactory explanation for the delay is a condition precedent for the reception of the document. But the rule should be liberally construed so as to advance the cause of justice. (1898) 22 *Bom* 173 (176) * (Vol 16) 1929 *P C* 99 (103) : 56 *Ind App* 119 : 56 *Cal* 1003 (P C). (Party or his legal advisers not knowing of existence of certain documents—Documents should not be excluded.) * (Vol 18) 1931 *Mad* 512 (513). (Trial Court can reject document for want of satisfactory explanation for late

6. Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

[1882—S. 142 ; 1877—S. 142 ; 1859—S. 134.]

Recording of admitted and return of rejected documents.

7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

[1882—S. 142A ; 1877—S. 142 ; 1859—S. 134.]

Provincial Amendments

MADRAS

Add the following proviso to sub-rule (2) :

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

[Dis. No. 434 of 1916.]

NAGPUR

The following shall be added as sub-rule (3) :

"(3) Every document produced in evidence, which is not written in the Court language or in English, shall be accompanied by a correct translation into English ; and every document which is written in the Court language but in a script other than Devanagari shall be accompanied by a correct transliteration into Devanagari script. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document."

[29.6.1943.]

8. Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

[1882—S. 143.]

9. (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of :

O. 13 R. 5 (contd.)

[3] Provisions of O. 13, Rr. 4 and 5 must be strictly complied with—Counsel on the opposite party must see that the Judge endorses as required by law. (Vol 15) 1928 Lah 142 (143); 9 Lah 4.

[4] For admission of unstamped documents, see S. 35 of the Stamp Act (2 [II] of 1899).

[5] For admission of unregistered documents see S. 49 of the Registration Act (16 [XVI] of 1908).

Order 13, Rule 6 — Note 1

[1] Document insufficiently stamped admitted and endorsed as required by Rr. 1 and 2—No endorsement of rejection under this Rule—*Held* document was admitted in evidence though not properly stamped. (1902) 12 Mad L Jour 351 (353).

Order 13, Rule 7 — Note 1

[1] Documents admitted in evidence are the only documents that can legally be on record. (1892) 14 All 356 (357, 358).

[2] Disputed document—*Prima facie* evidence given—It should be endorsed as admitted in evidence—Document not proved as genuine should not be rejected and

returned but should be kept on record. (Vol 23) 1936 Oudh 298 (301, 302) : 12 Luck 568.

[3] Documents not forming part of record under this rule should not be used in evidence (1880) 5 Cal 317 (320) (1892) 14 All 356 (357, 358). (Document produced and rejected as inadmissible—But document allowed to be on record—*Held* Appellate Court could not treat it as evidence on the ground that it was on record.) (1930) 31 Pun L R 250 (257). (Document neither exhibited nor brought on record—Appellate Court cannot treat that as evidence.)

[4] Documents rejected and therefore not forming part of the record should be returned to the person producing them. (Vol 13) 1931 Lah 546 (550): 13 Lah 126.

Order 13, Rule 9— Note 1

[1] Where a suit has been withdrawn the document on which the suit is based does not become void or useless and must be returned. (1893) 1893 Bom P J 123 (123).

[2] The act of returning document is purely ministerial and no oath is required, if there is a proper application for return. (Vol 8) 1921 Cal 433 (433).

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

[1882—S. 144 ; 1877—S. 144 ; 1859—Ss. 135, 136, 137.]

PROVINCIAL AMENDMENTS

BOMBAY

Between the first and second proviso to sub-rule (1) the following proviso shall be *inserted*, namely :

"Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order 41 Rule 1, may be returned after the appeal has been disposed of by the Court." [14-12-1923.]

LAHORE

To sub-rule (1), the following further proviso was *added* :

"Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced." [24-11-1927.]

MADRAS

Add the following as sub-rules (3), (4) and (5) :

"(3) Every application for return of a document under the first proviso to sub-rule (1) shall be made by a verified petition and shall set forth facts justifying the immediate return of the original.

(4) The Court may make such order as it thinks fit for the costs of any or all the parties to any application under sub-rule (1). The Court may further direct that any costs incurred in complying with or paid on application under sub-rule (1) or incurred in complying with the provisions of Rule 5 of this Order, shall be included as costs in the cause.

(5) Subject to the provisions of Rule 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court, the original document shall be returned to the applicant without further delay."

NAGPUR

Insert the following as sub-rule (2) and *re-number* the present sub-rule (2) as sub-rule (3) :

"Where the document has been produced by a person who is not a party to the suit, the Court may order and at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the costs of preparing a certified copy." [29-6-1943.]

PATNA

Add the following as sub-rule (1a) :

"(1a) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided."

10. (1) The Court may of its own motion, and may in its discretion upon the application

Court may send for papers of any of the parties to a suit, send for, either from its own records from its own records or from or from any other Court, the record of any other suit or proceeding, other Courts. and inspect the same.

Order 13 Rule 10—SYNOPSIS

1. Scope and object.
2. Discretion of Court.
3. "From any other Court."
4. Affidavit in support of application.

1. Scope and object.—[1] The Court is not bound to send for the whole of the record but only such of the documents that are specifically mentioned in the petition. (1864) 1864 Suth W R 272 (273).

[2] Mere summoning of document does not make it evidence in the case. It must be proved and brought on record like any other document before it can be used as evidence. (Vol 28) 1941 Oudh 341 (343)* (Vol 18) 1931 Lah 119 (120)* (Vol 16) 1929 Lah 78 (79).

2. Discretion of Court. — [1] The Judge has the discretion to grant or refuse an application for sending for the records. (1867) 7 Suth W R 109 (109).

[2] On a proper application to send for a document

the Court ought not to refuse such application. (1881) 7 Cal 560 (565). (That the document could not be produced before termination of trial is no ground for refusal.)

[3] The Court having granted an application should not omit to actually send for documents to be used by the party as evidence. (Vol 16) 1929 Lah 78 (79).

[4] A Court is not bound to send for a document when the party neglects or fails to make an application. (1872) 18 Suth W R 13 (14).

[5] The party applying for summoning records must satisfy the Court that the documents could not be produced otherwise without unreasonable delay or expense. (Vol 18) 1931 Lah 119 (120).

[6] Omission to exercise discretion in a proper case is good ground in appeal or revision where the party has been prejudiced thereby. (Vol 5) 1918 All 375 (376). (Application to send for patwari's record summarily rejected and suit dismissed—Suit held not properly tried.)

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

[1882—S. 137 ; 1877—S. 137 ; 1859—S. 138.]

Provisions as to documents applied to material objects.

[1882—S. 145.]

11. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

PROVINCIAL AMENDMENT

Rules 12 & 13—ALLAHABAD

Add the following to the end of Order 13 :

"12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint, or (b) at the first hearing, or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document.

13. When a document included in the list, prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A-1, A-2, A-3, etc., and those of the second party B-1, B-2, B-3, etc. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series."

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

[1882—S. 146 ; 1877—S. 146 ; 1859—S. 139.]

O. 13 R. 10 (contd.)

3. "From any other Court." — [1] Court from which document is sent for need not necessarily be a Civil Court. (1874) 1874 Pun Re No. 32, p. 147 (147). (Record of a criminal case.)

[2] It is only from a Court that documents may be sent for under this rule. (1871) 15 Suth W R 150 (151). (Court of Wards is not a Court.) (1871) 15 Suth W R 173 (174). (A Kasee acting is not a Court.)

[3] The Court from which records are called for has no discretion to refuse. (1879) 4 Cal L R 36 (37).

4. Affidavit in support of application. — [1]

Affidavits under this rule must strictly satisfy the conditions laid down. (Vol 18) 1931 Lah 119 (120).

[2] Where an application under this rule is unsupported by an affidavit, but the Court calls for documents of its own motion the fact that the application was unsupported by affidavit will not preclude the documents being used in evidence. (Vol 32) 1945 Pesh 9 (11, 12).

ORDER 14 RULE 1—SYNOPSIS

1. Scope and object.
2. Omission to frame issue.
3. Wrong issue.
4. Abandonment of issue.

O. 14 R. 1. (*contd.*)

1. Scope and object. — [1] The sole object of pleadings is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues. (1895) 22 Cal 324 (331) : 22 Ind App 4 (PC).

[2] The object of framing issues is to direct the attention of the parties to the main questions of fact or law to be decided and the duty of framing and recording of the proper issues has been placed on the Court by the Code—It is expected that in framing such issues the Courts of law should exert themselves so as to make them sufficiently expressive of matters which they desire to consider under such issues. (Vol 29) 1942 Cal 338 (340).

[3] Court should frame proper issues from the pleadings in the case and evidence has to be led in respect of those issues — No evidence need be led regarding the points not covered by issues. (1921) 60 Ind Cas 751 (752) (Lah) * (Vol 10) 1923 All 167 (167). (Courts should not raise fancy points not raised by parties.) * (Vol 6) 1919 Pat 196 (198). (A Court is not justified in framing an issue on a question about which there is no dispute in the pleadings.)

[4] Issues merely signed by Judge without knowledge of pleadings are useless. (Vol 17) 1930 Mad 78 (79).

[5] Under O. 14, R. 1, issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other — Such affirmation or denial must be contained in the pleadings as defined in O. 6, R. 1 — Where there is no written statement the only issues would be those arising out of the plaint, which allegations are put in issue when not admitted. (Vol 23) 1936 Nag 177 (179).

[6] In framing issues, Court is by no means bound by the language of the plaint and written statement — Issues may be framed from statements of parties and their pleaders, when they come before the Judge. (1895) 11 Cal 407 (410) * (1878-79) 3 Bom 210 (213). (Even if the pleadings are bad, it is the duty of Judge to ascertain the points in dispute clearly and frame issues accordingly.) * (Vol 12) 1925 Cal 1157 (1160). (Issue may be framed on other matters than pleadings.)

[7] It is the duty of the Court primarily to frame necessary issue but the parties are entitled to be heard. (Vol 12) 1925 Mad 169 (169).

[8] Issues should be exact. (Vol 11) 1924 Nag 156 (157).

[9] Order 14, R. 1 contemplates that issues may be settled whether there was a written statement or not though it is not obligatory on the Court to frame issues if the defendant makes no defence. (1907) 11 Cal W N 870 (872) * (1871) 15 Suth W R 145 (146). (Court not bound to frame and record issues when defendant is *ex parte*.)

[10] Issue not arising on pleadings — High Court will not order remand for trial thereof. (Vol 8) 1921 Lah 360 (361) * (1871) 15 Suth W R 145 (146). (Where the fact that plaintiff claims *utramque* title was not mentioned either in plaint or in course of any of the proceedings in trial Court or Appellate Court, a retrial of the case on that aspect of the case should not be ordered.)

[11] The Court is bound to limit its enquiry to the issues which alone are necessary in order to try the plaintiff's right to the special relief that he seeks even when a third party intervenes unless his intervention raises a new issue. (1871) 16 Suth W R 235 (237).

[12] Plea that plaintiff was not in possession not raised in written statement — No issue framed on that point — Court should not go into question of possession without calling upon parties to let in necessary evidence. (Vol 39) 1946 Mad 180 (181).

[13] Where the trial of a case had been vitiated for want of proper issues and the plaintiffs have been misled by conduct of defendants, the case should be remanded for retrial with proper issues. (Vol 18) 1931 All 625 (629).

[14] "First hearing of suit" in O. 14, R. 1 (5) would extend at least to period up to first hearing of suit referred to in O. 13, R. 1. (Vol 22) 1935 Mad 261 (261).

2. Omission to frame issue. — [1] Failure to frame issue is not necessarily fatal to suit provided substantial justice is done. (Vol 28) 1941 Pesh 59 (60). (Defendant raising plea for applying S. 41, T. P. Act : Arguments addressed — No issue framed — Court is justified in applying principles of S. 41, T. P. Act: (Vol 26) 1939 Pesh 44 overruled.) * (Vol 13) 1926 Bom 384 (385) * (1869-70) 13 Moo Ind App 573 (582, 583, 584) (PC). (If there has been no failure of justice by an omission to frame issues, remand of the case for settlement of issues and for retrial would not be made.) * (1864-65) 2 Mad H C R 470 (472). (Per *Innes J.* — Where the defendant is not prejudiced by the absence of an issue, the suit need not be sent for retrial.)

[2] Issues necessary for right decision of a suit to be framed by Judge — Failure to frame an unnecessary issue is not error of law. (Vol 2) 1915 Cal 648 (648).

[3] A case should not be sent back to be retried after framing an issue, where in spite of the omission of an issue, the matter had been tried and determined and the plaintiff was fully informed by defendant's list of documents and cross-examination on his behalf. (1907) 29 All 184 (190, 191, 192, 195) : 34 Ind App 27 (PC).

[4] The mere fact that a particular issue was raised at a late stage of the suit will be immaterial if the parties had sufficient opportunity to adduce evidence and the Court was in a position to pronounce judgment on it. (1895) 22 Cal 324 (331) : 22 Ind App 4 (P.C).

3. Wrong issue. — [1] Where wrong issues were framed and the suit was decided thereon, the decision will be set aside on appeal and the suit remanded for retrial after framing proper issues. (1872) 17 Suth W R 359 (359, 360) * (1890) 13 Mad 549 (551). (Inconsistent issues.)

[2] Where parties have not been misled, defect in form of issues is immaterial. (Vol 8) 1921 Sind 159 (164) : 16 Sind L R 207 (F B) * (Vol 29) 1942 Cal 338 (340). (Frame of issue defective — Parties going to trial knowing full well what question for decision was — Plaintiff given opportunity to meet point not covered by issue — Plaintiff not availing of opportunity — Plaintiff is precluded from contending that defect in issue prejudiced him.)

[3] The Court has power to consider the point whether an irregularity in the conduct of sale would invalidate it or not, even though that point was not raised in the pleadings. But in the absence of any allegation of consequent substantial injury, the framing of such issue would be improper. (1911) 21 Mad L Jour 1008 (1010).

4. Abandonment of issue. — [1] Courts are not bound to raise issues on questions of fact of their own motion, where parties do not ask for them. The omission to raise such issues implies an abandonment of such questions by the party interested. If the question is one purely of law, e.g., limitation or jurisdiction, it is incumbent on the Court to frame proper issues on such questions. (Vol 6) 1919 Mad 698 (699).

[2] Duty of framing issues though lies on Court, parties should draw Court's attention to omission in framing issues—Person alleging that he is not necessary

2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion *Issues of law and of fact.* that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

[1882—S. 146, cl. 6 ; 1877—S. 146, cl. 6 ; 1859—S. 139. Cf. R. S. C., O. 25, R. 2.]

Materials from which issues may be framed. 3. The Court may frame the issues from all or any of the following materials:—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party.

[1882—S. 147 ; 1877—S. 147 ; 1859—S. 139.]

O. 14 R. 1 (contd.)

party but not pressing issue to that effect when issues were being framed — That issue must be held to have been waived by him. (Vol 25) 1938 Mad 329 (329, 330).

ORDER 14 RULE 2 — SYNOPSIS

1. Scope and applicability.

2. Revision.

1. Scope and applicability.— [1] Order 14, Rule 2 casts on the Court the duty of determining whether circumstances exist in each case for exercise of power conferred by it. (Vol 8) 1921 Pat 467 (467) * (Vol 20) 1933 All 753 (753, 754). (Where there are issues of law and fact, it is obligatory for Court to consider whether case can be disposed of on legal issue alone.) * (Vol 23) 1936 Pat 250 (253). (Order 14, R. 2 is mandatory — Only discretion left with the Court is to form and express opinion if case can be disposed of on issue of law only.)

[2] Order 14, R. 2 applies not only to cases in which issues of fact have not been settled but also to cases where issues of fact have been settled and the Judge commits no irregularity if he proceeds to determine the issues of law postponing the trial of the issues of fact. (Vol 3) 1916 Cal 164 (165).

[3] Application made after date fixed for first hearing for trial of some of issues as issues of law without taking evidence — O. 14, R. 2 or O. 15 R. 3 has no application. (Vol 20) 1933 Cal 559 (560).

[4] The Court while striking issue regarding limitation should first ascertain what article the parties consider to be applicable to the suit as framed. If the application of a particular article raises a question of fact, an issue should be struck on those facts, and if there be no dispute on facts, the question may be decided at the initial stage of the case on purely legal arguments. (Vol 22) 1935 Lah 982 (983) : 17 Lah 391.

[5] The questions whether the defendant has a right to challenge plaintiff's adoption in view of a previous decision, is purely a question of law and should be disposed of first under this rule. (1935) 18 Nag L Jour 339 (340).

[6] Trial of case piecemeal is undesirable. (Vol 2) 1915 Cal 87 (90).

[7] Decision on issues of fact cannot be postponed, where all issues are questions of fact, except on the ground of embarrassment. (Vol 12) 1925 Pat 674 (676).

[8] It is desirable that subordinate Courts should decide all the issues in a case. Order proposing to try only some issues first and postpone trial of others was held to be not a proper order and was set aside in revision. (Vol 8) 1921 Pat 323 (323).

[9] Decision on certain questions first necessary — Suit should be set down for settlement of issues. (Vol 10) 1923 Bom 249 (251) : 47 Bom 509.

[10] Deciding issues of mixed questions of law and

fact without evidence by treating them as involving only questions of law is irregular — Declaring custom invalid before it is proved is bad. (Vol 2) 1915 Cal 87 (90).

[11] Issue requiring evidence is not a preliminary issue. (Vol 10) 1923 Pat 344 (345) * (Vol 19) 1932 Bom 128 (129) : 56 Bom 224. (Preliminary issue of fact cannot be framed.)

[12] As a general rule subordinate Court ought not to dismiss action on preliminary issue. (Vol 19) 1932 Bom 1 (3).

[13] Where the preliminary issue under this rule was a mixed question of law and fact, a question for the decision of which evidence was necessary, it was held that the Court should not refuse to frame all issues. Whether a preliminary issue falls under this rule or not is a matter which the Court must decide for itself after the issues have been framed. (1932) 1932 Mad WN 331 (332).

[14] Question whether Court should grant or reject prayer to try preliminary issue of law — Court should observe harmony between general principle that cases should not be tried piecemeal and the wholesome provisions of O. 14, R. 2. (Vol 23) 1936 Pat 250 (252).

[15] Preliminary issue decided by trial Court cannot be re-agitated by it at a later stage. (Vol 25) 1938 All 113 (114) : 1 L R (1938) All 198.

2. Revision. — [1] Order in which issues are to be tried is to be decided by trial Court and High Court will not interfere in revision. (Vol 20) 1933 All 749 (751).

Order 14 Rule 3 — Note 1

[1] It is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. (1866-67) 11 Moo Ind App 7 (20) (PC).

[2] The sole guides to a Court in framing issues for trial in a case are not the pleadings of the parties. The Court should settle the issues on the pleadings and after hearing the pleaders. (Vol 6) 1919 Cal 186 (187).

[3] Court may frame the issues from the oral examination of the parties or their pleaders notwithstanding any difference between such allegations of facts as are contained in those examinations and those contained in written statements. (1869) 12 Suth W R 512 (513).

[4] Court has no power to frame issue on point neither alleged by parties or their counsel nor contained in documents. (Vol 27) 1940 Nag 94 (95) * (Vol 6) 1919 Cal 805 (806). (The fact that the parties are ready with the evidence upon the issues not raised is no justification for raising or trying it.) * (1912) 1912 Mad WN 177 (178). (The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue is raised.) * (1911) 21 Mad L Jour 1008 (1009). (A Court is not justified in framing an

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

[1882—S. 148 ; 1877—S. 148 ; 1859—S. 140.]

5. (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1882—S. 149 ; 1877—S. 149 ; 1859—S. 141.]

Questions of fact or law may by agreement be stated in form of issues. 6. Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state

O. 14 R. 3 (contd.)

issue on a point not alleged in the plaint.) * (1882) 8 Cal 975 (980). (Cases must be tried and determined *secundum allegata et probata* and it is contrary to this principle to decide a cause upon a point not raised in the pleadings nor embodied in an issue.)

[5] Though no specific issue on a particular point was framed, and that point appears to be present to the minds of the parties and if further materials which may have a bearing on the question were not placed before the Court, it could not be said that it was due to the absence of distinct issue. (1906) 29 Mad 72 (74).

Order 14, Rule 4 — Note 1.

[1] A party producing documents at the appellate stage in Court under O. 14, R. 4 for the purpose of framing proper issues at the instance of his adversary cannot insist on their being used in evidence under S. 163, Evidence Act, all at once. (Vol 13) 1926 Nag 60 (61).

ORDER 14, RULE 5 — SYNOPSIS.

1. Scope.

2. "At any time before passing a decree."

1. Scope. — [1] Even in the absence of O. 14, R. 5, every Court trying a civil cause has inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. (1912) 35 Mad 607 (612) : 39 Ind App 218 (PC).

[2] Fresh facts not covered by pleadings disclosed in evidence — For awarding relief on such facts amendment of pleadings and framing of issues are necessary. (Vol 6) 1919 Mad 471 (471).

[3] Allowing additional issue does not give right to adduce fresh evidence. (Vol 2) 1915 Mad 1196 (1198) : 39 Mad 456.

[4] Where the amendment of an issue is necessary for the purpose of more effectually putting in issue and trying the real question or questions in controversy as disclosed by pleadings on either side, such amendment can be made under the second portion of sub-rule (1). (1880) 5 Cal 64 (70, 71).

[5] Amendment of issue not prejudicing any party — Trial upon such amended issue cannot be declared improper. (Vol 12) 1925 Cal 1157 (1160).

[6] Court has no power under this rule to frame new issues which will change the nature of the suit. (1889) 13 Bom 664 (668).

[7] Under O. 14, R. 5 one cause of action cannot be converted into a different one. Thus, a claimant as owner, cannot obtain relief on basis of contract of tenancy. (Vol 3) 1916 Pat 50 (51) : 2 Pat L Jour 69.

[8] Where no injustice would be done to either party

the Court in the exercise of its discretion, under special circumstances may allow issues to be raised upon matters which do not come within the proper scope of the pleadings. (1880) 5 Cal 64 (70).

[9] Parties going to trial on issue as it stood — Issue tried — It cannot be vacated on ground of misapprehension. (Vol 19) 1932 Mad 583 (587).

[10] Court can frame additional issues — But it should not go outside the statements of parties — Irregularity of framing additional issues at the end of trial is not cured by giving the parties opportunity to adduce additional evidence. (Vol 13) 1926 Bom 33 (37, 38).

[11] A plaintiff coming to Court with one case and hopelessly failing to prove it should not be permitted to succeed upon another and that directly in antagonism with primary allegations. (1883) 5 All 456 (459).

[12] Where the discretion exercised by Court in amending issues was not shown to have been abused or perverse, the trial of the case on amended issues should not be interfered with. (1911) 1911 Pun L R No. 51, p. 224 (225).

2. "At any time before passing a decree." —

[1] Under O. 14, R. 5 (1) Court has very wide powers to amend issues or frame additional issues at any time before passing of a decree. (Vol 17) 1930 Nag 225 (228) : 27 Nag L R 75.

[2] Court can amend issue even after case is closed and can give opportunity for additional evidence — Omission to frame specific issue is not bad if issues framed are wide enough. (Vol 1) 1914 Oudh 255 (257).

[3] A Court trying a suit on a mortgage can raise an issue as to the invalidity of the mortgage for want of proper attestation, even after the close of the arguments. (1912) 35 Mad 607 (612) : 39 Ind App 218 (PC).

[4] Special issue framed after evidence taken and arguments concluded — Decision thereon is not bad. (Vol 9) 1922 Pat 514 (524) : 2 Pat 52.

[5] After the plaintiff's case was closed, an issue on a new averment should not be allowed, when it necessitates the opening up of the whole case without any suggestion that the facts relied on had newly come to the knowledge and had excusably been unknown to the applicant. (1903) 27 Bom 485 (491, 492) : 30 Ind App 127 (PC).

[6] Though a Court has power of framing any fresh issues before the judgment is pronounced, it ought not to do so by allowing new pleas to be raised after the case is remanded by the Appellate Court. (1911) 10 Ind Cas 230 (231) (All).

Order 14, Rule 6 — Note 1.

[1] Where the parties agreed to refer issues of fact to a Commissioner and to abide by his findings, no appeal

the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue, —

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

[1882—S. 150; 1877—S. 150; 1859—S. 142. Cf. O. 36, R. 1.]

Objects and Reasons.

"There does not seem to be any real conflict as to whether an appeal lies, though at first sight it might appear otherwise. It has, therefore, been considered unnecessary to provide expressly for an appeal."

— S. O. R.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. Where the Court is satisfied, after making such inquiry as it deems proper, —

- (a) that the agreement was duly executed by the parties,
- (b) that they have a substantial interest in the decision of such question as aforesaid, and
- (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

[1882—S. 151; 1877—S. 151; 1859—S. 143.]

ORDER X V.

DISPOSAL OF THE SUIT AT THE FIRST HEARING

1. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

[1882—S. 152; 1877—S. 152; 1859—S. 144.]

2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

[1882—S. 153; 1877—S. 153.]

PROVINCIAL AMENDMENT

MADRAS

Re-number Rule 2 as sub-rule (1) of Rule 2 and *insert* the following as sub-rule (2) :

"(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced."

[R. O. C. No. 1729 of 1926.]

O. 14 R. 6 (*contd.*)

would lie against a decree passed on the report of the Commissioner. (1901) 29 Cal 306 (309, 310).

Order 14, Rule 7 — Note 1.

[1] Where adjustment of a suit is made contingent upon the findings of the Court on certain issues of fact or law, submitted to it by the parties, the adjustment becomes absolute upon the findings on such issues and the Court is bound to pronounce judgment according to the terms of the agreement. (1892) 16 Bom 202 (216).

[2] Where there are definite pleadings, and a definite issue on those pleadings is framed, the finding must be confined to matters raised in the issue. (Vol 15) 1928 Nag 179 (180).

Order 15, Rule 1 — Note 1.

[1] Where the defendant appears at the first hearing and confesses judgment, the Court may proceed to give judgment. (1869) 12 Suth W R 432 (435).

[2] Rule does not apply so as to enable the Court to assume that parties are not at issue, without complying with the provisions of O. 10, R. 1. (Vol 32) 1945 All 352 (353) : I L R (1945) All 499.

[3] Case cannot be disposed of prior to the date fixed for hearing. In such a case the decree is vitiated. (Vol 11) 1924 Lah 459 (460).

Order 15, Rule 2 — Note 1.

[1] Where one of several defendants confesses judgment, and judgment is pronounced against him, further prosecution of the suit as against the other defendants is not barred. (1901) 25 Bom 378 (386).

3. (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

[1882—S. 154; 1877—S. 154; 1859—S. 145.]

4. Where the summons has been issued for the final disposal of the suit and either party fails to produce evidence without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

[1882—S. 155; 1877—S. 155; 1859—S. 145.]

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES

Summons to attend to give evidence or produce documents.

1. At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

[1882—S. 159; 1877—S. 159; 1859—S. 149. See Sections 80 to 82.]

Order 15, Rule 3 — Note 1.

[1] Order 15, R. 3 gives power to the Court to determine the issues of law at a stage subsequent to the issue stage. (Vol 8) 1921 Pat 467 (467) & (Vol 9) 1922 Mad 321 (322).

[But see (Vol 20) 1933 Cal 559 (560) & (Vol 2) 1915 Cal 87 (90).]

[2] In appealable cases the Courts should, as far as may be practicable, pronounce their opinion on all the important points so as to avoid remand, expense and delay. (Vol 9) 1922 P C 405 (408); 50 Ind App 247: 50 Cal 243 (PC) & (Vol 17) 1930 Cal 787 (796): 58 Cal 474 & (Vol 13) 1926 Lah 125 (128): 7 Lah 42.

[3] It is wrong to dispose of the case at the first hearing when the procedure is objected to by the plaintiff's pleader. (1893) 16 Mad 198 (200) & (Vol 2) 1915 Mad 319 (319).

[4] Order 17, R. 3 would not apply to a general adjournment under O. 15, R. 3. (Vol 30) 1943 Bom 321 (324): I L R (1944) Bom 1 (FB) & (Vol 28) 1941 Bom 83 (85): I L R (1941) Bom 150.

Order 15, Rule 4 — Note 1.

[1] In a case in which the summons may have been issued for final disposal, if after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable in the interests of justice that the discretion given to the Court under O. 15, R. 4 should be so exercised as to ensure a fair trial and not to deny in effect the trial to the parties. (Vol 1) 1914 Bom 46 (47): 38 Bom 377.

[2] Adjournment granted conditionally on production of evidence — Condition not fulfilled — O. 15, R. 4 applies—Court can at once pronounce judgment—Suit cannot be dismissed for non-prosecution. (Vol 16) 1929 All 543 (543).

Order 16, Rule 1 — Note 1.

[1] Proceeding under Legal Practitioners Act held in Court of civil jurisdiction—In absence of provisions for summoning and enforcing attendance of witnesses, etc., procedure prescribed in O. 16 should be followed. (Vol 6) 1919 Cal 474 (475).

[2] Party desiring the presence of the opposite party for giving evidence should take steps to apply under O. 16, R. 1 and not under O. 3, R. 1. (Vol 20) 1933 Mad 821 (822) & (Vol 7) 1920 Mad 213 (216).

[3] Court is bound to issue summonses on application by either party at any time after institution of suit. (Vol 18) 1931 Lah 135 (136) & (1936) 17 Lah 775 (777). (The word "may" in O. 16, R. 1 means "it shall be lawful.") & (Vol 12) 1925 Bom 368 (369) & (1891) 15 Bom 86 (86) & (1910) 11 Cal L Jour 29 (32, 33). (Such an application should not be refused though many such applications may have been previously made.) & (Vol 13) 1926 Pat 545 (547). (Application at late stage to send for Chaukidari Register from Deputy Commissioner and admit it in evidence complied with.) & (1910) 8 Ind Cas 418 (418) (Oudh) & (1905) 28 Mad 28 (36) & (Vol 11) 1924 Lah 647 (648, 649).

[4] Application to summon witnesses though made late cannot be rejected unless it is not *bona fide*. (Vol 16) 1929 Pat 622 (623) & (Vol 11) 1924 Cal 971 (972) & (1936) 17 Lah 775 (777). (Unless the application under O. 16, R. 1 is on the face of it frivolous and vexatious the Court has no discretion but to summon the witness.)

[5] Issuing summonses to witnesses is a matter of course though the Court may not permit an adjournment of the case if the application is made too late. (Vol 16) 1929 All 449 (451): 51 All 341 & (1894) 16 All 218 (219) & (1885) 9 Bom 308 (310) & (Vol 16) 1929 Cal 459 (461) & (Vol 13) 1926 Cal 364 (364) & (Vol 12) 1925 Lah 87 (67) & (1936) 17 Lah 775 (777).

PROVINCIAL AMENDMENTS

ALLAHABAD

The following proviso shall be *added* :

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor."

LAHORE

Add the following proviso :

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence without an order of the Court made in writing and stating the reasons therefor." [15-10-1932.]

N.-W.F.P.

Substitute the following for Rule 1 :

"1. (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

(2) They shall not be permitted to call witnesses other than those contained in the said list except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list ; the Court granting such permission shall record reasons for so doing.

(3) On application to the Court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court."

OUDH

Substitute for Rule 1, the following :

"1. (1) The Court may, in any suit or class of suits require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce ; and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness, any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-rule (1) the parties may, after the suit is instituted, obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

Rule 1A—BOMBAY

The following shall be *added* as Rule 1A :

"1A. (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court." [9-8-1926.]

Rule 1A — SIND

Add the following as Rule 1A, *after* Rule 1 :

"1A. The Court may, on the application of any party for a summons for the attendance of any person as a witness, permit that service of such summons shall be effected by such party."

O. 16 R. 1 (*contd.*)

[6] Party can summon witnesses even after the time fixed by Court, but if witnesses are not served, Court should refuse adjournment. (Vol 14) 1927 Lah 281 (281).

[7] Once a Court holds that a party is not to blame for non-attendance of his witnesses, he ought to be given an opportunity of procuring the attendance of such witnesses. (Vol 12) 1925 Lah 572 (572) * (1910) 8 Ind Cas 418 (419) (Oudh).

[8] Plaintiff not taking steps for one hearing — Suit adjourned—He has a right to get witnesses summoned again. (Vol 10) 1923 Nag 58 (59).

[9] Court cannot refuse to issue summons on ground that witness if produced would not support case of party summoning. (Vol 12) 1925 Lah 572 (572) * (1905) 28 Mad 28 (36).

[10] A Court has no discretion to refuse to issue summons to witnesses on the ground that it is not possible to serve them in time. (1909) 5 Nag L R 181 (184).

[11] This rule does not take away the inherent power of the Court to refuse to summon witnesses in order to prevent an abuse of process of the Court. (Vol 11) 1924 Lah 647 (649) * (1905) 28 Mad 28 (32, 36).

[12] There is no appeal against an order of a Judge

refusing to grant an application for summonses. (1867) 7 Suth W R 147 (147).

[13] Application for summons refused—Appeal from decree in suit—Correctness of order refusing application can be questioned subject to provisions of S. 99. (1894) 16 All 218 (220) * (Vol 30) 1943 Oudh 91 (96) : 18 Luck 346. (The Appellate Court will not interfere unless it is shown that the trial Court did not exercise its discretion wisely) * (Vol 16) 1929 Pat 622 (623). (Refusal to summon witnesses — Refusal injuriously affecting decision—Decision can be set aside in appeal.)

[14] Lahore Amendment — Court has discretion to allow witnesses to be examined even if not mentioned in list if there are sufficient reasons for doing so. (Vol 28) 1941 Lah 38 (39).

[15] Witnesses present on date of hearing — Their names included in the original list — O. 16, R. 1, Proviso (local amendment), does not apply and the Court cannot refuse to examine them. (Vol 21) 1934 Lah 317 (317) : 35 Cri L Jour 579.

[16] Proviso (Lahore) — Witnesses need not be named in lists filed originally—Plaintiff can file list till he actually commences to lead evidence. (Vol 22) 1935 Lah 488 (489).

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

[1882—S. 160; 1877—S. 160; 1859—S. 151.]

PROVINCIAL AMENDMENTS

ALLAHABAD

To Rule 2, add :

"(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 *per mensem* and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters."

BOMBAY

Insert as proviso to sub-rule (1) :

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness."

[21-10-1918.]

CALCUTTA

Cancel clauses (1) and (2) and substitute the following :

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case."

[25-7-1928.]

LAHORE

Add the following exception to Rule 2 (1) :

"Exception.—When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1)."

[9-1-1919.]

NAGPUR

Add the following as an exception to Rule 2 (1) :

"Exception.—When applying for a summons for any of its own officers, Government and State Railway administrations will be exempt from the operation of sub-rule (1)."

[29-6-1943.]

PATNA

Add the following proviso to rule 2 (1) :

"Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under

Order 16, Rule 2 — Note 1.

[1] It is matter of course and common justice that a witness should be paid his expenses by the party at whose instance he had been summoned. (1879-80) 4 Bom 619 (621).

[2] Where a pleader is merely called to give evidence not on a question of law as an expert but merely to give evidence as to what occurred in a previous suit in which he was engaged as a pleader, no claim of special fees on account of status can be allowed. (Vol 9) 1922 Bom 116 (117) : 46 Bom 89.

[3] The assertion that a witness who has not made any claim to his expenses before giving his evidence could recover any sum due to him only by a suit is unwarranted. Witnesses in civil suits who have not been paid such reasonable sum for their expenses as the Court shall think fit, may apply to the Court at any time in person to enforce the payment of such sum as may be awarded to them. (1879-80) 4 Bom 619 (621).

[4] Witness does not lose his right to claim expenses because party at whose instance he was summoned did not examine him. (1904) 28 Bom 647 (649).

[5] Government servants — Salaries not deducted by Government—They are not entitled to include salaries in expenses when cited as witnesses. (Vol 7) 1920 Cal 821 (822).

[6] Plaintiff repeatedly failing to pay process-fees for witnesses—Witnesses absent consequently — No good reason for plaintiff's act — Suit can be dismissed. (Vol 12) 1925 Lah 457 (457, 458).

[7] Party filing list of witnesses and paying necessary expenses—Court's officers and not party are responsible for service and return of summons. (1871) 15 Suth W R 88 (89).

[8] Money paid to witness for batta and travelling expenses— Witness not attending Court though served —Money paid can be recovered by suit. (1907) 17 Mad L Jour 143 (143).

Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has to deal, in his public capacity."

SIND

Insert the following as proviso to sub-rule (1) :

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness."

Tender of expenses to witness.

3. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

[1882—S. 161; 1877—S. 161; 1859—S. 151.]

PROVINCIAL AMENDMENTS**BOMBAY**

Insert the proviso :

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him." [21-10-1918.]

CALCUTTA

Substitute the following for Rule 3 :

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally." [25-7-1928.]

LAHORE

For Rule 3, substitute :

Tender of expenses to witness "3. (1) The sum paid into a Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception.—(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

Exception.—(2) A Government servant, whose salary does not exceed Rs. 10 *per mensem*, may receive his expenses from the Court." [9-1-1919.]

MADRAS

The following shall be added as a separate paragraph :

"In the case of employees of the Central Government or a State Railway sums paid into Court as subsistence allowance or compensation shall be credited in the Treasury to the credit of the Central Government or State Railway as the case may be." [7-1-1942.]

NAGPUR

For Rule 3, substitute the following :

"3. (1) The sum so paid into Court shall, except in case of a Government servant or a State Railway employee be tendered to the person summoned, at the time of the serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government, and when a State Railway employee, to the Railway which employs him.

Exception.—In case in which a Government servant or a State Railway employee has to give evidence at a Court situate not more than five miles from his headquarters, the actual travelling expenses incurred by him, may, when the Court considers it necessary, be paid to him." [29-6-1943.]

UDDH

Substitute the following for Rule 3 :

"3. (1) The sum so paid into Court shall, except in the case of an employee of the Central Government or a State Railway or any other commercial department of Government who is subject to the Payment of Wages Act, 1936 (IV of 1936), be tendered to the person summoned at the time of serving the summons if it can be served personally.

(2) When the person summoned is an employee of the Central Government or a State Railway or any other commercial department of the Government, who is subject to the Payment of Wages Act, 1936 (IV of 1936), the sum so paid into Court shall be credited in the treasury to the credit of the Government concerned, i. e., Central Railway or any other commercial department of Government as the case may be.

Exception.—In any case in which such a Government servant has to give evidence at a Court situate not more than five miles from his headquarters or while on leave has to give evidence at any place other than the place of his residence, actual travelling expenses incurred by him may, when the Court considers it necessary, be paid to him." [16-5-1941.]

PATNA

Add the following as proviso :

"Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters which he has had to deal, in his public capacity, then —

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by Rule 2 and recover the amount from the Treasury ;

(ii) if the officer's salary exceeds Rs. 10 a month, and the Court is situated not more than five miles from his headquarters, the Court may, at its discretion on his appearance, pay him the actual travelling expenses incurred;

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than five miles from his headquarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government."

SIND

Insert the following as proviso :

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice, or of facts with which he has had to deal in his official capacity, or to produce a document from the public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him."

4. (1) Where it appears to the Court or to such officer as it appoints in this behalf that the *Procedure where insufficient sum paid in.* sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons ; or the Court may discharge the person summoned, without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person summoned for a longer period than one day, *Expenses of witnesses detained more than one day.* the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party ; or the Court may discharge the person summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid.

[1882—S. 162 ; 1877—S. 162 ; 1859—S. 151.]

PROVINCIAL AMENDMENTS**CALCUTTA**

Cancel clause (1) and substitute therefor the following :

"(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid".

[25-7-1928.]

LAHORE

After the word "summoned" where it first occurs in Rule 4 (1), insert :

"or when such person is a Government servant, to be paid into Court".

[9-1-1919.]

NAGPUR

Insert the following between the words "summoned" and "as appears" in sub-rule (1) :

"or, when such person is a Government servant or a State Railway employee, to be paid into Court".

[29-6-1943.]

Rule 4A—MADRAS

Insert the following as Rule 4A :

"4A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Crown no payment in accordance with Rule 2 or Rule 4 shall be required when *Special provision for public servants summoned as witnesses in suits to which the Crown is a party.* an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters ; and

Order 16 Rule 4 — Note 1.

[1] A trying Court is not bound to direct the witnesses to appear at the adjourned date of hearing when the case is adjourned by it for want of time and not at any party's request. (1912) 22 Mad L Jour 409 (410).

[2] A Court failing to bind witnesses to attend on the adjourned date, must allow the parties a reasonable time to summon them and to enforce their attendance

and grant an adjournment for the purpose. (1912) 16 Ind Cas 986 (986) (Mad).

[3] Order directing party to pay expenses of witness — Expenses can be realized by way of execution. (1910) 7 Mad L Tim 76 (76).

[4] Immovable property of debtor cannot be sold in default of payment of witnesses' expenses. (Vol 8) 1921 Cal 430 (431).

the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed [by the Government under whom the officer is serving] and shall also pay any further sum that may be required under Rule 4 according to the same scale; and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him certificate of attendance." [As amended on 2-3-1942.]

5. Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

[1882—S. 163; 1877—S. 163; 1859—S. 152.]

6. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

[1882—S. 164; 1877—S. 164; 1859—S. 153; Cf. R. S. C., O. 37, R. 7.]

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

[1882—S. 165; 1877—S. 165.]

PROVINCIAL AMENDMENT

Rule 7A—CALCUTTA

Insert the following as Rule 7A :

"7A. (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of Order 5 shall apply to summonses personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summonses, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant." [25-7-1928.]

8. Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

[1882—S. 166; 1877—S. 167; 1859—S. 154.]

PROVINCIAL AMENDMENTS

ALLAHABAD

After "this Order" and before "shall be served," add "may by leave of the Court be served by the party or his agent, applying for the same, by personal service and failing such service."

CALCUTTA

Cancel Rule 8 and substitute therefor the following :

"8. (1) Every summons under this Order not being a summons made over to a party for service under Rule 7A (i) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order 5 as to proof of service shall apply thereto.

Order 16, Rule 5 — Note 1.

[1] Summons should be clear and specific in its terms as to the title of the Court and when the attendance of the person summoned is required — Summons which contains no mention of place or time is bad. (1883) 5 All 7 (8).

[2] A witness is not bound to produce documents not duly specified in the summons and he can apply for specification of the documents. (1911) 5 Sind L R 44 (45).

Order 16, Rule 6 — Note 1.

[1] Documents, although not mentioned in sum-

mons to be produced, should be admitted — Witness is not bound to produce a document before he is put in witness box. (Vol 12) 1925 Cal 1149 (1151).

[2] A witness who is merely to produce a document will be deemed to have complied with the summons if he causes such document to be produced instead of attending in person. (Vol 28) 1941 Nag 159 (160).

Order 16, Rule 7 — Note 1.

[1] The rule is subject to Ss. 130 and 131, Evidence Act—Person cannot be called upon to produce title-deeds unless the requirements of Ss. 130 and 131 are fulfilled. (1911) 12 Cri L Jour 450 (450, 451) (Cal).

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this Order."

[25-7-1928.]

N.-W.F.P.

Add the following :

"Provided that such summons shall ordinarily be made over for service to the party calling the witnesses, and his affidavit shall be considered sufficient proof of service; provided further that he shall, for sufficient reasons, be entitled to apply to the Court to have the summonses served through its agency."

ODDH

Add the following provisos :

"Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness, as if he were an officer of the Court, but in this case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court :

Provided also that the special procedure for the service of summons upon defendant under Order 5, Rule 20A (1), shall not apply to service of summons under this Order."

PATNA

Add the following :

"Provided that a summons under this Order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner."

9. Service shall in all cases be made a sufficient time before the time specified in the summons. Time for serving summons. Time for preparation and for travelling to the place at which his attendance is required.

[1882—S. 167.]

10. (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

Order 16, Rule 10 — Note 1.

[1] It is not obligatory on Court to compel witness to attend except on party's application. (Vol 7) 1920 Nag 62 (62).

[2] Court can issue proclamation only when evidence or document is material. (Vol 16) 1929 All 850 (854)* (1871) 15 Suth W R 176 (178).

[3] If the Court is satisfied that a witness has absconded and that he is a material witness, it should grant an application for issuing a process against him unless the applicant is guilty of laches. (1910) 11 Cal L Jour 29 (31).

[4] Before issuing warrants against absent witnesses provisions of O. 16, R. 10 must be complied with. (Vol 4) 1917 Lah 281 (282).

[5] Witnesses absent — Further opportunity should be given to party to call them. (Vol 11) 1924 Pat 36 (36) * (Vol 13) 1926 Lah 26 (27).

[6] Witnesses absent—Party not asking for further action — Court can *suo motu* pass order under O. 16, R. 10 (2) and (3). (1911) 33 All 690 (693, 694).

[7] No evidence that witness whose evidence was material was keeping out of way to avoid service of summons — Coercive process under R. 10 cannot be issued. (1871) 15 Suth W R 176 (178).

[8] Whether there was lawful excuse should be de-

termined with reference to circumstances of each case. (1872) 15 Suth W R 63 (64).

[9] Witness — Non-appearance on day of hearing — Order-sheet not clear as to direction to witness to re-appear—Witness held not guilty of wilful absence in defiance of order. (Vol 24) 1939 Pat 285 (287).

[10] Municipal servant summoned to produce document—Witness not attending — His arrest refused on insufficient grounds - Witness held should be compelled to produce document. (1912) 16 Cal W N 116 (119).

[11] Summons duly served - Witnesses not appearing—Plaintiff offering to bring them — Court insisting on warrants to be issued is not legally wrong although it is harsh—High Court declined to interfere in appeal. (Vol 14) 1927 Lah 424 (424).

[12] Warrant for arrest of witness for failure to produce document — Court cannot subsequently issue proclamation and attach witness's property. (Vol 7) 1920 Mad 1014 (1017) : 20 Cr L Jour 763.

[13] If witness does not appear, his property is attached and sold to recover fine only — Action is taken by Court on motion by one party — Such party cannot be placed on same footing as attaching decree-holder — Person moving Court to proceed under O. 16, R. 10 — Property of wrong person attached — Such applicant cannot be penalized. (Vol 24) 1937 Mad 811 (813).

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

[1882—S. 168 ; 1877—S. 168 ; 1859—S. 159 ; Cf. R. S. C., O. 37, R. 8.]

PROVINCIAL AMENDMENT

ALLAHABAD

In sub-rule (1) *substitute* a colon for the full stop after the word "summons" and *add* the proviso :

"Provided that the Court need not examine the serving officer if the person has been summoned only to produce a document and has attended and admitted receipt of the summons but has failed to produce the document."

In sub-rule (2) :

(a) between the word "proclamation" and the word "requiring", *insert* the words, "or, if he is present, an order in writing to be signed by him";

(b) for the words "and a copy of such proclamation" *substitute* the words, "and a copy of the proclamation if issued".

In sub-rule (3) between the word "proclamation" and the words "or at any time afterwards" *insert* the words, "or an order in writing."

If witness appears, attachment may be withdrawn.

11. Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[1882—S. 169 ; 1877—S. 169 ; 1859—S. 160.]

12. The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[1882—S. 170 ; 1877—Ss. 170, 174 ; 1859—S. 160.]

Order 16, Rule 11 — Note 1.

[1] Order 16, R. 11 provides for a case where the person satisfies the Court that he has not intentionally failed to carry out the order. (Vol 7) 1920 Cal 46 (46, 47).

Order 16, Rule 12 — Note 1.

[1] Rule does not affect special jurisdiction of Chartered High Court to proceed for contempt against defaulting witness. (Vol 15) 1928 Rang 188 (189, 190) : 4 Rang 257 ; 27 Cri L Jour 1241.

[2] There is a conflict of opinion on the point as to when fine can be imposed and three different views have been expressed : —

(a) The words "such person" in O. 16, R. 12 mean a person to whom a summons has been issued and who fails to appear under O. 16, R. 10 (1) — Proclamation or order of attachment are not conditions precedent to impose fine on defaulting witness. (Vol 12) 1925 Mad 1247 (1247) : 48 Mad 941 * (Vol 15) 1928 Lah 469 (469) : 29 Cri L Jour 704.

(b) No order under O. 16, R. 12, can possibly be made until the procedure laid down in R. 10 has been followed, where that rule applies. (Vol 3) 1916 Cal 421

(422) * (Vol 16) 1929 All 850 (853) * (Vol 7) 1920 Cal 655 (655) * (Vol 15) 1928 Lah 478 (474).

(c) Witness or party present in Court—Court directing him to do certain act—Court need not go through procedure of issuing summons, proclamation or attachment of property to proceed under R. 12. (Vol 16) 1929 All 99 (100).

[3] Professional men should be given a reasonable latitude regarding attendance. (1910) 11 Cal L Jour 29 (33).

[4] Failure of witness to attend due to lawful excuse—Fine should not be imposed. (Vol 15) 1928 Lah 979 (980). (Witness missing the train—Sending a telegram—Fine imposed—Order of fine was quashed.)

[5] When the witness appears in obedience to an order of the Court requiring him to produce a document and states that the document is not in his possession, it is illegal to impose a fine upon him. (Vol 7) 1920 Mad 1014 (1017).

[6] Witness refusing to accept summons but attending Court on the date fixed—Fine cannot be imposed. (Vol 15) 1928 Lah 469 (469) : 29 Cri L Jour 704.

13. The provisions with regard to the attachment and sale of property in the execution of a *Mode of attachment.* decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

14. Subject to the provisions of this Code as to attendance and appearance and to any law *Court may of its own* for the time being in force, where the Court at any time thinks it *accord summon as witnesses* necessary to examine any person other than a party to the suit and not *strangers to suit.* called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

[1882—S. 171 ; 1877—S. 171.]

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit *Duty of persons summoned to give evidence or* shall attend at the time and place named in the summons for that *produce document.* purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

[1882—S. 172 ; 1877—S. 172 ; 1859—S. 167.]

16. (1) A person so summoned and attending shall, unless the Court otherwise directs, *When they may depart.* attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

[1882—S. 173.]

PROVINCIAL AMENDMENT

LAHORE

Add the following sub-rule (3) :

“(3) In the absence of the presiding officer the powers conferred by sub-r. (2) may be exercised by the Senior Subordinate Judge, of the first class exercising jurisdiction at the headquarters of the district, or by any Judge or court-official nominated by him for the purpose. [25-7-1938.]

Provided that a court-official nominated for the purpose shall not order a person, who fails to furnish such security as may be required under sub-r. (2), to be detained in prison, but shall refer the case immediately to the presiding officer on his return.” [23-1-1940.]

17. The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply *Application of rules* to any person who having attended in compliance with a summons departs, *10 to 13.* without lawful excuse, in contravention of rule 16.

[1882—Ss. 174, 175 ; 1877—Ss. 174, 175 ; 1859—Ss. 168, 169.]

18. Where any person arrested under a warrant is brought before the Court in custody and *Procedure where witness* cannot, owing to the absence of the parties or any of them, give the *apprehended cannot give* evidence or produce the document which he has been summoned to *evidenced or produce docu-* give or produce, the Court may require him to give reasonable bail or *ment.* other security for his appearance at such time and place as it thinks

O. 16 R. 12 (contd.)

[7] An order under R. 10 or R. 12 of O. 16 is not appealable, but where such an order is illegal the High Court will interfere under S. 115, Civil P. C. and remedy the injustice caused to the aggrieved party. (Vol 7) 1920 Mad 1014 (1017) (1911) 33 All 68 (70, 71).

Order 16, Rule 14 — Note 1.

[1] Power of Court to examine witness itself is discretionary. (Vol 31) 1944 P O 100 (108) : 71 Ind App 171 : I L R (1945) Kar P C 36 (P C).

[2] Lawyer present all through—He should not be examined as court witness. (Vol 20) 1933 Pat 306 (324) : 12 Pat 359.

[3] When the Court *suo motu* summons a person to give evidence in a case, he is just as liable to be cross-examined as any other witness. (1869) 11 Suth W R 468 (472).

[4] Where a Court desires to have the evidence of a particular witness, whom the defendant does not desire

to call, the Court cannot compel the defendant to pay the amount necessary to secure attendance or evidence of the witness and on defendant's refusal to do so, it cannot refuse to issue summonses for the attendance of his witnesses. In such a case the correct procedure is to take action under O. 16, R. 14. (1911) 1911 Pun L R No 159, p. 583 (584, 585).

[5] Party having plenty of opportunities — Court would refuse to examine witness at appellate stage. (Vol 20) 1933 Pat 306 (324, 325) : 12 Pat 359.

[6] In a case of boundary dispute or where the identity of land is doubtful the Court should make free use of powers under R. 14. (1909) 5 Low Bur Rul 1 (2).

Order 16, Rule 17 — Note 1.

[1] Contempt — Witness leaving jurisdiction of the Court for avoiding to give evidence — Rule 17 is inadequate. (Vol 13) 1926 Rang 188 (190) : 4 Rang 257 : 27 Ori L Jour 1241.

fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

[1882—S. 174 ; 1877 — S. 174 ; 1859 — S. 169.]

No witness to be ordered to attend in person unless resident within certain limits.

19. No one shall be ordered to attend in person to give evidence unless he resides —

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

[1882 — S. 176.]

20. Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

[1882 — S. 177 ; 1877 — S. 177 ; 1859 — S. 170.]

Rules as to witnesses to apply to parties summoned.

21. Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

[1882 — S. 178 ; 1877 — S. 177 ; Cf. 1859 — S. 126.]

PROVINCIAL AMENDMENTS

CALCUTTA

Cancel Rule 21 and substitute therefor the following :

"21. (1) When any party to a suit is required by any other party thereto to give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When any party to a suit gives evidence on his own behalf the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

[11-11-1927.]

MADRAS

Substitute the following for Rule 21 :

Rules in the case of parties appearing as witnesses.

"21. (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

[4-2-1936.]

RULES 22 AND 23—ALLAHABAD

To Order 16, add the following rules :

"22. (1) Save as provided in this rule and in Rule 2, the Court shall allow travelling and other expenses on the following scale :—

- (a) in the case of witnesses of the class of cultivators, labourers, and menials, six annas a day ;

Order 16, Rule 19 — Note 1.

[1] Plaintiff not residing within Court's jurisdiction nor within 200 miles from court-house — He cannot be compelled to appear in person as defendant's witness but should be examined on commission. (Vol 19) 1932 Nag 135 (136) : 28 Nag L R 146.

[2] The rule applies to persons who are ordered to attend in person to give evidence, including persons who may be parties, but are required to give evidence as witnesses. (Vol 9) 1922 Cal 42 (43).

[3] Rule 19 does not apply to summonses under S. 36, Presidency Towns Insolvency Act — Supposed debtor to insolvent's estate can be summoned even though he is beyond 200 miles. (Vol 15) 1928 Mad 856 (859).

Order 16, Rule 20 — Note 1.

[1] Rule must be strictly construed. (1874) 22 Suth W R 270 (271).

[2] Party producing document under rule, but not exhibiting in evidence — Court cannot make order under R. 20 against him. (Vol 5) 1918 Cal 145 (145).

[3] Rule applies only when party is present in Court

and refuses to comply with order. (1911) 12 I C 719 (719) (Mad).

[4] Party who is not guilty of wilful default is not liable to be visited with consequences of this rule. (1866) 6 Suth W R 247 (248) * (1871) 15 Suth W R 269 (269) * (1873) 20 Suth W R 165 (166).

[5] Rule is permissive and not mandatory. (1866) 5 Suth W R 89 (89) * (1869) 11 Suth W R 5 (5).

[6] Order 16, Rule 20 does not give the Court an arbitrary power to dismiss a suit and give judgment against the party defaulting to appear wholly without reference to the state of evidence, still less without hearing the evidence. (1875) 24 Suth W R 314 (314, 315).

[But see (1876) 2 Cal 222 (225).]

[7] Decision pronouncing judgment under this rule is appealable order. (1866) 5 Suth W R 270 (270).

Order 16, Rule 21 — Note 1.

[1] Rule 21 applies only to case where party has been called by other party — Court has no power under it to allow travelling expenses of party giving evidence in support of his own case. (Vol 22) 1935 Mad 244 (244).

- (b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct; and
- (c) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs. 200 a month, from three to five rupees a day.
- (2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the Court that he has actually and necessarily incurred the additional expense.

Illustration

A post office or railway employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which, he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip which the witness will present to the Court from which the summons issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule as may seem to the Court to be reasonable and proper :

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their head-quarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses."

ORDER XVII.

ADJOURNMENTS

Court may grant time and adjourn hearing. 1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and *Costs of adjournment.* may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

[1882—S. 156 ; 1877—S. 156 ; 1859—S. 146.]

PROVINCIAL AMENDMENTS

ALLAHABAD

Add the following further proviso :

"Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order 16 Rule 1."

LAHORE

(1) Add the following at the beginning of sub-rule (1) :

"Subject to the provisions of Order 23 Rule 3."

(2) Add the following as sub-rule (3) :

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1), the Court shall proceed with the suit forthwith." [As amended on 21-7-1937.]

ORDER 17, RULE 1. — SYNOPSIS.

1. Applicability and scope.
2. Adjournment.
3. "Sufficient cause."
4. Costs of adjournment.

1. Applicability and scope. — [1] The Court has discretion to grant adjournment at any stage of the suit — Court can grant time for production of further evidence even during course of arguments. (Vol 3) 1916 Lah 175 (176).

[2] Adjournments made, not at the instance of the parties, but necessitated by the rules of the Court, which regulate the disposal of its own business, do not fall within the scope of O. 17, R. 1. (1898) 2 Cal W N 490 (491).

[But see (Vol 22) 1935 All 210 (211). (Rule 1 applies to adjournment made at party's instance as also by Court on its own motion)].

[3] It is the duty of Court to see that service of summons to witnesses is effected—Person applying to Court without delay for issue of summons and paying necessary fees but witnesses though served refusing to come to Court until served through their superiors—Adjournment prayed for is not one to which strict provisions of O. 17, R. 1 should be applied. (Vol 16) 1929 Lah 620 (621).

[4] Hearing of suit is different from hearing of evidence. Court may adjourn the hearing of the suit and yet may, under O. 13, R. 2, refuse to accept documentary evidence which ought to have been but was not

O. 17 R. 1 (*contd.*)

produced at the first hearing though such hearing resulted only in an adjournment. (Vol 6) 1919 Cal 800 (801).

[5] When the hearing of a suit has once begun it must go on from day to day unless the trying Judge sees reasons to adjourn it. The District Judge has no power to order the adjournment of a suit which is part heard before Subordinate Judge. (Vol 2) 1915 Mad 78 (78) * (1910) 8 Ind Cas 990 (991) (Rang). (A Court granting an adjournment beyond the following day is bound to record its reasons therefor.)

[6] Orders 9 and 17 apply to application for final decree under O. 34, R. 5, in view of S. 141. (Vol 24) 1937 Sind 273 (278) : 31 Sind L R 180.

[7] Order 17 does not apply to execution proceedings. (Vol 20) 1933 Mad 418 (422) : 56 Mad 490 (F B). (Per *Sundaram Chetty J.*)

[8] An order of adjournment is not open to revision. (Vol 11) 1924 Nag 417 (418).

2. Adjournment. — [1] The granting of adjournment is a matter within the discretion of the Court to be exercised on the materials placed before it. (Vol 23) 1936 Pat 472 (474) : 15 Pat 561 (F B) * (Vol 22) 1935 All 476 (477). (Order of the lower Court deciding that there is sufficient cause to grant adjournment in its discretion is not appealable.) * (Vol 1) 1914 All 230 (232). (A Court of second appeal will not interfere with the exercise of such discretion.) * (Vol 14) 1927 Lah 879 (879). (What is sufficient cause is a question of fact — Second appeal does not lie.) * (Vol 13) 1926 Nag 486 (487). (It is in the discretion of the trial Court to allow a party to produce a witness for giving rebuttal evidence and to give adjournment for the purpose.) * (Vol 9) 1922 Nag 81 (81). (Adjournment is in the discretion of the Court of first instance.) * (Vol 4) 1917 Nag 48 (49). (Order refusing adjournment is not appealable — Appellate Court will not generally interfere with exercise of discretion refusing adjournment even in appeal from decree.) * (Vol 8) 1921 Pat 76 (78) : 5 Pat L Jour 390. (Non-compliance with a provision of law does not give a party an absolute right to insist an adjournment.)

[2] The discretion should be exercised judicially and reasonably, it not being subject to any definite rules. (Vol 1) 1914 Sind 105 (106, 107) : 8 Sing L R 275.

[3] Conduct of party should be scrutinised. (Vol 8) 1916 Pat 33 (33) : 1 Pat L Jour 173.

[3a] Court ought not to be too technical in the matter of adjournments. (Vol 13) 1926 Mad 859 (860).

[4] Defendant summoning no evidence and applying for adjournment on pretext of illness — Court rejecting application on ground that defendant was shamming — Trial Court's discretion in refusing adjournment held properly exercised. (Vol 28) 1941 Sind 41 (44) : 1 L R (1941) Kar. 146.

[5] Application for adjournment should not be summarily disposed of. (Vol 15) 1928 Cal 102 (102).

[6] Refusal to postpone the hearing for an hour or two to give time for a party to appear can be hardly called proper. (Vol 15) 1928 Nag 165 (165).

[7] Date of hearing — Case not called until 2 p. m. — Six witnesses for plaintiff examined and 40 witnesses for defendant present — Defendant's advocate appearing in other Court and defendant applying for adjournment but Court refusing — Though defendant has not shown sufficient cause for not being ready with his case, Court should use its discretion in allowing adjournment. (Vol 16) 1929 Rang 215 (216).

[8] Suit by creditor — Debtor's objection that claim is fraudulent — C. I. D. officer appointed to investigate fraud — Date fixed for hearing adjourned and another date fixed — C. I. D. officer requesting postponement of case for two months — Postponement granted without

any intimation to creditor's pleader — Procedure held not according to law. (Vol 23) 1936 Pat 472 (473) : 15 Pat 561 (F B).

[9] Adjournment should be asked for as early as possible. (Vol 12) 1925 Nag 236 (237).

[10] When a Court finds it necessary to adjourn a pending suit, it is part of the duty of the Court to see that the date fixed for the adjourned hearing is communicated to the parties concerned or to their pleaders or at any rate to such of them as are present or represented in Court when the adjournment takes place. (Vol 10) 1923 All 79 (80).

[11] Signatures of pleaders of both parties should be on order sheet. (Vol 12) 1925 Pat 807 (809) : 4 Pat 440.

[12] Adjourned date need not be intimated to an absent party. (Vol 17) 1930 Mad 113 (114) (S B).

3. "Sufficient cause." — [1] Question as to existence of sufficient cause for adjournment is one of fact. (Vol 22) 1935 All 476 (477).

[2] Plaintiff ready with witnesses several times but Court adjourning many times for want of time — Plaintiff failing on one occasion — Adjournment should be granted. (Vol 13) 1926 Mad 944 (944).

[3] Witnesses served but absent as wrong date given in processes — It is good ground for adjournment. (Vol 20) 1933 Nag 336 (337).

[4] Summonses duly served but witnesses in question not presenting themselves before the Court at the hearing — Plaintiffs applying for adjournment to enable them to re-summon these witnesses but adjournment refused — *Held* the Court ought to have granted adjournment to re-summon the witnesses. (Vol 10) 1923 All 218 (219) : 45 All 407 * (Vol 20) 1933 Lah 176 (177).

[5] Plaintiff taking steps to secure attesting witness and not responsible for non-service — Adjournment should be granted for examining him. (Vol 20) 1933 Mad 612 (613).

[6] Witnesses absent — Absence not due to delay in summoning — Adjournment should be granted. (Vol 12) 1925 Oudh 304 (304).

[6a] While it is desirable that trial of cases should be expedited no concession should be made to a party who does not exercise due diligence; it has to be remembered that witnesses are not always under the influence of the party by whom they are called and it may be necessary to secure the help of the Court in securing their attendance, and it is equally undesirable that cases should be expedited at the cost of substantial justice. (Vol 29) 1942 Lah 162 (163).

[7] Non-payment of process within time — Witness served in sufficient time to appear — Court should grant adjournment. (Vol 7) 1920 Nag 221 (222) : 16 Nag L R 1.

[8] The Court ought to grant adjournment if the witnesses fail to appear for non-service of summons due to vacation. (Vol 7) 1920 Pat 333 (335) : 5 Pat L Jour 70.

[9] Adjournment cannot be refused on ground that witnesses would not be able to prove the facts in issue. (Vol 12) 1925 Lah 572 (572).

[10] Case set down for final hearing but further evidence required — Plaintiff not expected to come prepared at such hearing with evidence before he has seen defendant's written statement — Judge is bound to adjourn case. (1867) 7 Suth W R 84 (84).

[11] Case transferred without notice to defendant — Defendant should be granted adjournment if he pleads unpreparedness to go on. (Vol 12) 1925 Pat 534 (534, 535).

[12] Hearing taken up on a date not fixed — Defendant praying for time — Court cannot pass *ex parte* decree. (Vol 16) 1929 Pat 609 (612) : 9 Pat 408.

2. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

[1882—S. 157, 1877—S. 157; 1859—S. 147.]

O. 17 R. 1 (contd.)

[13] Where there is a positive legal bar to a suit and where there are grounds for supposing that that bar may exist and where a decree (supposing such bar were to exist) would cause subsequent confusion and embarrassment the Court is justified in granting adjournment to enable the party to satisfy the Court on the point. (Vol 15) 1928 All 355 (356).

[14] Party undertaking to produce his own witnesses — Witnesses not produced — Court is not bound to give further time. (Vol 15) 1928 Lah 641 (642).

[15] Order 17, Rule 1 (as amended) — Defendants aware of intended departure of witnesses — No steps taken to get them examined before they leave — Court can refuse to wait till their return. (Vol 19) 1932 Lah 591 (592); 13 Lah 458.

[16] Laches in paying process fees may be ground for refusing adjournment. (Vol 20) 1933 Nag 336 (337).

[17] Adjournment cannot be granted for the reason that compromise was suggested. (Vol 15) 1928 Mad 401 (401).

[17a] Agreement in good faith between parties for an adjournment for a compromise — Adjournment should be granted. (Vol 5) 1918 Pat 256 (257).

[18] Parties cannot get adjournments on the ground that somebody else undertakes to keep the Court busy. (Vol 11) 1924 Cal 774 (776); 51 Cal 70.

[19] Where a notice as to inspection and discovery of documents is adjourned to the hearing of the suit, though no judgment is given on the notice, the Court may proceed with the suit on the day fixed for hearing and refuse further adjournment especially where the nature of the case requires the avoidance of delay. (Vol 12) 1925 Bom 105 (108).

[20] Absence of due diligence — No adjournment can be granted. (Vol 10) 1928 Lah 548 (550); 4 Lah 258 (Vol 13) 1926 Oudh 75 (76). (Missing of a train is no good ground for absence.)

[21] Adjournment must be granted for attendance of witness who is ill even in spite of two previous adjournments. (Vol 13) 1926 Lah 501 (501).

[22] Absence of advocate owing to his attendance in another case is not sufficient ground for adjournment. (Vol 14) 1927 Rang 258 (258).

4. Costs of adjournment. — [1] The party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be occasioned by the adjournment and as might reasonably compensate him for the expense incurred by reason of the adjournment — The condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment. (Vol 38) 1946 Bom 113 (114) & (Vol 29) 1942 Lah 162 (163). (Costs should not be awarded against party not substantially at fault in matter of adjournment.) & (Vol 17) 1930 Oudh 171 (173); 4 Luck 529.

[2] Plaintiff failing to bring forward sufficient evidence to establish his case in an *ex parte* suit asking for adjournment to bring more evidence — Adjournment granted on condition that plaintiff bears the whole costs of the hearing. (1881) 7 Cal 177 (177).

[3] Costs occasioned by adjournment should be ordered to be paid and not costs of suit generally. (Vol 25) 1938 Mad 711 (711).

[4] Plaintiff allowed to sue as pauper — Costs can be made condition precedent for allowing him an

adjournment. (Vol 15) 1928 Rang 306 (307); 6 Rang 561 & (Vol 28) 1941 Mad 437 (438). (Such condition can be enforced by dismissal of suit.)

[5] Payment of costs ordered before next hearing — Party not so paying has no right to be heard. (Vol 15) 1928 Mad 786 (788).

[6] Adjournment granted subject to payment of adjournment costs within certain time — Costs not paid within time granted — Suit can be dismissed. (Vol 27) 1940 Nag 158 (159) & (Vol 6) 1919 Cal 111 (111, 112). (Appeal.) & (Vol 3) 1916 Lah 162 (163).

[7] Defendants granted adjournment on condition of paying costs — Default in paying — Defence can be struck off. (Vol 12) 1925 All 280 (281); 47 All 538.

[8] Unless payment of costs is made a condition precedent to the hearing of defendants' evidence the defence cannot be struck off. (1898) 21 Mad 403 (404).

[9] Court offering defendant opportunity to make detailed statement under O. 6, R. 5 on payment of adjournment costs — Defendant refusing conditional offer — Formal amendment of plaint subsequently allowed — On such amendment, held no case for further pleadings arose and Court rightly refused to accept defendant's belated statement. (Vol 24) 1937 Nag 376 (378); 1 I L R (1937) Nag 498.

[10] The dismissal of an application for adjournment granted with a direction to pay costs, because the applicant failed to pay costs fixed by the Court on the same day is wrong. The party should be given sufficient time to produce the money. (Vol 12) 1925 Cal 570 (571).

[11] Where leave to sue in *forma pauperis*, is granted and thereafter the plaintiff applies for the amendment of the plaint it is not competent for the Court after allowing the amendment to direct him to pay the costs of the amendment and then dismiss the suit for default of payment of such costs. (Vol 9) 1922 Bom 385 (385); 47 Bom 104.

[12] Adjournment for good cause must be granted without costs. (Vol 2) 1915 Lah 476 (477).

[13] Pleader asked to admit genuineness of document is entitled to consult client — Pleader demanding short adjournment should not be burdened with costs. (Vol 23) 1936 Lah 705 (706).

[14] Date fixed for scrutiny of processes is not one for hearing of case — Court cannot order defendant to pay costs for his failure to appear on that date. (Vol 29) 1942 Lah 162 (163).

[15] Suit dismissed for non-payment of adjournment costs — Appeal lies — Suit cannot be restored in inherent jurisdiction. (Vol 30) 1943 Nag 149 (150, 151); 1 I L R (1943) Nag 613.

[16] Order dismissing suit for non-payment of costs of adjournment falls under O. 17, R. 3 and not R. 1 — Dismissal bars second suit (Oudh amendment.) (Vol 31) 1944 Oudh 89 (40).

ORDER 17, RULE 2 — SYNOPSIS.

1. Scope and applicability.
2. "Appearance."
3. "Hearing."
4. Remedy of party aggrieved.
5. Distinction between Rr. 2 and 3—See O. 17, R. 3.

1. Scope and applicability. — [1] Rule applies to cases in which a party having originally appeared fails to do so on the day to which the hearing is adjourned. (Vol 32) 1945 Sind 98 (102); 1 I L R (1945) Kar 1 &

PROVINCIAL AMENDMENTS

ALLAHABAD

Add the following :

"Where on any such day, the evidence, or a substantial portion of the evidence, of any party has already been recorded and such party fails to appear the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Explanation. — No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application." [28-5-1943.]

OUDH

Add the following as sub-rule (2), and read the existing Rule 2 as sub-rule (1) :

"(2) Where before any such day, the evidence, or a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day, the Court may, in its discretion, proceed with the case as if such party were present and may dispose of it on the merits.

Explanation. — No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader though engaged only for the purpose of making an application."

O. 17 R. 2 (contd.)

(Vol 22) 1935 All 210 (211) * (Vol 20) 1933 All 907 (908) * (Vol 12) 1925 All 267 (269) : 47 All 140. (Defendant absent at adjourned hearing—Order should be presumed to be under R. 2 in absence of mention otherwise.) * (Vol 10) 1923 All 551 (552) : 45 All 618 * (Vol 4) 1917 All 136 (137, 138). (Plaintiff directed to appear under O. 10. R. 4 and case adjourned—On his non-appearance case should have been dismissed under O. 17, R. 2 read with O. 9, R. 8.) * (Vol 29) 1942 Bom 344 (344). (Case adjourned—Defendant absent—Court can proceed *ex parte* — Defendant can apply under O. 9, R. 13.) * (Vol 12) 1925 Bom 328 (329) * (1396) 20 Bom 736 (744). * (Vol 1) 1914 Cal 360 (361) : 41 Cal 956. (Case proceeding from day to day — Disposal *ex parte* on default of defendants falls under this rule.) * (Vol 20) 1933 Lah 243 (249) * (Vol 24) 1937 Mad 674 (674, 675). (Defendant declared *ex parte* — Judgment reserved — O. 17, R. 2 applies.) * (1910) 33 Mad 241 (243) * (1887) 10 Mad 270 (271) * (Vol 12) 1925 Oudh 360 (360) * (Vol 15) 1928 Pat 167 (167) : 7 Pat 236. (Plaintiff not appearing on adjourned date — Hearing not commenced — Action should be taken under R. 2.) * (1909) 3 Sind L R 208 (211) (FB).

[2] Rule 2 of Order 17 applies only when one of the parties or both the parties are absent. (Vol 14) 1927 All 507 (507).

[3] Suit decided on evidence of plaintiff and defendant in absence of plaintiff — Judge should act under R. 2 — If suit is dismissed decree is *ex parte* within O. 9. (Vol 20) 1933 Cal 73 (74) * (Vol 2) 1915 All 139 (140) : 37 All 460. (Plaintiff and pleader remaining absent on adjourned hearing—Suit should be dismissed in default and not proceeded on merits.)

[4] Defendants failing to appear on date fixed by Court on its own motion—Court proceeding with case and passing order purporting to be on merits — Order should not have been on merits—Order must be held to be one *ex parte* under R. 2. (Vol 16) 1929 Rang 73 (74) : 6 Rang 766 * (Vol 12) 1925 All 182 (182, 183) : 47 All 181. (Defendant taking time to produce evidence, but remaining absent on adjourned hearing — Court ought to pass an *ex parte* decree and not a judgment on merits.) * (Vol 4) 1917 All 475 (476) : 39 All 143. (When the defendant fails to appear on an adjourned date, it is the duty of the Court to hear sufficient evidence, on the plaintiffs' side to justify the granting of the relief claimed and pressed for.) * (1937) 1937 Oudh W N 620 (621). (On day fixed for evidence defendants absent — Judge recording evidence of plaintiff and passing decree *ex parte* mentioning that decree was under R. 3 of O. 17. Held right procedure was to proceed under R. 2 and not R. 3 and presumption was that R. 3 was an accidental slip for R. 2.)

[5] Defendant taking time for producing evidence,

and absent — Rule applies. (Vol 12) 1925 All 267 (270) : 47 All 140 * (Vol 19) 1932 Lah 477 (478).

[6] Suit dismissed on plaintiff's pleader stating that plaintiff's absence was due to having mistaken date of hearing — Dismissal is under R. 2. (Vol 14) 1927 Rang 46 (47) : 4 Rang 408.

[7] It has been held in the following case that Court can, in exercise of discretion, pass order on merits under O. 17, R. 2 provided it has material before it. (Vol 28) 1941 Bom 83 (84, 85) : I L R (1941) Bom 150.

[8] Plaintiff closed his case, evidence tendered being sufficient if un rebutted — Case should not be dismissed for default of plaintiff. (Vol 3) 1916 Mad 897 (897).

[9] Plaintiff absent after making out *prima facie* case—Case should properly be adjourned. (Vol 16) 1929 Pat 243 (243, 249).

[10] Pre-emption suit—Evidence recorded and Commissioner appointed to report as to market value—Plaintiff absent on date of return of report — Report also not submitted by Commissioners—Case falls under O. 17, R. 2 and suit should not be dismissed but must be adjourned. (Vol 21) 1934 Lah 56 (57).

[11] In a suit petitioners applied for adjournment on the ground that some material witnesses were unable to attend on the date fixed for hearing—Court refused adjournment and dismissed the suit for default. Application under O. 9, R. 9 was also rejected—Held Court had wrongly exercised its jurisdiction and that suit should be re-heard. (Vol 25) 1938 Cal 789 (790).

[12] Rule does not apply where no day has been fixed for hearing. (1872) 18 Suth W R 325 (325).

[13] Where suit was adjourned for appointment of guardian only it cannot be dismissed on ground of plaintiff's absence. (Vol 11) 1924 Pat 714 (715).

[14] Amendment of issue applied for—Day fixed for consideration of amendment—Default of parties — Suit cannot be dismissed. (Vol 8) 1921 Pat 96 (97) : 6 Pat L Jour 331.

[15] If after settlement of issues the parties and their pleaders are absent at the hearing, if the Court does not dismiss the suit under O. 9, R. 8, it must give reasons for the decision arrived at. (1910) 8 Mad L Tim 450(450).

[16] Parties agreeing to refer remaining issues to Commissioner on determination of preliminary issue in favour of plaintiff — Defendant or his Advocate absent on date fixed for appointment of Commissioner — Held Court should have proceeded under O. 17, R. 2 and appointed Commissioner after consulting plaintiff's advocate. (Vol 4) 1917 Low Bur 77 (78).

[17] A suit which has been tried cannot be dismissed on the mere ground of absence of the plaintiff on the day on which it is postponed for judgment. (1911) 1911 Pun L R No. 254, p. 945.

[18] Court can set aside an *ex parte* final decree for foreclosure. Although a preliminary decree is passed,

O. 17 R. 2 (contd.)

the provisions of O. 9, R. 13 and O. 17, R. 2 apply. (Vol 31) 1944 Nag 181 (181, 182): ILR (1944) Nag 425.

[19] A suit, adjourned on payment of costs, is liable to be dismissed if costs are not paid. (Vol 3) 1916 Lah 162 (163).

[20] Party not paying process fee in time — Witness not served and, therefore, did not appear on the adjourned date—*Held* dismissal of suit is proper. (Vol 13) 1926 Lah 27 (28).

2. "Appearance"—[1] Mere physical presence of party on day of hearing is no appearance—Similarly, mere fact that pleader having no instructions to conduct suit asks for adjournment is not appearance. (Vol 26) 1939 Mad 974 (975) (1930) 124 Ind Cas 402 (402, 408) (All) (Vol 15) 1928 All 760 (761). (Vakil engaged for applying for adjournment, withdrawing on Court refusing adjournment—Mukhtar not empowered to conduct case — Proceedings are *ex parte*—Court could proceed under R.2.) (Vol 10) 1923 All 153 (155, 156). (Pleader withdrawing *vakalat*—Party must be deemed to be absent.) (Vol 9) 1922 All 68 (68, 69) (Vol 11) 1924 Bom 139 (139) (Vol 15) 1928 Cal 341 (342) (1929) 117 Ind Cas 73 (74) (Lah) (Vol 30) 1943 Mad 728 (728, 729) (On day of hearing plaintiff present with his witnesses—None of his three pleaders present—Another pleader appearing for one of the three and asking for adjournment for few hours and reporting "no instructions" when case called again—O. 17, R. 2 applied.) (Vol 23) 1936 Mad 625 (625) (Vol 21) 1934 Mad 199 (199) (Vol 15) 1928 Mad 831 (834, 835) (Vol 13) 1926 Mad 971 (971, 973) (1928) 27 Mad L W 347 (349, 350) (Vol 10) 1923 Pat 530 (531) (Vol 5) 1918 Pat 256 (257): 3 Pat L Jour 481 (Vol 15) 1928 Rang 191 (196): 6 Rang 323. (Defendant's pleader applying for further adjournment—Court refusing adjournment, pleader withdrawing and the Court proceeding with the case—Court is presumed to have acted under R. 2.) (Vol 14) 1927 Rang 46 (47, 48): 4 Rang 408. (Pleader present but only instructed to apply for adjournment—There is no appearance within the Code.)

[See however (Vol 13) 1926 All 729 (730). (Principle that a pleader's statement of his having no further instructions, except to apply for adjournment which is refused, does not amount to an appearance, requires reconsideration or amendment by a new rule.)]

[2] Where the party engages a pleader to make an application for adjournment and the pleader files the same in Court, the party must be deemed to be represented within the meaning of Rule 2 Expl. (All). (Vol 27) 1940 All 305 (306, 308): I L R (1940) All 192 (Vol 23) 1936 All 670 (670, 671) (Vol 22) 1935 All 565 (566). (Case fixed for final hearing—Adjournment asked by pleader refused—Pleader saying no instruction—Decree passed—Defendant's remedy is by appeal and not by application under O. 17, R. 2.) (Vol 22) 1935 All 210 (211) (Vol 21) 1934 All 107 (108) (Vol 18) 1931 All 703 (704).

[See however (Vol 20) 1933 All 652 (654). (Pleader stating that he has no instructions—Case does not come within Explanation to R. 2 (Allahabad Amendment).)]

[3] Pleader appearing on date fixed for trial and filing additional written statement—Fresh issue framed—Subsequent application for adjournment dismissed and pleader reporting no instruction—*Held* there was appearance and party was not *ex parte*. (Vol 22) 1935 Mad 210 (211): 58 Mad 817.

[4] Plaintiff directed to appear but instead of him, his *vakil* appearing on that date—It is no appearance by party. (Vol 19) 1932 Mad 414 (414).

[5] A party had summoned witnesses who did not appear in spite of the summons. *Held*, that this did

not amount to default in appearance of the party within O. 17, R. 2. (1911) 33 All 690 (694).

[6] On the date fixed for final disposal plaintiff found absent—His pleader offered to argue only law points as he could not lead evidence in the absence of plaintiff. — Suit dismissed for default — *Held* dismissal was incorrect and that lower Court ought to have proceeded with case. (Vol 20) 1933 All 539 (539, 540).

[7] If the plaintiff appears with his witnesses, the Court must proceed with the case though his counsel, is absent. (1909) 33 Bom 475 (477).

[8] The mere fact that the defendant fails to appear when summoned as a witness by the plaintiff, will not entitle the Court to declare him *ex parte*, when his pleader is present. The practice of one party summoning his opponent as a witness is objectionable. (1909) 3 Ind Cas 45 (45) (Bom).

[9] Interests of plaintiff and a certain defendant similar—Default of appearance by that defendant cannot be treated as that of plaintiff. (Vol 14) 1927 Mad 227 (228).

[10] Mere filing of list of witnesses before case is called for hearing does not amount to appearance. (Vol 23) 1936 All 619 (620, 621).

3. "Hearing."—[1] "When a suit is called for hearing" means "commencement of hearing on each day of hearing". (Vol 14) 1927 Mad 799 (800).

[2] By the hearing of suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. (Vol 7) 1920 Pat 595 (597).

[3] O. 17, R. 2 contemplates hearing at some later date to which it has been adjourned. The procedure of hearing of the suit is distinguished from interlocutory proceedings. (Vol 9) 1922 Pat 485 (487, 488): 1 Pat 158 (Vol 11) 1924 P C 198 (200): 4 Pat 61: 51 Ind App 321 (P C).

[4] Plaintiff absent on date of hearing of the application for the appointment of the guardian *ad litem* for the defendant. Suit was dismissed for want of prosecution. *Held* that the date was not fixed for the hearing of the suit and that the dismissal was bad. (1911) 33 All 560 (562, 563) (F B).

[5] Date of return of Commissioner's report is not date of hearing. (Vol 23) 1936 Lah 280 (281).

[6] O. 17, R. 2 does not apply to a case where the hearing is not an adjourned one. (Vol 24) 1937 All 347 (348).

[7] Judge absent—Date fixed by clerk of Court—Non-appearance on such date does not justify dismissal for default. (Vol 21) 1934 Lah 984 (984).

[8] Case not fixed for being heard on merits—Defendant and his counsel not present—Court cannot pass *ex parte* decree—Application to set aside *ex parte* decree made within 30 days from date of information of decree is not barred. (Vol 3) 1916 Lah 132 (133).

[9] Where a suit was postponed to a fixed day for finding out the whereabouts of an unserved defendant and no other separate day was specifically fixed for hearing, it was held that the date fixed was the date of the hearing of the suit. (Vol 6) 1919 Sind 89 (90): 13 Sind L R 149.

4. Remedy of party aggrieved. — [1] Order under O. 17, R. 2 read with O. 9, R. 8 is not appealable. (Vol 26) 1939 Nag 213 (213): I L R (1913) Nag 574 (Vol 3) 1916 Cal 233 (233).

[2] An order dismissing a suit for want of prosecution, made after the passing of the preliminary decree

3. Where any party to a suit to whom time has been granted fails to produce his evidence, *Court may proceed notwithstanding either party fails to produce evidence, etc.* or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

[1882—S. 158 ; 1877—S. 158 ; 1859—S. 148.]

PROVINCIAL AMENDMENT

OUDH

Substitute the following :

"3. Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, and whether such party is present or not, proceed to decide the suit on the merits."

O. 17 R. 2 (contd.)

is not appealable but is open to revision. (Vol 12) 1925 Pat 433 (434).

[3] Adjournment granted conditionally on production of evidence—Condition not fulfilled—O. 15, R. 4 applies and decree is appealable even if suit is wrongly dismissed for default under O. 17, R. 2. (Vol 16) 1929 All 543 (543).

[4] Plaintiff's case closed—Case adjourned to next day for defendant's evidence—Plaintiff absent next day—Suit dismissed for default—No revision lies. (Vol 12) 1925 Oudh 433 (434).

[5] Wrong decision that O. 9, R. 13 did not apply—Revision lies. (Vol 12) 1925 All 267 (268) : 47 All 140.

[6] Where the plaintiff has shown sufficient reason for his own absence, and where his presence is necessary he can ask for restoration. (1910) Mad L Tim 308 (309).

[7] Suit was dismissed for non-appearance of plaintiff on an adjourned date. *Held* that case should be restored under O. 9, R. 9 after showing sufficient cause for non-appearance. (1912) 34 All 426 (428)* (Vol 2) 1915 All 196 (196).

[8] The *ex parte* decree passed on an adjourned date of hearing under this rule after taking the evidence can be set aside under O. 9, R. 9 by application. (1909) 36 Cal 189 (192)* (1897) 19 All 355 (356).

[9] Court hours from 6 a. m. to noon—Court unable to attend during these hours—Case disposed of in absence of defendants after Court hours—Application for restoration should be granted. (Vol 20) 1933 All 652 (654).

[10] Two suits adjourned and parties asked to file list of witnesses before certain date—On date of hearing one suit dismissed "for default" and other dismissed "for want of prosecution" as list of witnesses not filed by plaintiff—Order of dismissal in each case being one under O. 17, R. 2 read with O. 9, R. 8, application for setting it aside and restoration of suit could be made under O. 9, R. 9. (Vol 24) 1937 Rang 437 (438).

[11] No evidence taken till date to which case was adjourned on defendant's application—Defendant absent on that date—Court after taking evidence for plaintiff decreed suit—It acted under this rule and defendant has right to apply under O. 9, R. 13. (Vol 17) 1930 Rang 270 (271) : 8 Rang 168.

[12] Order under O. 17, R. 2—Proper procedure to set it aside is by application under O. 9, R. 13 and not by review application. (Vol 21) 1934 Cal 116 (117) : 60 Cal 1331.

[13] Right of having *ex parte* decree set aside is substantive—New explanation to rule by Allahabad High Court cannot therefore be retrospective. (Vol 15) 1928 All 760 (761).

[14] If a suit is dismissed for failure of the plaintiff to produce any evidence after an order refusing an

adjournment, the order of dismissal is a decree and not an order. (Vol 6) 1919 Cal 1052 (1053).

5. Distinction between Rr. 2 and 3—See O. 17, R. 3.

ORDER 17, RULE 3—SYNOPSIS.

1. Scope and applicability of the rule.
2. Execution proceedings.
3. Distinction between Rr. 2 and 3.
4. "To whom time has been granted".
5. Party deemed to have failed to do the act within time.
6. Other acts necessary for the progress of the suit.
7. Remedy against an order under this rule.

1. Scope and applicability of the rule.—[1] Order 17, Rule 3 can be applied only when the hearing has been adjourned at the instance of a party who subsequently makes the default. (Vol 15) 1928 Rang 191 (192) : 6 Rang 323* (Vol 7) 1920 Pat 595 (597).

[2] R. 3 applies only where party to whom time has been granted fails to perform any act necessary for progress of suit. (Vol 20) 1933 All 907 (908)* (Vol 22) 1935 All 210 (212.) (Plaintiff asked to produce evidence applying for adjournment—Order dismissing suit is on merits and not for default.) * (Vol 8) 1921 Bom 458 (458) : 45 Bom 1181. (In such cases, Court can proceed to decide suit forthwith.)* (Vol 1) 1914 Cal 360 (361) : 41 Cal 956. (Adjournment at the instance of Court for completing cross examination—*Ex parte* order passed is under R. 2 and not R. 3.)* (Vol 14) 1927 Lah 484 (484, 485.) (Absence on date fixed for return of summons—The rule does not apply.)* (Vol 2) 1915 Lah 439 (439, 440) : 1915 Pun Re No. 51. (Scope of grant of adjournment for doing an act is condition precedent to apply R. 3—Adjournment for non-service on witness is in ordinary course and not one required by R. 3.)* (Vol 4) 1917 Mad 196 (197.) (Dismissal of suit for non-appearance of parties on the adjourned date—Adjournment on the motion of Court itself—Order comes under R. 2 and not this rule.)* (Vol 2) 1915 Mad-864 (865) * (1876-78) 1 Mad 287 (288). (Where issues were settled and the case had been adjourned for final disposal, an order of dismissal for the non-appearance of the plaintiff could not be properly made.)* (Vol 14) 1927 Rang 148 (148, 149) : 51 Rang. 838. (Refusal of adjournment and dismissal of suit—Order is not one under O. 17, R. 3 but a decree.)

[3] Order 17, R. 3 is an enabling and not a mandatory rule. (Vol 6) 1919 Lah 344 (345) : 1919 Pun Re No. 150* (Vol 21) 1934 Lah 560 (560.) (Garnishee denying debt—Still Court must investigate judgment-debtor's claim.)

[4] Powers under R. 3 should be used only in exceptional cases. Where defendant's absence is wilful

O. 17 R. 3 (*contd.*)

and deliberate Rule 3 should be applied. (Vol 30) 1943 Sind 94 (95, 96) : I L R (1942) Kar 547.

[5] Facts of case coming both under R. 2 and R. 3—Court has to act only under R. 2. (Vol 6) 1919 Low Bur 139 (140) : 9 Low Bur 266.

[6] A decision passed "forthwith" under O. 17, R. 3 is one on the merits as gathered from available facts. (Vol 3) 1916 Mad 708 (708)* (Vol 28) 1941 Bom 83 (85) : I L R (1941) Bom 150. (Case cannot be disposed of on merits in the absence of evidence.)* (Vol 11) 1924 Nag 26 (27)* (Vol 25) 1938 Sind 142 (143, 144) (Order of dismissal without reference to materials on record is against this rule.)

[7] Whatever evidence is available should be taken and considered before there can be an order of dismissal. (1911) 1 Mad WN 71 (71)* (Vol 6) 1919 All 232 (253) : 41 All 663. (Party unable to proceed with case—Court should dispose of case on materials before it.)* (Vol 14) 1927 Mad 109 (110). ("Notwithstanding such default" implies that the Court is to proceed, in spite of default, with disposal of suit on merits.)

[8] Where Court is not able to decide suit forthwith on the materials before it, it should not proceed under this rule. (Vol 6) 1919 Lah 344 (345) : 1919 Pun Re No. 150.

[9] Defendant's prayer for adjournment refused but time given to produce witnesses—Plaintiff's evidence recorded and without waiting up to day fixed for defendant's witness *ex parte* decree passed—Decree held to be illegal. (Vol 17) 1930 Cal 251 (251.)

[10] Rule does not authorise dismissal summarily. (Vol 11) 1924 Lah 404 (404). (Party paying process-fee is not responsible for non-appearance of witnesses.)

[11] Rule has application only after the institution of suit. (Vol 12) 1925 Mad 1045 (1046). (Plaint rejected because plaintiff did not file amended plaint as asked to do, O. 17, R. 3 does not apply.)

[12] Where in substance the order is one under R. 2 the mere remark of the Judge that it is under this rule will not make it so. (Vol 27) 1940 All 217 (218).

[13] Court deciding case either under O. 9 or O. 17 must specify the order. (Vol 7) 1920 Pat 600 (601) : 4 Pat L Jour 277.

[14] Decree passed under O. 17, R. 3 cannot be regarded as *ex parte* decree—Defendant cannot apply for restoration under O. 9, R. 13. (Vol 26) 1939 All 642 (643).

[15] Rule 3 does not apply to proceedings under S. 36 (6) (a) of the Bengal Money Lenders Act of 1940. (Vol 30) 1943 Cal 152 (154) : I L R (1943) 1 Cal 386.

2. Execution proceedings. — [1] This rule does not apply to execution proceedings. (Vol 20) 1933 Mad 418 (422) : 56 Mad 490 (F B). (Still Court has power to dismiss execution petition for non-payment of batta.)* (1893) 15 All 84 (94) (F B). ((1893) 15 All 49, overruled.)

3. Distinction between Rules 2 and 3. — [1] Rule 2 applies where adjournment is generally granted. This rule applies where it is granted for one of the special purposes mentioned in it. (Vol 30) 1943 Bom 321 (324) : I L R (1944) Bom 1 (F B). (General adjournment under O. 15, R. 3. This rule does not apply.)* (Vol 16) 1929 Rang 73 (74).

[2] Rule 3 and R. 2—Former rule applies to hearings adjourned at the instance of Court, while the latter applies to hearings adjourned at instance of a party. (Vol 1) 1914 Sind 92 (92) : 8 Sind L R 241* (Vol 18) 1931 Bom 111 (113)* (Vol 12) 1925 Oudh 278 (280, 281).

[3] Rule 3 is not in terms confined to default of appearance as is R. 2. Rule 3 applies where party is present and default has been made in production of evidence or performance of an act necessary for the further pro-

gress of the suit. (Vol 28) 1941 Bom 83 (85) : I L R (1941) Bom 150* (Vol 14) 1927 All 507 (507)* (Vol 12) 1925 Oudh 278 (280, 281)* (Vol 9) 1922 Pat 485 (487) : 1 Pat 188* (Vol 17) 1930 Rang 270 (271) : 8 Rang 168* (Vol 12) 1925 Nag 236 (238). (Dismissal wholesale is not proper if pleader is unprepared—Court should proceed to decide on merits.)

[4] Rule 2 deals with any kind of adjournment and gives power to dispose of suit under O. 9 where there is default in appearance. Rule 3 does not operate unless the hearing itself has commenced. (Vol 10) 1923 Bom 27 (28) : 46 Bom 1026.

[5] Where requisites of R. 2 are satisfied R. 3 should not be applied even though additional circumstances exist which satisfy the requisites of R. 3. (Vol 5) 1918 Mad 143 (146, 147) : 41 Mad 286. ((1911) 34 Mad 97, overruled.)* (Vol 23) 1936 Mad 625 (625)* (Vol 21) 1934 Mad 199 (199)* (1910) 33 Mad 241 (243)* (Vol 20) 1933 Nag 370 (371) : 30 Nag L R 94* (Vol 20) 1933 Nag 234 (236) : 29 Nag L R 326* (Vol 17) 1930 Nag 152 (152)* (Vol 6) 1919 Sind 89 (90) : 13 Sind L R 140.

[See however (Vol 30) 1943 Sind 94 (96) : I L R (1942) Kar 547. (Rules 2 and 3 are not mutually exclusive and the Courts have a certain discretion in the application.)]

[6] Bald statement by counsel that they have no instructions from client to proceed with case is not sufficient. (Vol 26) 1939 All 524 (526). (The rule as amended in Allahabad gives power to the Court to proceed under the rule even when no party is present.)* (Vol 33) 1946 All 353 (354) (F B). (Time granted to plaintiff to file document—Default of plaintiff and pleader withdrawing on refusal to adjourn—Dismissal held was under this rule.)* (Vol 22) 1935 All 398 (401). (Plaintiff appearing in person and by counsel—Adjournment refused—Dismissal of suit on absence of both is dismissal on merits and not for non-appearance.)* (Vol 20) 1933 All 41 (41)* (Vol 15) 1928 All 760 (761). (Right of setting aside *ex parte* decree is substantive—New explanation to R. 2 by Allahabad High Court cannot be retrospective.)* (1903) 25 All 194 (196). (Case decided before amendment of rule.)

[7] In view of the amendment in Oudh, Court can proceed to decide on merits under R. 3 even when the parties are absent and pleader reports no instructions. (Vol 21) 1934 Oudh 171 (174) : 9 Luck 586* (Vol 10) 1923 Oudh 18 (19). (Case decided before amendment of the rule.)

[8] Court can proceed under this rule when there are materials before it ; otherwise it can act under R. 2. (Vol 30) 1943 Bom 321 (324) : I L R (1944) Bom 1 (F B). ((Vol 10) 1923 Bom 27 : 46 Bom 1026 impliedly overruled.)* (Vol 20) 1933 Cal 412 (414)* (Vol 20) 1933 Cal 73 (74). (Plaintiff part heard—Plaintiff absent—Order 17, R. 2 applies and not R. 3.)* (Vol 5) 1918 Cal 330 (331)* (Vol 1) 1914 Cal 360 (361) : 41 Cal 956* (Vol 19) 1932 Lah 477 (478)* (Vol 6) 1919 Lah 419 (420) : 1919 Pun Re No. 48* (Vol 9) 1922 Pat 2 (3) : 6 Pat L Jour 313* (Vol 7) 1920 Pat 589 (590) : 4 Pat L Jour 712. (Suit dismissed without indication that Court applied its mind to some evidence or matter before it—Dismissal held under R. 2.)* (Vol 5) 1918 Pat 256 (257) : 3 Pat L Jour 481* (1909) 3 Sind L R 208 (211)* (Vol 11) 1924 Lah 545 (546) : 5 Lah 218.

[9] Rule 3 will apply only after commencement of hearing. Non-appearance before commencement will bring into operation R. 2 and not this rule. (Vol 15) 1928 Pat 167 (167) : 7 Pat 236.

[10] Evidence closed out case posted to another date for the clearing up of a point before judgement—Parties failing to appear—Case should be decided on merits under this rule. (Vol 18) 1931 Bom 111 (113)* (Vol 1)

O. 17 R. 3 (*contd.*)

1914 Mad 881 (382)* (Vol 1) 1914 Mad 116 (116, 117). (Evidence adduced by plaintiff — Default in producing succession certificate on adjourned date — Suit should not be dismissed under R. 2 but decided under R. 3.)

[11] Plaintiff present through pleader — Adjournment refused, pleader not effectively withdrawing — Case must be disposed of on merits. (Vol 11) 1924 Mad 43 (44)* (Vol 5) 1918 Mad 787 (788)* (Vol 22) 1935 Rang 123 (124).

[12] Defendant's vakil stating on final hearing day that he has no instructions after refusal of adjournment — Court proceeding with the case on merits — There is no failure of appearance. (Vol 12) 1925 Mad 316 (317)* (Vol 23) 1936 Mad 625 (625). (Neither defendants nor their vakil present on adjourned date — Vakil reporting he has "no instructions" beyond applying for adjournment — Decree passed is *ex parte*.)* (Vol 22) 1935 Mad 210 (211): 58 Mad 817* (Vol 10) 1923 Pat 530 (531). (Physical presence of pleader without instructions does not amount to appearance of parties.)

4. "To whom time has been granted". — [1] Where a party is merely ordered to be present at an adjourned hearing it does not amount to the granting of time for the purpose of doing any of the acts mentioned under the rule. (Vol 27) 1940 All 217 (218)* (Vol 14) 1927 Lah 388 (388). (Failure to comply with order by one of the plaintiffs to give evidence.)

[2] Adjournment under O. 15, R. 3 (2) for production of further evidence does not amount to granting of time under this rule. (Vol 30) 1943 Bom 321 (324): ILR (1944) Bom 1 (FB).

[3] Adjournment on the joint application of both the parties is not covered by this rule. (1887) 10 Mad 270 (271).

[But see (Vol 26) 1939 All 524 (525, 526). (Time granted on joint application — On failing to produce evidence or perform other acts necessary for progress of suit — Order 17, R. 3 still applies.)]

[4] Rule does not apply where time was granted to the opposite party and not to the party in default. (1884) 7 Mad 41 (42).

[5] Time must have been granted for doing what was not the duty of the Court itself to do. (Vol 11) 1924 Lah 404 (404).

[6] Application for adjournment for getting transfer of suit — Adjournment refused and case posted for further evidence — No time granted under this rule. (Vol 10) 1923 Lah 281 (281).

[7] Time granted under this rule — Date fixed on the request of parties falling on a holiday — Court can proceed under this rule. (1906) 1906 Pun Re No. 111, p. 426 (427, 428).

5. Party deemed to have failed to do the act within time. — [1] Refusal of application for issue of warrants for arrest against defaulting witness at an adjourned hearing — Pleader reporting no instructions — Dismissal is not under this rule. (1910) 5 Ind Cas 499 (499) (Cal).

[2] Parties failing to summon witness in time fails to do an act within time. (Vol 1) 1914 Low Bur 198 (199).

[3] Process-server being partly responsible for non-attendance of witness — Rule 3 should not be applied against plaintiff. (Vol 11) 1924 Lah 272 (272)* (1911) 33 All 690 (694)* (Vol 12) 1925 Lah 296 (296)* (Vol 4) 1917 Lah 281 (281, 282). (Correct address and other particulars furnished correctly — Expenses also paid — Non-service of process — Party cannot be penalised — Refusal to pay illegal levy of warrant process — The rule will not apply.)

[4] Party acting with due diligence and paying process-fee in time — Witness not served — Any adjournment granted for want of service does not amount to

time granted to party. (Vol 13) 1926 Lah 27 (28)* (Vol 12) 1925 Oudh 304 (304). (Taking steps late but sufficient time available to get witnesses served — The party is not at fault.)

[5] Non-return of commission ordered is no failure on the part of a party. (Vol 14) 1927 All 749 (750)* (Vol 7) 1920 Cal 204 (205).

[6] When time is regarded as the essence of the default, the party should be given distinct notice of the time limit. (1890) 13 Mad 510 (511).

[7] In recording orders of dismissal for laches on the part of plaintiff, the Court should be careful to mention whether he is acting under R. 2 or R. 3. (Vol 7) 1920 Pat 589 (590).

6. Other acts necessary for the progress of suit. — [1] The act contemplated by this rule must be necessary to the further progress of the suit. (1898) 21 Mad 403 (404). (Cost ordered to be paid is not condition precedent to the hearing.)

[2] Production of stay order is not an "act" within the rule. (Vol 15) 1928 Nag 24 (26).

[3] Following are acts necessary to the further progress of the suit :—

(a) Taking further steps within time allowed where summons was returned unserved. (1912) 17 Ind Cas 294 (295) (All)* (Vol 3) 1916 Pat 33 (33): 1 Pat L Jour 173. (Process-fee not paid within time fixed or reasonable time — Court can refuse adjournment).

(b) Payment of costs under conditional order setting aside *ex parte* proceedings. (Vol 17) 1930 Oudh 351 (352)* (1911) 34 Mad 88 (90). (Failure to deposit security on application to set aside small cause decree.)

(bb) Order dismissing suit for non-payment of costs of adjournment falls under O. 17, R. 3 — Dismissal bars second suit. (Vol 31) 1944 Oudh 39 (39).

[See also (Vol 13) 1926 Cal 1221 (1222). (Party not aware of order for costs — Hearing not conditional upon payment — Time should be allowed.)]

(c) Taking steps for preparation of Bench Copies and translation of vernacular documents. (Vol 6) 1919 Low Bur 139 (140): 9 Low Bur Rul 266.

[See however (1911) 1911 Mad W N 71 (71). (Failure of plaintiff to produce English translation of Guzarati accounts — Dismissal of suit improper.)]

(d) Taking steps to get *guardian ad litem* of a minor defendant. (Vol 9) 1922 Pat 252 (255): 6 Pat L Jour 650. (Evidence should be allowed to be adduced at least against the original defendants.)

(e) Defendant not filing written statement within time allowed. (1946) 1946 All W R (H C) 415 (416)* (Vol 5) 1918 Mad 1163 (1164)* (Vol 7) 1920 Pat 82 (83).

[4] Following acts are not necessary for the progress of the suit :—

(a) Amendment of plaint and payment of costs. (Vol 13) 1926 Lah 571 (571). (Dismissal for failure does not fall under this rule.)

(b) Non-production of document which ought to be produced in Court by the plaintiff when plaint is presented. (Vol 11) 1924 Lah 608 (608).

(c) Failure to take oath affecting third person which is illegal on the day appointed. (Vol 12) 1925 All 604 (605).

(d) Failure to supply defendant with copies in a specific language. (Vol 12) 1925 Pat 316 (317).

7. Remedy against an order under this rule. — [1] Dismissal under R. 3 is a decree and operates as *res judicata* to bar a fresh suit for the same relief. (1912) 1912 Pun L R No. 25, p. 86.

[2] Where the decision is not one properly within the rule it does not operate as *res judicata*. (1995) 18 Mad 466 (467, 468). (Dismissal for non-production of a certificate of a heirship is not a decision under this rule.)

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

[1882—S. 179, Explan.; 1877—S. 179. See Ss. 30 and 31.]

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned; the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

[1882—Ss. 179, 180; 1877—Ss. 179, 180.]

O. 17 R. 3 (contd.)

[3] The dismissal of suit or passing of decree being on merits, the only remedy of the aggrieved party will be by appeal or review. (Vol 5) 1918 Mad 143 (145): 41 Mad 286 (F B) (Vol 31) 1944 All 211 (212): I L R (1944) All 297. (But Appellate Court can consider whether there was reasonable excuse for plaintiff's absence or of his witnesses.) (Vol 26) 1939 All 524 (526) (Vol 16) 1929 All 432 (432). (Adjournment refused—Plaintiff not examining even witnesses in attendance—Suit dismissed—Dismissal order was on merits and so appealable.) (Vol 12) 1925 All 252 (252). (Court wrongly acting under R. 3 instead of under R. 2—Remedy is by appeal.) (Vol 6) 1919 All 252 (253): 41 All 663. (Part heard suit dismissed on the plaintiff, declining to proceed further—Appeal lies against order of dismissal.) (1912) 36 Bom 536 (538). (Party aggrieved by an order under the rule *san appeal*.) (Vol 14) 1927 Lah 562 (562). (Decree itself should be appealed against and not an order refusing to set it aside.) (Vol 4) 1917 Mad 659 (660). (Appeal only lies against an order expressly passed under this rule though erroneously.) (1870) 6 Mad H C R 262 (264) (Vol 12) 1925 Oudh 278 (280) (Vol 23) 1936 All 659 (660, 661). (*Ex parte* decree passed—Appeal lies.) (1912) 9 All L Jour 763 (765, 766). (Proper remedy is to appeal from the *ex parte* decree.)

[See (Vol 22) 1935 All 398 (402). (Order of dismissal on merits—Same Court passing the order cannot restore it holding that there was no decision on merits.) (1938) 1938 All W R (B R) 115 (116). (Plaintiff's suit dismissed under O. 17, R. 3—Remedy is appeal and not review.)]

[4] An application to restore suit under O. 9, R. 9 does not lie where suit has been disposed of under this rule. (Vol 2) 1915 Mad 16 (17).

[5] No revision lies against an order under this rule. (1912) 34 All 123 (126) (Vol 20) 1933 All 118 (119, 120). (Suit restored held to be under O. 9, R. 9 and no revision was competent from order of restoration.) (Vol 15) 1928 Lah 427 (428). (Restoration order set aside in appeal—No revision lies on the ground that the decree was on merits.)

[See (Vol 3) 1916 All 133 (139). (Refusal to give adjournment—Hearing denied—Default of party to serve notice or neglect to pay process fees through failure of Court officials—Revision lies.)]

[6] Suit decided under R. 3—R. 2 mentioned instead of R. 3 by mistake in judgment—Remedy is appeal and not re-hearing. (Vol 12) 1925 Oudh 495 (495) (Vol 3) 1916 Oudh 335 (336). (Remedy is appeal and not application under R. 18 of O. 9.)

[7] The substance of the order should be looked into to determine whether an order comes under this rule. In doubtful cases it should be treated as one under Rule 2. (Vol 7) 1920 Pat 589 (590): 4 Pat L Jour 712 (Vol 10) 1923 All 153 (155, 156) (Vol 9) 1922 All 497 (499). (Defendant absent but pleader present—Decree is not *ex parte*—Appeal from decree—Appellate Court should examine suit on merits.) (Vol 5) 1918 Pat 256 (257): 3 Pat L Jour 481. (Court's recording a decree as "on contest" does not make it so when it is in reality an *ex parte* decree.)

Order 18, Rule 1—Note 1.

[1] Where a defendant or a set of defendants support the plaintiff's case, wholly or in part, the former must immediately follow the plaintiff and call his or their witnesses and then only can the other set of defendants, who differ from the plaintiff be called upon to address the Court and produce their evidence. (1908) 32 Bom 599 (602).

[2] Applicant for mesne profits of property taken in execution of decree reversed on appeal, must begin. (Vol 12) 1925 Mad 145 (148): 47 Mad 800.

[3] When a plaintiff asks for the confirmation of his title, the onus is on him to make out that title to the satisfaction of the Court. (1869) 3 Beng L R (A C) 70 (76).

[4] In a suit for restitution of conjugal rights, where marriage is admitted but coercion and non-consent were pleaded it is the defendant who ought to begin. (Vol 1) 1914 Low Bur 210 (212): 7 Low Bur Rul 347.

[5] Raising of a preliminary issue by defendant, which is really a demurrer, gives him a right to begin. (1888) 12 Bom 454 (459).

Order 18, Rule 2—Note 1.

[1] New pleadings cannot be introduced by plaintiff without Court's permission. (Vol 14) 1927 Lah 615 (615).

[2] 'The day fixed for the hearing of the suit' does not mean or include the day on which issues are framed. (Vol 12) 1925 All 98 (99).

[3] The trial Court cannot refuse to take evidence of the witnesses tendered by the defendant while the hearing of the case for the defence is still proceeding. It could not pronounce, without hearing the witnesses, whether their testimony would be useful or not. (1883) 9 Bom 146 (149, 150).

[4] The omission of a counsel either to argue a question of law or his abandoning a question of law is not sufficient to disentitle Court to go into the question. The case is different when a question of fact is concerned. (1907) 11 Cal W N 340 (342).

PROVINCIAL AMENDMENTS.

ALLAHABAD

For the present Rule 2 substitute the following :

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)."

LAHORE

At the end of Rule 2 insert the following Explanations :

"Explanation I. — Nothing in this rule shall affect the jurisdiction of the Court, of its own accord or on the application of any party for reasons to be recorded in writing, to direct any party to examine any witness at any stage.

Explanation II.—The expression "witness" in Explanation I shall include any party as his own witness." [9-6-1942.]

MADRAS

At the end of Rule 2, insert the following "Explanation" :

"Explanation. — Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage."

[R. O. C. No. 1729 of 1926.]

NAGPUR

Add the following as sub-rule (4) to Rule 2 :

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit." [29-6-1943.]

OUDH

For the present Rule 2 substitute the following :

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him and the nature of the evidence which each of his witnesses is expected to give and shall then produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)."

RULE 2A — CALCUTTA

Insert the following as Rule 2A :—

"2A. Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded and may also allow either party to produce any witness at any stage of the suit." [8-11-1927.]

3. Where there are several issues, the burden of proving some of which lies on the other

Evidence where several issues. party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

[1882—S. 180; 1877—S. 180.]

PROVINCIAL AMENDMENTS.

ALLAHABAD

For the present Rule 3, substitute the following :

"3. (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on

O. 18 R. 2 (contd.)

[5] Where the onus is on the plaintiff and he has failed to prove his case after calling his witnesses, it is open to the Court to dismiss his suit on the ground that there is no case for the defendant to answer, without insisting on the defendant to go into the witness-box. (1912) 25 Mad L Jour 281 (290).

[6] Completion of hearing includes hearing of arguments. (Vol 4) 1917 Nag 99 (101); 14 Nag L R 71.

[7] Claim alleged to be within time by part payment endorsed on bond — One defendant *ex parte* — Other contesting — Only 4 out of 8 witnesses allowed to be examined and account books not admitted — Whole evidence should have been allowed — Suit should have been decreed against absent defendant. (Vol 6) 1919 Cal 217 (218).

[8] After the trial was closed plaintiff applied for summons on certain persons to prove a portion of the case but the Court did not allow these persons to be

produced though present. *Held*, that under the circumstances the plaintiff ought to have been allowed to tender further evidence. (Vol 3) 1916 Cal 367 (369).

[9] Case transferred after arguments — Judgment pronounced without giving any opportunity to parties to address any argument — Judgment is liable to be set aside. (Vol 7) 1920 Lah 246 (247). (Following 1904 Pun Re No. 91.)

Order 18, Rule 3 — Note 1.

[1] Defendant raising plea of benami to plaintiff's claim for possession — Plaintiff may at his option reserve to adduce evidence of rebuttal by way of answer to defendant's plea, after the latter has finished with his evidence. (1926) 7 Pat L Tim 445 (448).

[2] A party endeavouring to establish a point, not specifically stated in his pleadings, cannot object to the opposite party's tendering rebutting evidence as regards that point. (Vol 1) 1914 Oudh 52 (69).

those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence.

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case; the other party may then address the Court on the whole case, and the party beginning may reply generally on the whole case, provided that in doing so he shall not without the leave of the Court, raise questions which should have been raised in the opening address."

OU DH

Same as that of the Allahabad High Court, above, except that sub-rule (2) is numbered as (3) and the following is inserted as sub-rule (2) :

"(2) The substance of the statement of the case provided for by Rules 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings."

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

[1882—S. 181; 1877—S. 181; 1859—S. 172.]

²5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

[1882—S. 182; 1877—S. 182; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction; see Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

Order 18, Rule 4 — Note 1.

[1] The rejection of evidence upon the supposition that it would go only to prove the same facts deposed to by the witnesses previously examined, which facts, if proved, would have put an end to the case, is wholly irregular and detrimental to justice. (1841) 2 Moo Ind App 424 (427) (PC).

[2] It is the bounden duty of the Court to receive all the evidence tendered unless the object of a party, in summoning a large number of witnesses clearly appears to be to impede the adjudication of the case, or otherwise obstruct the ends of justice. (1871) 6 Beng L R App 10 (10) * (1872) 17 Suth W R 172 (172) * (1881) 6 Cal 608 (611) (SB). (The plaintiff is entitled to call such witnesses in evidence as he wishes to in support of his claim.)

[3] Court has always the power to examine any of the parties to the suit and compel their attendance. (1868) 10 Suth W R 280 (282).

[4] Court has power, if necessary, to examine any other person, other than parties to the suit, as a witness. (1868) 10 Suth W R 280 (282).

[5] Witnesses must be examined by the Judge himself in open Court — Judge's failure to examine them himself and allowing them to be examined by some one else is an irregularity but is no good ground for reversing the decision in the case. (Vol 15) 1928 Pat 438 (439).

[6] The Appellate Court is authorized to remedy the error of the lower Court in refusing to examine witnesses tendered by a party. (1841) 2 Moo Ind App 424 (427) (PC).

[7] Parties if so minded may agree that evidence shall be taken in a particular way and that evidence in one suit shall be treated as evidence in another. But, that is not a matter which can be said to affect the jurisdiction of the Court. (1906) 30 Bom 109 (112).

ORDER 18, RULE 5 — SYNOPSIS.

1. Scope and applicability.
2. "Shall be read over."

1. Scope and applicability. — [1] Order 18, Rules 5 to 12 have no application to Courts constituted under the Provincial Small Cause Courts Act or to Courts exercising the jurisdiction of the Court of Small Causes. (Vol 12) 1925 Nag 412 (413) : 26 Cr L Jour 1350.

[2] Rules 5 and 6 apply to Special Referees appointed by Original Side of High Court. (Vol 21) 1934 Cal 737 (739) : 61 Cal 488.

[3] A note by Munsif in the record of deposition as to the age of a witness at variance with his statement, cannot be made the basis of a finding as to the age by the Appellate Court. (Vol 6) 1919 Cal 502 (503).

2. "Shall be read over." — [1] Deposition not read over to witness cannot be basis of prosecution for perjury. (Vol 11) 1924 Cal 705 (709) : 51 Cal 236. (Dissenting from obiter in (Vol 5) 1918 Cal 289.) * (1881) 6 Cal 762 (763) * (Vol 7) 1920 Lah 318 (319) : 1 Lah 361 * (Vol 4) 1917 Lah 192 (193) : 18 Cr L Jour 607.

[But see (Vol 10) 1923 Nag 39 (40) : 18 Nag L R 192.]

[2] Reading out the deposition to a witness in a room adjoining the Court hall and at a distance of 30 feet from the Judge's seat is a sufficient compliance with O. 18, R. 5. Such a deposition is admissible in evidence in prosecutions under S. 193, Penal Code. Irregularity in reading out the deposition goes to its weight not to its admissibility. (Vol 5) 1919 Mad 334 (334, 335) : 19 Cri L Jour 608.

[3] Reading over of the deposition by the witness himself is a sufficient compliance with the rule, depositions so read over prove themselves under S. 80, Evidence Act. (Vol 6) 1919 Cal 514 (516) : 46 Cal 805 : 20 Cri L Jour 324.

[4] Provisions not complied with when evidence is dictated to typist and typed record revised and signed by Judge — It is not illegality, but mere irregularity. (Vol 16) 1929 Cal 78 (80) : 55 Cal 1084.

[5] Substantial compliance with O. 18, R. 5, is sufficient to raise presumption under Evidence Act (1872), S. 80. (Vol 6) 1919 Cal 514 (516) : 46 Cal 895 : 20 Cri L Jour 324.

***6.** Where the evidence is taken down in a language different from that in which it is given, *When deposition to* and the witness does not understand the language in which it is taken *be interpreted.* down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

[1882—S. 188; 1877—S. 183; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction; *see* the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

***7.** Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall *Evidence under* be read over and signed and, as occasion may require, interpreted and corrected *Section 138.* as if it were evidence taken down under that rule.

[1882—S. 185A (3).]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction; *see* the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

***8.** Where the evidence is not taken down in writing by the Judge, he shall be bound, as the *Memorandum when* examination of each witness proceeds, to make a memorandum of the *evidence not taken* substance of what each witness deposes, and such memorandum shall be *down by Judge.* written and signed by the Judge and shall form part of the record.

[1882—S. 184 ; 1877—S. 184 ; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction ; *see* the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

PROVINCIAL AMENDMENT

OUDH

Add the following proviso :

"Provided that such memorandum shall not be necessary in the case of a Judge who has obtained the previous sanction of the Chief Court to dictate evidence in open Court."

***9.** Where English is not the language of the Court, but all the parties to the suit *When evidence may* who appear in person, and the pleaders of such as appear by pleaders, do *be taken in English.* not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

[1882—S. 185 ; 1877—S. 185 ; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction ; *see* the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

10. The Court may, of its own motion or on the application of any party or his pleader, take *Any particular question and* down any particular question and answer, or any objection to any *answer may be taken down.* question, if there appears to be any special reason for so doing.

[1882—S. 186 ; 1877—S. 186 ; 1859—S. 172.]

Questions objected to ***11.** Where any question put to a witness is objected to by a party *and allowed by Court.* or his pleader, and the Court allows the same to be put, the Judge shall

O. 18 R. 5 (contd.)

[6] Absence of certificate that deposition was read over to or by witness—Benefit of presumption as to genuineness is not lost. (Vol 6) 1919 Cal 514 (516) : 46 Cal 895 : 20 Cri L Jour 324.

[7] Judge recording evidence under O. 18, R. 5, is not bound to append note that evidence was read out to witness when completed. (Vol 6) 1919 Lah 348 (349) : 19 Cri L Jour 972.

[8] There is no legal obligation on witnesses in civil cases to sign or thumb-mark their depositions. Courts cannot order them to do so, nor could they be compelled to sign under S. 151, Civil P. C. (1912) 13 Cri L Jour 713 (714) : 1912 Pun Re No. 8 Cr.

Order 18, Rule 6 — Note 1.

[1] Where a Commissioner of partition and special referee is appointed by the High Court on Original Side the provisions of O. 18, Rr. 5 and 6 apply although O. 49, R. 3 makes those provisions inapplicable to the proceedings conducted by the High Court itself. (Vol 21) 1934 Cal 737 (739) : 61 Cal 488.

[2] The deposition of a witness should be read over and explained to him after it is completed and, if necessary, translated into a language which he understands. (Vol 21) 1934 Cal 737 (739) : 61 Cal 488.

[3] Order 18, R. 5 does not apply to cases governed by

S. 19, Oudh Laws Act. (Vol 18) 1931 Oudh 385 (385). (Evidence by witness given in Urdu recorded by Judge in English and not interpreted to him — O. 18, R. 6, held inapplicable.)

Order 18, Rule 8—Note 1.

[1] In appealable cases, there might be either one or two records of evidence—If one, it should be in Judge's own handwriting—If written by some other person at his dictation, it should be supported by memorandum made or caused to be made by Judge. (Vol 16) 1929 Cal 78 (79) : 53 Cal 1054.

[2] Where evidence of witnesses was dictated to a typist and the typed copy was revised and signed by the Judge who added at the end of each deposition "dictated by me"—Held, that the provisions of O. 18, Rr. 5, 8 and 14 were not complied with. (Vol 16) 1929 Cal 78 (80) : 53 Cal 1054.

[3] In case of difference between the Judge's memorandum and the actual deposition, the actual recorded evidence *in extenso* is what the Court must be guided by—(Per Jackson J.). (1872) 9 Beng L R 274 (284) (SB).

Order 18, Rule 11 — Note 1.

[1] Objection as to admissibility of evidence has to be taken in the Court of first instance and if not so taken the appellate Court will not entertain any such objection.

take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

[1882—S. 187 ; 1877—S. 187 ; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction ; see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

Remarks on demeanour of witnesses.

12. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

[1882—S. 188 ; 1877—S. 188 ; 1859—S. 172.]

^a13. In cases in which an appeal is not allowed, it shall not be necessary to take down the *Memorandum of evidence in unappealable cases.* evidence of the witnesses in writing at length ; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

[1882—S. 189 ; 1877—S. 189 ; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction ; see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

Judge unable to make such memorandum to record reasons of his inability.

^a14. (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

[1882—S. 190 ; 1877—S. 190 ; 1859—S. 172.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction ; see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

PROVINCIAL AMENDMENT

‘OUDH

In sub-rule (1), between the words “is” and “unable”, insert “not authorized by the Chief Court to dictate and is.”

^a15. (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in suit transferred under section 24.

[1882—S. 191 ; 1877—S. 191.]

[a] This rule does not apply to the Chief Court of Oudh while exercising its original civil jurisdiction ; see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

O. 18 R. 11 (contd.)

(1887) 11 Bom 320 (324)* (Vol 3) 1916 All I (3, 4) : 38 All 866 (FB).

[2] An erroneous omission to object to irrelevant evidence will not make such evidence relevant and so will be disregarded by the Court. (1897) 19 All 76 (92)

Order 18, Rule 12—Note 1.

[1] Court cannot refuse to examine witness on the ground that he is biased. (Vol 10) 1923 Nag 58 (60).

[2] A Commissioner for the examination of witnesses is entitled by law to note his observations as to the demeanour of the witnesses examined by him. (Vol 5) 1918 Cal 363 (379) (SB).

Order 18, Rule 13—Note 1.

[1] Where in a judgment of a Provincial Small Cause Court the abstract of evidence is incomplete, the judgment based on such abstract is illegal. (Vol 3) 1916 Mad 547 (547, 548).

[2] Small Cause suit — It is mandatory that Court should make a separate memorandum of the evidence given by each witness and sign it. It is not enough that the Court refers to the evidence in judgment. (Vol 25) 1938 Pesh 46 (47).

Order 18, Rule 14—Note 1.

[1] Where evidence of witnesses was dictated to a typist and the typed copy was revised and signed by the Judge who added at the end of each deposition “dictated by me,” it was held that the provisions of O. 18, Rr. 5, 8 and 14 were not complied with and that the non-compliance was mere irregularity and not illegality (Vol 16) 1929 Cal 78 (80) : 55 Cal 1084.

Order 18, Rule 15—Note 1.

[1] Order 18, R. 15 applies only when the previous Judge has not concluded the trial of the case. (1911) 21 Mad L Jour 808 (810).

[2] It is not necessary for the succeeding Judge to rehear the case after arguments had been heard by the predecessor. (1912) 12 Mad L Tim 332 (333).

[3] Judgment written by ex-Judge—It is not necessarily incumbent upon successor-in-office to pronounce it—If successor is in doubt as to its correctness he should proceed according to O. 18, R. 15 or hear case *de novo*. (Vol 23) 1936 Rang 147 (149) : 14 Rang 136 (FB).

[4] A suit was disposed of by the Munsif, though objection was taken by defendant to plaintiff's maintaining the suit. On appeal, the Sub-Judge remanded

***16. (1)** Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

[1882—S. 192; 1877—S. 192; 1859—S. 173.]

[a] Provisions of the rule, so far as it relates to the manner of taking evidence, are not applicable to the Chief Court of Oudh while exercising its original civil jurisdiction; see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

17. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

[1882—S. 193.]

Power of Court to inspect.

18. The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Provincial Amendment.

Rule 19 — ALLAHABAD

Add the following rule at the end of Order 18 :

"19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings."

O. 18 R. 15 (contd.)

the suit for disposal after striking off the plaintiff's name from the record and substituting new plaintiffs in his stead. When the suit came on for hearing before the Munsif after the remand order, the defendant asked the successor of the District Munsif, who had originally disposed of the suit, for a *de novo* trial. This was refused : *Held*, that, a *de novo* trial should have been granted, S. 191, Civil P. C., (1882) (O. 18 R. 15 Civil P. C., (1908)) not applying to the case. (1911) 21 Mad L Jour 808 (810).

[5] Case remanded to determine damages — Further evidence allowed — Plaintiff's evidence recorded — Another Judge before defendants' evidence, reviewed — Order allowing fresh evidence and disposing of suit on merits — *Held*, it was not proper to review order at this late stage — Succeeding Judge who had not heard evidence in the case held should not have decided it without hearing arguments. (Vol 4) 1917 Lah 306 (307) : 1917 Pun Re No. 14.

Order 18, Rule 16 — Note 1.

[1] Under O. 18, R. 16 *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court and not under commission, unless so agreed to by the parties. (1870) 5 Beng L R 252 (253).

Order 18, Rule 18 — Note 1.

[1] Order 18, R. 18, authorises every Court to inspect any property or thing without the sanction of its superior Court. (Vol 1) 1914 Mad 640 (640).

[2] A judgment should not be based solely on the result of the personal inspection by the Judge. The inspection which a Judge makes should be used by him only to test

the accuracy and value of the evidence elicited. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. (Vol 2) 1915 Mad 1214 (1214) : 39 Mad 501 (Vol 16) 1929 All 116 (118). (Judge locally examining plot to see whether it was grave-yard — He in his notes mentioning not facts as he saw but only his inferences — His examination is not adequate and should not be substituted for oral evidence.) (Vol 32) 1945 Bom 302 (305). (The purpose of local inspection is not to make it a substitute for the evidence, but to assist in its appreciation.) (Vol 12) 1925 Cal 170 (170). (Result of inspection cannot be the foundation of judgment — It should be used to test accuracy of other evidence.) (Vol 17) 1930 Lah 152 (152). (Inspections are only intended to test accuracy of evidence let in.) (Vol 10) 1923 Lah 546 (548). (Decision should not be based on local inspection.) (1939) 2 Mad L Jour 284 (286). (No notes of inspection made — Decision based on impressions formed at the time of local inspection without putting points observed to the parties and eliciting their answers cannot be upheld.) (Vol 18) 1931 Mad 531 (532). (Judges are entitled to make local inspection to understand evidence — But they cannot base findings of fact solely upon its result.) (Vol 17) 1930 Nag 40 (41). (Finding based mainly on personal observations at inspection is wrong.) (Vol 4) 1917 Oudh 380 (387) : 19 Oudh Cas 374. (Remarks by Court on local inspection are not evidence in case.) (Vol 25) 1938 Pat 288 (289). (Observations of Judge made as result of local inspection should not be substituted for evidence of witnesses examined on the subject.)

ORDER XIX.

AFFIDAVITS

1. Any Court may at any time for sufficient reason order that any particular fact or *Power to order any point* facts may be proved by affidavit, or that the affidavit of any witness *may be proved by affidavit.* may be read at the hearing, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

[1882—S. 194 ; 1877—S. 194 ; Cf. R. S. C., O. 37 R. 1. See Ss. 30, 189 and O. 11.]

O. 18 R. 18 (*contd.*)

[3] A witness cannot be contradicted by Judge from his personal knowledge from local inspection. (Vol 24) 1937 Pat 333 (334).

[4] Parties agreeing to accept opinion of Judge on certain point requiring spot inspection and leading no evidence — Opinion of Judge formed on spot inspection can be accepted in place of evidence. (Vol 28) 1941 Nag 292 (292) : I L R (1942) Nag 269 (Vol 5) 1918 Pat 633 (634). (At the instance of plaintiff, the Munsif held a local inspection, and in the course thereof at the instance of both the parties he examined a person whose statements he used as confirming his impression formed independently of them. *Held*, that it was not open to any of the parties afterwards to turn round and say that the Munsif ought not to have used those statements.)

[5] Result of local inspection need not be recorded. (Vol 12) 1925 Cal 170 (170).

[6] Omission to make note of local inspection is formal defect and does not vitiate judgment. (Vol 7) 1920 Pat 738 (739, 740).

[7] Local inspection by Court — Omission to reduce to writing result of local investigation — Court not basing its judgment on the result of local investigation — Inspection carried only to ascertain if map put by plaintiff correctly depicted the locality—*Held*, defendant not prejudiced by Court not putting into writing results of local investigation. (1922) 65 Ind Cas 601 (602) (Cal).

[8] The result of inspection should be recorded in proceedings and not left for notice till judgment. (1910) 4 Sind L R 180 (184).

[9] It is not desirable to order scene before accident to be re-enacted in local inspection. (Vol 16) 1929 Cal 774 (774).

[10] The Judge should carry out the inspection at any stage before the arguments are heard—If it is to be made at the request of the parties, it should be made clear whether the parties have left the matter to be decided as he thinks proper from his inspection, or that he is merely inspecting under O. 18, R. 18—The parties must have an opportunity to urge their arguments on notes of inspection made by the Judge — It is desirable that the Judge does not record his opinions and inferences — If the Judge records his impressions the parties should have an opportunity to meet them in argument. (Vol 32) 1945 Bom 302 (305).

[11] There is no objection to a Judge viewing the place in dispute, in order to enable him to visualise the locality and to appreciate the evidence before him—But there is absolutely no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquires of all and sundry regarding their views of the rights of the parties, with the object of founding a judgment on what he has heard. (Vol 26) 1939 Mad 61 (64).

ORDER 19 RULE 1 — SYNOPSIS.

1. Affidavit — Essentials of.

2. Proof by affidavit.

1. Affidavit — Essentials of. — [1] An affidavit is a declaration in writing sworn before a person having authority to administer an oath. (1910) 4 Sind L R 88 (92, 93). (Statement sworn before foreign Court duly authorised to administer oath would be admissible as an affidavit under O. 19.)

[2] Want of seal of Magistrate before whom affidavit is sworn does not make it bad. (Vol 14) 1927 Lah. 376 (377).

[3] Vakalats, affidavits and pleadings — No difference exists in respect of their being 'signed'—Person making affidavit instead of signing his name may affix stamp bearing his name. (Vol 15) 1928 Mad 175 (176): 51 Mad 242.

2. Proof by affidavit.—[1] Affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence. (Vol 26) 1939 Mad 927 (928) * (Vol 32) 1945 Bom 60 (63) : I L R (1944) Bom 558. (Proof by affidavit is in discretion of Court—*Bona fide* desire of parties to produce witness — Affidavit should not be allowed.)

[2] Affidavit uncontradicted is *prima facie* reliable. (Vol 2) 1915 Mad 864 (865).

[3] Application to set aside dismissal for default — Affidavit can be used as evidence of facts alleged therein. (Vol 29) 1942 Oudh 350 (351) : 18 Luck 104.

[4] This rule enables a Court to order that any fact may be proved by affidavit. Therefore where, on the day of the first hearing of a suit the defendant does not appear though served, the execution of the document sued upon may be proved by affidavit without calling a witness. (Vol 20) 1933 Mad 164 (165).

[5] Identifier voluntarily swearing false affidavit as evidence of fact of service of summons held guilty both under Ss. 193 and 199, Penal Code. (Vol 15) 1928 Pat 161 (161) : 6 Pat 760 : 29 Cri L Jour 111.

[6] Where the adverse party *bona fide* desires the production of the deponent for cross-examination the Court cannot under this rule order that the affidavit may be read at the hearing on proof of certain facts. (Vol 13) 1926 All 161 (163) * (Vol 8) 1921 Mad 381 (382). (Showing answers to interrogatories.)

[7] Any person acquainted with the facts of the case may give the affidavit. (Vol 1) 1914 All 197 (199) : 36 All 18 : 15 Cri L Jour 164 * (Vol 5) 1918 Cal 177 (178). (An affidavit as to what was argued in a case sworn by a person who did not know the language in which the argument was made, is worthless.)

[8] Proceedings under S. 201, C. P. Land Revenue Act (2 [II] of 1917)—Revenue Court is Court of civil jurisdiction and can receive affidavit as evidence. (Vol 22) 1935 Nag 125 (125) : 36 Cri L Jour 765.

Power to order attendance of deponent for cross-examination.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

[1882—S. 195. Cf. R. S. C., O. 38 R. 1. See Ss. 132, 133 and O. 11.]

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

[1882—S. 196; 1877—S. 196; R. S. C., O. 38 R. 3.]

Provincial Amendments

Rules 4 to 15—ALLAHABAD

Add the following Rules:

"4. Affidavits shall be entitled, *In the Court of* _____ *at* _____ *(naming such Court.)* If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case, it shall be entitled *In the matter of the petition of* _____.

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say."

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

Order 19, Rule 2—Note 1.

[1] Rule 2 applies to interlocutory and not to substantive application. (Vol 31) 1944 Nag 161 (162): I L R (1944) Nag 436.

[2] Legal practitioner called upon to speak to facts relating to the case—His statement should be accepted—No affidavit need be insisted upon. (Vol 15) 1928 Mad 690 (692).

[3] A party (especially the petitioner) in a suit for dissolution of marriage is not entitled to give evidence by affidavit. (1935) 62 Cal 541 (545).

[4] In divorce proceedings the Court may allow a petitioner to give evidence on affidavit but the petitioner and his witness will have to be present for cross-examination if so directed by the Court. (1934) 38 Cal W N 969 (971).

[5] Application to declare certain persons to be touts—Court can act upon affidavits though it is desirable to hear oral evidence. (1903) 26 Mad 596 (597).

Order 19, Rule 3—Note 1.

[1] The grounds of belief must be stated with sufficient clearness to enable the Court to judge whether it would be safe to act on the deponent's belief. (Vol 11) 1924 Pat 312 (313) ✕ (Vol 1) 1914 Mad 366 (367) ✕ (Vol 21) 1934 Cal 694 (696); 61 Cal 814 ✕ (Vol 19) 1932

Cal 255 (256); 33 Cri L Jour 369. (Matters alleged to be true to information, but source of information not disclosed—Court will not take notice of such matters.) ✕ (Vol 6) 1919 Cal 970 (971) ✕ (1909) 10 Cal L Jour 414 (416) ✕ (Vol 13) 1926 Pat 54 (55) ✕ (Vol 3) 1916 Cal 979 (982): 43 Cal 884.

[2] An affidavit is defective if the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief. (Vol 21) 1934 Cal 694 (696): 61 Cal 814 ✕ (1910) 37 Cal 259 (261). (The affidavit should state clearly how much of the deponent's statement is within his knowledge and how much is of his belief and the grounds of such belief.)

[3] Verification of same facts on personal knowledge and information received—Affidavit is infructuous. (Vol 31) 1944 Nag 161 (163): I L R (1944) Nag 436.

[4] Affidavit not complying with requirements of O. 19, R. 3 is still a declaration within the meaning of Ss. 199 and 200, Penal Code. (Vol 20) 1933 Pat 513 (513): 34 Cri L Jour 912.

[5] No affidavit is necessary to support application for substitution of shebait's widow as plaintiff where evidence shows that she joined in performance of sheba with her husband. (Vol 17) 1930 Cal 270 (272).

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

11A. Such identification may be made by a person :

(a) personally acquainted with the person to be identified, or

(b) satisfied, from papers in that person's possession or otherwise, of his identity:

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified :—

FORM

I (name, address and description), declare that the person verifying this petition (or making this affidavit) and alleging himself to be A. B. has satisfied me (here state by what means, e. g., from papers in his possession or otherwise) that he is A. B.

12. No verification of a petition and no affidavit purporting to have been made by a *pardanashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition, or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom an affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit states that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made."

ORDER XX.

JUDGMENT AND DECREE

[See S. 33.]

*1. The Court, after the case has been heard, shall pronounce judgment in open Court, either *Judgment when pronounced.* at once or on some future day, of which due notice shall be given to the parties or their pleaders.

[1882—S. 198 ; 1877—S. 198 ; 1859—S. 183. See S. 33.]

[a] Not applicable to the Chief Court of Oudh while exercising its original civil jurisdiction : see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

PROVINCIAL AMENDMENT

MADRAS

The existing Rule 1 is re-numbered as sub-rule (1) and the following is added as sub-rule (2) :

"(2) The judgment may be pronounced by dictation to a shorthand writer in open Court where the presiding Judge has been specially empowered in that behalf by the High Court." [R. O. C. No. 1529 of 1923.]

ORDER 20, RULE 1—SYNOPSIS.

1. "Pronounce in open Court."
2. Judgment—When may be pronounced.
3. Notice to the parties.
4. Effect of non-compliance.

1. "Pronounce in open Court."—[1] Pronouncing judgment in open Court — Rule should be complied with in all cases. (Vol 10) 1923 Pat 129 (130): 1 Pat 771.

[2] A judgment cannot be said to have not been pronounced within O. 20 R. 1, simply because it is not read out entirely by the Court. (1926) 94 Ind Cas 121 (121) (Nag).

[3] The judgment of one of the two Judges consti-

tuting a Division Bench of the High Court which heard an appeal written and signed by him after retirement is a good judgment if it is read out and delivered on his behalf by the other Judge. (Vol 4) 1917 Cal 494 (495).

[4] A judgment written and signed by the Judge who heard the case does not become invalid merely because it was read out in open Court by his colleague, a Judge presiding in another Court, whom he requests to read out the judgment. Such a procedure is at the most a mere irregularity not affecting the merits of the case and is covered by S. 99. (Vol 6) 1919 Cal 799 (799).

[5] Judgment written, signed by Judge at home and communicated to parties by clerk in absence of Judge

Power to pronounce judgment written by Judge's predecessor.

2. A Judge may pronounce a judgment written but not pronounced by his predecessor.

[1882—S. 199; 1877—S. 200; 1859—S. 184.]

O. 20 R. 1 (*contd.*)

on account of illness—Case held should be remanded for fresh hearing—S. 99 did not apply to the case. (Vol 18) 1931 Cal 164 (165).

[6] Invalid pronouncement — Decree following — Decree should not be violated. (Vol 12) 1925 All 293 (295) : 47 All 332.

2. Judgment—When may be pronounced.—[1] Completion of hearing includes hearing of arguments. (Vol 4) 1917 Nag 99 (101) : 14 Nag L R 71 * (Vol 6) 1919 Mad 655 (690). (All arguments must be heard.)

[2] Commencement to write judgment before hearing whole evidence and arguments is irregular. (Vol 20) 1933 All 196 (196).

See also Note 3.

3. Notice to the parties. — [1] When a Court does not pronounce judgment at once after the case has been heard, it should give notice to the parties of the day of delivery of judgment. (Vol 4) 1917 Low Bur 90 (90).

[2] Omission to give notice of the date on which judgment is to be pronounced is a serious irregularity if not an illegality. (1912) 12 Mad L Tim 332 (333).

[3] Posting of notice upon notice board announcing result of appeal is not sufficient compliance with R. 1. (Vol 8) 1921 Mad 690 (690, 691).

[4] Judgment not pronounced at once — Due notice of future day given but judgment not pronounced even on that day—Judgment written on a certain day but no notice of it given to parties or their pleaders — Record showing that judgment was not pronounced to parties or pleaders—*Held* that judgment was never pronounced in accordance with law. (Vol 14) 1927 Lah 839 (839).

[5] Judgment delivered not in presence of, or without notice to, parties is not nullity. (Vol 20) 1933 Nag 12 (12) : 23 Nag L R 308.

[But see (Vol 12) 1925 All 293 (294) : 47 All 332. (Parties absent—No notice to parties—Judgment cannot be validly pronounced.)]

[6] Nothing on record to show that notice under R. 1 was not given—Parties must be presumed to have received notice. (Vol 7) 1920 Oudh 42 (42) : 22 Oudh Cas 379.

[7] Court not bound to communicate decision to party. (Vol 23) 1936 Lah 742 (743).

[8] Trial Court delivering judgment without having previously fixed date for same—Defendant being absent, judgment was sent to his counsel on some later day — *Held*, that this later day must be regarded the date of pronouncing judgment and limitation for appeal ran from day on which counsel for defendant was informed of judgment. (Vol 25) 1938 Lah 707 (708).

[9] Delay in filing appeal caused by failure of Court to give notice of date of judgment — It amounts to sufficient cause. (Vol 4) 1917 Low Bur 90 (90) * (Vol 2) 1915 Low Bur 108 (109).

4. Effect of non-compliance. — [1] A judgment though pronounced, dated and signed in contravention of the specific provision of O. 20, Rr. 1 to 3 constitutes an irregularity waived by the parties not objecting at the time and does not afford any ground for the reversal of the decree based on the judgment. The mere fact that the Court acted in a manner contrary to that prescribed by the Code, does not necessarily show that what was done was a nullity. The effect depends upon the nature, scope and object of the particular provision which has been violated. (Vol 7) 1920 Cal 597 (598, 599) : 46 Cal 978.

[2] Failure to comply with Rr. 1 and 7 is irregularity — Merits of decree in appeal are not affected thereby. (Vol 22) 1935 Lah 895 (896). (Question of limitation for appeal—Non-compliance with provisions is not mere irregularity.)

[3] Dismissal of application as time-barred — Omission to sign order — Vernacular order repeating fact of dismissal and initialled is binding on parties — Subsequent application without appealing is not maintainable. (Vol 21) 1934 Lah 763 (764).

[4] Where it appeared that the judgment of the lower Appellate Court did not comply with the requirements of the law, the Chief Court in second appeal set it aside and remanded the case for decision on its merits. (1919) 1919 Pun L R No. 35 p. 73.

[5] It is not legal for a Judge trying a civil suit to ask two members of the bar to act as assessors presumably to appraise the value of the evidence and to base his judgment on that opinion. (1913) 21 Ind Cas 427 (428) (All).

Order 20, Rule 2 — Note 1.

[1] Order 20, R. 2 does not apply to the original side of the High Court. (Vol 14) 1927 Bom 113 (114) : 51 Bom 267.

[2] The object of the Legislature in enacting this rule is that the judgment should be that of the Judge who heard the case though it may be delivered by another. (1885) 7 All 857 (859).

[3] A judgment written by one Judge and delivered by another, in the absence of the former is valid. (Vol 6) 1919 Cal 171 (172).

[4] Judgment written by ex-Judge, after he has ceased to be Judge is valid — It can be pronounced by his successor-in-office. (Vol 23) 1936 Rang 147 (147) : 14 Rang 136 (F B) * (1913) 35 All 368 (369) * (Vol 7) 1920 All 332 (340) : 42 All 362 * (Vol 30) 1943 Pesh 11 (12) * (1911) 1911 Pun W R No. 13, p. 34.

[But see (Vol 11) 1924 Rang 358 (359, 360) : 4 Upp Bur Rul 171. (A judgment written by the predecessor after cessation of powers is a nullity.)]

[5] Judgment written and pronounced by Judge after transfer is valid. (Vol 3) 1916 Lah 78 (78) : 1916 Pun Re No. 80 * (Vol 7) 1920 Pat 578 (581) : 5 Pat L Jour 147.

[See also (Vol 6) 1919 Lah 265 (269, 270) : 1919 Pun Re No. 80. (Per *Chevis, J.*—The validity of a judgment written after his transfer from his district and after the Judge has ceased to exercise jurisdiction in respect of the case is doubtful.)]

[6] Judgment by retiring Judge held to be validly pronounced by his successor-in-office. (Vol 18) 1931 All 90 (91) : 53 All 133.

[7] Unless the parties affected by the decision are prejudiced and objection is taken promptly at the earliest opportunity, it would not be illegal, even if a judgment written by an officer who heard and recorded the evidence, is pronounced by the successor-in-office. (Vol 7) 1920 Pat 578 (581) : 5 Pat L Jour 147.

[8] The words "may pronounce" in O. 20, R. 2 are not mandatory and the successor-in-office of a Judge has an option to pronounce the judgment written out by his predecessor or his own judgment. (1911) 33 All 236 (237) * (Vol 11) 1924 Rang 358 (359, 360) : 4 Upp Bur Rul 171. (Judge may refuse to pronounce judgment written by predecessor.) * (Vol 23) 1936 Rang 147 (149) : 14 Rang 136 (F B). (Judgment written by ex-Judge—It is not necessarily incumbent upon successor-in-office to pronounce it—If successor is in doubt as

^a3. The judgment shall be dated and signed by the Judge in open Court at the time of *Judgment to be signed*. pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

[1882—S. 202 ; 1877—Ss. 201, 202 and 203 ; 1859—S. 185.]

[a] Not applicable to the Chief Court of Oudh, while exercising its original civil jurisdiction ; see the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

PROVINCIAL AMENDMENT

MADRAS

Substitute the following for Rule 3 :

"3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge." [R. O. C. No. 1529 of 1928.]

Judgments of Small Cause Courts.

^a4. (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of other Courts.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

[1882—S. 203 ; 1877—Ss. 201, 202, 203 ; 1859—S. 185.]

[a] Not applicable to the Chief Court of Oudh while exercising its original civil jurisdiction ; See Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925), S. 16 (2).

O. 20 R. 2 (contd.)

to its correctness, he should proceed according to O. 18, R. 15 or hear case *de novo*.)

[9] Where a judgment is pronounced and dated by the predecessor himself and there is nothing to show that it was not pronounced by him the successor cannot proceed to pronounce it for a second time. If he does, his action is without jurisdiction. (Vol 7) 1920 Lah 288 (288, 289).

Order 20, Rule 3 — Note 1.

[1] So long as the order has not been perfected the Judge has the power to reconsider the matter, but he will not do so if it would mean a reconsideration of the whole matter in controversy between the parties. (1909) 10 Cal L Jour 496 (498).

[2] The Judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a Judge who has tried a part of the case. The prior decision can be reconsidered though given by consent. (Vol 5) 1918 Low Bur 7 (8).

[3] The jurisdiction of the Court to reconsider its order ceases once the judgment is signed except as provided by S. 152 or on review. (1913) 1913 Pun L R No. 254, p. 864* (Vol 20) 1933 Oudh 241 (242) : 8 Luck 502. (Order of Sub-Judge in appeal allowing plaintiff to amend plaint on payment of deficit court-fee and costs — Court has no power to further extend time.)*(1931) 8 Oudh W N 1238 (1239, 1240). (No clerical or arithmetical mistake—Judgment cannot be altered except by review.)*(Vol 26) 1939 Cal 782 (783). (Judgment setting aside *ex parte* decree delivered and signed — Finding that claim in that suit not proved to be true — Subsequent order restoring suit to file for retrial on merits is without jurisdiction.)*(Vol 20) 1933 Oudh 385 (386). (Order setting aside *ex parte* decree is judgment and cannot be set aside save under S. 152 or on review.)*(Vol 11) 1924 Pat 696 (697).

[4] Application dismissed with costs — Subsequent order as to taxation of costs under Oudh Rules, Chap. II, R. 97 was held not to contravene O. 20, R. 3. (Vol 29) 1942 Oudh 109 (110).

[5] Where judgment signed under O. 20, R. 3 directs the plaintiff to pay deficiency in court-fee within certain time and adds that in default the decree would be nullity, the Court has no jurisdiction to extend the time so fixed. (Vol 25) 1938 All 497 (501).

[6] Where a Judge pronounces a judgment but suspends the drawing up of the decree till a succession certificate is produced by the plaintiff, he cannot on plaintiff's failure to produce the certificate, cancel the judgment and deliver a different one inconsistent with the former. (1909) 31 All 153 (155).

[7] An accidental omission to sign an order is only an irregularity and an order in execution proceedings can be appealed against notwithstanding the irregularity, and it cannot be attacked in subsequent proceedings when it is not appealed against. (Vol 21) 1934 Lah 763 (763).

[8] The words "after such revision as may be deemed necessary" in the rule as substituted by the High Court of Madras, do not authorise the Judge to revise the transcript and to substitute fresh words for the words originally dictated. They do not contemplate a revision of the *effective part* of the judgment, but should be of the nature referred to in S. 152 and one relating to clerical and arithmetical mistakes arising from an accidental slip or omission. (Vol 10) 1923 Mad 663 (664).

ORDER 20, RULE 4 — SYNOPSIS.

1. Personal knowledge.
2. Appreciation of evidence.
3. Contents of judgments.
4. Judgments of Small Cause Courts.
5. Other judgments.

1. Personal knowledge. — [1] A Judge cannot import his own private knowledge or opinion into a case but must decide it on the evidence before him. (1873) 3 Ind App 259 (286) (P O).

[2] A judgment based upon personal knowledge or opinion without any reference to the evidence in the case is not one in accordance with law and is liable to be set aside. (Vol 10) 1923 Cal 311 (312).

2. Appreciation of evidence. — [1] Conjecture is not a sound basis for judicial decision. (1913) 18 Cal L Jour 220 (222).

[2] The omission in a judgment to make any special reference to oral evidence is not itself sufficient to show that it was not considered. (Vol 7) 1920 Cal 869 (869).

[3] Judge is not bound to refer in his judgment to each and every item of evidence relied on by parties. (Vol 18) 1931 All 210 (216).

*5. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

[1882—S. 204 ; 1877—S. 204 ; 1859—S. 186.]

[a] Not applicable to the Chief Court of Oudh while exercising its original civil jurisdiction; see Oudh Courts Act, 1925 (U.P. Act, 4 [IV] of 1925), S. 16 (2).

O. 20 R. 4 (contd.)

3. Contents of judgments. — [1] It is the duty of the lower Court to write their judgments without unnecessary prolixity and repetition of pleadings. (Vol 6) 1919 Mad 305 (311).

[2] Judgment brief and unintelligible—Case must be remitted for a proper judgment. (Vol 9) 1922 Lah 122 (122).

[3] A Court's judgment based on a question neither raised in written statement nor included in any issue is bad. (1912) 15 Ind Cas 159 (160) (Cal).

[4] Judges, whatever reasons they may give in judgments, must make specific and precise statements of their findings. (Vol 4) 1917 All 212 (212).

[5] Court should not quote judgment of other Court or refer to opinion of other Court as its own—It should set out its appreciation of evidence. (Vol 4) 1917 Oudh 374 (374).

[6] "Petition is struck off," is not a legal disposal—Merits of the controversy must be judicially determined. (Vol 20) 1933 Mad 510 (511).

[7] Opinion on historical facts and persons not necessary for decision of suit should not be expressed in judgment. (Vol 32) 1945 All 54 (54); I L R (1945) All 3.

[8] A Judge is appointed to a judicial office for the purpose of advancing the interests of justice—It is a solemn trust and obligation which must be fulfilled most impartially. (Vol 33) 1946 Sind 39 (41); I L R (1945) Kar 354.

4. Judgments of Small Cause Courts. — [1] Judgment of Small Cause Court need not contain the reasons for the decision. (Vol 23) 1936 Mad 913 (913, 914) (1910) 4 Sind L R 17 (18) (Vol 4) 1917 Low Bur 34 (34) (Vol 9) 1922 Mad 360 (360). ((Vol 7) 1920 Mad 310 dissented from) (Vol 5) 1913 Cal 252 (253) (1926) 13 Oudh L J 301 (302) (Vol 12) 1925 Oudh 648 (648) (Vol 24) 1937 Sind 243 (244) (1907) 31 Bom 314 (318) (F B).

[2] Order 20, R. 4 (1) should be read with S. 25, Provincial Small Cause Courts Act—Small Cause Court is not bound to state reasons for the decision though it is done usually except in unimportant cases. Where a question of law is involved, it is desirable that the Judge should give reasons in support of his conclusion. Where the case involves complicated questions of fact; a brief statement of reasons for the decision and the process by which the Judge has reached the conclusion should be given to facilitate the work of High Court. (Vol 32) 1945 Nag 192 (194, 195); I L R (1945) Nag 475 (Vol 30) 1943 Bom 416 (417, 418) (Vol 10) 1923 Rang 252 (252); 1 Rang 274.

[See also (Vol 21) 1934 Pat 243 (244) (1936) 64 Cal L Jour 456 (457).]

[3] Judgment must specifically state the points for determination and the decision on each of these points. (Vol 15) 1928 All 688 (688). (Statement "I disbelieve the defence. Claim proved and decreed with costs" held not enough.) (1922) 67 Ind Cas 851 (851) (Cal) (Vol 12) 1925 Oudh 283 (284) (Vol 19) 1932 Oudh 143 (144); 7 Luck 526 (1896) 6 Mad L Jour 50 (51) (1911) 7 Nag L R 146 (146, 147) (1928) 95 Ind Cas 584 (584) (Lah) (1910) 7 Mad L Tim 306 (306)

[4] Where the point for determination is obvious, the omission to state it in judgment, cannot be deemed

to cause failure of justice. (Vol 4) 1917 Low Bur 34 (34, 35).

[5] Judgment of Small Cause Court must show that the Judge has applied his mind to the case and has recorded a decision on it. (Vol 23) 1936 Mad 486 (487) (Vol 20) 1933 Sind 62 (65) (Vol 17) 1930 All 832 (832) (Vol 19) 1932 Cal 257 (258).

[See also (Vol 20) 1933 All 339 (340).]

[6] Though evidence need not be recorded *in extenso*, Court should record summary of evidence on which it relies in its judgment. (Vol 24) 1937 Cal 308 (309).

[7] Points for determination must be stated in judgment and not after pleadings on record. (Vol 20) 1933 Nag 272 (272); 30 Nag L R 14.

[8] Judgment of Small Cause Court Judge though short must be intelligible—Order not showing what the suit or defence was held no judgment. (Vol 25) 1938 Oudh 225 (226); 14 Luck 211 (Vol 19) 1932 Mad 336 (340, 343); 55 Mad 671. (It is sufficient if it shows that Judge has grasped questions and that answers are not arbitrary.) (Vol 9) 1922 Pat 337 (337).

[9] Judgment jumbling up all points together and containing statement that "all issues are found in plaintiff's favour" does not comply with the rule. (Vol 12) 1925 Mad 1229 (1229).

[10] Judgment "consideration not proved, suit dismissed," held not valid judgment. (1913) 1913 Pun L R No 109, p. 393 (394).

[11] Judgment simply repeating arguments of counsel is unsatisfactory. (Vol 8) 1921 Lah 119 (120); 2 Lah 271.

5. Other judgments. — [1] Order 20, R. 4 (2) lays down that judgment should contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision. (Vol 14) 1927 Lah 418 (419).

[2] Judgment need not discuss evidence. (Vol 20) 1933 Rang 174 (175).

[3] It is the duty of Judge to consider each objection whether of law or fact and to show in his judgment the nature of the objection and his grounds for allowing or dismissing it. (Vol 20) 1933 Sind 327 (327); 27 Sind L R 194.

[4] *Ex parte* decree—Judgment must comply with R. 4. (Vol 13) 1926 Cal 1221 (1221, 1222).

[5] To state merely that Judge is in agreement with finding of Court below is not sufficient. (Vol 25) 1938 Pat 69 (70).

[6] A Court in its judgment, stated that it adopted the reasons given in a judgment in a previous suit between the same parties; the evidence being almost the same, *Held*, this does not amount to using the previous judgment as evidence in the case and the judgment is one in accordance with law. (1912) 1912 Mad W N 900 (901).

Order 20, Rule 5 — Note 1.

[1] A Court has jurisdiction to determine all the issues, though some of them may be unnecessary for the decision of the case. (1905) 9 Cal W N 60 (67, 69).

[But see (1885) 11 Cal 514 (545).]

[2] In all appealable cases lower Court should, as far as practicable, pronounce its opinion on all important points. (Vol 9) 1922 P C 405 (408); 50 Cal 243; 50 Ind App 247 (P C) (1867) 8 Suth W R 481 (482) *

6. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the *Contents of decree.* names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

[1882—Ss. 206, 221; 1877—*Cf.* S. 257; 1859—S. 189; *Cf.* S. 206.]

PROVINCIAL AMENDMENTS

LAHORE

After sub-rule (1) *add* the following :

"(1A) In addition to the particulars mentioned in clause (1), the decree shall contain the addresses of the plaintiff and the defendant as given in O. 7, R. 19 and O. 8, R. 11 or as subsequently altered under O. 7, R. 24 and O. 8, R. 12 respectively." [10-2-1937.]

MADRAS

After sub-rule (2), the following shall be *inserted* as sub-rule (2A) :

"(2A) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant." [R. O. C. No. 3019 of 1926.]

O. 20 R. 5 (*contd.*)

(Vol 1) 1914 Mad 685 (686) & (1904) 26 All 234 (235) (F B) & (Vol 30) 1943 Bom 83 (88) : I L R (1943) Bom 441 & (Vol 29) 1942 Pat 108 (110) & (Vol 2) 1915 Cal 87 (90).

[3] A specific finding must be given on every issue though two or more issues may be discussed jointly. (1913) 25 Mad L Jour 329 (339).

[4] Issue raised and evidence given — It is incumbent on Court to come to conclusion thereon. (Vol 7) 1920 Pat 271 (271, 272).

[5] Opinion on historical facts and persons not necessary for decision of suit should not be expressed in judgment. (Vol 32) 1945 All 54 (54) : I L R (1945) All 3.

[6] High Court can set aside lower Court's judgment for uncertainty therein. (Vol 1) 1914 Cal 784 (784).

[7] Finding not including whole claim can be given. (Vol 30) 1943 Nag 84 (84, 85) : I L R (1943) Nag 27. (Finding that custom obtains among old established families is not opposed to pleading that custom obtains among all families, old or of recent origin.)

[8] Order on objections to award should comply with O. 20, R. 5. (Vol 22) 1935 All 519 (519).

ORDER 20, RULE 6 — SYNOPSIS.

1. Scope of the rule.
2. Form and contents of decree.
3. Amendment of decree — See S. 152.
4. Provision for costs — Sub-rule (2).
5. Set-off of costs.

1. Scope of the rule. — [1] Decree should conform to judgment. (Vol 11) 1924 All 818 (821) : 46 All 864.

[2] A party is entitled to presume that the Court will draw up its decree in accordance with its judgment — He cannot be held responsible for the errors which are due to the ignorance of a clerk who draws up a decree and to gross carelessness of a Judge who signs it. (Vol 15) 1928 Rang 215 (216).

[3] Duty of Court is to draw up decree in pursuance of judgment — No adverse inference as to right to appeal can be drawn against party omitting to ask Court to draw up decree. (Vol 1) 1914 Bom 23 (25) : 38 Bom 331 & (Vol 6) 1919 Lah 53 (54) : 1919 Pun Re No. 66.

[4] Preparation of decree after judgment is pronounced cannot be stopped. (Vol 28) 1941 Mad 929 (932) : I L R (1942) Mad 346 (F B) & (Vol 19) 1932 Pat 228 (231) : 11 Pat 532.

[5] When decree is passed by consent it should so appear when drawn up. (Vol 18) 1931 P C 107 (109) : 27 Nag L R 139 (P C).

[6] Decree not agreeing with judgment — Decree can be amended. (Vol 17) 1930 Cal 349 (350). (Interest allowed in judgment but omitted in decree — No ambiguity but pure omission — Decree can be amended.)

2. Form and contents of decree. — [1] Court has to prepare decree whether claim is allowed or dismissed. (Vol 20) 1933 Pat 135 (137) & (1869) 11 Suth W R 503 (503, 504).

[2] A decree properly prepared should state against whom, and in favour of which of the parties it has been made and who will be affected thereby. (Vol 4) 1917 All 281 (283) : 39 All 13.

[3] Decree must be quite distinct from judgment. (Vol 7) 1920 Lah 395 (396) : 1 Lah 223. (Paragraph in judgment not in form of decree is not decree.)

[4] Decree must be self-contained. (1912) 16 Cal L Jour 586 (591.) & (Vol 31) 1944 Oudh 42 (43). (Decree for pre-emption is not self-contained if it does not show amount pre-emptor is entitled to recover from vendee.)

[5] The finding on issues not essential for decision of the suit should not form part of the decree. (1904) 26 All 284 (235) (F B).

[6] Contract between parties to make interest charge on property — Decree should be prepared on that basis. (Vol 20) 1933 Lah 941 (942).

[7] Decree in a suit for contribution should specify the payment to be made by each defendant. (1866-69) 3 Mad H C R 187 (188) & (1875) 24 Suth W R 250 (251).

[8] Hindu widow's right to maintenance — Decree declaring her right to maintenance and directing payment of arrears — Decree, should contain order directing future payment of maintenance. (1885) 9 Bom 108 (110) (F B).

[9] Decree for pre-emption must show what amount pre-emptor is entitled to recover from vendee. (Vol 31) 1944 Oudh 42 (43).

[10] The mere fact that there will be difficulties in carrying out a decree a Court will not be deterred from making it. (1862-63) 1 Mad H C R 415 (417).

3. Amendment of decree. — See S. 152.

4. Provision for cost — Sub-rule (2). — [1] A decree ought to be drawn by the Court deciding a case, showing all the costs incurred by both the parties. (1911) 38 Cal 125 (126).

[2] Even when suit is dismissed decree ought to be prepared showing amount of costs and giving directions

7. The decree shall bear date the day on which the judgment was pronounced, and, when the *Date of decree*. Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

[1882—S. 205 ; 1877—Ss. 204, 205, 206 ; 1859—S. 189.]

PROVINCIAL AMENDMENT

Rule 7A—ALLAHABAD

Add the following new Rule 7A :

"7A. A Court, other than a Court subordinate to the District Court exercising insolvency jurisdiction, passing an order under S. 47 or S. 144, Civil P. C., or one against which an appeal is allowed by S. 104 or R. 1 of O. 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties."

Procedure where Judge has vacated office before signing decree.

8. Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

9. Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

[1882 — S. 207; 1877 — S. 207; 1859 — S. 190.]

O. 20 R. 6 (contd.)

In respect thereto even if each party has to bear its own costs. (Vol 20) 1933 Pat 135 (188, 189).

[3] Judgment granting costs — Decree taxing them improperly — Decree differs from judgment. (Vol 19) 1932 All 337 (340) : 54 All 490.

[4] The Code of Civil Procedure does not authorise a Court to decree costs against the guardian of a defendant except in the case referred to in O. 32, R. 11. (1881) 3 Mad 263 (263, 264).

[5] Judgment not awarding separate costs to defendants—Decree should not decree separate costs. (Vol 22) 1935 Pat 41 (41).

5. Set-off of costs.—[1] Costs not actually awarded—No set-off can be allowed. (1871) 16 Suth W R 308 (309).

[2] Costs awarded on the disposal of a preliminary point may be set off as against those awarded on the final decision of the suit. (1883) 9 Cal 797 (800, 801) : 10 Ind App 113 (P O).

ORDER 20, RULE 7—SYNOPSIS.

1. Applicability of rule.
2. Date of decree.
3. "Shall sign the decree."
4. Limitation. See S. 12 and Art. 182, Limitation Act.
 1. Applicability of rule.—[1] Order 20, R. 7 does not apply to a Chartered High Court in the exercise of its ordinary or extraordinary original jurisdiction, but it does apply to the High Court in the exercise of its appellate jurisdiction. (Vol 28) 1941 Mad 929 (931) : 1 L R (1942) Mad 346 (F B).
 - [2] A decree of the High Court on its original side should bear the same date as the judgment and limitation should not be calculated from the date when the decree is signed by the Registrar. (1913) 25 Mad L Jour 560 (560).
 2. Date of decree.—[1] A decree has to bear the same date as that of the order making it and not the date on which it is signed by the Court. (Vol 3) 1916 Cal 511 (512) * (Vol 17) 1930 Rang 67 (68) * (Vol 14) 1927 Rang 335 (335)*(1886) 13 Cal 104 (106) (FB) *(Vol 5) 1918 Bom 217 (218) : 42 Bom 309*(Vol 29) 1942 Oudh 139 (140). (Provisions of O. 20, R. 7 are mandatory.)*(Vol 27) 1940 Pat 270 (271). (Assignment of decree after delivery of judgment is valid.)* (Vol 10) 1923 Pat 129 (130) : 1 Pat 771 * (Vol 9) 1922 Nag 113 (113)*(Vol 20) 1933 Mad 315 (318) : 56 Mad 458*(Vol 2) 1915 Mad 308 (308).

[2] Decree operates from date of judgment although prepared subsequent to judgment. (Vol 29) 1942 Oudh 139 (141).

[3] Judgment given but passing of decree made conditional—Date when decree is passed must be considered as date of judgment and decree. (Vol 3) 1916 Sind 2 (3) : 9 Sind L R 193.

[4] Decree not drawn up on non-judicial stamp paper — Non-judicial stamp paper subsequently annexed and defaced and names of parties and cause title of case put down—Decree is in order with retrospective effect from date when it was drawn up and can be executed. (Vol 22) 1935 Cal 125 (126).

3. "Shall sign the decree." — [1] Decree signed — Presumption is that Judge has satisfied himself that it has been prepared in accordance with judgment. (Vol 20) 1933 Oudh 466 (467) : 9 Luck 90. (Court's proceedings are presumed to be legal and correct.)

4. Limitation.—See S. 12 and Art. 182, Limitation Act.

Order 20 Rule 9—Note 1.

[1] In suits relating to immovable property the decree should contain description of property sufficient to identify the same and where it can be identified by boundaries or survey numbers the decree should specify such boundaries or numbers. The reason is that otherwise the decree may in many cases become impossible of execution by reason of the indefiniteness of the property dealt with by it. (1876) 25 Suth W R 39 (40) * (1879) 4 Cal 69 (71, 72)*(Vol 31) 1944 Pat 254 (255) : 23 Pat 145. (The rule emphasises the fact that in the decree there should be a description of the immovable property sufficient to identify the same and if there be plot numbers, they should be given.)

[2] The Court can ascertain the subject upon which the decree operates from the acts and conduct of the parties. (1892) 19 Cal 312 (321, 322) * (1874) 22 Suth W R 330 (331) * (Vol 1) 1914 Cal 775 (775, 776) * (Vol 4) 1917 Cal 407 (409). (There is no error in leaving the ascertainment of boundaries to be decided in execution proceedings.)* (1871) 16 Suth W R 171 (172). (Boundaries described in plaint no longer in existence—Evidence may be taken to ascertain their former position.)

[3] Evidence cannot be taken in execution department to ascertain what is decreed. (1869) 12 Suth W R 99 (99).

10. Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

[1882—S. 208; 1877—S. 208; 1859—S. 191.]

11. (1) Where and in so far as a decree is for the payment of money,² the Court³ may for any sufficient reason⁵ at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest⁶ notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him⁸, or otherwise, as it thinks fit.

[1882—S. 210; 1877—S. 210; 1859—S. 194.]

O. 20 R. 9 (contd.)

[4] Where the property was described in the plaint as follows. "Entire sixteen annas of kamat lands 45 bighas, 8 Ch. 3 dhurs in mouja Simaria Ghat T. No. 610 covered by Jamabandi No. 113, with all rights and interest therein, being plots Nos. . . ." and where the decree-holder sought to take possession of ten plots which were not mentioned by the numbers given in the plaint but formed part of sixteen annas kamat lands of Simaria Ghat Village, it was held that "sixteen annas kamat lands in village Simaria Ghat" was the leading description which must prevail over description by plot numbers which was incomplete, and therefore decree-holder was entitled to take possession of the ten plots not described by numbers. (Vol 31) 1944 Pat 254 (256): 23 Pat 145.

Order 20 Rule, 10—Note 1.

[1] Order 20, R. 10 does not mean that delivery of property must be decreed in every case. A person entitled to delivery of movable property from another is not bound to sue for delivery of the property itself. He may sue for value thereof. (Vol 11) 1924 Nag 176 (177, 178).

[2] Alternative decree for money in decree for return of movable property does not give the judgment-debtor an option to surrender property or to pay money decreed. It is only when after putting into force O. 21, R. 31, it is found impossible to obtain the property ordered to be delivered that the alternative amount in the decree comes into operation. (1903) 13 Mad L Jour 444 (444).

[3] Holders of a decree in terms of O. 20, R. 10 cannot execute the money portion of it without having recourse to the procedure prescribed by O. 21, R. 31. (Vol 14) 1927 Cal 652 (653) : 55 Cal 26 (Vol 22) 1935 Cal 39 (51) : 61 Cal 711.

[4] Money amount inserted in decree under O. 20, R. 10, as an alternative in case delivery cannot be had, is for the benefit of the decree-holder and not of defaulting judgment-debtor. Where the decree for the return of a letter did not state money amount to be paid in alternative if delivery could not be had, it was held that the executing Court could determine compensation payable in the alternative only after recourse to O. 21, R. 31 had proved fruitless in obtaining delivery. (Vol 30) 1943 Mad 716 (716, 717).

[5] Assessment of price under O. 20, R. 10 — Rate prevailing at time of suit should be applied. (Vol 32) 1945 Pesh 5 (5).

ORDER 20, RULE 11—SYNOPSIS.

1. Scope and applicability.
2. Decree must be for the payment of money.
3. "The Court."

4. Order for payment by instalments.

5. Sufficient reason.

6. "With or without interest."

7. Order for instalments after decree — Sub-rule (2).

8. Security under sub-rule (2).

9. Appeal.

10. Limitation for an application under sub-rule (2).

1. Scope and applicability. — [1] Rule 11 (2) of O. 20 is wide enough in its terms to apply to the fixing of instalments and the taking of security after the passing of any decree for the payment of money whether the original decree was for instalments or for a lump sum, provided that the new direction is made by consent of both parties. (1939) 18 Pat 719 (721).

[2] Certification under O. 21, R. 2 is not tantamount to order under O. 20, R. 11. (Vol 21) 1934 Oudh 465 (472).

[3] Order 20, Rule 11 is not controlled by the Imperial Bank Act. (Vol 20) 1933 Nag 330 (332).

[4] Provisions of U. P. Agriculturists' Relief Act do not derogate from those of O. 20, R. 11. (Vol 25) 1938 All 52 (52, 53).

[5] Revenue Court cannot direct decree for rent under the Agra Tenancy Act (1926) (now see U. P. Tenancy Act) in case of tenants other than permanent or fixed rate tenants to be paid by instalments — Agra Tenancy Act (1926), Ss. 79 and 80. (Vol 19) 1932 All 436 (437) : 54 All 521.

2. Decree must be for the payment of money.—

[1] Provisions of O. 20, R. 11 are intended to apply to what are commonly known as money-decrees, and not to decrees in which a sale is ordered of immovable property in pursuance of a contract specifically affecting the property. (1878-80) 2 All 130 (131, 132).

[2] Order 20, Rule 11 does not empower a Court to make payable by instalments a decree for the recovery of money by sale of mortgaged property. (1880) 5 Bom 604 (607)* (Vol 21) 1934 Oudh 465 (472)* (1883) 7 Bom 332 (335)* (1878-80) 2 All 649 (651). (Decree in suit to enforce a lien on an annuity called nankar does not fall under O. 20, R. 11.)

[3] Where the lower Court out of consideration for an innocent purchaser forced to satisfy a mortgage, awarded payment by instalments at short intervals, held it was reasonable for trial Court under the circumstances, to do so. (1878-79) 3 Bom 202 (203).

[4] A supplemental decree under O. 34, R. 6, for the unrealised mortgage money is a personal decree and the Court can order the payment of such decree amount by instalments. (1911) 15 Cal W N 1083 (1084).

3. "The Court."—[1] It has been held in the following cases that it is only the Court passing the

Objects and Reasons.

"The Committee have added words to sub-rule (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Raghu Govind Paranjpe v. Dipchand* (I. L. R. 4 Bom 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India."—S. O. R.

PROVINCIAL AMENDMENTS

MADRAS

Substitute the following for Rule 11 :

"11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which money is payable.

(2) After the passing of any such decree, the Court may, on the application of the judgment-debtor and after notice to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise as it thinks fit." [R. O. C. No. 2191 of 1926.]

NAGPUR

In sub-rule (2) for the words "and with the consent of the decree-holder" the words "and after notice to the decree-holder" shall be substituted. [29-6-1943.]

SIND

In sub-rule (2) for the words "and with the consent of the decree-holder," substitute the words "and after notice to the decree-holder."

O. 20 R. 11 (contd.)

decree that can act under this rule. (Vol 30) 1943 Nag 340 (344) : I L R (1944) Nag 1 (F B)* (Vol 5) 1918 All 216 (217) : 40 All 198* (Vol 19) 1932 All 273 (282) : 54 All 573 (F B)* (1890) 12 All 571 (577)* (1883) 7 Bom 332 (335)* (Vol 5) 1918 Mad 1174 (1175) : 40 Mad 233 (F B)* (Vol 8) 1921 Pat 340 (340)* (Vol 21) 1934 Rang 197 (198)* (Vol 21) 1934 Rang 165 (166) : 12 Rang 320.

See also Notes on S. 48.

4. Order for payment by instalments. — [1] Small cause suit — Instalment decree passed on condition of the defendant executing the mortgage of a zamindari share in a certain village within a certain time is valid. (Vol 14) 1927 Oudh 236 (236).

5. Sufficient reason. — [1] The discretion under R. 11, O. 20 is to be judicially exercised on sufficient reason ; it should not be arbitrarily exercised. (1910) 6 Ind Cas 552 (552, 553) (Cal). (The spreading of a small amount over a long period of years is illegal.) * (Vol 21) 1934 Pesh 2 (3).

[2] In the absence of consent on the part of the plaintiff, the Court has no power to direct payment of decree amount by instalments where there are no sufficient reasons for doing so. (1880) 2 All 130 (132).

[3] The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree-holder's rights. (Vol 22) 1935 Rang 495 (495).

[4] Even a Small Cause Court, in granting instalments is required, under the provisions of O. 20, R. 11 to state its reason for granting the prayer. (Vol 22) 1935 Cal 559 (560).

[5] Decree for money passed against defendant, an influential person — Judge on defendant's request passing order in Chambers, directing payment by instalments without giving any reasons — Procedure and order held improper. (Vol 33) 1946 Sind 39 (39, 40, 42) : I L R (1945) Kar 354.

[6] Simply because instalment is prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. In making order for instalment, condition of debtor, and other circumstances, like, date of loan, amount of instalment etc should be considered. Interest of creditor also should be guarded. (Vol 22) 1935 Cal 559 (560).

[7] Prompt payment of fair proportion of debt is not condition precedent — *Bona fides* of debtor is predominating factor — Each case depends on particular facts. (Val 20) 1933 Nag 330 (331).

[8] Where a defendant claims the assistance of the Court in the matter of fixing instalments for the payment of a decretal debt, the burden of proof lies heavily upon him to show that he is entitled to specially lenient treatment. The *malā fide* behaviour on part of defendant would disentitle him to lenient treatment. (1923) 71 Ind Cas 303 (304) (Pesh).

[9] Instalments—Means of livelihood should be kept intact if the decretal amount can be otherwise satisfied. (Vol 12) 1925 Rang 33 (33).

[10] Rule 11 is not controlled by Imperial Bank Act—Refusal to grant instalments in proper cases on grounds of postponement of realization of dues by Bank over six months would amount to failure of duty. (Vol 20) 1933 Nag 330 (332).

[11] The mere fact that the defendant is hard pressed is not by itself a sufficient reason to justify a decree for instalments spread over for many years. (1910) 6 Ind Cas 552 (553) (Cal).

[12] The chance that the plaintiff may succeed in another suit pending between him and the defendant and in that case the two decrees can be set off against each other is not sufficient cause for passing an order of postponing payment. (Vol 13) 1926 Lah 604 (605) : 7 Lah 393.

[13] Estate being with Court of Wards is no ground for instalment decree. (Vol 10) 1923 Lah 256 (256).

[14] Court passing decree for Rs. 884 and ordering that defendant should pay in six-monthly instalments of Rs. 60 each and allowing no future interest — It is not proper exercise of discretion. (Vol 20) 1933 All 90 (90) : 54 All 539.

6. "With or without interest." — [1] Payment of money decree by instalments—Interest—Where the Court below exercised its discretion in giving from the institution of the suit a rate lower than that stipulated, held, that the lower Court had not acted illegally nor without jurisdiction and the High Court saw no reason to interfere in revision. (1878-79) 3 Bom 202 (203).

[2] Mortgage decree with interest at contract rate till suit and at court rate till realization — Judge on application by defendant allowing instalment and ordering that decree should cease to bear interest — Order is without jurisdiction. (Vol 20) 1933 Rang 323 (324, 325).

7. Order for instalments after decree — Sub-rule (2). — [1] Under sub-rule (2) the Court may, after the passing of a decree in money suits, order that the amount be paid by instalments, provided that the decree-holder consents. (1880-81) 5 Bom 604 (608).

[2] Consent means free consent. (Vol 33) 1946 Sind 39 (41) : I L R (1945) Kar 354.

Decree for possession and mesne profits.

12. (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree —

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until —
 - (i) the delivery of possession to the decree-holder,
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

[1882—Ss. 211, 212; 1877—Ss. 211, 212; 1859—Ss. 196, 197. See Ss. 2 (12), 144.]

PROVINCIAL AMENDMENT

MADRAS

Add the following sub-rule (3) :

“(3) Where an appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance may of its own accord and shall whenever moved to do so by the decree-holder, inquire and pass the final decree.” [Dis. No. 550 of 1911 as amended in 1943.]

O. 20 R. 11 (contd.)

[3] When the not ordering the amount of the decree to be paid by instalments has arisen from any error or omission, or it is otherwise requisite for the ends of justice that such an order should be made, the Court passing the decree has power to review it, and to make an order for payment by instalments; but it cannot be done in other cases, unless the judgment-creditor consents. (1867-68) 4 Bom H C R 77 (78).

[4] Court can postpone payment of decretal amount with decree-holder's consent on taking security even though appeal is pending from the decree. (Vol 14) 1927 Mad 416 (420).

[5] Parties agreeing after the decree that payment be made by instalments—Order of the Court striking off execution proceedings on such compromise deemed to be an order under sub-rule (2). (1885) 11 Cal 143 (145) & (1889) 16 Cal 16 (18). (A mere order for stay for 15 days to enable judgment-debtor to pay is not an order under O. 20 R. 11 (2).)

[See also (Vol 22) 1935 Mad 17 (19, 20).]

[6] Unless the arrangement between the parties for instalments is recognized by the Court in some form, it will not, by itself, amount to a direction by the Court under O. 20, R. 11 (2). (1887) 14 Cal 348 (350).

[7] Compromise of parties after decree that decretal amount should be paid by instalments — Court accepting compromise and dismissing execution case — Order of Court comes within provisions of O. 20, R. 11 (2) — Court cannot, on default of payment of instalments, refuse to execute decree and drive parties to suit (Vol 24) 1937 Cal 236 (237) & (Vol 20) 1933 Lah 758 (759).

[8] A judgment-debtor directed to pay the decretal amount by instalments should deposit the instalment money in Court on the proper date; otherwise he is liable to pay interest till the instalment is paid. (1910) 14 Cal W N 146 (147).

8. Security under sub-rule (2). — [1] Security taken under sub-rule (2) can be exercised in execution — O. 34 R. 14 is no bar. (Vol 13) 1926 Mad 194 (197).

[2] Order under sub-rule (2) whereby the judgment-debtor was to execute a mortgage in favour of the decree-holder — Judgment-debtor subsequently adjudged insolvent — The adjudication does not affect decree-holder's right to have the mortgage executed in his favour. (Vol 12) 1925 Rang 189 (191) : 2 Rang 673.

9. Appeal. — [1] An order refusing payment of

decree by instalments is not appealable. (Vol 15) 1928 Lah 931 (931)* (1918) 7 Low Bur Rul 71 (72).

[3] Order directing payment in instalments or postponing payment is incorporated in the decree and therefore can be attacked in appeal against the decree. (Vol 20) 1933 Pesh 81 (33)* (1911) 15 Cal W N 1083 (1084)* (Vol 18) 1931 Rang 152 (152).

[4] Under sub-rule (2) as amended in Rangoon and Nagpur instalments may be ordered after notice to, and without the consent of, the decree-holder. The order, not being a *consent* order, is appealable as an order under S. 47. (Vol 16) 1929 Rang 191 (192) & (Vol 30) 1943 Nag 155 (156) : 1 L R (1943) Nag 456* (Vol 13) 1926 Rang 192 (192) : 4 Rang 247.

[5] Appeal against order of dismissal of application under O. 20, R. 11 as time barred is competent. (Vol 19) 1932 Rang 54 (55).

10. Limitation for an application under sub-rule (2). — [1] See A.I.R. Commentaries on the Limitation Act, 2nd (1942) Edition, Notes on Article 175.

ORDER 20, RULE 12 — SYNOPSIS.

1. Scope of the rule.
2. Rule applies only where specific interest in land is claimed.
3. Enquiry as to mesne profits — Nature of proceeding.
4. Mesne profits — Liability for.
5. Extent of liability.
6. Principles relating to assessment.
7. Deductions from gross profits.
8. Onus of proof.
9. Interest forming part of mesne profits.
10. Value of mesne profits, if affects jurisdiction.
11. Right to apply for ascertainment of mesne profits, when arises.
12. Decree silent as to future mesne profits.
13. Court-fees — See S. 11, Court-fees Act.
14. Notice of relinquishment—Clause (c).
15. Three years from date of decree.
16. Limitation—See Arts. 109 and 181, Limitation Act.
17. Appeal and revision.

1. Scope of the rule. — [1] Rule applies only where, and in so far as, a suit for recovery of possession and for rent or mesne profits has been actually filed. (Vol 33) 1946 Cal 357 (364).

O. 20 R. 12 (*contd.*)

[2] Rule does not apply to suit for mesne profits only. (1872) 9 Bom H C R 7 (9).

[3] Rule has no application to suit for damages which are not mesne profits. (Vol 22) 1935 All 186 (186, 187). (Prospective damages on tort must be given in decree itself and cannot be determined in execution — Order of Court in decree that it will be determined in execution does not give executing Court jurisdiction to determine it — O. 20, R. 12 has no application.) (1869) 1 N W P H C R 22 (23). (Suit for damages for obstruction in exercise of right of *usucapio*.)

[4] Rule has no applicability to suit for assessment and recovery of additional rent. (Vol 30) 1943 Cal 544 (552); 1 L R (1943) 2 Cal 245.

[5] Even when there is an alternative claim for possession and the statement of the claim for mesne profits is not clear, mesne profits could be decreed. (Vol 4) 1917 Cal 562 (563).

[6] Order 20, R. 12 relates to a claim where the defendant is in wrongful possession of the disputed lands. (Vol 15) 1928 Pat 565 (566); 7 Pat 491. (Reversed in (Vol 18) 1931 P C 209 : 58 Ind App 299 : 11 Pat 22 (P C) on another point.)

[7] To determine applicability of O. 20 R. 12 to a suit averments in plaint are to be looked at — It is immaterial that decree in terms of prayers is not passed. (Vol 33) 1946 Sind 58 (60) : 1 L R (1945) Kar 318.

[8] Rule does not prohibit additional reliefs being asked for. (Vol 33) 1946 Cal 357 (363, 364).

[9] It is only by virtue of O. 20, R. 12 which is framed for shortening litigation that future mesne profits can be awarded, though they accrue subsequent to the institution of suit. (Vol 2) 1915 Cal 352 (353) : 43 Cal 650 & (Vol 8) 1921 Lah 85 (88) : 2 Lah 833 & (Vol 17) 1930 Mad 30 (33, 37) : 53 Mad 838.

[10] Rule is a purely enabling provision and gives the Court a discretion to award future mesne profits which it is free to exercise or not according to the circumstances of the particular case. (1899) 21 All 425 (429) (F B) & (Vol 5) 1918 Mad 484 (487) : 41 Mad 188 (F B).

[See also (Vol 18) 1931 Oudh 131 (132) : 6 Luck 248. (Court is given discretion to direct inquiry in respect of future mesne profits.)]

[11] Rule being directory only does not compel plaintiff to claim future mesne profits in suit for possession. (Vol 18) 1931 All 429 (432) : 53 All 951 (S B).

[12] Plaintiff failing to obtain decree for possession — Claim for mesne profits should not ordinarily be allowed. (Vol 20) 1933 Cal 554 (553).

[13] Decree under O. 20, R. 12 — Decree may be partly final and partly preliminary, final as to possession and preliminary as to mesne profits. (Vol 33) 1946 Sind 58 (61) : 1 L R (1945) Kar 318. (Suit for possession and mesne profits — Suit compromised — Decree for possession and monthly sums on basis of half share in rents — Payments described as maintenance — For any sums drawn in excess of half share, property to be charged in favour of judgment-debtor — Decree held partly final and partly preliminary.) & (Vol 1) 1914 Cal 804 (804) & (Vol 3) 1916 Mad 767 (767). (Decree for possession and mesne profits can be executed piecemeal.)

[14] No claim for damages but relief confined only to recovery of fixed rent — Amount due definitely ascertained — Preliminary decree not necessary to ascertain amount freshly. (Vol 24) 1937 All 86 (39).

[15] It is competent to a Court without directing enquiry to pass decree finally determining amount of profits payable subsequent to suit, if it is made out that it is not necessary to make such an enquiry. (Vol 25) 1938 Mad 727 (729) : 1 L R (1938) Mad 1050.

[16] Inquiry as to mesne profits directed by preliminary

decree — Final decree should be passed in accordance with result of such inquiry. (Vol 13) 1926 Pat 218 (223) : 5 Pat 361 (F B) & (Vol 25) 1938 Bom 320 (321).

[17] More than one final decree can be passed where terms of decree passed are such as to call for that course. (Vol 33) 1946 Sind 58 (61) : 1 L R (1945) Kar 313.

[18] Decree directing delivery of possession and awarding mesne profits without directing enquiry is final and not preliminary. (Vol 12) 1925 Mad 1276 (1276).

[19] *Ex parte* decree directing ascertainment of mesne profits — Petition presented in Court that compromise has been effected regarding mesne profits — Omission of Court to prepare final decree — Decree-holder is not to suffer and can execute decree. (Vol 21) 1934 Pat 380 (381).

[20] It is only the person who is entitled to actual possession that can claim mesne profits. (Vol 22) 1935 Lah 379 (380).

[21] Suit for possession and mesne profits — One of coparceners or co-owners can sue — Decree for possession of entire property and whole of mesne profits payable by trespasser can be passed. (Vol 29) 1942 All 358 (360) : 1 L R (1942) All 671 & (Vol 14) 1927 Nag 9 (10).

[22] Order 20 R. 12 does not contemplate the determination of anything but the relation between the plaintiff and the defendant. There is nothing in this rule to suggest that it applies between co-defendants. (Vol 3) 1916 Cal 673 (674).

2. Rule applies only where specific interest in land is claimed. — [1] The provisions of O. 20, R. 12 are intended for and applicable to suits for land or property in which plaintiff has a specific interest and not to a suit for partition in which the plaintiff has no specific interest until decree. (1887) 14 Cal 493 (509) : 14 Ind App 37 (P C) & (1913) 9 Nag L R 145 (148). (Suit for partial partition by transferee of coparcener.)

[But see (Vol 6) 1919 Mad 868 (868).]

[2] Where the property is held in specific and distinct shares under an agreement, any disturbance in the enjoyment will give rise to a right to profits along with a claim for partition. (1888) 16 Cal 397 (413) : 16 Ind App 71 (P C).

[3] Hindu law — Suit for partition — Manager is liable to account for profits subsequent to suit — Such liability is not one for mesne profits. (Vol 10) 1923 Mad 147 (150) : 46 Mad 47.

[4] Though mesne profits for a period prior to partition are not ordinarily recoverable under Hindu law, yet a member who has been entirely excluded from enjoyment is entitled to them. (1895) 19 Bom 532 (536).

[See also (1882) 5 Mad 236 (238, 239) : 9 Ind App 125 (P C). (Mesne profits from time of exclusion of co-sharers were awarded.)]

[5] Mere attachment of land does not create any interest in land in person attaching it so as to give him right to sue for mesne profits. (Vol 28) 1941 Pesh 87 (88).

3. Enquiry as to mesne profits — Nature of proceeding. — [1] Assessment of mesne profits is proceeding in suit and not in execution. (Vol 18) 1931 All 538 (539) & (Vol 17) 1930 Cal 422 (424) : 57 Cal 148 & (Vol 18) 1931 Pat 1 (4) & (Vol 3) 1916 Pat 10 (11) : 1 Pat L Jour 427 & (Vol 25) 1938 Oudh 103 (105) & (Vol 29) 1942 Sind 60 (61) : 1 L R (1941) Kar 563 & (1903) 25 All 385 (387).

[See also (1892) 14 All 531 (536). (Direction for assessment need not necessarily be contained in decree.)]

[2] Inquiry as to mesne profits is made in the course of proceeding which is in continuation of the original suit. (Vol 12) 1925 All 588 (589) : 47 All 543 & (1900) 24 Bom 345 (349, 350) & (Vol 10) 1923 Bom 268 (269). (Application to ascertain mesne profits is not one under

O. 20 R. 12 (contd.)

the Code or one in execution.) * (Vol 15) 1928 Bom 236 (237) : 52 Bom 360 * (1912) 16 Cal L Jour 8 (5) * (1910) 5 Ind Cas 272 (273) (Cal) * (Vol 13) 1926 Cal 175 (175) * (1885) 8 Mad 137 (139). (Enquiry under this rule is a continuation of suit which results in a final decree.) * (1879) 4 Cal 629 (632) * (1887) 14 Cal 50 (53, 54) * (1892) 19 Cal 132 (136, 137) (F B) * (1912) 39 Cal 220 (225) * (Vol 5) 1918 Cal 742 (743) * (Vol 3) 1916 Mad 523 (523) : 39 Mad 488 * (Vol 4) 1917 Pat 334 (335) : 2 Pat L Jour 394 * (Vol 11) 1924 Pat 781 (782) : 4 Pat 57.

[But see (Vol 8) 1921 Bom 404 (404) : 45 Bom 819. (Application for ascertainment of mesne profits is one in execution.) * (Vol 1) 1914 Mad 526 (531, 532) : 37 Mad 186.]

[3] Application for ascertainment of mesne profits is not plaint — Verbal application is sufficient. (Vol 13) 1926 Pat 218 (227) : 5 Pat 361 (F B).

[4] Decree directing ascertainment of mesne profits in execution is not legal. (Vol 5) 1918 Cal 742 (743) * (Vol 25) 1938 All 445 (446) : 1 L R (1938) All 658.

[5] Mesne profits to be determined in execution — Decree is wrong — But parties not appealing, decree is binding. (Vol 21) 1934 Cal 472 (474). (Dismissal of application in execution in default does not bar claim to mesne profits.)

[6] Court ordering profits to be ascertained in execution — Order though irregular is not without jurisdiction — Executing Court cannot go behind it but must ascertain the mesne profits. (Vol 16) 1929 Bom 217 (218, 219) * (Vol 17) 1930 Mad 90 (31) : 53 Mad 838.

[See also (1938) 67 Cal L Jour 473 (478). (Executing Court ascertaining mesne profits — It should make report to trial Court which should pass final decree.)

[7] Application for determination of mesne profits — Dismissal for failure to prosecute — Application does not become inoperative as Court is bound to pass decree. (Vol 15) 1928 Mad 522 (524) * (Vol 27) 1940 Mad 124 (126, 127) : ILR (1940) Mad 372 (F B). (Appellate Court directing trial Court to inquire into mesne profits — Trial Court should fix date for appearance of parties — If decree-holder fails to appear Court should not pass final decree but adjourn matter *sine die*. (Vol 13) 1926 Pat 141 (142) : 5 Pat 223.

[8] Mesne profits awarded — Application for ascertainment filed — Amount claimed in excess of jurisdiction — Application dismissed in default — Second application to Court competent — Dismissal in default did not bar subsequent application. (Vol 7) 1920 Cal 458 (459).

[9] Preliminary decree — Further questions remaining to be decided — Further hearing of the suit should be adjourned to a definite date. (Vol 15) 1928 Mad 1165 (1168).

4. Mesne profits — Liability for. — [1] Mesne profits can be claimed only against person in actual possession. (Vol 11) 1924 Lah 738 (740).

[2] Mesne profits are always recoverable from a person who has enjoyed them, even though he has been in *bona fide* possession without knowledge of defect of his title. (1867) 8 Suth W R 479 (480).

[3] In an action for mesne profits wrongful possession by defendant is the foundation of his liability. (Vol 4) 1917 Cal 107 (112) * (Vol 19) 1932 Cal 600 (616, 617) : 59 Cal 859 * (Vol 14) 1927 Cal 182 (189) : 53 Cal 992 * (Vol 20) 1933 Mad 825 (830) : 57 Mad 49. (Court has only to see whether possession of defendant is wrongful — It is not justified in going further and inquiring into degree of defendant's misconduct or culpability.) * (Vol 26) 1939 Nag 23 (25, 26). (Plaintiff in claim suit establishing his title to property — Possession of auction-purchaser becomes wrongful so far as

mesne profits are concerned — Plaintiff is entitled to claim mesne profits from him.) * (Vol 15) 1928 Pat 565 (566) : 7 Pat 491. (Reversed on another point in (Vol 18) 1931 P C 209:58 Ind App 299: 11 Pat 22 (P C).)

[4] Sale under Bengal Land Revenue Sales Act — Defaulter's possession after confirmation of sale is wrongful for purposes of mesne profits. (Vol 18) 1931 Cal 805 (806).

[5] Possession of person against whom decree under S. 9, Specific Relief Act, has been passed is wrongful. (Vol 14) 1927 Nag 9 (10).

[6] Government making settlement *ultra vires* of its powers — Possession of person claiming under Government is wrongful — Government is liable for mesne profits to person dispossessed. (Vol 23) 1936 Cal 629 (637).

[7] Mesne profits are not to be granted if possession is not wrongful. (Vol 21) 1934 Lah 322 (323) * (1899) 9 Mad L Jour 163 (164).

[8] Acceptance of rent, though under mistake of law, disentitles owner from claiming mesne profits. (Vol 11) 1924 P C 213 (215) : 27 Oudh Cas 208 (P C).

[9] Possession under deed liable to be set aside on payment of certain sum is not unlawful. (Vol 5) 1918 P C 118 (120) : 45 Ind App 284 : 41 All 63 : 21 Oudh Cas 228 (P C) * (Vol 8) 1921 Nag 132 (132).

[10] Possession of transferee from widow is not wrongful until transfer is attacked. (Vol 8) 1921 Nag 133 (133).

[11] Possession of co-sharer of joint property in absence of proof of ouster or exclusion is not wrongful. (Vol 18) 1931 P C 209 (211) : 58 Ind App 299 : 11 Pat 22 (P C) * (Vol 20) 1933 Nag 316 (318) : 30 Nag L R 71 * (Vol 13) 1926 Cal 860 (862) * (Vol 1) 1914 Cal 209 (210).

[12] Mesne profits cannot be ordered against possessory mortgagee till mortgage subsists. (Vol 17) 1930 Rang 152 (152).

[13] No decree for mesne profits can be passed against person who is not in possession of property. (Vol 28) 1941 Pesh 87 (88) * (Vol 4) 1917 All 117 (118) * (Vol 4) 1917 Cal 107 (111).

[14] Transfer under deed obtained by undue influence and fraud — Possession of transferee is wrongful as between himself and person defrauded from date of possession under transfer. (Vol 19) 1932 P C 89 (91) : 59 Ind App 147 : 7 Luck 64 (P C).

5. Extent of liability. — [1] Defendant is answerable to mesne profits for the time he has been in possession. (Vol 18) 1931 Cal 663 (664) * (Vol 6) 1919 Cal 167 (167) * (1868) 10 Suth W R 486 (486) * (1913) 9 Nag L R 145 (149). (As against a wrong-doer possession relates back to the time when the right to enter accrued.) * (Vol 8) 1921 Pat 102 (102) : 6 Pat L Jour 166.

[2] Defendant restrained from letting — Mesne profits can be awarded only till that period. (Vol 30) 1943 Cal 125 (127).

[3] Mesne profits cannot be claimed during period Court is in possession of suit land on plaintiff's behalf by operation of order under Criminal Procedure Code, S. 146. (Vol 11) 1924 Cal 1010 (1012) : 51 Cal 853.

[4] Defendant excluded from possession — He is not liable for mesne profits for period of exclusion. (1897) 24 Cal 413 (416) * (Vol 10) 1923 Nag 108 (105) : 18 Nag L R 195.

[5] Mesne profits ought not to be estimated for any period during which defendant was not active in keeping plaintiff out of possession. (Vol 8) 1921 Pat 102 (102) : 6 Pat L Jour 166.

[6] Preliminary decree granting mesne profits before suit — Exact date from which they were to be assessed not specified — Plaintiff is entitled to mesne profits for three years before suit. (Vol 25) 1938 Cal 563 (566).

O. 20 R. 12 (*contd.*)

[7] Suit to set aside deed on ground of fraud and undue influence — Plaintiff is entitled to mesne profits from date of defendant's possession and not from date of suit (Vol 19) 1932 P C 89 (91) : 59 Ind App 147 : 7 Luck 64 (P C).

[8] Suit to set aside sale by manager — Plaintiff is entitled to mesne profits only from date of plaint. (Vol 11) 1924 Mad 81 (83) : 46 Mad 815 * (Vol 4) 1917 All 479 (480, 481) : 39 All 61.

[9] Person in possession under voidable transaction — Suit to avoid transaction and get possession — Whether plaintiff can claim profits prior to date of suit depends upon circumstances of each case and conduct of plaintiff. (Vol 23) 1936 Mad 887 (898) : I L R (1937) Mad 66 * (Vol 5) 1918 Mad 178 (180).

[10] Suit by coparcener to set aside sale by manager of joint Hindu family — Decree conditional on payment of money to defendant — Plaintiff is entitled to mesne profits from date of deposit of money and not from date of suit. (Vol 30) 1943 Bom 278 (282, 283) * (1928) 1928 Mad W N 51 (52).

[11] Where plaintiff does not take steps to get possession as soon as he has become entitled, he can claim mesne profits only from date of filing suit. (Vol 11) 1924 Pat 780 (781).

[12] Husband of donee, who was plaintiff's natural guardian, obtaining possession by untrue representation in application for mutation of names that his wife had died childless — Mesne profits held rightly decreed from date of his wife's death, and not limited to three years before suit. (1906) 33 Cal 23 (28) : 32 Ind App 181 (PC).

6. Principles relating to assessment. — [1] Mesne profits are in the nature of damages which the Court may award according to the justice of the case. (1900) 27 Cal 951 (967) : 27 Ind App 110 (P C) * (Vol 8) 1921 Cal 863 (865) * (Vol 12) 1925 Mad 297 (297) * (Vol 16) 1929 Oudh 55 (56).

[2] The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. (Vol 3) 1916 Mad 14 (17).

[3] Court may, having regard to circumstances of case, decline to award any mesne profits at all; or limit the period for which such profits are to be awarded; or give specific directions as to how the same should be calculated. (Vol 18) 1931 Mad 650 (651, 652) : 54 Mad 955 (F B) * (1866) 5 Suth W R 127 (128) (P C). (Court cannot give mesne profits more than claimed although greater amount may be proved.) * (1881) 6 Cal 472 (475). (Amount of mesne profits must be limited to the amount claimed in plaint.) * (1882) 8 Cal 295 (297). (Mesne profits cannot be limited to amount stated in plaint.) * (1883) 9 Cal 112 (115). (Plaintiff is not limited to the amount or rate stated in the plaint.) * (1880) 5 Cal 563 (565). (Decree silent as to date up to which profits are to be reckoned — Profits are to be reckoned only up to institution of suit.) * (1871) 6 Beng L R (App) 70 (72) (FB). (No evidence as to mesne profits given — Mesne profits not allowed.)

[4] Mesne profits should be calculated on the basis of what the trespasser actually received or might without wilful default have received. (1894) 21 Cal 142 (148, 149) : 20 Ind App 160 (P C) * (Vol 21) 1934 All 465 (469) * (Vol 17) 1930 Cal 308 (310) * (Vol 14) 1927 Cal 182 (185) : 53 Cal 992 * (Vol 10) 1923 Bom 37 (38, 39) * (1882) 8 Cal 332 (335, 336) : 9 Ind App 1 (P C) * (1911) 15 Cal W N 825 (829) * (1884) 10 Cal 785 (791) : 11 Ind App 88 (P C) * (1900) 27 Cal 951 (969) : 27 Ind App 110 (P C) * (1913) 17 Cal W N 984 (987) * (Vol 6) 1919 Cal 917 (918) * (1865) 3 Suth W R 80 (80) * (1912) 15

Ind Cas 1 (2) (Cal) * (Vol 12) 1925 Mad 297 (297, 299) * (1912) 16 Ind Cas 866 (867) (Oudh).

[See (Vol 20) 1933 Nag 222 (223). (It was not shown that defendant had received or should have received any profits before suit — Held that there was no cause of action for suit.)]

[5] The test is not what the plaintiff has lost by his exclusion but what the defendant has or might reasonably have made by his wrongful possession. (Vol 17) 1930 P C 82 (83) : 57 Ind App 105 : 9 Pat 621 (P C) * (Vol 18) 1929 P C 300 (301, 303) : 56 Ind App 290 : 57 Cal 1 (P C) * (Vol 30) 1943 Cal 125 (127). (Plaintiff must prove that more could be realised by reasonable diligence.) * (Vol 20) 1933 Nag 316 (318) : 30 Nag L R 71 * (Vol 18) 1931 Cal 802 (803) * (Vol 30) 1943 Pat 69 (70) : 21 Pat 735 * (Vol 16) 1929 Pat 530 (531).

[6] What the plaintiff might have made can only be evidence of what the trespasser might with reasonable diligence have received. (Vol 17) 1930 P C 82 (83) : 57 Ind App 105 : 9 Pat 621 (P C) * (Vol 30) 1943 Cal 125 (127) * (1908) 35 Cal 1000 (1006).

[7] The principles which would ordinarily guide a Court in determining the mesne profits are that wrongful possession should not be a source of profit to the wrongful possessor and that the person wrongfully kept out of possession is put in the same position financially as before dispossession. (Vol 4) 1917 Pat 421 (422).

[8] That trespasser left land waste is no defence to claim for mesne profits. (Vol 3) 1916 Mad 328 (330).

[See also (Vol 30) 1943 Cal 125 (127). (No evidence that lands could not be settled with tenants — Mesne profits held should be granted.)]

[9] Trespasser cultivating land must pay mesne profits to its owner on the basis of its produce. (Vol 13) 1926 Cal 847 (847) * (Vol 10) 1923 Nag 64 (1) (64) * (Vol 13) 1926 All 404 (404). (Future mesne profits include profits recovered after decree though relating to years prior to decree.)

[See also (1871) 16 Suth W R 171 (173). (The right of the true owner is to all profits of the land and not merely to cash collections during the time he is illegally kept out of possession.)]

[10] Defendant leasing land to third person — Mesne profits are to be calculated on what defendant actually received as rent unless he could have with ordinary diligence received more. (Vol 16) 1929 P C 300 (303) : 56 Ind App 290 : 57 Cal 1 (P C) * (Vol 22) 1935 P C 49 (50) : 62 Ind App 53 : 62 Cal 499 (PC). (Person in wrongful possession is not liable for failure to realise highest possible rates of rent and premium from tenants — It is enough if on taking account of both rent and premium, a fair return has been realised from land.) * (1912) 16 Cal L Jour 93 (95) * (1926) 44 Cal L Jour 559 (562) * (1902) 29 Cal 622 (625) * (Vol 13) 1926 Cal 1233 (1235) * (Vol 13) 1926 Cal 860 (861) * (Vol 14) 1927 Rang 116 (117) * (Vol 22) 1935 Cal 206 (207) : 62 Cal 217 * (1891) 18 Cal 99 (107) : 17 Ind App 90 (PC) * (1908) 25 All 266 (269).

[See also (1908) 35 Cal 1000. (1007). (If rent were customary and not competitive, it would not be a practical test for ascertaining the net profits.)]

[But see (Vol 11) 1924 Nag 427 (428) : 20 Nag L R 112 * (Vol 5) 1918 Nag 89 (89).]

[11] *Prima facie*, it is fair to infer that a person in possession of land may, by ordinary diligence, get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a loser by that amount. (1900) 27 Cal 951 (963) : 27 Ind App 110 (PC) * (Vol 20) 1933 Mad 825 (828) : 57 Mad 49.

[12] Trespasser leasing land to tenant — Produce actually received or might be received with ordinary

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diligence by tenant is measure of assessment of mesne profits. (Vol 18) 1931 Cal 802 (804).

[13] Defendants in wrongful possession but not proving that the land was being cultivated by previous tenants or that they could not cultivate—Mesne profits should be awarded on the basis that they were in khas possession. (Vol 15) 1928 Cal 474 (475).

[14] Zemindar illegally ejecting his tenant is liable not only for rents received but also for damages incurred by the tenant in consequence of ejectment. (1869) 12 Suth W R 104 (105) & (1871) 15 Suth W R 428 (428).

[15] Tenant holding over receiving premium from sub-tenant—Landlord can recover premium as mesne profits. (Vol 10) 1923 Bom 398 (398).

[16] Several trespassers—Decree for mesne profits may be passed jointly and severally against all or their respective liabilities may be ascertained and decree on basis of such several liabilities may be passed. (Vol 19) 1932 Cal 600 (617): 59 Cal 859 & (Vol 20) 1933 Cal 554 (558).

[See also (Vol 30) 1943 Pat 80 (81, 82). (Decree for mesne profits against co-sharer maliks though joint and several in form held decree against them for their proportionate share of mesne profits—Executing Court held could apportion liability of each judgment-debtor.) & (Vol 18) 1931 Cal 788 (789): 58 Cal 1040. (Apportionment of mesne profits is necessary where various sets of people are held liable for mesne profits.)

[17] Mesne profits—No conspiracy among defendants wrongfully dispossessing plaintiff—Liability of defendants for mesne profits is several—Wrongful combination between defendants dispossessing plaintiff—All are liable jointly and severally for mesne profits. (Vol 30) 1943 Cal 1 (8, 9): 1 I L R (1942) 2 Cal 268.

7. Deductions from gross profits.—[1] In calculating mesne profits, costs of cultivation incurred by trespasser should be deducted. (1901) 23 All 252 (256, 257) & (1908) 35 Cal 1000 (1007) & (1926) 44 Cal L Jour 559 (562, 563) & (1913) 24 Mad L Jour 30 (30, 31) & (Vol 8) 1921 Pat 102 (103): 6 Pat L Jour 166 & (Vol 6) 1919 Pat 392 (392): 4 Pat L Jour 801.

[2] In estimating mesne profits, Government revenue, rent or cesses should be deducted. (1894) 21 Cal 142 (148, 149): 20 Ind App 160 (P C). (Government revenue.) & (1909) 6 All L Jour 327 (330, 331). (Do.) & (Vol 4) 1917 Mad 79 (79) (Do.) & (1871) 16 Suth W R 171 (173) (Rent.) & (1893) 17 Bom 35 (39) & (Vol 11) 1924 Nag 427 (428): 20 Nag L R 112 & (1931) 1931 Mad W N 813 (815, 816). (Government assessment.) & (1875-77) 1 All 518 (521) (F B). (Government revenue or ground-rent.) & (1911) 21 Mad L Jour 965 (966). (Public taxes.)

[3] Expenses of collection can be deducted in calculating mesne profits. (Vol 22) 1935 P C 49 (52): 62 Cal 499: 62 Ind App 53 (P C).

[4] *Bona fide* claimant though found to be a trespasser is entitled to expenses incurred in getting profits. (Vol 8) 1921 Cal 363 (363).

[5] As to whether the expenses of collecting rent cannot be deducted unless the defendant entered upon the property under a *bona fide* claim of right, see the following cases:—(1898) 20 All 208 (210). (Expenses allowed if entry under *bona fide* claim of right.) & (1902) 24 All 376 (380). (Do.) & (1912) 22 Mad L Jour 253 (256, 257). (Do.) & (Vol 11) 1924 Nag 427 (428): 20 Nag L R 112. (Do.) & (Vol 16) 1929 Oudh 55 (56). (Do.) & (Vol 25) 1938 Cal 563 (568). (Even in case of wanton dispossession, collection of charges should be deducted from gross realizations—View expressed in above cases held overruled in (Vol 22) 1935 P C 49: 62 Ind App 53: 62 Cal 499 (P C).) & (Vol 24) 1937 All 328 (333). (No

deduction for collection charges should be allowed in case of gross and contemptuous trespass.)

[6] Charges involved by appointment of receiver should not be allowed. (1892) 15 Mad 203 (213).]

[7] No evidence as to actual amount spent for collection—Deduction of 10 per cent. is allowed. (Vol 22) 1935 P C 49 (52): 62 Ind App 53: 62 Cal 499 (P C) & (Vol 25) 1938 Cal 563 (568) & (1900) 27 Cal 951 (970): 27 Ind App 110 (P C) & (1912) 16 Ind Cas 866 (867) (Oudh).

[8] The increased rent that is properly attributable to the improvements can be set off against the mesne profits. (Vol 9) 1922 P C 91 (92, 93) (P C).

8. Onus of proof.—[1] It is incumbent on plaintiff, in order to establish claim for mesne profits, that he was entitled to possession during period for which mesne profits are claimed and that he was wrongfully kept out of possession by defendant for such period. (1874) 21 Suth W R 276 (276, 277) & (1912) 16 Cal W N 288 (289).

[2] The burden of proving the amount of mesne profits actually received is on the person receiving them; but as regards the amount of profits which might with ordinary diligence have been received by the person in occupation, the burden lies on person claiming it. (Vol 30) 1943 Pat 69 (71): 21 Pat 735 & (Vol 12) 1925 Mad 145 (148): 47 Mad 800 & (Vol 11) 1924 Nag 117 (118): 20 Nag L R 52 & (Vol 22) 1935 P C 49 (50): 62 Cal 499: 62 Ind App 53 (P C) & (Vol 30) 1943 Cal 125 (127) & (Vol 20) 1933 Mad 825 (828): 57 Mad 49.

[3] Burden is shifted to defendant if plaintiff proves *prima facie* that the profits were somewhere about the sum alleged. (Vol 11) 1924 Nag 117 (118): 20 Nag L R 52.

9. Interest forming part of mesne profits.—

[1] A plaintiff is entitled to interest on mesne profits as interest is a part of mesne profits. (Vol 30) 1943 Cal 1 (11): 1 I L R (1942) 2 Cal 268 & (1909) 31 All 551 (556): 36 Ind App 197: 13 Oudh Cas 180 (P C) & (Vol 8) 1921 Lah 234 (235) & (1910) 5 Ind Cas 529 (530) (All) & (Vol 15) 1928 All 532 (534): 50 All 857 & (Vol 27) 1940 Mad 934 (937) & (1903) 25 All 275 (276).

[2] Co-sharer kept out of possession is entitled to claim from his co-tenant interest on mesne profits. (Vol 16) 1929 Nag 291 (294).

[3] It is a matter entirely for the discretion of the Court, whether or not to allow interest on mesne profits. (1884) 10 Cal 785 (791): 11 Ind App 88 (P C) & (Vol 6) 1919 Cal 184 (186) & (Vol 24) 1937 P C 143 (145, 146): 64 Ind App 240: 16 Pat 382: 31 Sind L R 360 (P C) & (1900) 22 All 262 (265) & (Vol 13) 1926 Cal 1233 (1235) & (1900) 27 Cal 951 (969, 970): 27 Ind App 110 (P C) & (Vol 3) 1916 Mad 895 (896) & (Vol 18) 1931 Mad 513 (520). (Interest on mesne profits may be disallowed on special grounds.) & (Vol 8) 1921 Pat 430 (432).

[4] Executing Court cannot allow interest when decree is silent as to interest. (Vol 18) 1931 Mad 650 (652): 54 Mad 955 (F B). ((Vol 14) 1927 Mad 954 overruled.) & (1900) 22 All 262 (264) & (Vol 6) 1919 Cal 184 (186).

[But see (Vol 9) 1922 All 117 (118): 44 All 579.]

[5] Where the Court of first instance ascertains the amount of mesne profits, but does not award interest, the Appellate Court is not competent to award interest. (1910) 8 Mad L Tim 356 (356).

[6] Delay in filing suit for mesne profits is no ground for disallowing interest claimed. (Vol 27) 1940 Mad 934 (937).

[7] Since mesne profits are due from the moment possession is wrongfully withheld, interest is to be calculated from the date when each instalment of mesne profits is due. (1908) 25 All 275 (276).

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[8] When profits are earned or might have been earned by the wrongdoer yearly, interest on those profits must be calculated yearly and year by year. (Vol 25) 1938 Cal 563 (569) * (1903) 30 Cal 506 (507).

[9] Rate of interest depends on variety of circumstances, but in absence of special circumstances six per cent. is fair rate. (Vol 24) 1937 P C 143 (146) : 64 Ind App 240 : 16 Pat 382 : 31 Sind L R 360 (P C) * (Vol 22) 1935 P C 49 (52) : 62 Cal 499 : 62 Ind App 53 (P C) * (Vol 30) 1943 Cal 1 (11) : I L R (1942) 2 Cal 268 * (Vol 8) 1921 Cal 699 (706, 707). (Rate may be mitigated in cases of *bona fide* trespasser.) * (Vol 25) 1938 Cal 563 (568, 569).

[10] In absence of special contract or statutory provision, interest at higher rate up to date of delivery of possession and at lower rate thereafter cannot be granted. (Vol 24) 1937 P C 143 (146) : 64 Ind App 240 : 16 Pat 382 : 31 Sind L R 360 (P C) * (Vol 25) 1938 Cal 563 (568, 569).

[11] The decree-holder is entitled to interest up to date of realisation of mesne profits. (Vol 11) 1942 Pat 781 (783) : 4 Pat 57.

[12] Preliminary decree awarding mesne profits — But amount ascertained subsequently — Interest should be calculated from date of preliminary decree. (Vol 11) 1924 All 801 (802) : 46 All 842.

10. Value of mesne profits, if affects jurisdiction. — [1] Court's jurisdiction is not ousted where mesne profits allowable under O. 20, R. 12 (2) exceed its jurisdiction. (Vol 12) 1925 Cal 1076 (1081, 1082, 1083) : 53 Cal 14 (F B) * (1894) 21 Cal 550 (552) * (1913) 40 Cal 56 (63) * (Vol 8) 1921 Pat 118 (119, 120) : 6 Pat L Jour 54 * (Vol 8) 1921 Pat 430 (431) * (Vol 4) 1917 Pat 334 (335) : 2 Pat L Jour 394.

See also S. 6, Note 2.

[2] Person deliberately undervaluing mesne profits accruing before institution of suit, to make it untenable by Munsif's Court — He cannot claim greater amount exceeding pecuniary jurisdiction of Court. (Vol 24) 1937 Cal 761 (762) : I L R (1937) 2 Cal 176.

11. Right to apply for ascertainment of mesne profits when arises. — [1] The right to apply for ascertainment of mesne profits will arise either when the delivery of possession is actually given or three years expire from the date of the preliminary decree. (Vol 11) 1924 Pat 781 (782) : 4 Pat 57 * (Vol 2) 1915 Cal 696 (698) * (Vol 20) 1933 Pat 81 (83) : 12 Pat 188.

[2] Decree for possession made conditional on payment of money — Decree-holder is not entitled to mesne profits until such payment is made. (Vol 13) 1926 Pat 218 (224) : 5 Pat 861 (F B) * (Vol 22) 1935 All 206 (206, 207).

12. Decree silent as to future mesne profits. —

[1] Where possession is decreed the plaintiff is entitled to a further decree for mesne profits. (Vol 7) 1920 All 823 (828) : 42 All 497 * (1882) 8 Cal 178 (191) : 8 Ind App 197 (P C).

[2] Right to future mesne profits negated in preliminary decree — Court cannot award same in final decree. (Vol 10) 1923 Mad 43 (43).

[3] Right to mesne profits found in judgment — No direction in decree — Assessment of mesne profits in decree was allowed. (Vol 16) 1929 Cal 719 (720) * (Vol 30) 1943 Cal 1 (4, 5) : I L R (1942) 2 Cal 268 * (Vol 17) 1930 Mad 80 (32) : 53 Mad 888. (Unqualified decree must be construed to have granted past and subsequent profits.) * (Vol 10) 1923 Mad 43 (45). (No direction in the preliminary decree about mesne profits due to inadvertence — Final decree can provide therefor.)

[4] Decree for possession — No direction given about future mesne profits — Remedy of decree-holder is by

separate suit. (Vol 5) 1918 Mad 484 (487) : 41 Mad 188 (F B) * (Vol 32) 1945 Mad 222 (222).

[5] Decree silent as to future mesne profits — Subsequent suit for such profits is not barred by *res judicata*. (Vol 25) 1938 Bom 231 (232) : I L R (1938) Bom 655 (F B). ((Vol 7) 1920 Bom 39 overruled.) * (1899) 21 All 425 (433) (F B). (1884 All W N 159 overruled.) * (1868) 10 Suth W R 486 (486) * (Vol 18) 1931 Pat 1 (10, 12) * (1899) 9 Mad L Jour 163 (164) * (Vol 18) 1931 Cal 788 (789) : 58 Cal 1040 * (1905) 32 Cal 118 (122) * (Vol 5) 1918 All 412 (413) : 40 All 292 * (Vol 19) 1932 Bom 222 (223) : 56 Bom 292.

13. Court-fees. — See S. 11, Court-fees Act.

14. Notice of relinquishment — Clause (c). —

[1] Clause (c) indicates the *prima facie* liability of a defendant in possession of immovable property — Such person is liable until possession is relinquished or delivered to the decree-holder. (Vol 23) 1936 Mad 137 (137).

[2] Mesne profits — Possession surrendered in time to enable plaintiff to cultivate — Defendant would not be liable for mesne profits. (Vol 9) 1916 Mad 895 (895, 896).

[3] Relinquishment of possession by judgment-debtor with notice to decree-holder through Court absolves him from further liability in respect of future mesne profits. (Vol 8) 1921 Cal 699 (706).

[4] When a decree directs mesne profits from the date of the delivery of possession the mere filing of a petition by the defendant asking the plaintiff to take possession without notice to him is not a delivery of possession. (1911) 2 Mad W N 258 (259).

[5] Notice of relinquishment given at a time when it was too late for cultivation — Notice held was not sufficient to absolve defendant from liability. (Vol 3) 1916 Mad 895 (895, 896).

15. Three years from date of decree. — [1] Decree-holder is entitled to mesne profits from institution of suit until expiration of three years from the date of decree — The judgment of the first Court cannot be regarded final when Appellate Court might modify or reverse it — The date of appellate order must be regarded as date of decree. (1903) 30 Cal 664 (664, 665) (F B) * (Vol 17) 1930 Cal 808 (810).

[2] Appeal to Privy Council — Mesne profits have to be calculated for three years from date of Privy Council decree. (1901) 23 All 152 (158) : 27 Ind App 209 (P C) * (Vol 5) 1918 Pat 280 (280) : 3 Pat L Jour 118.

[3] The wording "whichever event occurs first" restricts the recovery of profits to three years from the date of decree if that event occurred before delivery of possession. (1908) 85 Cal 1017 (1020).

[4] In the absence of a period for the calculation of mesne profits in a decree awarding mesne profits, the decree should be construed as awarding mesne profits for three years. (Vol 2) 1915 Mad 226 (227) * (1900) 24 Bom 149 (153).

[5] Decree directing mesne profits but not specifying period — Mesne profits should be awarded till delivery of possession. (1912) 16 Ind Cas 866 (867) (Oudh) * (1869) 12 Suth W R 75 (75) * (1897) 19 All 296 (299).

[6] Award of mesne profits from trial Court's decree to recovery of possession does not contravene R. 12. (Vol 12) 1925 P C 113 (113) (P C) * (1900) 24 Bom 345 (349, 350) * (Vol 30) 1943 Mad 354 (355). (Decree for mesne profits till delivery of possession means subject to period of three years.) * (Vol 29) 1942 Sind 60 (62) : I L R (1941) Kar 563.

16. Limitation. — See Arts. 109 and 181, Limitation Act.

17. Appeal and revision. — [1] Order for future mesne profits under R. 12 (1) (a) — No final decree

13. (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

[1882—S. 213; 1877—S. 213.]

14. (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall —

(a) specify a day on or before which the purchase-money shall be so paid,³ and

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drawn up under Rule 12 (3) — Order is not appealable — Appeal should be against final decree. (Vol 29) 1942 Sind 60 (61, 62) : I L R (1941) Kar 563 (Vol 12) 1925 All 588 (589) : 47 All 543 (1912) 13 Ind Cas 186 (186) (Cal) (Vol 15) 1928 Bom 236 (237) : 52 Bom 360 (1910) 11 Cal L Jour 501 (502) (Vol 15) 1928 Pat 565 (566) : 7 Pat 491. (Reversed in 1931 P C 209 : 58 Ind App 299 : 11 Pat 22 on another point.) (Vol 19) 1932 Oudh 271 (272).

[2] Appellate Court finding party entitled to possession must itself pass preliminary decree for possession with direction to inquire into mesne profits and not remand case. (Vol 9) 1922 Mad 112 (114) : 45 Mad 449.

[3] Appellate Court directing Court of first instance to inquire into mesne profits — Court of first instances should fix date for appearance of parties after receipt of record — If decree-holder fails to appear Court should not pass final decree but adjourn matter *sine die*. (Vol 27) 1940 Mad 124 (126, 127) : I L R (1940) Mad 372 (FB). (Case decided with reference to Madras amendment to this rule.)

[4] Joint and several decree for mesne profits against several defendants — Appeal for enhancement of mesne profits against some defendants only is not tenable. (Vol 19) 1932 Pat 327 (328) : 11 Pat 538.

[5] Decision as to maintainability of claim for mesne profits is not 'case decided' within S. 115. (Vol 19) 1932 Oudh 271 (272).

Order 20, Rule 13—Note 1.

[1] Debtor asking another to administer estate for liquidating his liabilities — Decree based on composition deed is not administration decree and binds only parties to it. (Vol 22) 1935 Pesh 63 (64.)

[2] Main purpose of suit to determine as to who is rightful heir of deceased — Such suit is not administration suit. (Vol 27) 1940 Lah 179 (180.)

[3] Administration suit — Creditor obtaining preliminary decree is entitled to order, against another decree-holder attaching property of deceased judgment-debtor, staying all proceedings taken by him and restraining him from executing his decree — Court is entitled to pass appropriate orders to safeguard interest of all creditors — Such orders cannot be strictly called injunction orders — Recourse to provisions of S. 151 is not necessary. (Vol 26) 1939 Mad 204 (207 208). (Although suit is filed only by one creditor, decree enures for benefit of

all creditors of deceased — No creditor stands in better position than another unless he holds vested interest in property.

[4] Administration suit — Court can demand security for due performance of funeral rights and expenditure of money allotted for it. (Vol 1) 1914 Oudh 1 (17).

[5] In a suit for the administration of a Mahomedan estate, the Court is entitled to retain in its hands the amount of any debt ascertained or subject to account though time-barred, due to the estate from any heir and the person who seeks administration must prove such a debt. (1912) 6 Low Bur Rul 34 (37).

[6] Suit for administration — Court after preliminary decree making order determining dispute but refusing to frame final decree — Such order amounts to final decree to that extent and is appealable — Contents of final decree in such suit are nowhere stated — Form in Civil Procedure Code can be varied and adopted. (Vol 23) 1936 Lah 879 (882, 883).

[7] Administration suit in Rangoon High Court — Change in form of preliminary decree was recommended. (Vol 12) 1925 P C 261 (262) (PC).

[8] Administration suit — Receiver appointed — Property does not automatically vest in him — Suit by one creditor — Decree is in favour of all — Another creditor obtaining separate decree and proceeding in execution — Court passing preliminary decree in administration suit may either stay execution proceedings or call them and include in administration proceedings. (Vol 30) 1943 Bom 273 (275, 276).

[9] In the administration of an estate under a decree of Court, the same rules have to be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, as are in force in respect to estates of insolvents. When the administration is under a decree of the High Court under S. 49, Presidency Towns Insolvency Act, all debts due to the Crown shall be paid in priority to all other debts. (Vol 6) 1919 Cal 908 (912) : 45 Cal 653.

[10] Order 20, R. 13 does not apply where the Administrator-General has obtained letters of administration of the estate of a deceased insolvent. (Vol 1) 1914 Mad 281 (282) : 38 Mad 500.

[11] Preliminary decree reversed on ground of want of jurisdiction — Remedy is by revision. (Vol 26) 1939 Bom 485 (485) : I L R (1939) Bom 472.

ORDER 20, RULE 14 — SYNOPSIS.

1. Pre-emption.
2. Pre-emption under Mahomedan law.

(b) direct that on payment into Court⁶ of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued⁵ from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct, —

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

[1882—S. 214; 1877—S. 214.]

Objects and Reasons.

"These amendments [*i. e.*, incorporated in sub-rule (2)] are based on the rulings contained in the decisions of the High Court of Allahabad in I. L. R. 6 All. 370, 455 and I. L. R. 11 All. 164.

Having regard to the opinion expressed in I. L. R. 24

Mad. 449 at page 463, we have thought it right to make it clear that title vests without an instrument of transfer. To require a transfer now might throw a cloud over numberless titles which rest on the assumption sanctioned by long practice that no instrument of transfer was necessary."—S. O. R.

O. 20 R. 14 (*contd.*)

3. Shall specify a day before which purchase money shall be paid.
4. Extension of time.
5. Plaintiff's title when accrues.
6. Payment into Court.
7. Tender of money if sufficient.
8. Right to rents and profits.
9. Set-off of costs against purchase-money.
- 9a. Rival pre-emptors.
10. Appeal.

1 Pre-emption. — [1] Acquiescence in mortgage by conditional sale is not relinquishment of right of pre-emption upon conditional sale becoming absolute. (1889) 11 All 164 (174).

[2] Where a co-proprietor does not part with his entire interest by an absolute sale, but merely creates a perpetual lease of it, the doctrine of pre-emption will not apply. (1888) 15 Cal 184 (186).

[3] The decree-holder in a pre-emption suit sold the property to a stranger subsequent to the date of the decree. By such transfer he is not debarred from obtaining possession of the property in execution of the decree. (1885) 7 All 107 (111, 112).

[4] Every suit for pre-emption must include whole of the property subject to pre-emption, conveyed by one transfer and when there are rival suits, Court should determine which should succeed, and if more than one suit succeed, what extent of the property transferred is to be decreed in such suit. (1884) 6 All 455 (456).

2. Pre-emption under Mahomedan law. — [1] Under Mahomedan law the rule is that if a sharer alienates his interest to a cosharer and a stranger, the purchasing sharer by joining an outsider in the purchase forfeits his rights as a sharer and another cosharer has a right of pre-emption. (1888) 15 Cal 224 (226).

[2] Under the doctrine of the Mahomedan law of pre-emption, if a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger who has no such right, he forfeits his right to pre-empt. (1883) 5 All 197 (200, 201).

3. Shall specify a day before which purchase-money shall be paid. — [1] Date of payment of pre-emption money must be specified in the decree. (Vol 13) 1926 All 158 (158).

[2] Pre-emption decree is one for possession — Pre-emptor should pay incumbrances paid by vendee — (Vol 11) 1924 Oudh 1 (1, 6).

4. Extension of time. — [1] Order 20, R. 14 is precise. The Court should state in the decree that if the pre-emptive price is not paid on or before the day fixed the suit shall stand dismissed with costs. (1896) 18 All 228 (226) (S B).

[2] When a decree is passed by a Court that the plaintiff should deposit the sum within a specified time, the Court has no power to extend the time for payment after the time mentioned in the decree has elapsed. (1891) 13 All 400 (408) & (Vol 11) 1924 Lah 359 (359). (Failure to deposit even costs in time cannot be excused.) & (Vol 26) 1939 Nag 107 (109) & (Vol 21) 1934 Oudh 17 (17, 18) : 9 Luck 215 & (1913) 16 Oudh Cas 5 (6) & (1910) 13 Oudh Cas 28 (30, 31).

[But see (Vol 3) 1916 Pat 268 (269): 1 Pat L Jour 92.]

[3] Pre-emption—Pre-emptor prevented from depositing money within time by reason of last day of period allowed to him being holiday—Deposit on next opening day of Court is sufficient. (Vol 18) 1931 Lah 888 (889) & (Vol 11) 1924 All 218 (219): 46 All 228 (FB). (Overruling (Vol 9) 1922 All 278 and (Vol 5) 1918 All 13:41 All 47.) & (1881) 3 All 850 (851) & (Vol 18) 1931 Lah 386 (387).

[4] The preferring of an appeal from a pre-emption decree does not extend time for paying pre-emptive price in Court. (Vol 20) 1933 All 113 (114) & (Vol 26) 1939 Nag 107 (109). (Mere fact that the plaintiff files an appeal and executes a security bond does not extend time.)

[5] In a pre-emption suit the appellate Court can on an application made within time fixed for payment of pre-emption money extend time fixed by trial Court for making deposit of purchase money. (Vol 27) 1940 Nag 202 (202, 203) : I.L.R. (1940) Nag 157 & (Vol 10) 1923 All 516 (517) : 45 All 456. (Time expiring in vacation—Deposit was allowed to be made on reopening day.) & (1878-80) 2 All 744 (745) & (1896) 18 All 228 (226) (SB).

O. 20 R. 14 (contd.)

[6] Plaintiff in pre-emption suit does not lose his right of pre-emption for failure to make deposit within time allowed by decree so long as he has a right to question the correctness of the amount made payable by the trial Court by means of an appeal against it. (Vol 19) 1932 Oudh 63 (66) : 7 Luck 550.

[7] Decree in pre-emption suit — Omission to state the effect on plaintiff's suit, of non-payment of purchase money within prescribed period — It was held that plaintiff could enforce his decree for pre-emption, only if pre-emptive price was deposited before the time given in the decree. (1892) 14 All 529 (531).

[8] In an appeal by the vendee, the pre-emptor was directed by the Appellate Court to pay into Court an extra sum within the time fixed by the original Court. The pre-emptor had twelve days after the date of this order within which the amount could be paid into Court, but he failed — *Held*, that the decree became final and that his suit must be dismissed. (Vol 5) 1918 Lah 165 (166).

5. Plaintiff's title when accrues. — [1] Pre-emptor depositing amount in Court becomes entitled to land from date of such payment. (Vol 20) 1933 Lah 791 (791, 792) * (Vol 16) 1929 All 237 (238). (Registration is not necessary.) * (Vol 29) 1942 Lah 243 (249) * (Vol 17) 1930 Lah 273 (276, 277) : 11 Lah 128 (F B). (1903 Pun Re No. 25, overruled.) * (Vol 12) 1925 Lah 202 (203) : 5 Lah 486.

[2] Decree of claim of pre-emption — Court should direct that on payment of purchase money, possession of property must be given by defendant — If property is in possession of mortgagees, pre-emptor merely pre-empt equity of redemption — On payment of money, he need not execute decree for possession. (Vol 22) 1935 Lah 523 (525) : 16 Lah 1065.

[3] Pre-emption decree for possession silent as to standing crops — The decree-holder is entitled to them on paying money into Court. (Vol 10) 1923 Nag 327 (329).

[4] Pre-emption — Possession with mortgagees — Deposit of price in Court will give complete title to pre-emptor — Not taking out execution for possession will not bar his rights. (Vol 10) 1923 All 507 (508) : 45 All 482.

6. Payment into Court. — [1] Pre-emption decree directing plaintiff to deposit money within certain period — Payment out of Court certified by vendee is enough. (Vol 8) 1921 All 159 (160).

[2] Failure to deposit money by mistake — Judgment-debtor can claim restitution of possession. (Vol 10) 1923 Lah 250 (251).

[3] A pre-emptor who has not deposited the full amount by mistake within time, will not be allowed to make up the deficiency, and the vendee may compel the pre-emptor to give up possession of the property if it had been taken possession of, by the latter in execution of his decree. Section 151, Civil P. C., is not applicable to such a case. (1913) 1913 Pun L R No. 141, p. 485 (487).

[4] Pre-emption — Decree for — Full amount not deposited — Suit stands dismissed. (Vol 11) 1924 Lah 384 (384).

[5] Pre-emption — Decree conditional on payment into Court of pre-emption money — Amount raised by mortgage of decreed property — There is sufficient compliance with terms of decree. (Vol 4) 1917 All 156 (157).

[6] Under O. 20, R. 14 the pre-emptor cannot enforce his decree without depositing not only the purchase

money but also the costs (if any) decreed against him. (1884) 6 All 351 (353).

[7] No direction in decree to plaintiffs to pay costs — Costs awarded to defendant by separate order — Defendant cannot claim payment of costs within time allotted by decree. (Vol 11) 1924 Oudh 104 (105) : 26 Oudh Cas 345.

[8] Decree in pre-emption suit — Decree fixing price to be paid, and allowing costs to be deducted — Payment of decree amount after deducting costs — Appellate Court raising the price to be paid and reversing order as to costs — Payment of difference without costs previously recovered, is sufficient compliance with the appellate decree. (1910) 1910 Pun L R No. 133, p. 366 (368) : 1910 Pun Re No 56.

[9] A compromise decree having been given in a pre-emption suit requiring the plaintiff to hand over to the defendant certain land within a certain period, held that the decree could not, in the first place, be a decree in a pre-emption suit under R. 14, O. 20 and that the plaintiff's action in ceasing to cultivate the land before the expiration of the prescribed period with a view to giving possession to the defendant is a sufficient compliance with the decree, even if it was a decree in a pre-emption suit. (Vol 4) 1917 Lah 400 (401).

[10] Conditional pre-emption decree — Deposit by one co-plaintiff whose claim was dismissed, on behalf of both — *Held* successful plaintiff was rightly given credit for that amount. (Vol 4) 1917 Lah 121 (122).

7. Tender of money if sufficient. — [1] Money though tendered on the last day fixed was not deposited on that day but on the next reopening day as there were two holidays intervening, through a mistake of the Court or its officers — *Held*, that the tender within the specified time should be deemed as a due compliance with the terms of the decree and the pre-emptor is entitled to execute it. (Vol 3) 1916 Lah 77 (77, 78). (Following 1880 Pun Re No. 31.)

[2] Where an application for payment of pre-emption money was made on the last day and the Court permitted the money to be accepted, but the money could not be deposited until after the expiry of the period fixed owing to the laxity of Court — *Held*, that the deposit of money was good, as the party could not be prejudiced by an error of the Court. (Vol 2) 1915 Oudh 171 (172).

[3] Pre-emption — Decree — Tender of pre-emption money made in time but money not actually deposited, officer of Court being too busy — Tender is sufficient. (Vol 18) 1931 Lah 388 (389).

8. Right to rents and profits. — [1] Under a pre-emption decree the right to possession of the property and the consequential right to mesne profits accrue to the pre-emptor only from the date when he pays the amount of purchase price finally declared by the Court — Till then the original purchaser retains possession and is entitled to the rents and profits. (Vol 3) 1916 P C 179 (181) : 44 Cal 675 : 44 Ind App 80 (PC).

[2] Agra Pre-emption Act (11 of 1922), S. 24 — Vendee is entitled to rents and profits for period between sale and deposit of pre-emption money by pre-emptor. (Vol 31) 1944 All 255 (256) : 1 L R (1944) All 499.

9. Set-off of costs against purchase money. — [1] The rule makes no provision to meet cases where costs, instead of being awarded against the pre-emptor, are awarded in his favour by the decree. The rule does not authorize the pre-emptor decree-holder in depositing the purchase money to set off the amount due to him from the judgment-debtor for the costs. But under the doctrine of equitable set-off he is entitled to deduct the costs while depositing the purchase money. (1884) 6

15. Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

[1882—S. 215; 1877—S. 215.]

O. 20 R. 14 (*contd.*)

All 351 (353)* (Vol 20) 1933 All 113 (114)* (Vol 9) 1922 Lah 142 (143) : 2 Lah 294.

[2] Decree in pre-emption suit not directing plaintiff to deposit defendant's costs — Plaintiff depositing pre-emption money within period fixed by Court after deducting costs awarded to him but without giving credit for defendant's costs—Plaintiff having complied with terms of decree is entitled to pre-emption — His right is not lost by his failure to give credit for defendant's costs. (Vol 26) 1939 All 228 (230) : 1 L R (1939) All 261. (Reversing (Vol 24) 1937 All 756.)

9a. Rival pre-emptors.—[1] (Per *Sulaiman, J.*)—Joint decree does not pass title to all joint decree-holders even if one pays amount—Rights of decree-holders will have to be determined in case dispute arises—(*Boys, J.*, contra). (Vol 16) 1929 All 953 (954, 956) : 51 All 998.

10. Appeal.—[1] A plaintiff who has obtained a decree for pre-emption conditional on his paying a certain sum within a certain period, could after the period has expired, appeal against such decree, alleging that the decree does not contain a condition of the contract of which their right to pre-empt arose. (1894) 16 All 126 (128).

[2] Order refusing to extend time in pre-emption decree is not appealable. (Vol 7) 1920 Lah 88 (89).

[3] An order passed on an application for payment of the pre-emption money in compliance with a decree under O. 20, R. 14 is not appealable under S. 47 as it is not an order relating to execution, discharge or satisfaction. (1882) 4 All 420 (422).

[See (Vol 16) 1929 All 953 (954) : 51 All 998. (Deposit of the pre-emption money within time fixed by the Court is neither proceeding in execution of decree nor step-in-aid of it.)]

[4] A decree in a pre-emption suit, with a condition that unless the purchase money is paid within time fixed therefor the suit shall stand dismissed, is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred. (Vol 7) 1920 Oudh 25 (26, 27) : 23 Oudh Cas 254. (Dissenting from (Vol 1) 1914 Oudh 147 : 17 Oudh Cas 14.)

ORDER 20, RULE 15 — SYNOPSIS.

1. Scope.

2. Accounts.

1. Scope.—[1] Court has discretion to pass a preliminary decree, but a preliminary decree ought not to be passed for determining points already agreed upon by the parties. (Vol 1) 1914 Oudh 399 (404) : 17 Oudh Cas 193.

[2] Preliminary decree directing taking of partnership account is one for payment of money. (Vol 16) 1929 Mad 641 (643) : 52 Mad 563 (F B).

[3] A firm is incapable of becoming, as a firm, a partner in another firm, but once a declaration of partners has been made under O. 30, R. 2 a suit for dissolution can proceed though the plaintiffs had in the first instance described themselves as a firm. (Vol 23) 1936 Lah 78 (79).

[4] Fixing date of dissolution of partnership is matter of judicial and not arbitrary discretion — Ordinarily date of notice if any or of plaint should be the date and not the date of judgment. (Vol 5) 1918 Mad 264 (264).

[5] Preliminary decree for partition — Directions given to official commissioner are not decree and hence not appealable. (Vol 15) 1928 Sind 100 (101) : 23 Sind L R 87.

[6] Appointment of Official Receiver, if likely to prejudice the business, should not be made. (Vol 14) 1927 Rang 139 (139) : 5 Rang 99.

[7] Suit for dissolution of partnership and accounts — Court after passing preliminary decree but before final decree ordering commissioner to credit plaintiff with certain sum—Order is not supplementary preliminary decree but interlocutory order. (Vol 27) 1940 Pat 204 (208) : 19 Pat 1.

[8] Direction in final decree leaving distribution of assets undisposed of is in essence preliminary decree and decree is partly final and partly preliminary—Civil P. C., S. 2 (2). (Vol 17) 1930 Mad 528 (530, 531) : 53 Mad 378.

[9] Proceedings between preliminary decree and final decree are continuation of suit for carrying out directions in the preliminary decree. (Vol 17) 1930 Mad 528 (533) : 53 Mad 378.

2. Accounts.—[1] After passing the preliminary decree in a suit for dissolution of partnership and accounts, Court has jurisdiction to order that account should be taken on a certain basis because such order is about the mode of taking account. (Vol 27) 1940 Pat 204 (209) : 19 Pat 1.

[2] Personal representative of deceased partner is bound to give account of what has been received on behalf of partnership — Liability extends to assets received. (Vol 5) 1918 All 288 (289) : 40 All 446.

[3] For the purpose of working out a partnership decree each party to the action is bound to produce and discover all documents in his possession relating to the partnership. Accounts taken by a Commissioner appointed for that purpose, without production or discovery of partnership books and documents are not properly taken. (Vol 1) 1914 P C 33 (33) (P C).

[4] In a suit for dissolution of a partnership and for accounts, sufficient time should be given to the parties to produce accounts. A final decree should be passed on evidence by the Court. It will not do to pass an *ex parte* final decree on the mere statements of the plaintiffs. (Vol 5) 1918 Lah 166 (168, 169).

[5] A commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners. (Vol 24) 1937 Bom 81 (89).

[6] It is no doubt desirable that the Court passing a preliminary decree for taking of accounts should decide who is to be the accounting party. But it is open to the Court to give instructions at any time to facilitate and regularise the taking of accounts. (Vol 23) 1936 Lah 78 (80).

16. In a suit for an account of pecuniary transactions between a principal and an agent, and *Decree in suit for account between principal and agent.* in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

[1882—S. 215A.]

17. The Court may either by the decree directing an account to be taken or by any subsequent *Special directions as to accounts.* order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima*

ORDER 20 RULE 16 — SYNOPSIS.

1. Scope of the rule.

2. "Shall . . . pass a preliminary decree."

1. Scope of the rule.—[1] Rule 16 is not restricted to suit for account between principal and agent but it is wider. (Vol 8) 1921 Sind 42 (43) : 15 Sind L R 16.

[2] Suit for dissolution of partnership—Rendition of accounts can be directed only where that relief alone would enable claimant to satisfactorily assert his legal right. (Vol 6) 1919 Lah 217 (218).

[3] Rule 16 does not only apply to a suit for an account between principal and agent, but words used in the rule are wide and apply to all cases where Court, instead of settling account itself considers it necessary to stay its hand in order to ascertain amount of money due to or from any party by having an account taken before a commissioner. (Vol 24) 1937 All 276 (278)* (Vol 4) 1917 All 431 (431).

[4] Purpose of preliminary decree is merely to ascertain whether defendant is liable to account to plaintiff. Objection to particular item should be taken when question as to accounts is tried. (Vol 13) 1926 Nag 393 (396).

[5] Preliminary judgment need not be detailed and exhaustive. (Vol 18) 1931 Cal 358 (359).

[6] Agreement by A to collect dues of C and pay to B — Suit by A for rendition of accounts is not incompetent. (Vol 16) 1929 Lah 182 (184).

2. "Shall . . . pass a preliminary decree."—[1] Relationship between plaintiff and defendant established which makes the latter accountable to the former. Court should pass preliminary decree directing an account to be taken of the transactions between parties. (1887) 14 Cal 147 (154)* (1905) 27 All 374 (377)* (1881) 7 Cal 654 (656).

[2] Defendant must be liable to account—Mere convenience cannot make party liable to account. (Vol 16) 1929 Cal 418 (421).

[3] It is not necessary to pass a preliminary decree directing accounts to be taken in every suit for accounts. It is only where it is necessary in order to ascertain the amount of money due to or from any parties, that an account should be taken that the Court shall before passing the final decree, pass a preliminary decree directing such account to be taken as it thinks fit. (Vol 3) 1916 Cal 244 (245)* (Vol 17) 1930 Mad 721 (722) : 53 Mad 475.

[4] Passing of preliminary decree is not necessary if facts are simple so as to afford ready decision. (Vol 27) 1940 Nag 207 (208) : I L R (1940) Nag 569.

[5] Suit under S. 92 for accounts — Decree passed after framing issues and taking evidence — Fact that preliminary decree under O. 20, R. 16 was not passed does not make the decree illegal if nobody is prejudiced by the procedure. (Vol 15) 1928 Nag 299 (300).

[6] Suit for accounts — Judge finding that account has to be rendered by defendant—Judge should pass preliminary decree under this rule with special directions, if necessary. (1942) 1942 Nag L Jour 355 (363, 364) * (Vol 31) 1944 Nag 7 (14) : ILR (1944) Nag 63.

[7] The proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and are not proceedings in execution. (Vol 24) 1937 P C 163 (164) : 64 Ind App 191 : 31 Sind L R 367 : I L R (1937) Lah 502 (P C) * (Vol 18) 1931 Lah 268 (269).

[8] Preliminary decree directing defendant to bear costs — Ordinarily the decree for costs is not made till the stage of final decree. But as the amount of costs is specified in the body of the preliminary decree itself, actual assessment of costs need not be postponed till the stage of final decree. (Vol 21) 1934 Pat 146 (147).

[9] Judgment-debtor can discharge liability to render accounts by showing that he has paid or accounted for money that have come into his hands, and for which he is accountable, and plaintiff may show that defendant has not complied with terms of decree. (1871) 15 Suth W R 260 (260, 261).

[10] Once the rights and liabilities are fixed in preliminary decree, they cannot be varied by the Judge in proceedings taken thereafter. (Vol 31) 1944 Sind 73 (77) : I L R (1943) Kar 429.

[11] Accounts — Suit for — Question as to which of defendants is accounting party should be decided at time of passing preliminary decree. (Vol 20) 1933 Lah 891 (891).

[12] Commissioner to determine the quantum and not the factum of liability of an agent which is for the determination of the Court only. (Vol 12) 1925 Cal 1069 (1072) : 52 Cal 766 * (Vol 16) 1929 Cal 418 (422).

[13] If a partner has books of account in his possession and will not produce them, an account may nevertheless be arrived at, by presuming everything against him. The principle applies in a case where accounts are to be taken between a financier who keeps accounts and his debtor-contractor. (Vol 31) 1944 Sind 73 (77) : I L R (1943) Kar 429.

[14] All accounts of agent in principal's possession—Machinery of Court to examine the accounts cannot be employed. (Vol 16) 1929 Cal 418 (421).

Order 20 Rule 17 — Note 1

[1] In a suit for accounts, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree. (Vol 23) 1936 P C 325 (329) (P C).

[2] Directions by the Court under O. 20, R. 17 with regard to the mode in which the account is to be taken or vouched will not, at least in redemption suits, amount to preliminary decrees. (Vol 21) 1934 Pat 97 (99).

facie evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

[R. S. C., O. 33, R. 9.]

Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, —

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

ORDER 20 RULE 18 — SYNOPSIS.

1. Scope.
2. Preliminary decree.
3. Final decree.

1. Scope.—[1] This rule governs suit for partition of joint family property consisting of land assessed to revenue. (Vol 6) 1919 All 140 (142) : 41 All 207.

[2] In cases of partition of properties assessed to land revenue, the Court cannot pass a final decree but only a decree declaring the shares of the parties and directing the Revenue Courts to give effect to its decree. (Vol 1) 1914 Oudh 332 (333).

[3] Decree not containing directions as required under O. 20, R. 18 (1)—Decree not corrected—Plaintiff cannot ask Court to transfer proceedings to Collector. (Vol 22) 1935 Sind 192 (192).

[4] Order decreeing partition of property assessed to Government revenue and referring it to Collector to carry out partition—Subsequent application by parties to send decree and papers to Collector is not in execution. (Vol 26) 1939 Bom 454 (455).

[5] Order 20, R. 18 contemplates judicial and not mere *ex parte* declaration in absence of interested parties and therefore Court must see that all persons interested in partition are before it. (Vol 27) 1940 All 399 (400, 401). (Necessary parties not impleaded—Appellate Court should remand case for addition of necessary parties.)

[6] Suit for partition of undivided share in revenue-paying and other property—Preliminary decree decreeing suit for possession of plaintiff's share in certain properties—Form of decree held not proper—Decree held should have provided for further action by revenue authorities in respect of revenue-paying property and further directions in respect of other property. (Vol 28) 1941 Oudh 383 (385) : 16 Luck 765.

[7] Plaintiff's share specified but undivided—Receiver can be appointed of entire property until partition by Collector. (Vol 29) 1942 Sind 60 (62) : 1 L R (1941) Kar 563.

[8] The partition of the estate is to be effected by the Collector or by his subordinate in accordance with the provisions of S. 54 read with O. 20 R. 18. If the Collector is unable or declines to effect the partition by metes and bounds on that footing, then and then only will the Court appoint a Commissioner to partition the same by metes and bounds. (Vol 27) 1940 Cal 33 (39).

[9] Before a Court passes a preliminary decree for partition of moveables, it must determine whether they exist, if so, in whose possession, what their value is, and

whether the jewels on the persons of the ladies of the family should be divided. (Vol 6) 1919 Oudh 208 (210).

[10] A preliminary decree for partition affects the severance of the members of a joint Hindu family and if a plaintiff in a partition suit dies issueless, after the passing of a preliminary decree, his proper legal representative is his widow. (Vol 2) 1915 Mad 1065 (1065).

[11] Courts can have regard to events occurring subsequent to date of institution of suit to settle rights between parties completely. (Vol 20) 1933 Sind 371 (374) : 27 Sind L R 411.

[12] Decree for partition of revenue paying lands—Application to send papers to Collector is not governed by Limitation Act, Art. 181 or 182. (Vol 32) 1945 Bom 338 (340, 341, 342) (F B).

[13] Decree covering agricultural and other land—Decree is final regarding former—Interim injunction as to it cannot be passed by Court. (Vol 12) 1925 Ind 357 (357).

2. Preliminary decree.—[1] A decree for joint possession cannot be construed as a preliminary decree for partition. (Vol 16) 1929 Oudh 117 (119).

[2] Preliminary decree must not deal with matters proper for final decree. (Vol 13) 1925 Pat 433 (433).

[3] The Court has no jurisdiction to dismiss the suit after a preliminary decree has been passed in a partition suit merely because there has been delay in producing the commissioner's fee. (Vol 12) 1925 Pat 433 (434) * (Vol 19) 1932 Mad 519 (522).

[4] After preliminary decree in partition suit, application for final decree is proper course and fresh suit for absolute partition does not lie. (Vol 16) 1929 Oudh 456 (457) : 5 Luck 280.

[5] After a preliminary decree, it is open to any party to a suit, to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings; but in ordinary case it is the plaintiff who moves. (Vol 11) 1924 P C 193 (193) : 51 Ind App 321 : 4 Pat 61 (PC).

[6] Where a preliminary decree in a partition suit has either intentionally or inadvertently omitted to direct an enquiry into mesne profits, the final decree cannot award mesne profits or direct an enquiry regarding the same—The words "further directions" in O. 20, R. 13 do not authorise an order or inquiry into mesne profits after the preliminary decree. (Vol 6) 1919 Mad 993 (999, 1000) : 42 Mad 296* (1931) 1931 Mad W N 846 (347).

[7] A Court can pass a final decree for mesne profits in a partition suit although there has been no preli-

19. (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, *Decree when set-off is allowed.* the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same *Appeal from decree relating to set-off.* provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

[1882—S. 216 ; 1877—S. 216 ; 1859—S. 195.]

Objects and Reasons.

"The Committee have introduced an amendment to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim would lie."—S. O. R.

PROVINCIAL AMENDMENT

ALLAHABAD

In sub-rule (1), *substitute* a comma for the full stop at the end, and *add* the following :

"but no decree shall be passed against the plaintiff unless the claim to set-off was within limitation on the date on which the written statement was presented."

O. 20 R. 18 (contd.)

Primary decree in respect of such profits. (Vol 26) 1939 Mad 81 (89, 90).

[8] Preliminary decree silent as to interest—Interest can be awarded in a proper case. (Vol 12) 1925 Bom 406 (409) ; 49 Bom 282.

[9] Preliminary decree for partition and for determination of mesne profits does not terminate action. (Vol 20) 1933 Sind 371 (374) ; 27 Sind L R 411.

[10] Preliminary decree passed—Death of one of defendants—Suit does not abate against heirs of deceased—Proper order is to adjourn suit *sine die*. (Vol 32) 1945 Pat 350 (383, 385) ; 24 Pat 314.

3. Final decree.—[1] A preliminary decree for partition passed under this rule cannot be made effective without a final decree. (Vol 22) 1935 P C 12 (13) (P C).

[2] Preliminary decree for partition passed by High Court—Case remitted to District Court—Proceedings for final decree are proceedings in suit—District Judge has seisin of proceedings—Parties are entitled to shares as on date of final decree. (Vol 8) 1921 Pat 296 (297).

[3] In working out preliminary decree for partition the Court may, instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former. Such charge binds alienees *pendente lite*. (Vol 17) 1930 Mad 988 (990).

[4] Where the parties have by means of an execution petition treated a preliminary decree as a final decree, it is not open to either of them to object that it is only a preliminary decree. (Vol 20) 1933 Mad 516 (517).

[5] Final decree effected—Second suit for partition does not lie—Application for passing final decree is not application in execution. (Vol 5) 1918 Mad 751 (754, 755).

[6] Partition suit—Compromise decree—Properties allotted to each share specified—Decree is final—Engrossment on stamp—No time-limit is prescribed. (Vol 32) 1945 Pat 482 (482, 483) ; 24 Pat 427.

[7] There is no reason why in a partition suit, where the claim is for a certain share in a joint property a final decree should not be passed in the first instance if the share can be ascertained without difficulty in execution. (1912) 1912 Pun L R No. 246, p. 773 (774).

ORDER 20, RULE 19—SYNOPSIS

1. Scope.

2. Sub-rule (3).

1. Scope.—[1] Order 20, R. 19 applies where the defendant has been allowed to set off a demand against the claim of the plaintiff. The rule does not apply where in determining the defendant's liability for mesne profits deductions for expenses of cultivation are made. (1876) 25 Suth W R 275 (275).

[2] Order 20, R. 19 prescribes the *form* of decree in a suit in which a set-off is allowed. Only one decree should be drawn up in a suit in which a set-off is claimed when all the matters in controversy between the parties had been decided. (Vol 4) 1917 Lah 261 (265) ; 1917 Pun Re No. 62.

[3] Defendant's claim under R. 6, O. 8 must be treated as plaint. Decree under O. 20, R. 19 (1) should be granted. (Vol 21) 1934 All 543 (545) ; 56 All 912.

[4] Claim barred by limitation cannot be pleaded as set-off. (Vol 7) 1920 Mad 819 (821) ; 42 Mad 873.

[5] A defendant in a suit to whom a smaller amount is due from the plaintiff as costs of the appeal is not entitled to execute his decree for costs against the plaintiff where a larger amount decreed by the lower Court remains unpaid to the latter by the former. (Vol 5) 1918 Cal 133 (134).

[6] The question whether or not an attorney's lien should be allowed to intercept a set-off between the parties is a matter of discretion. (Vol 19) 1932 Bom 619 (622).

2. Sub-rule (3).—[1] Equitable set-off in suit for accounts is governed not by O. 8, R. 6, but by O. 20, R. 19. (Vol 18) 1931 Cal 358 (359).

[2] Suit for arrears of rent on basis of lease—Set-off arising under lease, though inadmissible under O. 8, R. 6, can be claimed. (Vol 23) 1936 All 522 (523).

[3] Set-off may be purely defensive or may be by way of counter-claim—In case of defensive set-off, set-off claimed must be recoverable at date of plaintiff's suit—In case of counter-claim sum claimed by defendant must be legally recoverable when he files written statement claiming set-off—Indian Courts make distinction between defensive set-off and counter-claim. (Vol 23) 1936 Cal 277 (278, 279).

Certified copies of judgment and decree to be furnished.

20. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

[1892 — S. 217; 1877 — S. 217; 1859 — S. 198.]

PROVINCIAL AMENDMENT

Rule 21 — ALLAHABAD

Add the following :

"21. (1) Every decree and order as defined in Section 2 other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular, or in English, if the Court so orders. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly, what is the error, defect, or variance alleged, and shall be signed and dated by the person making it. [As amended on 1-11-1941.]

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed."

Order 20 Rule 20—Note 1

[1] Proceedings arising out of an application to obtain a copy must be deemed to be pending before the Court

which decided the case— Application to an official for a copy must be deemed to have been made to the Court. (Vol 15) 1928 Lah 759 (761) : 29 Cri L Jour 1028.



Overlooking of Precedents leads to Erroneous Decisions

"Ignorance of the Judge is the misfortune of the innocent." *Latin Maxim.*

(1943) 30 A. I. R. 1943 Privy Council 189 (191).— In an appeal from Allaha. bad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in 46 I. A. 228 was not cited in either of the Courts in India The application now before the Board invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution by the method laid down in 46 I. A. 228 For this purpose the case must go back to the Court of the Subordinate Judge. . . ."

(1922) 9 A. I. R. 1922 Privy Council 11 (13) = 43 All. 469 (475) (PC). — Section 89, T.P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases, e.g., *Vanmika-linga v. Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, (1918) 45 I. A. 130—therefore no longer arises."

(1948) 35 A. I. R. 1948 Nagpur 382 (384) (DB). — "The decree [of the District Judge] was set aside and the decree of the trial Court was restored by Gruer J. in Second Appeal No. 108 of 1938 on 7-11-1940. It is against this decree that the present appeal has been filed If the above decision [namely, 1939 Rang. I. R. 358] had been placed before Gruer J. he would not have reached the conclusion he did."

(1947) 34 A. I. R. 1947 Bombay 430 (431).—*Per Kania J.* — "My attention has been drawn to two judgments in this connection. One is my own judgment in (1913) 45 Bom. L. R. 400 At that time my attention was not drawn to the judgment of the Appeal Court in (1938) 40 Bom. L. R. 676."

(1947) 34 A. I. R. 1947 Madras 405 (407) (DB). — "We now come to the first case referred to in the order of reference, namely, 1943-2 M. L. J. 180. There Horwill J. held that the right of a legal representative was merely to file a fresh application to sue *in forma pauperis* or institute a separate suit. No reference was made in the judgment to the decision in (1935) 58 Mad. 169 This decision is not only in conflict with the judgments in (1928) 51 Mad. 697 and (1935) 58 Mad. 169, but it ignores the fact. . . ."

(1947) 34 A. I. R. 1947 Oudh 180 (190) (FB).—*Thomas C. J.* — "The learned counsel for the plaintiffs respondents has strongly relied . . . upon my decision in A.I.R. 1936 Oudh 840 relying on 55 I. A. 189 wherein I held But now having regard to the argument advanced, and the fact that my attention was not drawn to the decision of their Lordships of the Privy Council in (1876) 4 I. A. 228, I entertain serious doubt as to the correctness of that decision. Nor was 4 I. A. 228 brought to the notice of Ashworth J. in (1926) 3 O. W. N. 321."

(1947) 34 A. I. R. 1947 Oudh 232 (233) (DB).—"No doubt in 1940 O. W. N. 561 a Bench of this Court entertained an application in revision against the order of a District Judge and set aside that order but the attention of the learned Judges does not seem to have been drawn to the Full Bench decision to which we have referred [namely, a decision of five Judges reported in (1929) 4 Luck. 589], nor was the point as to the maintainability of an application in revision considered."

(1945) 32 A. I. R. 1945 Lahore 260 (261) (FB). — *Per Achhru Ram J.* (in the Order of Reference) — "Ho (i. e., Patanjali Sastri, J. in A. I. R. 1942 Mad. 13) does not, however, appear to have noticed one of the Division Bench judgments of his own Court reported in A. I. R. 1920 Mad. 177 which also dealt with the same subject and took just the opposite view from that taken by him."

(1945) 32 A. I. R. 1945 Madras 139 (141) (FB). — "The decisions in which the contrary view has been expressed are: 45 Mad. 466, A. I. R. 1919 Mad. 220, A. I. R. 1928 Mad. 440 and 1941-2 M. L. J. 754." In the first of these cases "the Court did not, however, consider the case in 5 Mad. 141 In none of the other cases was any reason given for the view expressed and in no case was 5 Mad. 141 mentioned or considered We consider that 5 Mad. 141 should be followed."

A. I. R. Commentaries Judicially Noticed.

(1949) 36 A. I. R. 1949 P. C. 156 (158). — *Sir John Beaumont* — "There have been no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are collected in Edn. 4 of Chitaley and Rao on the Code of Civil Procedure Vol I, page 1105."

(1949) 36 A. I. R. 1949 Allahabad 169 (169). — *Per Harish Chandra J.* — "... it may be that the reason why no provision has been made in the Code in respect of a minor defendant or a minor respondent attaining majority during the pendency of the suit is, as pointed out by Chitaley and Rao in their Commentary on the Code of Civil Procedure (4th (1944) Edn. O. 32, R. 12, Note 2) that while a plaintiff on becoming a major can elect . . . notwithstanding his becoming a major."

(1949) 36 A. I. R. 1949 East Punjab 254 (256). — *Per Mahajan J.* — "That the section (namely, T. P. Act, s. 92) is founded on the doctrine of reimbursement is further supported by a number of authorities that have been collected in Chitaley's latest edition of the Transfer of Property Act at page 1423." (Cited with approval).

(1949) 36 A. I. R. 1949 East Punjab 213 (214). — *Per Bhandari J.* — "The law in regard to the execution of decrees has been stated with admirable clarity by the learned author of Chitaley's Commentaries on the Code of Civil Procedure. In Note 8 to s. 33, the learned author observes as follows: 'An executing Court cannot go the decree was a valid one.' Judged in the light of these principles, it seems to me that the decree-holder cannot ask for the execution of the decree etc."

(1949) 36 A. I. R. 1949 East Punjab 213 (217). — *Per Bhandari J.* — "In Chitaley's Commentary on the Law of Limitation, page 2132 (of 1st Edn. : now see (1942) 2nd Edn., page 2619) it is clearly stated that where a decree-holder recovers in execution money in excess of what is due to him" etc.

(1949) 36 A. I. R. 1949 East Punjab 67 (79, 80) (FB). — *Per Mahajan J.* — "Reference in this connection may be made to *Diwan Singh v. Emperor*, A.I.R. (23) 1926 Nag. 55 and to cases cited at page 2171 of Chitaley's Code of Criminal Procedure, 2nd (1941) edition [now see 3rd (1946) Edn. Note 1 of S. 403], in the commentary under S. 403."

"The cases on this subject will be found collected in Chitaley's Code of Criminal Procedure, latest edition, at pages 2032 to 2034 [now see 3rd (1946) Edn., S. 400, Note 8]. It is unnecessary to mention all of them." (page 80)

(1949) 36 A. I. R. 1949 Mad. 349 (352). — *Per Govindarajachari J.* — "The view which I am inclined to take seems to be supported by the ruling of the Nagpur High Court cited in Chitaley's Commentaries on the Court-fees Act, 1911 edition, page 499." (Now see 2nd (1949) Edn. Sch. II Art. 17 (vi) Note 1, pp. 544, 545).

(1948) 35 A. I. R. 1948 Allahabad 19 (24, 25) (FB). — *Per Raghubar Dayal J.* — "Circumstances requiring remand of a case can be many and need not be exhaustively imagined at a time. A good number of such circumstances are noted under Note 20, O. 41, R. 23, Civil P. C., in Chitaley's Civil P. C. 4th (1941) Edn. I find that two other High Courts, the Madras High Court and the Lahore High Court, have given very wide powers to the appellate Court to remand the suits. These amendments are given in Chitaley's Code of Civil Procedure, 4th Edn."

(1947) 34 A. I. R. 1947 Bombay 345 (350) (SB). — *Per Sen J.* — "Chitaley in his Code of Criminal Procedure, 1941 edition, has pointed out at page 1204 that there is no specific provision enabling the Court to try the case where the accused pleads guilty and the Court does not accept the same and that in England where the Court does not think it expedient to act upon the accused's plea of guilty, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty. Chitaley has further pointed out that in this country the general trend of opinion is that the accused may be treated in such cases as if he had pleaded not guilty, and that the trial may be proceeded with in the ordinary way and he has referred to several authorities in support of this view." [View approved.]

(1945) 32 A. I. R. 1945 Calcutta 298 (299). — "The view that we are taking of sub-r. (2), R. 1 of O. 40 finds support from the decision of all the other High Courts and even from some earlier decisions of the Allahabad High Court itself. Those decisions are noted at the foot-note to para. 49 of Chitaley and Rao's Commentaries on the Code of Civil Procedure, vol. 3, page 2924." (Now see 4th Edn., page 2968.)

(1947) 34 A. I. R. 1947 Lahore 409 (409). — *Per Bhandari J.* — "In Chitaley's Commentary on S. 141, Civil P. O. [4th (1944) Edn. Note 2 p. 1174], the learned author observes that proceedings under the Guardians and Wards Act, 1890, have been held to be original matters of the nature contemplated by this section." [This view is approved.]

(1948) 35 A. I. R. 1948 Nagpur 210 (222) (DB). — *Per Hidayatullah J.* — "In my opinion, the matter is to be determined on a true construction of s. 91 (a), T. P. Act. As pointed out in Chitaley's Transfer of Property Act, [2nd (1942) Edn.], p. 1372, the two phrases in s. 91 (a) refer to different stages. . . . The passage in Chitaley can be quoted with advantage here: 'The property mortgaged is not the same thing . . . after deducting the mortgagee interest.'"

(1948) 35 A. I. R. 1948 Oudh 116 (125) (DB). — *Per Kaul J.* — "As pointed out by Chitaley in his Commentary on s. 151, Civil P. O., (Note 2) it has been held by the High Courts of Allahabad, Calcutta, Lahore, Madras, Patna, Rangoon and the Judicial Commissioner's Court of Oudh and Sind that there is no inherent power to set aside an *ex parte* decree, or restore a suit dismissed for default, except under the circumstances and conditions mentioned in O. 9, R. 13 and R. 9 respectively. The same remarks would apply to restoration of appeals under O. 41, R. 19, Civil P. O. I agree with the view thus stated."

(1948) 35 A. I. R. 1948 Patna 460 (462) (DB). — *Per Meredith J.* — "I will make two quotations from Chitaley and Anwar Rao's annotated edition of the Civil Procedure Code, 4th Edn., vol. III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered. At page 2099, with reference to O. 41, R. 4 they say: 'There is a conflict . . . that the former view is correct.' Then with regard to O. 41, R. 33, at page 2165 they say: 'The appellate Court can exercise . . . the words respondents or parties'. That is just the point which appeals to me."

(1947) 34 A. I. R. 1947 Allahabad 31 (32). — *Yorke J.* — "The general impression I derive from Art. 39, from the notes to Art. 39 in Chitaley's Commentary on Indian Limitation Act, vol. II [2nd (1942) Edn.] and the quotations from Salmond Torts which he reproduces . . . In the passage quoted from Salmond on Torts to immovable property is defined . . . [p. 1225] Another passage quoted in (runs as follows . . . [p. 1225] In the same section of his notes Chitaley quotes Madras decision . . . It appears to me that the upshot of all these clearly is that the present suit is not a suit for compensation for trespass upon immovable property."

(1947) 34 A. I. R. 1947 Oudh 122 (125, 126). — *Kidwai J.* — "I have come to the conclusion that on both the points the decision must be in the appellant's favour . . . (Chitaley in Note 43 to S. 60, T. P. Act [2nd (1942) Edn., p. 1067], summarises the law and the Note supports the case of the appellants."

(1947) 34 A. I. R. 1947 Oudh 98 (100). — *Kaul J.* — "As observed by Chitaley in his Note 114 on S. 11 [Civil P. O. 4th (1944) Edn.] an estoppel by consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. The question in all such cases, the learned author says, would be whether the parties did intend that the question at issue should be finally settled between them by the consent decree and whether the consent decree did actually settle that question."

(1947) 34 A. I. R. 1947 Peshawar 15 (18) (DB). — "All the authorities bearing on the point were examined and the result of the examination was thus stated in the Indian Limitation Act by Chitaley etc., 2nd (1942) Edn. page 1837: 'It would seem to appear from an examination of cases . . . a fresh cause of action and time would run from that date.' It is obvious that according to this view a fresh invasion of title would constitute a new cause of action for a suit from which limitation should commence to run."